Raising the Bar

Raising the Bar – Second Edition

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Dear Friends,

Spring has arrived, and with the changing of the season, what better time for us to deliver our second issue of Raising the Bar! We hope that this issue will invigorate your mind and spark your interest with fresh and noteworthy developments from the courts.

This issue will "shine a light" on expert evidence. From how to get your expert's evidence admitted into court to how far your expert can go once at court, this issue will provide you with a number of insights on the use of experts at trial.

You will also read what the Ontario court says about costs. How will the courts treat unnecessary costs claimed by the other side? When will the court award you costs in excess of the maximum rates set out in the costs grid? You will find the answers to those questions and more. You will learn about when you may be required to produce more than one deponent at discovery and what type of conduct in employment may lead to additional damages.

We want to thank Carolyn Cornford Greaves and Julia Nanos, whose efforts and contributions were integral to the publication of this issue.

We hope that you benefit from reading this issue and after reading it, you feel even more energized about the arrival of spring. Enjoy!

Frank Cesario and Elisha Jamieson
Co-Editors

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PART 1 – CASES YOU NEED TO KNOW ABOUT

First Capital (Canholdings) Corporation v. North American Property Group, 2012 ONSC 1359 (CanLII)

This is an important decision for successful litigants looking to recoup their costs at the end of a trial and for unsuccessful litigants who are ordered to pay costs.

In this case, the parties brought cross-motions regarding the sale of a commercial shopping centre. The Plaintiff was only partially successful on its motion but was completely successful in opposing the Defendant's motion. The Plaintiff sought its costs on a partial indemnity scale. The Defendant took the position that the costs claimed were excessive because the hourly rate exceeded the rates set by the Costs Subcommittee in an Information Notice for the Profession in 2005 ("Information Notice"). The Information Notice sets out a maximum rate for lawyers based on years of experience that is often used to determine what costs to award.

The Court found that it could award costs based on an hourly rate exceeding the Information Notice. In the Court's view, the hourly rate in the Information Notice should be increased for inflation and is intended to be a guide, not a mandatory rate. The Court also concluded it was appropriate to award a higher rate in this case because: the amount in dispute was substantial; the Plaintiff's lawyers were from a well-respected Toronto law firm where hourly rates and office overhead costs are higher than the provincial average; and the lead counsel on the file had been called to the bar for almost ten years.

Fortini v. Simcoe (County), 2012 ONSC 1034 (CanLII)

In this decision, the Court considered Rule 31.03(4) of the *Rules of Civil Procedure* for the first time. The Rule came into force on January 1, 2010. Rule 31.03 outlines when a party may examine for discovery more than one representative of a company or organization. The Rule was amended to include a list of criteria that a court must consider before leave is granted to examine more than one person. The Rule states that a court must satisfy itself that satisfactory answers respecting all of the issues raised cannot be obtained from only one person without undue expense and inconvenience and that the examination of more than one person would likely expedite the conduct of the action.

In *Fortini,* the deceased was killed in a car accident. His wife and children (Plaintiffs) brought a claim against the County for failing to remove ice from the road. The County provided a deponent to be discovered at discovery. The Plaintiffs successfully brought a motion to discover a second deponent from the County. The County appealed the order of the motions judge.

The motions judge's order was overturned on appeal. The Court held the quality of the evidence should be measured using an objective standard. A party cannot simply be dissatisfied with the answers given; rather, it is only when a court has concluded that a party is likely to be deprived of a meaningful discovery that leave to discover a second deponent should be granted. In this case, the Court concluded the Plaintiffs' request to discover a second deponent was premature. The motion was brought before the Defendant had a chance to provide complete answers to the undertakings from discovery. Accordingly, the quality of the deponent's evidence could not properly be assessed. The Court found that the motions judge had improperly concluded that information the Plaintiffs required could not be obtained through the first deponent.

Vernon v. British Columbia (Liquor Distribution Branch), 2012 BCSC 133

This case provides a good example of the type of employer conduct that may attract punitive damages.

Ms. Vernon was a long-service employee and store manager for the Liquor Distribution Branch ("LDB"). In 2010, a employee complained in writing about Ms. Vernon's behaviour as a manager. The complaint was investigated by the LDB and the investigation concluded that Ms. Vernon had engaged in gross workplace misconduct. The LDB advised Ms. Vernon that her employment would be terminated unless she resigned. It offered her a reference letter if she resigned. She did not resign and her employment was terminated for cause.

The British Columbia Superior Court found that Ms. Vernon was wrongfully dismissed. She was awarded pay in lieu of notice and aggravated damages for the insensitive manner in which she was dismissed. In addition, the Court concluded that the LDB's offer of a reference letter, or a "carrot", in exchange for Ms. Vernon's resignation was "properly the subject matter of retribution, deterrence and denunciation" warranting an award of punitive damages. The Court concluded that the LDB's

offer was reprehensible because the LDB knew that Ms. Vernon was in a vulnerable position and would have a very hard time finding employment without a reference letter. The Court awarded Ms. Vernon $50,000 in punitive damages.

PART 2 – SHINE A LIGHT ON…EXPERT EVIDENCE

Litigation in the courts and before administrative tribunals often requires expert evidence. In order to make informed and effective decisions about expert evidence, litigants must understand the nature of expert evidence, when it can be admissible, and how it can be used. Recent decisions in both the criminal and civil context highlight important strategic issues with respect to the admissibility and use of expert evidence.

PRECONDITIONS FOR ADMISSIBILITY

Expert evidence involves an expert providing an opinion on an issue in the case. Opinion evidence is presumptively inadmissible because it is the primary duty of the judge (or jury) to draw inferences from evidence and to decide the case. An exception to this general rule is made for expert evidence for one reason: where the subject matter at issue is *beyond the trier* of fact's knowledge or expertise such that he or she is unable to draw an inference or form a proper conclusion on the evidence, expert testimony may be required to assist in the exercise of this duty.

To be admissible, expert evidence must meet the criteria set out by the Supreme Court of Canada in *R. v. Mohan*:

1. The proposed opinion must be **necessary** to enable the trier of fact to understand and evaluate material evidence;
2. The witness must be **qualified**, through formal education, private study, work experience or other personal involvement in the subject matter, to give the opinion;
3. The expert evidence must not violate any other **exclusionary rule** of evidence; and
4. The proposed opinion must be logically **relevant** to a material issue in the case.

ADMISSIBILITY IS ONLY THE BEGINNING

Meeting the "Mohan" criteria does not guarantee that the expert evidence will be admitted. Even if the preconditions are satisfied, the trial judge is also required to conduct a cost/benefit analysis to determine whether the evidence is sufficiently beneficial to the trial process that it ought to be admitted despite potential harms that may flow from its admission. This "*gatekeeping*" function is an important exercise of judicial discretion and it must be approached with caution.

In his 2008 report "Inquiry into Pedatric Pathology in Ontario", Justice Stephen Goudge emphasized the need for judicial vigilance with respect to the admission of expert evidence, and specifically the need to scrutinize the necessity and reliability of expert evidence *before* permitting it to be admitted. Likewise, in both *Dulong v. Merrill Lynch Canada Inc.* and *Hoang v. Vicentini*, the Ontario Superior Court of Justice confirmed in strong terms that it is an abdication of the proper function of a trial judge to admit expert evidence and then compensate for weaknesses in the evidence by attaching less weight to it. These are significant decisions because the practice of "let it in and deficiencies go to weight" is common.

When conducting the cost/benefit analysis, trial judges should also consider whether the evidence will unduly lengthen and complicate the proceedings, consume the parties' resources, and further burden the legal system. Where the probative value of the evidence is limited, the trial judge ought to consider excluding the evidence if for no other reason than trial economy.

Judicial vigilance is also required because expert evidence can swallow the essential "fact-finding" function of the trier of fact. This is especially true in a jury case, and where the inferences offered by the expert weigh heavily upon the ultimate issue to be decided in the case. For example, in *Chasczewski v. 528089 Ontario Inc.*, the Ontario Court of Appeal found that a trial judge became affixed on expert evidence and surrendered his duty as the trier of fact in favour of statistical evidence by a defendant's expert.

THE USE OF EXPERT EVIDENCE

In *R. v. Abbey*, the Supreme Court of Canada clarified that admissibility is not an all or nothing proposition. The trial judge is to balance the probative value and prejudicial effect of the proposed evidence, and to control the *manner* in which the expert evidence is presented. Expert evidence ought to be presented in a manner that enables the trier of fact to understand and consider the facts that form the basis of the expert's opinion. As gatekeeper, the trial judge is entitled to modify the nature and scope of the proposed opinion, edit the language used to frame the opinion, direct the manner of its presentation, and outline with precision what a witness can and cannot say. These steps ensure that a witness' testimony is limited to his or her area of expertise and that decision-making is properly confined to the trier of fact.

A very recent Ontario decision demonstrates this principle in action. In the much-publicized case of *R. v. Gager*, the defence sought to introduce expert evidence related to certain gang phenomena. The court expressed serious reservations about the expert's qualifications, data and opinions, but admitted the expert evidence because of the principle that defence evidence in a criminal case should be excluded only where its prejudicial effect *substantially* outweighs its probative value. However, it is noteworthy that even in the criminal defence context, the court limited the permissible scope of the expert's evidence in several respects, including to not allow the expert to express opinions on the "ultimate issue" in the case.

But the court's ability to deal with the manner of expert evidence has limits. In *Suward v. Women's College Hospital*, the trial judge criticized the experts for failing to meet in advance of trial to attempt to narrow differences and eliminate areas of overlapping opinion. The Ontario Court of Appeal noted that, where experts conflict with respect to a given issue at trial, it is often desirable and efficient for the experts to focus their evidence to areas of "true" difference. However desirable the practice, the Court clearly held that the decision is for counsel and that experts are not to decide on such a procedure in the absence of instruction.

EXPERT QUALIFICATION AND "JUNK SCIENCE"

Particular concerns arise where a party seeks to admit "expert" evidence relating to a novel scientific theory or method. The court will subject the opinion to a higher degree of scrutiny to determine if it meets the threshold of reliability and necessity. In *Mohan*, the Court outlined the following factors to be considered in exercising the "gatekeeper" function this context:

1. whether the theory or technique can and has been tested;
2. whether the theory or technique has been subjected to peer review and publication;
3. the known or potential rate of error or the existence of standards; and
4. whether the theory or technique has been generally accepted.

The goal of this exercise is to exclude opinions that are based on untested "junk" science. As the Ontario Court of Appeal explained in *Johnson v. Milton (Town)*, expert opinion may be based on little more than guesswork, speculation, commonplace information and "junk science", despite the fact that the witness otherwise appears to be knowledgeable, well-experienced and educated. Where this is the case, the trier of fact may be unduly influenced by the expert's testimony.

Therefore, parties who are faced with relying on, or responding to, novel science must make certain that they have properly considered how best to support or attack the theory.

EXPERT EVIDENCE AND HEARSAY

An interesting problem arises when an expert opinion is founded upon hearsay. An expert's opinion is based on proven facts of a technical or scientific nature, which are beyond the trier of fact's expertise or knowledge. If admitted, counsel is able to cross-examine the expert to demonstrate the reliability of the opinion or lack thereof. However, where an opinion is based on unproven fact or information given to the expert by a third party, the information relied upon is hearsay when admitted in evidence.

Canadian evidence law permits an expert to rely upon hearsay in forming his or her opinion *in certain circumstances*. In *Segway Enterprises Inc. v. Lacroix*, the Superior Court drew an important distinction. Hearsay evidence, obtained by an expert and acted upon in the course of his or her expertise, is permissible and admissible under the law of evidence. However, where the expert obtains information from a party to the litigation, a court ought to require independent proof of the information. Furthermore, where an opinion is based on disputed facts, these disputed facts must be put before the trier of fact for determination. The expert opinion must not be presented in a manner that conceals the contentious nature of the facts underlying it.

PRACTICE CHANGES

The *Rules of Civil Procedure* were amended in 2010 with respect to expert evidence. An expert is now required to sign an acknowledgement (Form 53) that he or she has a duty to provide an opinion that is fair, objective and nonpartisan, and which falls within his or her area of expertise. The Rule also specifies that the expert's duty to the court is paramount over any duty owed to a party to the litigation. This is a stark reminder to an expert!

In *Brandiferri v. Wawanesa Mutual Insurance Co.*, the Ontario Superior Court of Justice recently made an interesting comment about expert impartiality. The Court noted the general principle that "an expert who lacks impartiality and independence should be disqualified", but also noted that the best that could be expected in this regard is a "curbing of the excesses." The Court reasoned that so long as the parties retain their own experts, a certain degree of "favouritism" from expert witnesses is "simply a reality of the adversarial process." A court's primary consideration is trial fairness. Where expert testimony contributes to this goal, the opinion may be admissible despite shades of impartiality. It is important to note, however, that the Court also emphasized that once an expert witness enters the box at trial, "the expert speaks only to assist the court." In this regard, the Court took comfort from the fact that the expert signed the Form 53 acknowledgement required under the Rules.

CONCLUSION

Expert evidence is an important exception to the rule against opinion evidence. The decisions discussed above demonstrate that courts will take a principled and cautious approach to the admissibility and use of expert evidence. Therefore, parties and their counsel should carefully consider the rules and requirements for the admissibility and use of expert evidence when making strategic decisions about how to frame and prove their case.

PART 3 – DID YOU KNOW?

Did you know…that courts will not award costs for unreasonable hours or disbursements regardless of a successful Rule 49 offer?

In *Howell v. Yourk,* 2012 ONSC 766 (CanLII), the Plaintiff was awarded damages totalling $481,000, which exceeded the amounts in his offer to settle. Given that the Plaintiff "beat" his Rule 49 offer, the Court awarded the Plaintiff costs on a substantial indemnity scale. However, the amount awarded was much less than the amount claimed. The Court found that while the substantial indemnity scale is intended to be a complete indemnification for all costs, it does not include the costs of services which were not reasonably necessary to the action (e.g. excessive hours, excessive disbursements for an expert's attendance, etc.).

If you have any questions about the issues discussed in Raising the Bar, or would like more information, please contact a member of the Hicks Morley Litigation Practice Group, and we would be pleased to assist you.

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