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Corralling the Experts: Opinion Containment

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Introduction

There are a few things as difficult or as dangerous as the cross-examination of the defendant's expert. While it is often said that a plaintiffs case is made or lost on the strength and credibility of the plaintiff's witnesses, one can never underestimate the damage that the defendant's experts can do to the plaintiff's case in compelling a less than advantageous settlement offer during the course of the trial or alternatively, setting the stage for a favourable verdict for the defence. Trials in the 90's have become in many cases a battle of the experts.

Trials today are quite different from the way they were 10 or 15 years ago. The stakes are much higher and the cost to the winners and losers are so much greater. Not to long ago, the average personal injury trial lasted between 5 and 8 days. Today a 5 to 8 day trial is rare.

What is also a departure is that experts themselves have entered into the fray, thus betraying their role as independent objective professionals, and often impeding justice for injured and afflicted people. Today, the defence orthopaedic surgeon holds himself out as not simply an expert in orthopaedics, but also in psychology, psvchiatrv, rheumatology, chronic pain, and fibromyalgia. Today the psychologist is not simply an expert in psychology, but also an expert in rehabilitation medicine. In case after case, the expert once qualified, becomes an expert in everything. Expert witnesses have been accorded wide latitude by the courts and have been permitted to offer opinion evidence on matters clearly outside their area of expertise. Containing the expert is a task which is becoming increasingly difficult, particularly in light of the Supreme Court of Canada's decision in R. v. Marquard [199314 S.C.R., 223, which will be discussed below. The aim of this paper is to shed some light on this complex and controversial aspect of the law of evidence.

1. The Role of the Expert — A Review of First Principles

In National Justice Compania Naviera S. A. v. Prudential Assurance Co. Ltd. [1993] 2 Lloyd's Reports 68, also known 'The Ikarian/Reefer, Mr. Justice Cresswell summarized the duties and responsibilities of the expert (p. 81-82) (as paraphrased):

A. Expert evidence presented to the court should be, and should be seen to be the independent product of the expert uninfluenced as to form or content by exigencies of litigation.

B. An expert should provide independent assistance to the court by objective unbiased opinion in relation to matters within his or her expertise. And expert witness should never assume the role of advocate.
C. An expert should state the facts or assumptions upon which the opinion is based and should not omit to consider material facts which detract from that opinion.
D. An expert witness should make it clear when a particular question or issue falls outside his area of expertise.
E. If an expert's opinion is not properly researched because insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one.
F. If after the exchange of reports, an expert changes his or her view in a material matter, having read the other sides expert's report, that fact should be promptly communicated to the other side.
G. Where expert evidence refers to photographs, plans, calculations, etc. they must be provided to the opposite party. (underlining mine)

The "Ikarian/Reefer" has been followed by Canadian courts. It is useful to remind the defence expert of his duty and responsibility. Regrettably, not many experts today in the cut and thrust of litigation, adhere to the principals adumbrated by the "Ikarian Reefer". Portraying the defendant's expert as an advocate and not as a disinterested expert trying to assist the court will help to weaken the defendant's case and hopefully cause the trier of fact to accord little weight to the expert's opinion.

2. Expert Evidence: When Admissible'[1]

Four criteria must be satisfied in order for expert opinion to be admissible.
A. Necessity in assisting the trier of fact.
B. Relevance.
C. A properly qualified expert.
D. The absence of any exclusionary rule that would prohibit the admission of the opinion.

Of relevance to our discussion is the third criteria: a properly qualified expert.

Expertise is determined during the qualification phase of the examination-in-chief of the expert, and is "a modest status that is achieved when the expert possesses special knowledge and experience going beyond that of the trier of fact".[2] Although the expert may have scant experience in a particular area, this limitation will effect the weight of the evidence but not its admissibility. In this regard, R v Marauard is of significant importance. In Maquard, doctors who had no expertise in burns were allowed to give evidence that a child's injury was cased by a contact rather than a flame burn.[3] Moreover, the "expertise" rule was not offended by allowing a plastic

[1] David Paciocco and Lee Stuesser, The Law of Evidence, Irwin Law, Pg. 119
[2] Ibid, pg. 119
[3] Ibid, pg. 122

surgeon who was not an expert in child abuse cases to testify that the passivity of children to treatment is a characteristic common to abused children.[4] Maquard altered the landscape for the reception of opinion evidence of experts who testify as to matters beyond their expertise. As Mr. Justice Griffith's has noted:[5]

> "the test of expertness is the skill in the field in which the expert opinion is sought. The court will not be overly concerned with whether the skill of the witness has been derived from specific studies or by practical training. That is, it does not matter whether the expertise has been acquired through training in the filed, studies or by practical observations."

3. **R v Marquard**

As indicated above, important evidentiary issues arose in R v. Marquard, which involved an appeal from the Court of Appeal of Ontario. The facts are usefully summarized in the head note and are as follows: Marquard was charged with aggravated assault of her three and a half year old granddaughter. It was alleged by the Crown that Deborah Marquard had put her granddaughter's face against a hot stove door in order to discipline her. The child's unsworn testimony was that her "nanna" had put her in the stove. Marquard and her husband had both testified that they discovered the child early in the morning screaming after she burned herself trying to light a cigarette with a butane lighter.

At trial, both the Crown and defence called a number of expert witnesses to corroborate their version of the events. Expert evidence relating to the function of butane lighters, the nature of the burn, whether the child was telling the truth at trial and the psychological effects of abuse were adduced. The Crown witnesses were permitted to testify in areas outside the ambit of their expertise. Instead of instructing the jury to disregard the evidence where it went beyond the expertise of the expert, the trial judge told the jury to simply weigh those options, stating that the opinions outside the area of the expertise were to be weighed along with all the other evidence. Defence counsel did not object to the witnesses giving evidence outside their area of expertise, but objected to the judge's charge that they could rely on the opinion outside their stated areas of expertise.

The jury found Marquard guilty and sentenced her to 5 years imprisonment. The Ontario Court of Appeal upheld the conviction, but reduced the sentence. In allowing the appeal and ordering a new trial, the Supreme Court of Canada considered a number of important issues. Of relevance to our discussion, the Court considered the admissibility of opinion, established the parameters for the admissibility of expert evidence beyond their areas of expertise. It is submitted that the ratio of Marquard will resonate in the conduct of civil trials. The head noted fairly summarizes the salient features of Madam Justice McLachin's decision. The following is from the head note;

> 1. "The only requirement for the admission of expert opinion is that the expert witness possess special knowledge and experience going beyond that of the

[4] Ibid, pg. 122

[5] Quoted in The Litigator's Guide to Expert Witnesses by Mark J. Freiman and Mark L. Berenblut, at pg. 32

trier of fact. Deficiencies in the expertise go to weight, not admissibility. Here the witnesses were qualified more narrowly than their areas of expertise, or in one case, not formally qualified at all. The proper practice is for counsel presenting an expert witness to qualify the expert in all the areas in which the expert is to give opinion evidence. If this is done, no question as to the admissibility of their opinions arises.[6]

2. Important as the initial qualifications of an expert witness may be it would be overly technical to reject expert evidence simply because the witness ventures an opinion beyond the area of expertise in which he or she has been qualified. As a practical matter, it is for opposing counsel to object if the witness goes beyond the proper limits of his or her expertise. The objection to the witness's expertise may be made at the stage of initial qualification, or during the witness's evidence if it becomes apparent that the witness is going beyond the area in which he or she was qualified to give expert opinion. In the absence of objection, a technical failure to qualify a witness who clearly has expertise in the area will not mean that the witness's evidence should be struck. However, if the witness has not shown to have possessed the expertise to testily in the area, his or her evidence must be disregarded and the jury so instructed. Allowina the jury to consider the experts' evidence did not constitute an error of law because all of them clearly possessed expertise. sufficient to permit them to permit them to testify as they did.[7] (underlining mine)

3. "The ultimate conclusion as to the credibility or truthfulness or a particular witnesses is for the trier of fact, and is not the proper subject of expert opinion. A judge or jury which simply accepts an expert's opinion of a witness would be abandoning its duty to itself to determine the credibility of the witness. The expert who testifies on credibility is not sworn to the heavy duty of a judge or a juror. Moreover, the expert's opinion may be founded on factors which are not in the evidence upon which the judge and juror are duty bound to render a true verdict.[8]

4. "While expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility, is admissible, provided the testimony goes beyond the ordinary experience of the trier fact."[9] (underlining mine)

It is to be noted that in Marguard, one of the expert's who testified was a Dr. Mians, who was qualified as an expert in child abuse and paediatrics.[10] She was not an expert in burns, but her opinion was that the burn the child had was a contact burn and not a flame burn. Dr. Mians admitted in cross-examination that she was not an

[6] R v Marquard, pg.225
[7] Pg. 226
[8] Pg. 227
[9] Pg. 227
[10] Pg. 242

expert in burns or in plastic surgery.

Another doctor who saw the child upon her arrival at hospital was a Dr. Campbell who was not qualified at all as an expert. He testified however that his experience lead him to the conclusion that the child had suffered a contact burn.[11]

Dr. Zuker, a plastic surgeon, was qualified to testify as an expert in burn. He went beyond his area of expertise to testify that passivity during a medical examination is characteristic of abused children.[12]
All this evidence was admitted by the trial judge. Although she had accepted that the witnesses had gone beyond the area of expertise as qualified, she did not instruct the jury to disregard the opinions which went beyond the witnesses area of expertise. Dr. Mians and Dr. Campbell were not specialists in burns, yet they could testify based on their experience. As Madame Justice McLachin said: (at page 243)

> "While Dr. Mians and Dr. Campbell were not medical specialists in burns, there could be no doubt that as practicing physicians, they possessed an expertise on burns, which is not possessed by the ordinary untrained person. Similarly, while Dr. Zuker was not qualified as an expert in child abuse, his long experience working with children who had been injured and had no doubt, given him a degree of expertise which is not possessed by the lay person. The only requirement for the admission of expert opinion is that the "expert witness possessed special knowledge and experience going beyond that of the trier fact: R. V. Beland [198712 S.C.R. 398, at p. 415. Deficiencies in the expertise go to weight not admissibility[12]. (Underlining mine)

Marquard will allow experts to proffer opinion evidence on matters outside their narrow area of expertise. Containment of the defence expert's opinion will prove difficult. The qualification phase will be crucial. If success is to be achieved in limiting the reach of the expert's opinion, a vigorous cross-examination will need to be mounted. At worst, the objection will be made and the record protected.

4. Containment of the defence experts' opinion

The first attack in your cross-examination of the defendant's experts begins in the qualifications phase. Before an expert can testify, he must be properly qualified. In a typical case, an orthopaedic surgeon no doubt hasn't the qualifications or training of a psychologist or physiatrist. Your cross-examination during the qualifications phase should be geared to establish this lack of expertise.

The experts Curriculum Vitae, a copy of which will have been sent to you prior to the trial, must be carefully reviewed. You should do a computer search of all cases in which the expert testified.

[11] Pg. 242
[12] Pg. 242 & Paciocco & Stuesser, pg. 122

Sample Cross-Examination:

Question: Doctor, from looking at your curriculum vitae, I noted that you have taken no courses in physical medicine and rehabilitation. Is that true?

Question: Doctor, I note that you have not published articles or done original research in chronic pain and fibromyalgia. True?

Question: Your clinical practice is that of an orthopaedic surgeon and not of a chronic pain specialist. True?

This exercise is designed to limit the effect and the damage that the defence doctor can do the plaintiffs case and to limit the reach of his evidence to issues involving orthopaedic surgery only. Even if the defence doctor is qualified to comment on fibromyalgia, the effect of the cross-examination will hopefully weaken the force of the expert's opinion.

5. Conclusion

While it will be difficult to contain the opinion of the Defendant's expert, it will also be difficult to limit the reach of the Plaintiff's expert testimony. Marauard shifts the inquiry from admissibility to weight. Effective cross-examination will go a long way to neutralizing the power and force of the defence expert. As always, preparation, preparation and more preparation will be the difference between victory and defeat.

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