MEDICAL MALPRACTICE

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Expert Evidence – The New Normal

INTRODUCTION

This is part 7 of our 8-part series on the anatomy of a medical negligence claim within which we review the following topics:

- The Doctor-Patient Relationship and Duty of Care (Verdict Issue 163 – Winter 2019)
- Consent (*the Verdict* Issue 164 – Spring 2020)
- Standard of Care (*the Verdict* Issue 165 – Summer 2020)
- Defences to a Claim of a Breach of the Standard of Care (*the Verdict* Issue 166 – Fall 2020)
- Causation – Basic Principles (*the Verdict* Issue 167 – Winter 2020)
- Causation – Application (*the Verdict* Issue 168 – Spring 2021)
- **Expert Evidence**
- Disclosure of Errors

In previous articles, we outlined the essential criteria in a medical negligence action including the requirements to prove a duty of care owed by the defendant to the patient, a breach of the standard of care on the part of the defendant and a causal link between the breach of the standard of care and the plaintiff's injuries and the basic rules for establishing and applying causation. In this article, we will highlight both common law and statutory rules relating to the admissibility of expert evidence and identify issues counsel need to deal with in leading expert evidence at trial.

It is hard to remember a time when expert evidence was not an integral part of almost every case. Over the decades counsel have found that experts were an important part of proving our cases, indeed, an essential part in most cases. The last thing any lawyer wanted to see was a judgment dismissing our case on the basis that no expert evidence was led to prove a critical aspect of our case. Expert evidence was persuasive and compelling, all the more so when the expert was willing to become part of "the team", advocating on behalf of our clients. The use of expert evidence became ubiquitous. The judiciary largely went along with this, probably to avoid the risk of a new trial if the evidence was rejected (see, for example, *Morrison v Hicks* (1991) 80 DLR (4th) 659 (BCCA) where the court ordered a new trial after the trial judge refused to allow further evidence on a point that had already been canvassed in other evidence at trial).

This led to a number of abuses, most particularly the phenomenon of the "expert as advocate".

Our courts have struggled to reign in this problem with limited success. Starting in 2010, the legislature amended the Rules to strengthen the requirements for the admissibility of expert evidence. In 2014 and again in 2015, the Supreme Court of Canada weighed in to address the issue in judgements which have given the courts new impetus to control the type and manner of expert evidence and to reject evidence which does not meet appropriate criteria.

The purpose of this paper is to highlight both common law and statutory rules relating to the admissibility of expert evidence and to deal with some of the more prominent issues counsel need to deal with in assessing whether and how to lead expert evidence.

THE BASICS

Historically, expert evidence was not admissible at all, due in large part to concerns regarding the risk of the expert usurping the role of the trier of fact, and related concerns regarding necessity, reliability, bias, confusion, delay and cost. As the judiciary came to the realization that the fact-finding process could not

be accomplished without the admission of expert evidence, rules were set up to limit the scope of that evidence.

In *R. v Morris*, [1983] 2 S.C.R. 190 Lamer J. (as he then was) set out the basic common law rules regarding the admissibility of evidence at trial (p. 201):

> Thayer's statement of the law which is still the law in Canada, was as follows:
>
> > "(1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) *that everything which is thus probative should come in, unless a clear ground of policy or law excludes it.*"

To this general statement should be added the discretionary power judges exercise to exclude logically relevant evidence

> > "… as being of too slight a significance, or as having too conjectural and remote a connection; others, as being dangerous, in their effect on the jury, and likely to be misused or overestimated by that body; others, as being impolitic, or unsafe on public grounds; others, on the bare ground of precedent. It is this sort of thing, as I said before, – the rejection on one or another practical ground, of what is really probative, – which is the characteristic thing in the law of evidence; stamping it as the child of the jury system."

The Court went on to outline the 4 criteria for the admission of expert evidence:

> (a) relevance;
> (b) necessity in assisting the trier of fact;
> (c) the absence of any exclusionary rule; and
> (d) a properly qualified expert.

With regard to relevance, the court stated:

> Relevance is a threshold requirement for the admission of expert evidence as with all other evidence. Relevance is a matter to be decided by a judge as question of law. Although *prima facie* admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs." See *McCormick on Evidence* (3rd ed. 1984), at p. 544. Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability.

As to necessity, the Court stated:

> This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury…the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature.

The other 2 criteria are self-explanatory.

Mohan also left the door open to novel scientific evidence but stated that such evidence must be subjected to "special scrutiny" in order to avoid a distortion of the fact finding process. Drawing on the *Daubert* line of cases in the US, the court stated that novel scientific evidence must be evaluated in light of the following criteria:

> (1) whether the theory or technique can be and has been tested:
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> 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.
>
> (2) whether the theory or technique has been subjected to peer review and publication:
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> [S]ubmission 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.
>
> (3) the known or potential rate of error or the existence of standards; and,
>
> (4) whether the theory or technique used has been generally accepted:
>
> 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."
>
> . . .
>
> Widespread acceptance can be an important factor in ruling particular evidence admissible, and "a known technique which has been able to attract only minimal support within the community," . . . may properly be viewed with skepticism.

In tandem with these common law principles, the Rules of Court played a crucial role. The admissibility of expert reports prior to the enactment of the new Rules was subject to Rule 40A, which set out specific notice requirements. Those requirements were often noted in their breach rather than compliance. The attitude of the court regarding late notice was typified by the following quote:

> It may be that late delivery of a report may cause such prejudice to the opposing party that the evidence cannot be permitted lest injustice result. Such cases must be very rare indeed, particularly if the trial is without a jury and an adjournment can be granted without undue inconvenience (*Hunter v. Ellenberger* (1988), 25 C.P.C. (2d) 14 (Ont. H.C.J.), quoted with approval by Coultas, J. in *Gibson v. Rickett; Gibson v. Hall* (1996), 15 B.C.L.R. (3d) 208 (S.C.))

In many\most cases, therefore, the party served with late notice was often faced with a dubious choice – accept the notice or seek an adjournment to allow for preparation for cross-examination. Given the costs and delay associated with an adjournment, the evidence was usually admitted without further adieu.

With the enactment of the new Rules in 2010, the notice requirements were enhanced. The relevant notice provisions are now found in Rule 11. That Rule provides, inter alia:

- All expert evidence must be contained within a written report. The practice of giving notice of oral expert evidence under Rule 40A(3) was abolished;
- The requirements for how all expert reports must be structured (Rule 11-6(1));
- The certification that the expert is aware of the need to be impartial and that he\she has complied with that duty (Rule 11-6(2));
- The 84 day notice requirement (Rule 11-6(3))

Rule 11-7 only permits expert opinion evidence at trial where it conforms with R. 11-6.

The court is given jurisdiction to allow expert evidence at trial where specific criteria are met:

> (a) facts have come to the knowledge of one or more of the parties and those facts could not, with due diligence, have been learned in time to be included in a report or supplementary report and served within the time required by this Part,
> (b) the non-compliance is unlikely to cause prejudice
> (i) by reason of an inability to prepare for cross-examination, or
> (ii) by depriving the party against whom the evidence is tendered of a reasonable opportunity to tender evidence in response, or
> (c) the interests of justice require it.

Note that these criteria are disjunctive.

Early indications were that our courts were going to take a different approach to the admissibility requirements than earlier judgments had taken.

In *Perry v. Vargas*, 2012 BCSC 1537, Savage J. held that a report served on the eve of trial was not admissible. In rejecting the evidence, he stated:

> [22] In my view the discretion provided for in R. 11-7(6)(c) must be exercised sparingly, with appropriate caution, and in a disciplined way given the express requirements contained in Rules 11-6 and 11-7. That is, the "interests of justice" are not a reason to simply excuse or ignore the requirements of the other Rules. There must be some compelling analysis why the interests of justice require in a particular case the extraordinary step of abrogating the other requirements of the *Supreme Court Civil Rules.* None was provided.

In *Wright v. Brauer,* 2010 BCSC 1282 at para. 12, Savage J. noted that "Rule 11-6(4) was enacted to fill a lacuna in the Rules." This was required because the former Rules permitted without notice expert evidence in reply if it was truly responsive. Rule 11-6(4) now clearly requires that notice.

In *Redmond v. Krider*, 2014 BCSC 2585, Madam Justice Maisonville stated that the Rules are to be read as a codification of the earlier common law respecting expert evidence, particularly with respect to service and notice requirements relating to the expert witness's report, with the exceptions as set out in Rule 11-7.

While these changes enhanced the notice requirements for expert evidence, the common law rules were also enhanced to strengthen the role of the trial judge to act as the gatekeeper, with a mandate to ensure that only properly admissible evidence was allowed.

In 2014, in *R. v Sekhon* [2014] 1SCR 272, the SCC was faced with deciding whether expert evidence from an experienced police officer to the effect that "…in his many years' experience he had never encountered a blind courier…" was admissible to rebut the suggestion that the driver of a vehicle coming over the border with drugs concealed in a hidden compartment was unaware that they were there. Moldaver J., speaking for the majority in rejecting the evidence, reiterated the *Mohan* rules for admissibility, and then emphasized the ongoing obligation of the trial judge to act as a gatekeeper.

> [46] Given the concerns about the impact expert evidence can have on a trial — including the possibility that experts may usurp the role of the trier of fact — trial judges must be vigilant in monitoring and enforcing the proper scope of expert evidence. While these concerns are perhaps more pronounced in jury trials, all trial judges — including those in judge-alone trials — have an ongoing duty to ensure that expert evidence remains within its proper scope. It is not enough to simply consider the *Mohan* criteria at the outset of the expert's testimony and make an initial ruling as to the admissibility of the evidence. The trial judge must do his or her best to ensure that, throughout the expert's testimony, the testimony remains within the proper boundaries of expert evidence. As noted by Doherty J.A. in *R. v. Abbey*, 2009 ONCA 624 (CanLII), 97 O.R. (3d) 330, at para. 62:
>
> The admissibility inquiry is not conducted in a vacuum. Before deciding admissibility, a trial judge must determine the nature and scope of the proposed expert evidence. In doing so, the trial judge sets not only the boundaries of the proposed expert evidence but also, if necessary, the language in which the expert's opinion may be proffered so as to minimize any potential harm to the trial process. A cautious delineation of the scope of the proposed expert evidence and strict adherence to those boundaries, if the evidence is admitted, are essential. The case law demonstrates that overreaching by expert witnesses is probably the most common fault leading to reversals on appeal . . . . [Emphasis added; citations omitted.]
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> [47] The trial judge must both ensure that an expert stays within the proper bounds of his or her expertise and that the content of the evidence itself is properly the subject of expert evidence.

The following year, in *White Burgess v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, the Supreme Court came back to the concept of the judge as a gatekeeper. The case involved a professional negligence case against a firm of auditors by the shareholders of a company. The shareholders retained different auditors who were critical of the original auditors' work. A partner in a different office of the new auditors' firm provided expert opinion evidence against the former firm. They objected, taking the position that she was biased because the case boiled down to a contest between the two firms, and if her firm was found to be wrong, it could expose her to personal liability as a partner. The court agreed and struck the evidence. The Court of Appeal disagreed. In upholding that ruling Cromwell, J., speaking for the Court, opened his judgment with these words:

> [1] Expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers. To guard against them, the Court over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role. These developments seek to ensure that expert opinion evidence meets certain basic standards before it is admitted. The question on this appeal is whether one of these basic standards for admissibility should relate to the proposed expert's independence and impartiality. In my view, it should.
>
> [2] Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so. Less fundamental concerns about an expert's independence and impartiality should

be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence.

His Lordship highlighted the judicial concern about impartiality of expert witnesses, and the tendency for experts to try to help those who retain them. As noted in para. 18, "The point is to preserve trial by judge and jury, not devolve to trial by expert." The Court mandated a two stage process to govern the introduction of expert evidence at trial. These two stages are explained below: (Note: the following is largely adopted by the excellent analysis conducted by Madam Justice S. Donegan in *Whaley v. Bryant* (2020) BCSC 531)

> [9] First, the proffering party must demonstrate the existence of certain pre-conditions (the "Threshold Requirements"):
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> 1. The evidence must be logically relevant (to a material issue);
> 2. The evidence must be necessary to assist the trier of fact;
> 3. The evidence must not be subject to any other exclusionary rule;
> 4. The expert must be properly qualified, which includes a requirement that the expert be willing and able to fulfill the expert's duty to the court to provide evidence that is impartial, independent, and unbiased; and
> 5. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose.

The relevance issue relates to an examination of the pleadings and the issues raised in the case, and to determine whether, as a matter of logic and human experience, the expert opinion will tend to prove or disprove the fact in issue (See for example: *R. v. Arp,* 1998 CanLII 769 (SCC), [1998] 3 S.C.R. 339 at 360).

The necessity criterium is satisfied when expert opinion evidence:

1. provides information that is likely to be outside the experience or knowledge of the trier of fact;
2. will assist the trier of fact to appreciate technical dimensions of the matter in issue; and
3. relates to something about which ordinary people are unlikely to form a correct opinion without expert assistance: *Mohan* at 23- 24.

Thus, both relevance and necessity must be determined on a case by case basis.

Argument in the guise of an expert opinion is by definition not necessary (*Sengbusch v. Priest,* 1987 CanLII 2796 (BCSC)

An example of an exclusionary rule is the rule against allowing

an expert to opine on issues of credibility (see, for example, *R. v. Sekhon* (supra).

A "properly qualified expert" means an expert who has special or peculiar knowledge acquired through study or experience: *Mohan* at 25. They must also be impartial, independent, and unbiased. The Court in *White Burgess* explained at para. 10, in part:

> … expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. If they do not meet this threshold requirement, their evidence should not be admitted.

This means actual bias, not apprehension of bias:

> …The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance. *White Burgess* at para. 50.

Once an expert attests or swears to this duty, there is an evidential burden on the party opposing admission to show a realistic concern that the expert is unable or unwilling to comply with a duty of impartiality, independence, and lack of bias. If shown, the burden returns to the proffering party to "establish on a balance of probabilities this aspect of the admissibility threshold" (*White Burgess*, para. 48.

As Madame Justice Donegan noted in *Whaley*

> [49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

Following this "Threshold Enquiry", the trial judge must be satisfied that the cost of admitting the evidence does not outweigh its benefits. The Court referred to this as the "Gatekeeping Exclusionary Discretion" stage. The judge must consider factors such as questions of relevance, necessity, reliability, and absence of bias, independence, and impartiality. Where the probative value of the expert opinion evidence is outweighed by its prejudicial effect, it should be excluded: *R. v. Bingley,* 2017 SCC 12 at para. 16

Note that concerns regarding impartiality or bias come into play in both the Threshold Requirement criterion as well as in the

gatekeeping cost/benefit analysis: *J.P. v. British Columbia*, 2017 BCCA 308 where the CA ordered a new trial because of the failure of the trial judge to properly perform his gatekeeper function.

The court's initial ruling on admissibility does not end the court's gatekeeper function. The judge must play an ongoing role to ensure that, throughout the expert's testimony, the testimony remains within the proper boundaries of expert evidence (R. v. Abbey, 2009 ONCA 624). As noted in that case at para. 62:

> The admissibility inquiry is not conducted in a vacuum. Before deciding admissibility, a trial judge must determine the nature and scope of the proposed expert evidence. In doing so, the trial judge sets not only the boundaries of the proposed expert evidence but also, if necessary, the language in which the expert's opinion may be proffered so as to mini¬mize any potential harm to the trial process. A cautious de-lineation of the scope of the proposed expert evidence and strict adherence to those boundaries, if the evidence is ad-mitted, are essential. . . .

Whether the trial is a judge alone or a jury trial does not affect the application of the *Mohan* criteria; expert opinion evidence either satisfies the *Mohan* admissibility criteria or it does not: *Maras v. Seemore Entertainment Ltd.*, 2014 BCSC 1109 at para. 20. Nevertheless, the judge's gatekeeping role requires particular caution when the trier of fact is a jury: *Karpowicz v. Glessing,* 2018 BCSC 887, at para. 14, citing Justice Abrioux, as he then was, in *Maras* at para. 20.

One final point should be mentioned. The issue that comes up from time to time is whether giving discovery transcripts to experts renders their evidence inadmissible. The answer is "no". This issue comes up as a result of the judgment in *Croutch (Guardian ad litem of) v. B.C. Women's Hospital & Health Centre,* 2001 BCSC 995, aff'd 2003 BCCA 472, where the trial judge said:

> [17] In my view, expert witnesses should not base their opinions on discovery evidence which may or may not be read in 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 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 the statement that is to be delivered in compliance with the Rules.

This led many to argue that merely giving an expert access to discovery transcripts effected admissibility. That notion was dispelled by Smith, J. in *Keefer Laundry Ltd. v. Pellerin Milnor*

Corporation, 2007 BCSC 899, who stated:

> [46] … There may be situations where an expert is asked to comment directly on the conduct of a party, as in a case alleging professional negligence, and it is more convenient for counsel to simply provide an expert with portions of a discovery transcript, along with instructions to assume the facts contained in that testimony. However, in those cases the expert must clearly identify the facts and assumptions he or she has drawn from the discovery transcript. There should also be no suggestion that the expert has weighed the discovery testimony against other evidence and chosen the facts that will be assumed.

The key issue is whether the trier of fact is able to determine what facts in the discovery transcript inform the expert's opinion. In *Friebel v. Omelchenko*, 2013 BCSC 948, the Court said:

> [18] Chief Justice Brenner identified the crux of the problem which has led some judges to criticize the practice of providing experts with material such as transcripts of examinations for discovery. The problem does not arise as a result of the expert's review of the transcript, but where the transcripts are relied upon in the report in such a way that the trier of fact is unable to determine what facts form the basis for the expert's opinion. ...

See also *Edwards v. Parkinson's Heating Ltd.,* 2018 BCSC 593 at paras. 234–236. V