

The Medical Report and Expert Witnesses

Forensic and Demonstrative Evidence for Insurance Claims
March 27, 2003

REFLECTIONS ON THE ROLE OF THE EXPERT WITNESS

Richard M Bogoroch & Leanne Goldstein
Barristers & Solicitors

Introduction

In *R v. Abbey*¹, Dickson J. held:

Witnesses testify as to facts. The judge or jury draws inferences from facts. With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with the ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. An expert's opinion is admissible to furnish the court with scientific information, which is likely to be outside the experience and knowledge of a judge or jury.

As science and technology have become more complex, the role of the expert witness has become increasingly more important. The selection and preparation of the expert witness has been and will prove to be at the cornerstone of much successful litigation.

The *Ikarian Reefer*

The British decision commonly referred to as *The Ikarian Reefer*², a 1993 decision of Justice Cresswell, has been referred to in a number of Canadian decisions as providing certain guidelines for expert evidence and as setting out certain duties of the expert witness.

The first two duties referred to by Justice Cresswell are as follows:

1. 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 the exigencies of litigation; and
2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise.

The courts tend to be wary of an expert who assumes the role of an advocate or advances a self-serving viewpoint. Expert testimony that appears objective and well-balanced is likely to be accorded more weight and is more likely to be relied upon by the trier of fact.

In *Perricone v Ba1dassatra*³, a decision on a motion brought pursuant to s.266 of the *Insurance Act* Macdonald J. stated that:

[I]f the person rendering the evidence assumes the role of advocate, he or she can no longer be viewed as an expert in the legally correct sense; instead, he or she must be viewed as advocating the case of a party with the attendant diminishment in the credibility of the report. Expert opinions guide the court but they do not determine the matters which are to be determined by the court.

In *Fellowes, McNeil v Kansa General International Insurance Company Ltd. et al*⁴, Macdonald J. once again referred to *The Ikarian Reefer* and the duties of the expert witness listed above, and ruled that a proposed expert in a solicitor's negligence action did not qualify to give expert evidence because of his early involvement as an advocate for Kansa.

In *Fellowes, McNeil*, Macdonald J. reiterates that:

Experts must not be permitted to become advocates. To do so would change or tamper with the essence of the role of the expert, which was developed to assist the court in matters which require a special knowledge or expertise beyond the knowledge of the court.

In *Toronto-Dominion Bank v. E. Goldberger Holdings Ltd.*,⁵ it was stated that:

[E]xperts must conduct themselves as objective neutral assisters of the court and, if they fail to fulfill this function, their testimony should be ruled inadmissible and therefore ignored after they have been eviscerated.

The duty to remain impartial and objective and the value of finding experts who can fulfill this duty has become increasingly more important, particularly with the proliferation, in recent times, of "professional expert witnesses" - people who have little, if any, clinical practice, but who spend the majority of their time testifying as experts.

Experts must always be reminded of their primary role, which is to assist the trier of fact. After all, this forms one of the bases for the admissibility of expert evidence by the courts, as set out in the Supreme Court of Canada decision in *R v. Mohar*⁶.

The next duty of an expert witness mentioned by Justice Cresswell in *The Ikarian Reefer* is as follows:

An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

It is logical that, in order for a court to evaluate an expert's opinion and compare and contrast competing opinions, it is necessary to have knowledge of the facts and assumptions which underpin those opinions. It is therefore incumbent upon counsel to

carefully evaluate the opinion of his/her own expert and that of the opposing expert as this can provide fertile ground for examination and cross-examination.

In this regard, the disclosure requirements contained in the ***Rules of Civil Procedure*** are particularly useful in providing counsel with an opportunity to evaluate the potential expert testimony and canvass issues and controversial areas with his/her expert in advance of a trial. This is particularly important in personal injury actions where the evidence can become very complex and technical. The input of the expert is essential in focusing both the lawyer's and the expert's attention on potential strengths and weaknesses in the expert's testimony and the testimony of competing experts.

The fourth duty of expert witnesses expressed by Justice Creswell in ***The Ikarian Reefer*** is as follows:

An expert witness should make it clear when a particular question or issue falls outside of his expertise.

The Supreme Court of Canada in ***R v. Mohan***⁷ stated that in order for expert evidence to be admissible, such evidence must, *inter alia*, be presented by a witness who is properly qualified: in other words, a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.

In ***Kozak v. Funk***⁸ a decision of the Saskatchewan Court of the Queen's Bench, Klebuc J., referring to the decisions of *R v. Kuzmack* and *R v. Howard*, states that:

Whether a person qualifies as an expert varies with the circumstances and thus no all-encompassing definition is possible. Nonetheless principles have evolved to control the testimony of proposed experts. An expert is limited to testifying to matters within his or her area of expertise. Experts are not to consider or comment on facts that are not subject his professional expert assessment.

Freiman and Berenblut, in their book, The Litigator's Guide to Expert Witnesses⁹ state that:

The test of expertness is the skill in the field in which the expert opinion is sought. Before the expert witness may be permitted to testify, counsel must qualify the expert witness's knowledge of the subject matter....Counsel calling the witness must demonstrate to the court, by examining the expert on his or her qualifications, that the witness has special knowledge, experience or expertise in the area in which he or she proposes to testify. Once the expert witness has been qualified in a particular field, he or she may testify about matters falling within that field.

The corollary to this is that it is incumbent upon the expert witness to make it clear when a question or issue falls outside of his or her expertise.

In *The Ikarlan Reefer*, Justice Creswell also suggests that the expert witness has a further duty which is that:

If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than provisional one.

Once again, this goes to the role of the expert in assisting the trier of fact. Particularly where an expert is testifying on a complex and technical issue, the judge needs to know the factual bases and assumptions underlying the expert's testimony in order to fully understand the testimony and to question the expert should this prove necessary.

It is equally vital, therefore, that the expert convey to the judge that his testimony, or a report prepared by him, is deficient as a result of there being a paucity of information or data for him to evaluate and that he requires further information in order to provide a more comprehensive opinion. Failure to do so could mislead the court and be detrimental to the case in the long run.

The last two duties mentioned by Justice Creswell in *The Ikarlan Reefer* echo the emphasis placed by Canadian courts in recent years on the importance of pre-trial disclosure. These duties are that:

If after the exchange of reports, an expert witness changes his view having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate, to the court; and Where expert evidence refers to photographs, plans, calculations, analyses, measurements, surveys, reports or similar documents, these must be provided to the other party at the same time as the exchange of reports.

The purpose of exchanging information is to enable the parties and the experts to evaluate opposing opinions in an attempt to narrow the issues and possibly canvass settlement where the experts appear not to be very far apart. It may, however, also result in the experts and the parties realizing that they maybe required to obtain further information to bolster the expert evidence that they intend to present to the court.

Conclusion

Although it is a decision of the British courts, *The Ikarlan Reefer* and the duties of the expert witness enumerated by Justice Creswell have been applied in a number of subsequent Canadian decisions, and the decision provides a useful roadmap to counsel on how to deal with expert testimony. Counsel should consider the principles espoused in *The Ikarlan Reefer* and the Canadian cases applying those principles, when preparing or assisting an expert witness to prepare for trial.

References

- 1 [1982] 2 S.C.R. 24
- 2 *The Ikarian Reefer* [1993] 2 Lloyd's Rep. 68 (Comm. Ct. Q.B. Div.) (frill style: National Justice Compania S.A. v. Prudential Assurance Co. Ltd.)
3. *Perricone v. Baldassarra* [1994] O.J. No. 2199 at para. 22
4. *Fellowes, McNeil v. Kansa General International Insurance Company Ltd. et. al* 40 O.R. (3d) 456
5. *Toronto-Dominion Bank v. E. Goldberger Holdings Ltd.* [1999] O.J. No. 5324
6. *R v. Mohan*, [1994] 2 S.C.R. 9
7. *R v. Mohan Supra*, at para. 27
8. *Kozak v. Funk*, [1995] S.J. No. 569 at para. 15
9. Freiman M.J. and Berenblut M.L. (1997) The Litigator's Guide to Expert Witnesses

Reprinted with permission from Richard Bogoroch.

Richard M. Bogoroch & Leanne Goldstein of Bogoroch & Associates, Barristers & Solicitors can be contacted at Sun Life Centre, 150 King Street West, Suite 1707, Toronto, Ontario, M5H 1J9. Phone (416) 599-1700.