PIA Law Practical Strategies for Experts: Testifying Without Fear

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THE TOP 10 "DO'S AND DON'TS" OF EXPERT EVIDENCE: A VIEW FROM THE BENCH

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10 DO'S and DON'TS for

EXPERT WITNESSES

(Or, Ten Ways for an Expert to Win a Trial Judge's Heart)

1. Understand the Role of the Trial Judge

The goal of every trial judge is to conduct fair trials that achieve a just result for both the plaintiff and the defendant.

Trial Judges preside in two types of cases:

1. As a judge alone – where they find the facts, resolve the legal issues, including determining liability and quantifying damages to be awarded to the plaintiff;
2. In Jury trials – juries decide the facts. Judges decide legal issues that arise, including the admissibility of evidence [including expert evidence]. In jury trials I liken my role to that of an umpire or referee because one of my roles is to apply and enforce the rules.

Both as judges alone and in their evidentiary gatekeeping role in jury cases, trial judges love and hate expert evidence.

They love it because in many cases, a fair trial requires expert evidence. It is often needed for fact finders to come to a fair resolution, where the matters judges and juries are required to decide are outside their own everyday experience. Experts can provide scientific or other data that fact finders can use to answer the questions they have been asked to answer, and without which the fact finders would be at a loss.

For instance, consider the situation in which a fact finder must decide the blood alcohol level of a party at a given time. While judges and juries know that drinking raises a person's blood alcohol, they do not know exactly how much alcohol, of what proof, over what time, generally results in what blood alcohol level. They don't know how other factors such as weight or gender can affect the results. If they are asked to determine whether a defendant was intoxicated at a given time, they will need expert assistance on the applicable science to fairly determine the issue.

So, trial judges love expert evidence because they couldn't do without it.

At the same time, trial judges hate expert evidence because of the risks to fairness it can pose, and because of the perception that it can be misleading and can cause injustice.

Judges are aware that expert opinions can be dangerous. They appreciate the risk of overvaluing opinions cloaked in scientific language that they or jurors may not be fully able to understand. They recognize the risk that under a scientific guise, expert opinions may appear to be more authoritative than they really are. Jurors and judges may have a hard time understanding and giving appropriate weight to expert opinion evidence.

In 1994, Justice Sopinka, who was on the Supreme Court of Canada at the time, wrote in *R. v. Mohan,* [1994] 2 SCR 9:

> "There is a danger that expert evidence will be misused and will distort the fact finding process. Dressed up in scientific language which the jury does not easily understand and submitted through witnesses of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves."

In another decision of the Supreme Court of Canada, Justice Binnie in *JLJ* at paragraph 47 included "prejudice and confusion" in the risks inherent in expert opinion evidence.

We all know that inappropriate behavior by expert witnesses has been held to have led to horrible injustice in the past, including wrongful convictions of parents for the death of their own children.

These are not the only threats that expert evidence poses to trial fairness.

There is also the choice and use of experts prepared to tailor their evidence to the wishes of those who hire them.

This can translate, for example, into a tendency for experts retained by counsel for the plaintiff to over-diagnose the plaintiff's condition and for expert witnesses retained by counsel for the defendant to under-diagnose the plaintiff's condition.

In short, the problem is expert witnesses straining to support the litigation position of whoever is paying them.

The use of "hired guns" is not a new problem. In 1873, Sir George Jessel Master of the Rolls wrote in *Lord Abinger v Ashton* (1873), LR 17 EQ 358 at 374:

> "We constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them."

In "The Proper Use of Experts in Civil Trials: Where Do We Go From Here?" authors Steve Rastin and Catherine Mahony wrote:

> The system only works, however, if the litigation experts properly fulfil their roles as experts assisting the Court in properly understanding complex issues in dispute. In

> Ontario this is often not the case. The Judiciary is increasingly expressing frustration at the role that hired-gun experts are taking in the Courtroom. How can two supposedly qualified experts analyze the same car wreck and come to widely different conclusions with one saying, for example, that the plaintiff's car was stopped and the other saying she was speeding? Or, how can two doctors examine the same accident victim and conclude, on the one hand, that he is totally disabled and will never work again, while the other says he's faking and should go back to work tomorrow? Or, two Occupational Therapists examine the same person, with one saying she needs no attendant care support while the other says she needs the maximum? In Ontario, for us, this has become the new norm. There remain many balanced and fair experts. There are, alas, also many hired-gun experts working on both sides of the fence. Experts should not be advocates, and the proliferation of the hired-gun-expert-advocate is negatively impacting the administration of justice in Ontario.

The 2007 Osborne Civil Justice Reform project, "Summary of Findings and Recommendations on Expert Evidence," included the following at page 7: "Too many experts are no more than hired guns who tailor their reports and evidence to suit their clients' needs."

In response to that and to other expressions of concern about evidence being given by "hired guns," the Civil Rules Committee in Ontario amended the civil rules in an obvious attempt to root out the problem. In the amendments to Rule 4.1.01 and Rule 53, the Civil Rules Committee made it clear that the primary duty of every expert who gives evidence in a civil case is to the Court, not to the party who retained him.

The amendments were also obviously directed at making experts accountable to the Court to deter them from simply parroting the evidence that the retaining party would like him to give.

Rule 4.1.01(1) reads as follows:

Duty of Expert

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue. O. Reg. 438/08, s. 8.

Rule 53.03 sets out timelines for the preparation and delivery of experts' reports, then mandates their content:

Rule 53 (2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.

2. The expert's qualifications and employment and educational experiences in his or her area of expertise.

3. The instructions provided to the expert in relation to the proceeding.

4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

6. The expert's reasons for his or her opinion, including,

i. a description of the factual assumptions on which the opinion is based,

ii. a description of any research conducted by the expert that led him or her to form the opinion, and

iii. a list of every document, if any, relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 53) signed by the expert. O. Reg. 438/08, s. 48. [Emphasis added.]

The Rule also sets out sanctions that the Court may impose if the expert fails to meet the required timelines or to include the mandated content in his report, including refusing to permit an expert to give evidence. [Emphasis added.]

Form 53 contains the following:

FORM 53

Courts of Justice Act

ACKNOWLEDGMENT OF EXPERT'S DUTY

(General heading)

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is ..... *(name)*. I live at ..... *(city)*, in the ..... *(province/state)* of ..... *(name of province/state)*.

2. I have been engaged by or on behalf of ..... *(name of party/parties)* to provide evidence in relation to the above-noted court proceeding.

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:

   (a) to provide opinion evidence that is fair, objective and non-partisan;

   (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and

   (c) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date .....

Signature

NOTE: This form must be attached to any expert report under subrules 53.03(1) or (2) and any opinion evidence provided by an expert witness on a motion or application.

RCP-E 53 (July 22, 2014)

Continuing Concerns

Unfortunately, widespread concern remains that the changes to the Rules mentioned above have not rooted out the problem of "hired guns."

Some think it inappropriate for judges to comment on such matters outside of written Reasons, so I shall not express my personal opinion on that issue here. Rather, I shall quote here one written comment made by a member of the bar about the continuing existence of a serious problem, and in the next section of this paper, I shall quote comments of other judges recently made in a number of written decisions.

2. Understand Your Role as an Expert – Know Your Duty – Take Your Rule 4 and Rule 53 Duties Seriously

Insist on cultivating and maintaining a reputation for thoroughness and scientific objectivity. Give opinions on both side of the fence. Don't give opinions only for plaintiffs or only for defendants.

Beware of the lawyer who hires you and then gives you cherry-picked documentation to review. Do not limit your review to what has been sent to you. Insist on seeing and reviewing relevant records from both sides before you reach or provide your opinion. Give the same opinion whether you have been hired by the plaintiff or by the defendant.

Be conversant with and able to knowledgeably discuss recent research, especially peer-reviewed research, on the issues about which you have been asked to opine.

In short, be thorough and be prepared to "tell it like it is," regardless of who is paying you and of how much you are being paid. The Court needs to be able to have confidence that you would give the same opinion whether you had been hired by counsel for the plaintiff or counsel for the defendant.

If you don't, you will eventually get egg on your face. Experts who favour the party who is paying them often publically do.

As I have already said, in a jury trial, judges are responsible to adjudicate admissibility of evidence. Their reasons for their rulings are widely and publically reported and read. Judges have the power to sanction experts who have not complied with their duties, including the power to altogether prevent experts from giving evidence in a case.

There are numerous reported cases where judges have explained why they are ruling that they will not allow an expert to give evidence or they do not accept the evidence of an expert. I shall mention only a few here. It must have been embarrassing for the experts involved to have had their opinions ruled inadmissible or to have had their impartiality so publicly called into question. Please note that the judges in the written reasons I am about to quote do mention the names of the experts. Here I do not.

In *Alfano v. Piersanti*, 2009 CarswellOnt 1576 (OSCJ), the court refused to allow an expert to give evidence, because it held that the expert "was very much committed to advancing the theory of the case and thereby assuming the role of an advocate." His role as an independent witness was "very much secondary to the role of…someone

who is trying their best for their client to counter the other side." The court held that the expert had crafted his opinion to meet the litigation goals of the lawyer who had retained him. The court cautioned that an expert cannot "buy into" the theory of one party's theory of the case to the exclusion of that of the other side.

In *Anand v Belanger* 2010 ONSC 2619(CanLII) the court wrote:

> 55 I am compelled to observe that Dr. … did not impress me as an expert witness. Quite apart from her long-time (and remunerative) involvement with defence insurers, during the course of her testimony she frequently descended from the role of opinion witness to that of advocate, by either debating issues with counsel, or giving non-responsive answers, or providing information not sought by the questioner but (apparently) supportive of her theory. I am therefore not prepared to place much weight on Dr … evidence or opinion.

In *DeBruge v Amold*, 2014 ONSC 7044, the court wrote:

> 41 Doctor … struck me as a witness who sought to justify his opinion at every opportunity regardless of other evidence that might call his opinion into question... …
>
> 52 Where a medical legal expert like Doctor … is retained to provide the only opinion evidence on the threshold it will, in my opinion, be a rare case where that opinion evidence will carry the day on a threshold motion. This is particularly so where there is evidence of treating doctors that conflicts with the evidence of the expert who many might call a "hired gun."
>
> 53 Trial judges are constantly reminded about the gate-keeper function which we must perform when dealing with the evidence of experts. We are also constantly reminded about how experts have, in many respects, become the "life-blood" of personal injury litigation.

> 56 … Doctor … was not the unbiased and objective witness that the court expects of an expert. Doctor …, in my view, did not understand his role. The Rule 53 Acknowledgement of Expert Certificate that Doctor… signed says, amongst other things:
>
> > I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:
> >
> > a) To provide opinion evidence that is fair, objective and non-partisan…
>
> 57 Doctor… did provide opinion evidence, but his opinion was neither fair, objective nor non-partisan. Doctor… unfortunately, like so many other experts that this court sees both in court and in reports filed in pre-trial memorandums, completely failed to understand the role of an expert, that being to assist the court in an unbiased objective manner. I do not make this statement lightly and it applies equally to both sides of the bar – Plaintiff and Defence.
>
> 58 Fundamentally, if an expert does not present his evidence in a fair objective and non partisan fashion, the court can have little comfort in accepting such opinion…

The Supreme Court Of Canada in *White Burgess Langille Inman v Abbott and Haliburton Co.* (SCC 2015) has also weighed in on the degree of impartiality required of litigation experts and has confirmed that if an expert is not prepared to recognize that his primary duty is to the court, and he is not willing to honour that duty, then his evidence should be altogether excluded.

3. <u>Know What Kind Of Expert You Are and Stick to That Role</u>

When you are retained, you need to understand whether you are being asked to give evidence as a treatment provider (participant expert), third party expert, or litigation expert.

Different kinds of experts have different duties and are required to follow different rules.

Know the type of Expert you are, and the limits on your evidence that stem from that type.

In *Westerhof v. Gee Estate*, 2015 ONCA 206, the Ontario Court of Appeal set out the differences.

If you are called to give evidence as a participant witness, don't go beyond opinions formed in your diagnosis and treatment of your patient. You must have formed the opinion as part of the ordinary exercise of your skills, knowledge, training and experience in your role as treatment provider.

If you are giving evidence as a litigation expert, cover what you intend to say in your report and stick to the contents of your report when giving your evidence.. Comply with your Rule 4 and 53 duties.

4. Stick to Your Expertise – Do Not Over-claim

Rule 4.1.01(b) specifically requires experts to provide opinion evidence that is related only to matters that are within the expert's area of expertise.

Others have commented on the frequency with which experts attempt to give evidence that is beyond their expertise, indeed, often after the trial judge has already ruled that they cannot give it because he is not satisfied that the expert is qualified to give it.

Do experts in particular have a hard time differentiating what they know from what they do not?

According to an article in *Psychological Science* (Vol. 26, No 8, 1295-1303) by authors Atir, Rosenweig and Dunning entitled "When Knowledge Knows No Bounds," to the extent that people perceive their expertise favourably, they can be predicted to make claims of impossible knowledge, a phenomenon called "over-claiming."

Such people often overestimate their knowledge of concepts, events and people that do not exist and cannot be known.

Therefore, I guess we should not be surprised when some experts vainly claim to have expertise that objectively they do not have.

However predictable these claims may be, experts on bones for example should not purport to be qualified to give evidence, for example, on psychological matters [unless they have had appropriate additional training and or experience with regard to psychological matters].

5. <u>Avoid Surprises in your evidence</u>

I have already mentioned that under Rule 53, litigation experts are expressly required to provide a report that contains, among other things, instructions provided to the expert in relation to the proceeding, each issue to which the opinion relates, and the reasons for the opinion including the factual assumptions on which the opinion is based.

Rule 31.06(3) is also relevant. It provides:

> SCOPE OF EXAMINATION
>
> Expert Opinions

(3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that are relevant to a matter in issue in the action and of the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,

(a) the findings, opinions and conclusions of the expert relevant to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and

(b) the party being examined undertakes not to call the expert as a witness at the trial. R.R.O. 1990, Reg. 194, r. 31.06 (3); O. Reg. 438/08, s. 30 (2); O. Reg. 453/09, s. 1.

If you are giving evidence as a litigation expert, stick to your report. Cover what you want and need to say in your report.

If you are giving evidence as a participant expert, stick to matters derived from the treatment role.

6. Focus on Issues to be Decided – Make sure You are Confining Your Evidence to the Issues that the Judge or Jury is being Asked to Decide.

Since the issues to be decided can and do vary enormously in each trial, it is vitally important to ensure that the testimony of each expert is relevant to the issues actually being decided.

Rule 53.03(2.1) lists the information to be contained in an expert report, including item 4: "The nature of the opinion being sought and each issue in the proceeding to which the opinion relates."

Since experts are required to identify what opinion they have been asked to provide and the issues the opinion is supposed to address, surely it is not asking too much to require experts to confine their evidence to those issues.

You might be surprised to know that we often see experts trying to raise matters not raised by the other side or in the pleadings. In effect, they set up straw men to knock them down. This wastes time and is very annoying to a trial judge.

7. Bring what You Reviewed and Considered in Reaching Your Conclusions

Have with you in court the materials you reviewed in coming to your opinion.

8. Understand Foundational Issues Basis of Opinion.

Rule 53 requires litigation experts to set out reasons for their opinion, including a description of the factual assumptions on which the opinion is based. **This is key.**

Often experts do not comply with the requirement that they set out their factual assumptions in their report. As a result, it is often difficult to glean the underlying assumptions from the report.

Since experts have a clear duty in this regard, I cannot emphasize strongly enough that they should do so.

If experts are vouching for the assumptions they are using in their reports and relying on their own review and observations, they must set out what they have reviewed and observed as well as any other further bases for their assumptions/conclusions.

Although it is always necessary for experts to set out the assumptions underlying their opinion, there is no need for them to always vouch for the accuracy of those assumptions.

There is nothing wrong if litigation experts express opinions based on hypothetical facts/assumptions about facts.

There is nothing wrong if they are given assumptions to use as a basis for their opinion. For example, "please calculate the present value of $1000 per year for a male born on October 20, 1976 to age 65"[on the assumption the plaintiff would have retired at age 65].

If these are the instructions an expert has been given, there is no need for the expert to opine on whether a calculation to age 65 would be appropriate. He has simply been asked to provide a calculation so that **if** the fact finder determines, on all of the evidence in the case, that a calculation to age 65 is appropriate, the fact finder will be in a position to determine the amount needed to provide $1000 a year to age 65 and to assess the damages on that basis.

If the fact finder were to conclude, based on all of the evidence, that a calculation to age 65 would not be appropriate [for example, because the fact finder concludes the plaintiff would not have retired at age 65], then the calculation to age 65 would be of little use to the fact finder.

Similarly, an expert may opine, based on an assumption that a plaintiff was in good health and pain-free before an accident, that his pain that arose only from the time of the accident was caused by the accident.

The weight the fact finders give to the opinion will depend on whether the fact finders adopt as true the underlying assumptions the expert has used.

Whether or not the expert vouches for his assumption that the plaintiff was pain-free before the accident or has simply been asked to assume that that is the case, if on all the evidence, the fact finders were to conclude that the plaintiff had not been pain-free before the accident but had suffered before the accident from the same type of pain said to have been suffered in the accident, the opinion of the expert as to the cause of the accident would be of questionable use to the fact finders when deciding whether or not the accident caused the pain.

In that case , if Dr. X had simply opined that the accident had caused the pain but had not set out the assumptions on which the opinion was based [the absence of pain and disability in the timeframe before the accident], expressing that opinion in that way would have been confusing at best, and misleading at worst.

In short, the judge in a judge-alone case and the jury in a jury case must understand the assumed facts forming the basis or foundation for the expert's opinion. So the fact finders can fairly weigh the expert's opinion, the expert must have clearly and understandably set out those underlying assumptions. Only if the fact finders accept those facts as true will they feel free to accept the opinion of the expert.

9. <u>Make technical language comprehensible to the layperson.</u>

Remember, if your assistance in a technical area weren't needed, you wouldn't have been asked to provide an opinion in the first place. You wouldn't be welcome.

Judges and juries may not understand your technical or specialized lingo, and they should not need to ask you for a translation.

10. Stay Current

In Ontario, working as an expert can be a lucrative part-time job for a retired person.

In some places, some disciplines regulate their members by requiring that providers of expert opinions must be providing treatment to the population about which they are giving evidence, at the time that they are giving evidence.

In the Netherlands, for example, I have read that the Dutch Association for Obstetrics and Gynecology has established a Code of Conduct for its members including a rule that a person hired as an expert must still be practicing in the field.

Even if there are no similar requirements in Ontario, every expert should keep current with the scientific research and state of thinking among practitioners in his field.

FINAL COMMENT

An Austrian author, Marie Von Ebner Eschenbach, who lived between 1830 and 1916, wrote: "Intelligence stops where vanity starts."

That should be food for thought for all of us.