

Introduction:

Since many civil actions require expert opinion evidence the importance of such evidence cannot be overstated.

During this Webinar there will be a review of the **Queen's Bench Rules** and **The Evidence Act** pertaining to Experts and Expert Reports.

There will be a discussion on the importance of retaining credible experts including, for example, when (i.e. the timing) to retain an expert witness, what to look for when retaining an expert witness, how to instruct an expert witness, how to obtain an effective expert opinion and how to use an expert opinion to support and further your client's case.

Much of what I have to say during this webinar is a result of my practice experience. For many years, I have restricted my law practice to representing plaintiffs in medical negligence actions. I regularly retain expert witnesses on behalf of my clients for the purpose of informing me whether my clients' have a case.

Also, some of what I have to say during this webinar stems from my observations as a Practice Advisor for the Law Society of Saskatchewan.

Queen's Bench Rule

Division 3 of the **Queen's Bench Rules** is titled **Experts and Expert Reports**.

Rule 5-37 provides as follows:

Duty of expert witness

- (1) In giving an opinion to the Court, an expert appointed pursuant to this Division by one or more parties or by the Court has a duty to assist the Court and is not an advocate for any party.
- (2) The expert's duty to assist the Court requires the expert to provide evidence in relation to the proceeding as follows:
 - (a) to provide opinion evidence that is objective and non-partisan;
 - (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
 - (c) to provide any additional assistance that the Court may reasonably require to determine a matter in issue.

- (3) If an expert is appointed pursuant to this Division by one or more parties or by the Court, the expert shall, in any report the expert prepares pursuant to this Division, certify that the expert:
- (a) is aware of the duty mentioned in subrules (1) and (2);
 - (b) has made the report in conformity with that duty; and
 - (c) will, if called on to give oral or written testimony, give that testimony in conformity with that duty.

To recap, the expert witness "... has a duty to assist the Court and is not an advocate for any party". The expert witness is to provide "objective and non-partisan" opinion evidence. The expert witness is to offer opinion evidence within the expert's area of expertise. And the expert witness is to provide any additional assistance that the Court may require to determine the matter in issue.

The Evidence Act

Section 21 of **The Evidence Act** states as follows:

- (1) Where any of the parties to a proceeding intend to examine as witnesses professional or other experts who are entitled according to the law or practice to give opinion evidence, not more than five of those witnesses may be called on either side without leave of the court.
- (2) The leave required by subsection (1) must be applied for before any of the experts who may be examined without leave are examined.

Timing of the search for an expert witness:

When, in terms of timing, should you begin to search for an expert witness?

During my initial meeting, I inform my client of the need to retain an expert witness for an opinion on standard of care and, if the expert witness is critical of the standard of care, on causation.

I always inform my clients I will retain knowledgeable, credible and respected individuals for expert opinion evidence.

I provide my clients with a monetary range of what they can expect to spend in order to investigate whether there are grounds to support a lawsuit. I also inform my client of the retainer I need to move the matter forward to retaining experts. I don't move the matter forward until I have received the retainer.

How do you search for an expert witness who will satisfy all of the requirements set out in Rule 5-37?

I find physician experts who will satisfy all of the requirements set out in Rule 5-37 by doing a CanLII search of physicians who have offered expert opinion evidence in actions with facts and issues similar to my client's matter. If, for example, I have a file which centers on the standard of care by provided by an anaesthesiologist who had difficulty maintaining a patient's airway during an operative procedure and the patient has died from a respiratory and cardiac arrest due to a lack of oxygen caused by an inadequate airway I will search CanLII for actions that have proceeded to trial with a similar fact pattern. It is surprising how often there are reported actions with similar fact patterns and issues. I will read the judgment and determine whether the trial judge has expressed any comments about the physician experts called on behalf of the parties. Often judges will offer comments about the quality of expert witnesses. Also, I will determine whether the trial judge favored the opinion evidence called on behalf of the plaintiff or the defendant and, if so, why? Often, unless the trial judge has expressed negative comments about the expert physician witness called by the defendant, I will contact and attempt to retain the expert physician witness called on behalf of the defendant. By retaining experts who have been retained by the other side you should be able to avoid the assertion by the opposing lawyer that you have hired an expert witness who is not objective or is partisan.

As indicated I do a CanLII search for physicians, nurses, etc. who have offered expert opinion on fact patterns and issue similar to my client's matter. The same can be done if you have a matter that centers on the appropriateness of the professional services provided by, for example, an architect who has prepared the blueprint for an office tower and an engineer who has done the mechanical design for the office tower.

Avoid retaining a "Hired Gun" as an expert witness:

Retaining a "hired gun" will do you and your client no good. Sure you might receive a supportive expert opinion on behalf of your client but if your opposing colleague (or the opposing expert) views your expert witness as being an "advocate" the likelihood of your client's action being ultimately successful by way of a settlement or a judgement is remote.

Related to this point, I am aware of businesses that offer assistance to lawyers in locating expert witnesses. I am reluctant to use those services unless I have done all I can do to find an expert witness but have come up empty handed. My reluctance is due to a Judgement, now somewhat dated but still relevant, of Mr. Justice Hrabinsky in **Martin v. Inglis** 2002 SKQB 157 (CanLII).

Martin v. Inglis was a medical negligence action. Plaintiff's counsel retained an expert witness physician. The expert physician witness admitted he had been associated with organizations engaged in the business of providing expert witness testimony. At paragraph [122] Justice Hrabinsky held:

I have already alluded to Dr. Leitman's credibility or lack thereof. He admitted that he was involved in, or had been associated with a number of professional expert witness organizations and that he had been approached for this case through one of these organizations. He admitted that he primarily testifies on behalf of plaintiffs in cases involving allegations of medical

negligence. I do not find his expert evidence to be an independent product uninfluenced by the demands of litigation. I am of the view that he assumed the role of an advocate advocating the plaintiff's case.

Justice Hrabinsky favoured the testimony of the expert physician witness called on behalf of the defendant and dismissed the action.

The initial contact with the prospective expert witness:

When I have narrowed down my search for an expert witness I will contact the potential expert and determine whether the individual is willing and interested in being retained by me to serve as an expert witness. Most often one of the first questions I am asked is whether the matter is likely to proceed to trial and, if so, when is the trial date. In response, I always state there is the potential of the matter proceeding to trial but the lawsuit has not yet been commenced so a possible trial date is at least a year or two into the future.

I discuss with the expert the likely fees that will be incurred for a report. I ask if the expert wants to be paid a retainer.

I inquire about the individual's experience as an expert witness. I prefer to retain individuals who have a significant amount of expert witness experience. Individuals who have extensive expert witness experience typically know what is expected of them (i.e. to provide objective non-partisan opinion evidence).

The instruction letter addressed to the expert witness:

Once I have decided to retain, for example, a physician as an expert witness for my client's matter I will prepare a cover letter addressed to the expert in which I identify all of the documents (i.e. hospital records, physician charts) that I am asking the expert to review when arriving at an opinion.

I set out in my letter specific questions and/or specific aspects of the medical care that I want the expert to address when arriving at an opinion.

I will include in my letter Rule 5-37 (1), (2), (3). I will ask the expert witness, if he/she is agreeable, to include a statement in his/her report that he/she certifies that he/she is aware of the duty mentioned in subrules (1) and (2); has made the report in conformity with that duty; and will, if called on to give oral or written testimony, give that testimony in conformity with that duty.

How to use the report of the expert witness before the Pre-Trial Conference?

i) To determine whether your client has the basis for an action or a defence to an action:

Once the expert's written report is received there are many ways the lawyer can use the expert report to advance the client's case. The most obvious use is to assess whether the client has the basis for a lawsuit or a defence to an action.

On that point, in my role as a Practice Advisor I have come across files in which lawyers have commenced actions on behalf of their clients where, for example, the quality of the defendant's professional services are called into question but the lawyer has not obtained an expert opinion commenting on the services provided by the defendant. Unless there is, for example, a pressing time limitation the best practice is to obtain an expert opinion before starting an action.

ii) To assist with drafting the pleadings:

Another use of an expert report is to assist with the drafting of the pleadings.

The expert report will, for example, assist the lawyer in determining who needs to be named as a defendant.

The expert report can also be used to set out in the Statement of Claim specific grounds of alleged negligence against the defendant(s). The expert report can be used to focus the plaintiff's complaint against the defendant(s).

iii) To assist with the preparation for the Questioning:

The expert report is very helpful when preparing for the Questioning of the defendant. The expert report can be used to direct the lawyer to the subject areas that need to be covered off with the defendant.

It also assists with formulating questions in which admissions would be helpful.

As a Practice Advisor I have come across files in which the lawyers have conducted the Questioning without the benefit of having expert opinions on standard of care, causation and damages. As previously stated, the best practice is to obtain expert opinions (at least on standard of care and causation) before the action is commenced.

Summary:

To summarize, a significant amount of time and attention must be devoted to ensure credible and objective expert witnesses are retained on behalf of your clients. The reports prepared by credible and objective expert witnesses will go a long way in determining whether your client's action/ defence to the action will be successful.

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