

**EXPERT WITNESSES IN PERSONAL INJURY CASES****By Peter Willcock**

*"If you don't know where you are going, you'll end up somewhere else."*

-- Yogi Berra

**Introduction**

The following brief paper is itself a statement of opinion. Like any opinion, its value should be weighed carefully in light of the author's training and experience. The reader should assess the advice offered here in light of her or his own experience. Like all opinion on the conduct of litigation, it is only as valuable to the extent that it proves to be useful in your labours.

The comments here are directed to counsel retaining expert witnesses to assist in the presentation of civil cases. My comments will address four stages of your involvement with experts: their selection, instruction, preparation and examination at trial.

Because of the limited time available for discussion of this topic, I would simply like to make one or two points with respect to your role at each stage in the proceedings. I will briefly touch upon some recent decisions which will be canvassed by Allison Murray in her review of recent decisions in this area.

**Selection**

In a recent case which neatly summarises the law in this area, *R. v. Nahar* 2004 BCCA 77, the Court of Appeal reminded counsel that when seeking to adduce the opinion of an expert witness at trial, it is important that counsel state what fact or facts the opinion is being proffered to prove.

Of course, this admonition is equally applicable at the time you are retaining an expert. Determining the issue you wish to address will obviously affect your selection of a witness. This seems self-evident, but subtleties are often overlooked. For example, when retaining a witness to comment on causation of damages or the nature and extent of the damages, it is my view that you should be looking to retain the most qualified expert witness possible. In the medical field, this may be accomplished by asking the treating physicians for some input on appropriate specialist investigations which should be conducted and asking the specialists for their input on experts who may be particularly well qualified to comment on significant issues such as causation and prognosis. However, there are cases where your expert should not be the most qualified specialist. If you are seeking to address the standard of care, you should recognize that there are significant hazards in retaining experts who are too eminently qualified. Overqualification may lead to the exclusion of an expert's report on the standard of care, it will certainly affect the weight afforded to it by the trier of fact.

It was once the case that over-qualification routinely led to the exclusion of the opinions of experts who intended to comment on the standard of care, on the basis that evidence of a superior

standard would not be of assistance in determining whether the Defendant met the standard to be reasonably expected of a competent peer. (see *St. Jules v. Chen* [1990] B.C.J. 23 and *Hughes v. Cooper* [1997] B.C.J.1303). This resulted in some careful consideration of the definition of the appropriate peer group, as in *Bastian v. Mori* [1990] B.C.J. No. 591.

In a number of recent decisions, the rule with respect to admissibility of specialist opinions has been modified. In *Phillips v. Central Cariboo Chilcotin Council* [2002] B.C.J. 1245, *McLellan v. Dickinson* [2002] B.C.J. No. 2698 and *Ewert v. Marshall* [2003] B.C.J. 2202 experts who were arguably over-qualified were allowed to express opinions which were received as to the standard of care, subject to some reservations as to the weight of the opinions. These cases refer to decisions in other provinces in *Robinson v. Sisters of St. Joseph in the Diocese of Peterborough in Ontario* (1999), 29 C.P.C. (4th) 184 (Ont. C.A.), *Briffett v. Gander and District Hospital Board* (1996), 29 C.C.L.T. (2d) 251 (Nfld. C.A.), and *Quintal v. Datta*, [1988] 6 W.W.R. 481 (Sask. C.A.), [leave to appeal to S.C.C. refused (1989), 76 Sask. R. 80n (S.C.C.)]. The extent to which this signals a significant change, and the extent to which the more liberal approach to admissibility is consistent with the decision in *ter Nuzen v. Korn* (1995), 11 B.C.L.R. (3d) 201, is likely to be tested on appeal in the near future. There is a suggestion in at least one recent Court of Appeal decision, *Hoskin v. Han* 2003 BCCA 220, that the Court of Appeal feels that “the melding of admissibility and weight is too easily undertaken” and that the trial courts should more seriously guard their role as “gatekeepers”.

For the time being, some trial judges will allow specialists to express opinions on the quality of the work of a generalist, subject to some reservation as to the weight which should be afforded to the opinion. There will be some cases where the expert is so over-qualified or so out of touch with the standard of the generalist that the expert opinion will not be admitted into evidence. I expect that over time, as *Phillips v. Cariboo Chilcotin* and the cases which follow it are considered, a body of case law will develop which will establish that in addressing the standard of care, the greatest weight should be placed upon the expert whose training, education, experience and qualification most closely resembles that of the group to whom the Defendant is said to belong.

It may be useful, in considering whether or not you have the right expert, to ask the expert the following simple question: “If, in the course of your ordinary practise in your profession, a client/patient had come to you and asked the question which I propose to ask of you at trial, would you be able to answer that question with a reasonable degree of comfort in your qualification and experience or is it a question which you would address to someone who is more qualified or otherwise qualified, or is it a question which you would have to research before answering? If it is a question which you would have to research, is that research something which you would ordinarily undertake in your practise?”

In determining whether or not a subject is appropriate to put to an expert, you should bear in mind that our courts have adopted the rules enunciated by the Supreme Court of the United States in *Daubert v. Merrell Dow Pharmaceuticals* 509 US 579 (1993) (See the Supreme Court of Canada decision in *R. v. J. - L.J.*, [2002] S.C.R. 600; and our Court of Appeal’s recent decision in *Millership v. HMTQ* 2004 BCCA 9) In *Daubert* the US Supreme Court was considering the Federal Court Rules of admissibility and wrestled with the question whether the

Court should be a gatekeeper at all or should merely address relevance, as opposed to weight of opinion evidence. The Court held that judges should be wary of accepting into evidence the opinions of experts in what has come to be called “junk science”. The Court enunciated set of criteria to be considered:

Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." Green, at 645...

Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. Publication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability, see S. Jasanoff, *The Fifth Branch: Science Advisors as Policymakers* 61-76 (1990), and in some instances well grounded but innovative theories will not have been published, see Horrobin, *The Philosophical Basis of Peer Review and the Suppression of Innovation*, 263 *J. Am. Med. Assn.* 1438 (1990). Some propositions, moreover, are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected....

Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, see, e. g., *United States v. Smith*, 869 F. 2d 348, 353-354 (CA7 1989) (surveying studies of the error rate of spectrographic voice identification technique), and the existence and maintenance of standards controlling the technique's operation. See *United States v. Williams*, 583 F. 2d 1194, 1198 (CA2 1978) (noting professional organization's standard governing spectrographic analysis), cert. denied, [439 U.S. 1117](#) (1979).

Finally, "general acceptance" can yet have a bearing on the inquiry. A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." *United States v. Downing*, 753 F. 2d, at 1238. See also 3 Weinstein & Berger ¶ 702[03], pp. 702-41 to 702-42. Widespread acceptance can be an important factor in ruling particular evidence admissible, and "a known technique that has been able to attract only minimal support within the community," *Downing, supra*, at 1238, may properly be viewed with skepticism.

The criteria were further clarified in a later case, *Kumho Tire Co. V. Carmichael* (97-1709) 526 U.S. 137 (1999), which did not involve the same type of scientific evidence as the *Daubert* case:

This case requires us to decide how *Daubert* applies to the testimony of engineers and other experts who are not scientists. We conclude that *Daubert*'s general holding— setting forth the trial judge's general “gatekeeping” obligation—applies not only to testimony based on “scientific” knowledge, but also to testimony based on “technical” and “other specialized” knowledge. See Fed. Rule Evid. 702. We also conclude that a trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is “flexible,” and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination....

The Court added:

Neither is there a convincing need to make such distinctions. Experts of all kinds tie observations to conclusions through the use of what Judge Learned Hand called “general truths derived from ... specialized experience.” Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40, 54 (1901). And whether the specific expert testimony focuses upon specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case, the expert’s testimony often will rest “upon an experience confessedly foreign in kind to [the jury’s] own.” *Ibid.* The trial judge’s effort to assure that the specialized testimony is reliable and relevant can help the jury evaluate that foreign experience, whether the testimony reflects scientific, technical, or other specialized knowledge.

Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases. See, e.g., Brief for Stephen Bobo et al. as *Amici Curiae* 23 (stressing the scientific bases of engineering disciplines). In other cases, the relevant reliability concerns may focus upon personal knowledge or experience. As the Solicitor General points out, there are many different kinds of experts, and many different kinds of expertise.... The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.

*Daubert* itself is not to the contrary. It made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged. It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of *Daubert*’s general acceptance factor help show that an expert’s testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.

At the same time, and contrary to the Court of Appeals’ view, some of *Daubert*’s questions can help to evaluate the reliability even of experience-based testimony. In certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert’s experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community. Likewise, it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.

You should also be certain that the opinion you are seeking is one which is beyond the realm of normal experience and should be hesitant, for example, to call opinion evidence which does not easily fall within the realm of a recognized expert (*R. v. Nahar* 2004 BCCA 77). As noted in Kumho astrologists and necromancers are not welcome witnesses

When you are retaining experts, you will want to turn your attention to questions which they will be asked in cross-examination. Before cross-examining an expert, I usually check a number of databases available on the internet to determine whether or not that expert has previously testified or written or spoken about the subject matter which the witness is asked to address in a lawsuit. Previous testimony or published material may serve as a very useful tool for cross-examination. On reviewing your own expert’s publication at the outset, you may determine that

your expert has previously testified or expressed an opinion in writing which is contrary to your client's interests.

For example, at a recent trial in which I was involved, opposing counsel called an expert witness to testify on the causation of an infant's death. The allegation in the lawsuit was that my client was negligent in the care of the infant or, in the alternative, was negligent in failing to provide appropriate information and comfort to the mother following the death of the infant. In preparation for trial, I found that the Plaintiff's expert witness on causation had conducted a very lengthy and detailed study, assisted by a counseling psychologist, of the informational needs of parents following the death of a child. In cross-examination at trial, the expert agreed that the conclusion of the study was that physicians should provide information to parents which was very similar to that provided by my client. This "collateral" expertise was quite useful to the defence. I have often found material in the research and publications of an expert called for the other side which is supportive of some aspect of my client's case.

In addition to researching the expert witness's work in general and on other cases, you should canvas the witness's relationship to the parties and their counsel. It may be useful to know before retaining an expert whether or not that expert has had a long history of dealing with opposing counsel, such as might result in that counsel having particular insight into the opinions of the expert. On this point, I should note that if the expert has previously been retained to assess the case by opposing counsel and if that retainer has come to an end, that alone may not bar the expert witness from testifying. The question of whether or not an expert witness may be conflicted out of a case was recently considered by our Court of Appeal in *Schober v. Walker* 2004 BCCA 205 and in that case, the court appears to have adopted the judgment of the English Court of Appeal in *Harmony Shipping v. Davis*, [1979] 3 All E.R. 177 (C.A.), in which the court said:

There is no property in a witness as to fact. There is no property in an expert witness as to facts he has observed and his own independent opinion on them. There being no such property in a witness, it is the duty of a witness to come to court and give his evidence in so far as he is directed by the judge to do so.

### **Instruction**

Expert witnesses are often troubled by the constraints placed upon them by the Rules. In my opinion, it is essential that experts understand the purpose and effect of the Rules so that they will appreciate the effect of non-compliance with Rule 40A on the testimony which they are able to give at trial, the nature and extent of solicitor and client privilege in the pre-trial period and the effect of the loss of that privilege at trial. It is vital that expert witnesses appreciate that not only must their reports conform with the Rules but that in the absence of cross-examination they will be able to add little to their reports at trial. I have occasionally seen a witness leave the stand complaining that he or she did not have an opportunity to address what he or she regarded as a critical issue. This demonstrates a lack of communication with counsel and a failure to appreciate the constraints under which we and experts operate.

On the other hand, I have also seen expert reports in which the expert is asked to address one issue and comments briefly on another issue which is both outside the area of their expertise and addressed at great length by more qualified experts in other reports. This demonstrates a failure in communicating to the expert the specific role which that expert plays in the litigation.

For example, in a case brought against a general practice physician, the Plaintiff's GP advisor may say that the Defendant physician failed to meet the standard of care to be expected of a general practitioner. Occasionally, that critical GP goes on to say that the failure to meet the standard of care caused the Plaintiff to suffer an injury, the cause of which may properly only be determined by a specialist. Expression of an opinion on a complex question outside the area of his expertise leaves the expert open to criticism, not only that the expert is unable or unwilling to acknowledge the limits of his or her expertise, but also that he or she has become an advocate.

Careful consideration must be given to what material is provided to the expert witness. In general, counsel wants to avoid the suggestion that any material evidence has been concealed from the expert or that the expert has not made appropriate inquiries into the evidence which is available for his or her consideration. On the other hand, there are conflicting cases on the extent to which experts should be provided with what is the most crucial evidence in most cases: transcripts of Examinations for Discovery.

Mr. Justice Lowry in *Ralston v. Morris*, SCBC Vancouver Registry No. C953130, October 4, 1996. In that case, the defence had asked an expert plastic surgeon to review the transcript of the discovery of the Defendant plastic surgeon. Mr. Justice Lowry noted:

No objection was taken to the admissibility of this opinion but, as I informed counsel, it was not, in my view, appropriate to ask the witness to read discovery transcripts. His function was not one of assessing evidence. One does see references to discovery in the statements of experts tendered in this court, but for the most part, I consider that should be avoided. What is said on discovery may never become evidence at trial.

In *Crouch v. B.C. Women's Hospital* 2001 BCSC 995, Mr. Justice Lowry addressed a case arising out of a birth injury. He repeated the caution with respect to the review of transcripts by experts:

The opinions of expert witnesses are of course common in cases of this kind. They are, however, admissible only because, and to the extent that, the subject about which an opinion is given is beyond common understanding and the court can be said to require assistance as to what inferences or conclusions are to be drawn from facts the expert is asked to assume. The Rules governing a presentation of evidence of this kind are now so well established it is difficult to understand why they are not always closely followed. They require that a statement be delivered to an opposing party 60 days in advance setting out the opinion, the facts on which it is based, and the qualifications of the person who has given the opinion. The purpose of the requirement is to ensure that the party

against whom the opinion is to be tendered has ample opportunity to address the opinion when it is adduced at trial.

I consider it preferable that a statement of expert evidence (most often referred to as an expert's report) begin with a clear statement, or perhaps reference to an annexed letter of request, sufficiently specifying the nature of the opinion sought so as to make it immediately evident why the opinion is required and what it is that must be proven with this kind of evidence. The facts upon which the opinion is to be based - and only those facts - should then be set out in as complete and concise a statement as the circumstances will allow. The opinion, including the reasoning applied, should be expressed in the simplest terms, bearing in mind that the challenge an expert witness faces is to make the evidence easily understood. Uncommon technical terms should be avoided or at least well explained. Finally there should be a complete statement of the expert's qualifications, including any particular training or experience beyond what might be found in a curriculum vitae, that is germane to the opinion.

In the *Crouch* case, however, the Plaintiff's experts were given all of the transcripts of Examinations for Discovery conducted on both sides and clinical records. Mr. Justice Lowry noted:

In my view, expert witnesses should not base their opinions on discovery evidence which may or may not be read at trial. Indeed, as a general rule, I do not consider they should be given access to discovery transcripts. The assessment of evidence is not their function, and there is no place for the delivery of an expert's opinion when it is based on facts drawn by the expert from what was said on discovery. The facts underlying an opinion are within the purview of counsel. It is counsel who must be satisfied that they are facts that can be proven, and it is for counsel to settle with an expert witness the facts that are to be assumed for the purpose of the opinion. It is those facts that must then be set out clearly in a statement that is to be delivered in compliance with the Rules.

An opinion is to be based on what an expert witness is asked to assume or what he does assume from what he personally observes. The assumptions made must be clearly set out in the statement of the opinion evidence to be heard. In general, it is my view that this objection can be addressed by providing the transcripts to the experts for review and asking the expert to identify evidence which is crucial to the opinion, drafting a Statement of Assumed Facts and asking the expert to assume those facts and serving the Statement with the expert opinion. In fact this approach appears to have some support from the Courts and was found to be acceptable in *Blackwater v. Plint* (BCSC, Unreported Oral Ruling August 14, 2000) where Brenner, CJBC, ruling on an objection that an expert ought not to have referred to passages from discovery transcripts in his report, noted:

...in this case what Dr. Coen has done is set out the information he looked at and considered when coming to the conclusion or opinions in his report. Far from this being improper, it is my view that he was obliged to do this as an expert being

tendered to the court in order that the opposing parties could understand the basis for his opinions.

I would observe that the reference by an expert to any facts obtained outside the court room do not make those facts evidence in the trial unless proven in the usual way. What is important for the trial process, however, is that all parties understand the basis of the expert's opinion, and for that reason it is appropriate that the information relied upon or referred to by the expert be clearly set out and identified.

## **Preparation**

Once the expert reports are complete, there are a number of critical measures to be taken before the expert is called to testify at trial.

First, in my opinion, the expert should be provided with all other expert opinion evidence which will be introduced at trial. Experts may be most useful in assisting you in preparing cross-examination of opposing experts. This may consist of providing you with a commentary on opposing counsel's expert reports but may also include assistance in locating literature which may be used in cross-examination.

In preparation for trial, the expert should be advised that all physical evidence and all factual evidence in the possession of the expert and upon which the expert relies, such as photographs and test data, must be produced with the expert report and will not be privileged (*Traynor v. Degroot* 2001 BCCA 556).

Similarly, experts should be advised that all material relied upon or referred to in preparation of the expert report should be retained and brought to trial so that it may be produced on cross-examination if required. It is, as you know, common for draft reports to be produced. Experts, particularly those who are not regularly appearing in the courts, often produce first drafts which fail to meet the requirements of the Rules or contain comments outside the area of inquiry or the expertise of the expert and which must be edited in order to make them acceptable. The editing process is normal. Destruction of drafts may have a more significant impact upon the credibility of the witness than a willingness to revise a report to make it acceptable for submission to a trial court.

## **Examination**

In my experience, it is important to pay careful attention to the order in which the expert witnesses appear. The first expert will have to educate the court with respect to the subject matter of the opinion and it is crucial that this groundwork be laid before the most detailed expert opinion evidence is put before the trier of fact. So, for example, the mechanics of an air brake system on a truck must be explained in detail before one begins to address the opinion that an

accident occurred as a result of a malfunction of a particular component of the system. In such a case the first expert to testify must give the court a basic introduction to air brakes. Subsequent witnesses may address the specific evidence with respect to the failure thought to have occurred. We have all been involved in trials where in the course of the testimony of the second or third expert witness, a misconception on the part of one party or the trier of fact is revealed which demonstrates that the testimony of the first expert witness has failed to satisfactorily cover the ground so as to permit that evidence and the evidence of subsequent expert witnesses to be understood in the proper context.

The fear on the part of counsel examining experts in chief is that they will be accused of breaching the provisions of Rule 40A if they attempt to have their expert witnesses provide sufficient background so that their reports may be understood. In general, this is not the case. An expert witness may be asked to provide the court with factual information about the subject matter of the litigation and their area of expertise in general before being asked to address the question which has led to the expression of their opinion. So, for example, a neurosurgeon may properly be asked to describe the anatomy and physiology before describing the injury, its treatment and the prognosis.

I have rarely faced objection when asking an expert witness to educate the court with respect to the nature of a medical procedure, for example, before asking the expert to comment on the manner in which the procedure was conducted by the Defendant. Nor have I ever been advised by the court that we have provided too much testimony in the way of background evidence on anatomy, construction or technical terms.

It should be borne in mind that it is too late to educate the court after an expert witness has testified. The expert testimony can only be properly understood if one is properly prepared to receive it.

It is often useful to ask your experts whether they have material which they use to explain the area of their expertise to laypeople or to their colleagues. In response to this question, I have had a neurosurgeon advise me that he has and uses a videotape of a procedure to explain that procedure to residents and occasionally to patients. I have shown a videotape of an operation to a trial judge and had the videotape explained by the expert before the expert addresses his report.

I have been advised by a radiologist that as a teaching method, X-ray and CT scan films are routinely put on disks and projected in PowerPoint presentations to colleagues and students to demonstrate radiological findings. I have had a radiologist bring a disk to trial with a PowerPoint presentation and comment on X-rays projected on a large screen.

Leading experts are often experts at teaching and when examining such experts in chief, you should prepare in such a fashion as to give them an opportunity to teach the court about the area of their expertise before launching into their sometimes complex and often difficult testimony.

Recommended Reading

**When "Experts" Speak, Should Judges Listen? Some Basic Science Lessons** Gold, Alan D  
The Advocate (1999) 57: 885-900

**Experts' Statements Pursuant to the B.C. Evidence Act** Kirkham, D.B  
The Advocate (1978) 36: 29-34