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PUBLICATION

The Times They Are A-Changin': More Important Stuff on Expert Witnesses

Date: August 16, 2017
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Original Newsletter(s) this article was published in: Blaneys' Coffee House: August 2017

It is trite to say that the hallmark of the Canadian judicial system (and of most common-law jurisdictions) is fairness. In pursuit of preserving that hallmark, the law governing expert witnesses has evolved greatly over the past 20 years. Gone are the days of the 'hired gun' - the biased expert witness, whom a party could retain to do its bidding, and who would say whatever it took to win. Nowadays, expert witnesses must be independent, and advance evidence that is fair, objective and non-partisan, despite who is paying their bills.

In our last newsletter (April 2017: *'DIY': Experts Must Write Their Own Reports*), I had talked about the obligation of expert witnesses to write their own reports, and to not have them ghost-written. This mandate contributes to ensuring fairness at trial, and to maintaining the integrity of the justice system.

This article focuses on the role and obligations of the *trial judge* to ensure that the expert witness does not jeopardize a fair trial.

The Trial

Recently, the Ontario Court of Appeal addressed the important role of the trial judge as gatekeeper, in the context of expert witnesses.

In *Bruff-Murphy v. Gunawardena* (2017 ONCA 502), the plaintiff had been injured in a motor vehicle accident. The defendant admitted liability, leaving the issue of damages to be resolved by a jury at trial.

The defendant called two expert medical witnesses, one of whom was a psychiatrist. Counsel for the plaintiff objected to the admission of the psychiatrist's testimony, on the basis that the psychiatrist had attacked the plaintiff's credibility, and was biased.

Notwithstanding the plaintiff's objections, the trial judge qualified the expert, and allowed the psychiatrist's evidence to be admitted. During trial, it became obvious that the psychiatrist had adopted the role of advocate, and lacked independence. The trial judge, however, did not raise any concerns with the jury.

Ultimately, the jury awarded the plaintiff the amount of CDN$23,500 for general damages, but rejected all other heads of damages including special damages, future care costs, and past and future income loss.

The Appeal

The plaintiff appealed the damages award, on the basis that the trial had not been fair because of the trial judge's failure to deal with the expert's impropriety.

The Court of Appeal affirmed the following threshold test to qualify a witness and allow his evidence to be admitted:

1. The evidence must meet the threshold requirement of admissibility: relevance, necessity in assisting the trier of fact, absence of an exclusionary rule, and the need for a properly qualified expert. The essential question, at this preliminary stage, is whether the expert is able and willing to carry out his primary duty to the court.

2. If the criteria under the first step are met, the trial judge must balance the potential risks and benefits. In other words, she must determine whether the evidence ought to be admitted because its probative value outweighs its prejudicial effect (the 'discretionary gatekeeping step').

It is only after the court has applied this two-pronged analysis that it can be properly determined whether it is probable that the witness' testimony would impair the fairness of the proceeding.

Ongoing Obligation of the Trial Judge

At the qualification stage, although the expert's report provides a roadmap of the anticipated testimony of the expert, and the specific limits to be placed on the scope of that testimony, the trial judge cannot predict, with certainty, the nature or content of the expert's actual testimony. In other words, although the issue of admissibility is determined when the evidence is proffered, and qualification is requested by a party (which is prior to the expert's report being admitted, and before the expert testifies), this does not mean that the expert will, in fact, remain fair, objective and impartial throughout the trial.

If, during the trial, it becomes apparent that the expert lacks independence and poses an acute risk to the fairness of the trial, a judge cannot act as if her job is done. She has an obligation to independently act, regardless of the initial qualification, and whether or not an opposing party makes an objection about the testimony.

Options for the Trial Judge if Prejudice is identified after the Qualification Stage

It was the Court of Appeal's view that, in the face of prejudice after the qualification stage, the trial judge could have:

1. advised counsel that he was going to instruct the jury that the psychiatrist's evidence would be excluded, in whole or in part. In that event, counsel could have made submissions about the extent of the instruction; or

2. invited submissions from counsel regarding the prospect of a mistrial.

It is important to note that the plaintiff's counsel did not ask the trial judge to instruct the jury regarding the problem with the psychiatrist's evidence (the general rule is that the failure to object to a civil jury charge is fatal to a request for a re-trial on appeal based on misdirection or non-direction. This rule, however, is subject to an exception: Where the misdirection or non-direction resulted in a substantial wrong or miscarriage of justice, it may warrant a new trial).

The Holding of the Court of Appeal

The court reasoned that if the trial judge had properly applied the two-pronged qualification test (he failed to apply the second prong of the test, altogether), he would have reached the conclusion that the potential risk of admitting the psychiatrist's evidence far outweighed the potential benefit: the psychiatrist lacked independence, was essentially an advocate for the defence, and was coming dangerously close to usurping the role of the jury in assessing the plaintiff's credibility.

The trial judge's inaction resulted in the evidence adversely affecting the fairness of the trial, and ultimately resulted in a miscarriage of justice. The court, therefore, granted the plaintiff's appeal, and ordered a new trial.

It is clear that, had the trial judge intervened and provided options in the face of the prejudice, the chances are that counsel would have rejected a mistrial (a Draconian step) and instead requested that the jury be properly instructed. In that regard, the court commented,

No doubt, another trial will be costly and time consuming, but it is necessary because the defence proffered the evidence of a wholly unsuitable expert witness.

So, despite the negative financial repercussions of a second trial, and the consequential adverse impact on the parties, the Court of Appeal chose integrity over efficiency.

What does it all Mean?

Now, there is some certainty about the conduct of the expert witness: the courts have spelled out the expectations of experts, lawyers and courts, in order that fairness will be maintained throughout the process.

A thought came to mind: What does a lawyer do in a highly complex, large-scale case, when she requires technical assistance in order to successfully examine or cross-examine an adverse party? How does she get input from her expert without crossing the line and leading him down the road to impartiality? In circumstances where the budget can tolerate it, it is often worthwhile for the lawyer to retain a second expert, on a short-term basis, who will assist her in successfully prosecuting or defending the case. For example, in a construction claim, the second expert could enhance success by directing the lawyer to ask the right questions of adverse parties, thus eliciting the best evidence. He would not have to maintain independence because he would not be called to testify at trial as an expert witness. If a second expert is not in the budget, then it is important for the lawyer to ensure that her expert witness remains impartial when providing her with technical information and assistance.

Nowadays, the court, the lawyer, and the expert witness each have an independent obligation to ensure that the witness remains impartial and independent, and does not morph into a ‘hired gun’ at some point during the process.