

WHEN & WHY DO YOU NEED TO CALL AN EXPERT?

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INTRODUCTION

It is axiomatic that experts have come to play an increasingly important role in civil litigation. This development may reflect, at least in part, the increasing complexity of modern life, and general trends towards the compartmentalization of knowledge, and increased specialization and division of labour. In the courtroom, as in society, experts wield important technical knowledge and expertise which is otherwise beyond the scope of knowledge of most lay persons.

Because of their special knowledge, qualifications and function, experts are not limited to testifying as to direct observations, as other witnesses would be. Rather, experts may express opinions involving the drawing of inferences based on facts which are proven or assumed.

In litigation, experts may often include professionals (such as physicians, architects, engineers, accountants and lawyers), as well as academics and practitioners of economics, business management or similar social sciences. The category of experts is not closed, however, and questions may arise in any given case as to what constitutes the proper subject of expert opinion, and the proper degree of expertise. In addition, important questions arise regarding the qualification of experts, and the scope of the testimony they may give, and the uses to which that evidence may be put.

*Hughes Amys LLP, Toronto. This paper is an updated and expanded version of a paper delivered by the author at the Ontario Bar Association, 2006 Institute of Continuing Education, January 24, 2006, with the research and writing assistance of our associate, Marc Spector, and our Law Librarian, Ms. Penny Sheehan.

Expert opinion evidence must be viewed against the context of the entire case. The expert evidence is only one part of the case, and despite best efforts, it is not always possible to predict whether that evidence will be admitted, let alone the weight which the court may give the opinion.¹ If the underlying facts and law are against you, an expert is unlikely to change the outcome. By the same token, an expert is not required in all cases, and in some cases, calling an expert may be counter-productive or damaging to the case. If the evidence you propose to admit through the expert can be put into evidence through other witnesses, documents or admissions, the need to call an expert (and subject the expert to potentially damaging cross-examination) may be avoided. In each case, the strength and weaknesses of the expert's opinion— and the decision whether to call the expert— must be understood against the background of the facts, issues and law that arise in the particular case.

The probabilities of correctly assessing the need for an expert in any particular case, and making best use of the expert in the circumstances, can be improved by understanding the role of expert evidence in civil litigation, and the uses to which that evidence may be put by the court. The admissibility and scope of expert evidence is governed by aspects of the substantive law of evidence, as well as procedural requirements under the various *Rules of Civil Procedure* and *Evidence Acts*. Recent trends include an increased focus on the independence of the expert, and questions of privilege may also arise regarding communications with experts. One should also consider alternatives which may avoid the need to retain, or call, an expert in an appropriate case.

The role of the expert in litigation, however, is not limited to giving evidence at trial. Experts may assist with a range of advisory and investigative functions in the prosecution or defence of an action, regardless of whether they ultimately will be called to testify at trial.

¹See, for example, *Fellowes McNeil v. Kansa* (1999), 9 C.C.L.I. (3d) 17, aff'd in part (2001), 22 C.C.L.I. (3d) 1 (Ont. C.A.), discussed in greater detail below, in which it was held, *inter alia*, that a lawyer was not negligent in selecting an expert who later was disqualified from testifying as to certain matters at trial. The writer was co-counsel for Fellowes, McNeil at trial and on appeal.

THE ROLE OF THE EXPERT WITNESS AT TRIAL

The purpose of expert evidence is to provide judges and juries with assistance concerning matters normally outside the experience of lay persons. The expert witness helps the trier of fact make observations or draw inferences beyond those of the ordinary person, where common sense and everyday experience are insufficient to permit the trier of fact to draw correct inferences without the assistance of such evidence. The expert expresses an “opinion” on the basis of a set of facts. The facts are usually assumed, or treated as hypothetical until accepted as proven by the trier of fact, although the expert may testify as to direct observations as a fact witness, in addition to expressing opinion evidence as an expert. Expert opinion evidence is an exception to the general rule which confines evidence to the direct observations and personal knowledge of witnesses, and prohibits opinion evidence.

The prohibition against opinion evidence is based on the principle that the drawing of conclusions, inferences or opinions is solely within the province of the trier of fact. Expert opinion evidence, however, is permitted in circumstances where the trier of fact requires special skill or knowledge to draw the appropriate inference or conclusion from other facts. This principle, and the modern role of experts, was explained in *R. v. Abbey*, as follows:²

“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 a 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. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary’: *Turner* (1974), 60 Crim. App. R. 80 at p. 83, per Lawton L.J.”

² *R. v. Abbey*, [1982] 2 S.C.R. 24, at p. 42.

Opinion evidence is not rendered inadmissible simply because it addresses the “ultimate issue” which the trier of fact must decide in the case.³ However, the growing reliance and proliferation of experts in criminal and civil litigation has led to judicial warnings that expert evidence ought not to usurp the role of the trier of fact in the litigation process.⁴ For example, in *R. v. McIntosh*⁵, Finlayson J.A., for the Ontario Court of Appeal, expressed the need for judges to act as gate-keepers and to generally exercise greater control over the reception of expert opinion evidence, stating:

“In my respectful opinion, the courts are overly eager to abdicate their fact-finding responsibilities to ‘experts’ in the field of the behavioural sciences. We are too quick to say that a particular witness possesses special knowledge and experience going beyond that of the trier of fact without engaging in an analysis of the subject-matter of that expertise.”

Binnie J. conveyed a similar sentiment in *R. v. J. (J.-L.)*⁶ when, in scrutinizing expert evidence before it was received by a Court, he stated:⁷

“Expert witnesses have an essential role to play in criminal courts. However, the dramatic growth in the frequency with which they have been called upon in recent years has led to ongoing debate about suitable controls on their participation, precautions to exclude ‘junk science’, and the need to preserve and protect the role of the trier of fact - the judge or the jury. The law in this regard was significantly advanced by [the decision of Sopinka J. in] *Mohan*.”

These comments demonstrate that, while expert witnesses may be necessary to assist the trier of fact in drawing appropriate inferences, their qualifications and opinions will not be recognized as

³See, for example, *R. v. Lavallee*, [1990] 1 S.C.R. 852.

⁴ John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada* (2nd ed.) Supplement, at p. 94.

⁵ *R. v. McIntosh* (1997), 35 O.R. (3d) 97 (C.A.).

⁶ *R. v. J. (J.-L.)*, [2000] 2 S.C.R. 600.

⁷ *Ibid.*, at para. 25.

a matter of routine, but will be subject to scrutiny by the trier of fact, who remains free to accept or reject the expert evidence.

THE TEST FOR ADMISSIBILITY OF EXPERT EVIDENCE

Overview

The general principles governing the admissibility of expert evidence were enunciated by the Supreme Court of Canada in the leading case of *R. v. Mohan*⁸. In that criminal case, the accused was a pediatrician charged with the sexual assault of four female patients. The defence sought to call an expert witness, a psychiatrist, to testify that the perpetrator of these crimes would fit a certain psychological profile and that the accused did not possess these character traits. The Court upheld the trial judge's decision that such evidence was inadmissible. In so doing, Sopinka J., speaking for the Court, indicated that the following prerequisites ought to be met before expert evidence can be admitted:⁹

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

These criteria are interdependent, and may overlap to admit or exclude expert evidence in a particular case.

In addition, the Court made it clear that evidence which satisfies the threshold test will then be subject to a “cost/benefit analysis” to consider its impact on the trial process as a whole. Sopinka J. suggested that consideration should be given to whether the value of the opinion in the adjudication process (in assisting the trier of fact in drawing appropriate inferences) outweighs the possibility that a jury may simply defer to the opinion of an expert, and fail to critically assess all the facts and evidence:

⁸ *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.).

⁹ *Ibid.*, at para. 17.

“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”.¹⁰

Necessity

The Court in *Mohan* explained that the expert evidence must be necessary in order to allow the fact finder to appreciate the facts (due to their technical nature), or to form a correct judgment on a matter if ordinary persons are unlikely to do so without the assistance of persons with special knowledge. In the words of Sopinka J.:

“What is requested 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’: as quoted by Dixon J. in *R. v. Abbey*.”¹¹

The standard to be applied is more than simple “helpfulness” to the trier of fact. In *R. v. D. (D.)*¹², Major J., writing for the majority of the seven-judge panel, held that opinion evidence that is merely helpful or might reasonably assist the jury does not meet the threshold of necessity.¹³ He held that expert evidence becomes necessary only when the fact finder is apt to come to a

¹⁰ *Ibid.*, at para. 18.

¹¹ *Ibid.*, at p. 429.

¹² *R. v. D. (D.)*, [2000] 2 S.C.R. 275. [This case involved an allegation of sexual assault and invitation to sexual touching of a child. At trial, counsel for the accused questioned the complainant about the delay of 2½ years before she reported the alleged abuse. The trial judge, in turn, permitted the Crown to call a child psychologist who testified that delayed disclosure neither confirms nor disproves sexual abuse. The Ontario Court of Appeal found that the psychologist’s evidence was inadmissible, having failed to meet both the relevance and necessity criteria set out in *Mohan*. The majority of the Supreme Court of Canada agreed.]

¹³ *Ibid.* In dissent, McLachlin C.J. stated at paras. 21, 24 and 25 that absolute necessity was not required. She suggested that proffered expert evidence may satisfy the “necessity” criteria if the opinion evidence *might* involve matters beyond ordinary jurors’ knowledge and expertise, or the opinion *might* reasonably assist the jury in making a decision.

wrong conclusion, or important information is unavailable without the existence of experts. The Supreme Court made a similar determination in *R. v. J. (J.-L.)*.¹⁴

Properly Qualified Expert

Who is an expert?

The term, “expert”, was aptly described by Tyrwhitt-Drake J. in *R. v. Bunniss* as follows:

“I adopt as a working definition of the term ‘skilled person’, one who has, by dint or training and practice, acquired a good knowledge of the science or art concerning which his opinion is sought, and the practical ability to use his judgment in that science.”¹⁵

Similarly, Falconbridge, C.J. explained that an expert is someone who:

“... by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation; and one who is an old hunter, and has thus had much experience in the use of firearms, may be as well qualified to testify as to the appearance which a gun recently fired would present as a highly educated and skilled gunsmith...”¹⁶

The witness put forward as an expert must persuade the court that he or she has acquired, by reason of study, training or practical experience, sufficient knowledge about a matter as to make observations or draw inferences beyond those of the ordinary person.

An expert need not have formal academic qualifications in order to be qualified. For example, in *Taylor v. Sawh*,¹⁷ the trial judge had excluded the evidence of a police accident reconstruction expert, *inter alia*, on the grounds that the officer was not an engineer. The Court of Appeal held that the trial judge erred in excluding the evidence of the police reconstruction expert on that ground (among others), stating:

¹⁴ *Supra*, note 6.

¹⁵ *R. v. Bunniss*, [1965] 3 C.C.C. 236 (B.C. Co. Ct.).

¹⁶ *Rice v. Sockett* (1912), 8 D.L.R. 84 (Ont. C.A.) at p. 85.

¹⁷ [2000] O.J. No. 257 (C.A.).

The fact that Constable Thomas was not an engineer was also not a basis for excluding his evidence. Witnesses can obtain the necessary expertise through training and experience. See *R. v. Dugandzic* (1981), 57 C.C.C. (2d) 517 (Ont. C.A.). In M. J. Freiman & M. L. Berenblut, *The Litigator's Guide to Expert Witnesses*, (Aurora, Ont.: Canada Law Book, 1997), in the chapter entitled "Motor Vehicle Accident Reconstruction", David Bender at p. 303 makes these comments about the way in which a person can become an expert:

There are generally two avenues to becoming an experienced motor vehicle accident reconstructionist. One way of becoming a reconstructionist is through experience with the police force. Police forces or police-based training schools provide introductory courses in the reconstruction field. Advanced courses in such facilities, combined with practical field experience and self-learning programs, expand the experience base of police reconstructionists. Frequently, police reconstructionists are limited by the courts to giving evidence only on the investigation and documentation phases of the reconstruction. Depending on the experience and training level achieved by the particular officer, he or she may be qualified to give opinion evidence on some forms of dynamic issues based on scientific formulae and the basic principles of motion. For example, a police officer trained as a reconstructionist may be qualified to give evidence with respect to the speed of a vehicle based on the skid mark length on the road and the friction values personally measured by the officer. Unless trained as engineers, police investigators are not qualified to give opinion evidence on vehicle speeds based on crush patterns or in cases where complex dynamic motion has taken place.

A second way to become a reconstructionist is by obtaining an engineering degree from a recognized college or university....

If the Court is prepared to accept a witness as an expert, it is important to ensure that the field in which the opinion is to be expressed is clearly defined in the course of qualifying the witness as an expert. That is, the witness must be qualified to give expert opinion evidence which reflects special skill and knowledge, and encompasses the particular issue for which the expert is called to testify in the action.

It is not always possible to anticipate whether an expert will be found to possess the necessary qualifications for the opinion evidence to be admitted into evidence. Counsel may be given some latitude with respect to decisions regarding the calling of expert, assuming that reasonable care was taken in the consideration and selection of the expert. For example, in *Fellowes, McNeil v. Kansa*,¹⁸ Kansa complained of negligence on the part of its counsel at trial, *inter alia*, in failing to retain an appropriate expert to address the viability of a property as a syndicated MURB investment. The expert who had been retained was not permitted to testify that the project would not be viable, other than as a MURB syndication, on the grounds that the expert was not qualified to testify with respect to that issue. Justice Ellen Macdonald held that the lawyer met

¹⁸*Supra*, note 1.

the standard of care in the circumstances, and dismissed this aspect of the negligence claim, stating, *inter alia*:

“Mr. McNeil’s decisions in respect of the retainer of Mr. Hughes, Mr. Martin and Mr. Grayhurst [as expert witnesses] are judgment calls made by experienced counsel in respect of trial preparation and the conduct of the matter once the trial begins. The decision to choose one expert as opposed to another is always a question of judgment... I am satisfied that Mr. McNeil made appropriate and reasonable inquiries as to the qualifications of Messrs. Hughes, Martin and Grayhurst. I am further satisfied that it was reasonable for Mr. McNeil to conclude that a trial justice would accept these qualifications even in the face of a possibility that [other counsel] may challenge the qualifications of any prospective expert. I would further observe that I consider that it was reasonable for Mr. McNeil to consider that given Mr. Hughes’ background he would not be limited, in his opinion evidence, to matters that pertain only to the valuation of the property. It was not unreasonable for Mr. McNeil to attempt to offer Mr. Hughes as an expert on broader issues because these issues appeared to be within his expertise and experience. The fact that the trial justice disagreed cannot give rise to a claim for solicitor negligence.

... Mr. McNeil, acting as reasonably competent trial counsel, cannot be put in the position of being a guarantor of the court’s acceptance of the qualification of any expert that may be called.”¹⁹

Scientific Reliability

As noted by Sopinka J. in *Mohan*, there is a risk that an expert’s persuasiveness may depend more on credentials or personality, than on the quality of their reasoning or the soundness of their “scientific” methodology. The challenge for lawyers, judges and juries is to assess the strength of the proffered expert evidence, including its underlying method, degree of proof, overall quality and the distinction of what is and is not science.²⁰ Put another way, vigilant scrutiny of proposed expert evidence is required to ensure that it meets the *Mohan* criteria, particularly where it involves a novel scientific theory or technique relating to a subject matter that normally falls within the province of the trier of fact.

¹⁹*Ibid.*, at pp. 44-5.

²⁰ On the issue of what constitutes “junk science”, from a medical perspective, see Henry Berry, M.D., “The Medical Expert, Junk Reasoning, and Junk Science in Personal Injury Litigation”, in *Tort Trial & Insurance Practice Law Journal*, Summer 2005 (40:4) 1101-1143.

Similar issues in American cases such as *Daubert*²¹ were resolved on the basis that the proposed expert evidence should meet a test of “general acceptance”,²² or “reliable foundation”.²³ Canadian courts have resisted the adoption of a single test for determining a minimum level of scientific validity of proposed expert evidence, however, the degree to which the proposed opinion represents an accepted body of thinking will be one factor to consider in admitting and weighing the evidence. In *R. v. J.-L.J.*, Binnie J. outlined the gatekeeper function of trial judges as follows:

“In the course of *Mohan*, [1994] 2 S.C.R. 9, and other judgments, the Court has emphasized that the trial judge should take seriously the role of ‘gatekeeper’. The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.”²⁴

Although the case law identifies some useful factors to evaluate the evidence being proffered, their application and importance will vary depending on the peculiar circumstances of each case.

Objectivity and Independence

Increasingly, Judges have expressed skepticism, or concern, that experts may be swayed to provide unbalanced or biased views, and become an advocate for the party who retained him or her. Chief Justice McLachlin recently emphasized the importance of maintaining objectivity in the following terms:

“Above all, experts must restore the Court’s faith in them by reaffirming their objectivity. An expert who contests too obviously for one side or the other loses his or her credibility. He reduces himself to the status of a hired gun, nothing more. I believe - a belief reinforced by witnessing many impressive and impartial contributions by experts in my role as presiding trial Judge - that an expert, even though retained by one side or the other, can retain his or her integrity and credibility with the Court, even though it may on occasion mean giving an answer which may hurt the side who is paying him. The expert must always bear in mind

²¹ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

²² *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

²³ *Supra*, note 21.

²⁴ *Supra*, note 6.

that regardless of who is paying him, his duty is to tell the truth, his role to assist the Court. If he does less, he will fail his duty to the Court and, in all probability, his obligations to his client.”²⁵

Issues of objectivity and independence are relevant to the credibility of all witnesses. In the case of experts, however, in the aftermath of *Mohan*, it is open to the court to require a minimum threshold of independence as a precondition to qualifying the expert, or the admissibility of the expert’s opinion, rather than credibility alone.

For example, in *Fellowes, McNeil v. Kansa General International Insurance Co.*,²⁶ Kansa brought action against its former solicitors alleging negligence, *inter alia*, in the handling of an environmental pollution file. In the negligence action, Kansa sought to call the lawyer who had assumed carriage of the case as an expert to give opinion evidence as to the standard of care applicable to lawyers handling environmental pollution files. In the unique circumstances of that case, the proposed expert had acted, quite literally, as an advocate for the party (Kansa) which proposed to call him to opine on the standard of care applicable to the defendant.

Justice Macdonald ruled that the proposed expert could not testify, stating that “an expert must have a minimal requirement of independence”:²⁷ She continued:

“I turn briefly to the case law in the role of an expert. 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 ... If I look to only two of the seven duties and responsibilities of experts testifying in civil cases that are laid out in *The “Ikarian Reefer”*, [1993] 2 Lloyd’s Rep. 68 at p. 81, I have to conclude that this would not be a case for [the proposed expert] to assume the role of an expert. These duties are:

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.

²⁵ Beverley McLachlin, “The Role of the Expert Witness,” (1990), 14:3 *Prov. Judges J.* 27 quoted by Mark Freiman & Mark Berenblut, “The Litigators Guide to Expert Witnesses”.

²⁶ *Supra*, note 1.

²⁷ *Ibid.*, at p. 460.

2. An expert should provide independent assistance to the court by objective, unbiased opinion in relation to matters within his or her expertise. An expert witness should never assume the role of advocate.”

A similar result was obtained in *Fraser River Pile & Dredge Ltd. v. Empire Tug Boats Ltd.*,²⁸ which was cited in support of Justice Macdonald’s conclusion in *Fellowes*.

While these cases express important principles, there is no clearly articulated rule which can be applied to determine when, precisely, an expert's partiality or bias will be of sufficient concern as to preclude the admissibility of the opinion, rather than merely going to weight.

Independence also requires that experts be free of conflicts as experts, and may be disqualified from testifying on that basis. For example, in *Drabinsky v. KPMG*²⁹, an accounting firm was disqualified from acting as expert witnesses against a former client. Therefore, care must be taken to confirm that a proposed expert is free of any conflict of interest, in the same manner as counsel.

THE SCOPE OF EXPERT EVIDENCE

There is no closed list of factual matters which may be the subject of expert evidence. Expert evidence may be called whenever the *Mohan* tests of reliability, necessity and objectivity are met, and no exclusionary rule applies.

Accordingly, in personal injury cases, expert evidence may be called to address such matters as the nature and extent of injuries sustained, the nature of treatment required, and the expected course of recovery. In addition, evidence from economists, accountants, actuaries and others may be required with respect to the value of pecuniary losses sustained. Engineering evidence, such as accident reconstruction, may be used to assist with liability issues. Toxicological or pharmacological evidence may be required in cases involving alcohol or other drugs.

In professional negligence actions, expert evidence may be called with regard to the standard of care, or commonly accepted practices, in particular professions or trades. In medical malpractice cases, this will involve medical evidence as to the standard of practice, as well as damages

²⁸(1995), 92 F.T.R. 26 (Fed. T.D.).

²⁹(1999), 33 C.P.C. (4th) 318 (Div. Ct.).

issues. The special role of the expert witness in medical malpractice cases was recently described by Roccamo J., in *Williams (Litigation Guardian of) v. Bowler*,³⁰ where Her Honour noted that “due to the specialized nature of the medical field, expert evidence is critical to establishing whether the standard of care has been met in medical malpractice cases.” Similar principles may apply in other areas of specialized knowledge or practice.

In addition, issues may arise where the court is faced with two legitimate competing schools of thought and approaches to a medical or scientific issue, each held by competent and properly qualified experts. In *Maynard v. West Midland Regional Health Authority*,³¹ the House of Lords observed, at page 638, that:

It is not enough to show that there is a body of competent professional opinion which considers that theirs was a wrong decision, if there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances. It is not enough to show that subsequent events show that the operation need never have been performed, if at the time the decision to operate was taken, it was reasonable in the sense that a reasonable body of medical opinion would have accepted it as proper ... Differences of opinion and practice exist, and will always exist in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence.

On the other hand, in *Kehler v. Myles*³² the Alberta Court of Appeal, in upholding a lower court dismissal of a malpractice claim on the basis of expert evidence adduced in favour of the defendant, stated:

“There is no necessitated dismissal of a medical negligence claim simply because honest and competent experts disagree over a doctor’s diagnosis or treatment. Disagreement notwithstanding, the only question to be answered remains: has negligence been established under proof, by a preponderance of evidence, that the specialist failed to possess or to exercise a reasonable degree of learning or skill possessed by the average specialist in the field?”

³⁰[2005] O.J. No. 3323 (S.C.J.).

³¹[1985] 1 All E.R. 635.

³²[1988] A.J. No. 1127 (C.A.).

The Court further observed that deciding liability in such cases “*was not an exercise in merely totaling the experts who testified*”.

In construction or property damage cases, expert evidence may be received from architects, engineers, construction managers, contractors and others regarding standards in the industry, technical and scientific issues (for example, with regard to the failure of a building component or material), as well as damages issues, such as the cost of reconstruction. Experts may be called to testify as to the value of businesses or property, or the shares of a business. In family law cases, experts may include accountants to address financial issues, or psychologists to assist in determining what is in the best interest of children. In intellectual property cases, experts may be called upon to address issues concerning the extent of copying, or quantification of damages.

Questions of Law

Expert evidence must relate to factual issues, and not matters of law. Foreign law is a question of fact and may be proven through expert evidence. Similar evidence is not admissible to prove domestic law. Matters of domestic law are not issues of fact requiring the assistance of expert evidence, and as matters of law, they lie within the sole domain of the Court.

In *Midland Bank Trust Co. Ltd. v. Hett Stubbs & Kemp*, Oliver J. (as he then was), commented on the use of expert evidence in a solicitors’ negligence action, as follows:

“As to this, I have heard the evidence of a number of practicing solicitors... I must say that I doubt the value, or even the admissibility of this sort of evidence which seems to be becoming customary in cases of this type. The extent of the legal duty in any given situation must, I think, be a question of law for the court. Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of this can and ought to be received... Evidence of the witness’ view of what, as a matter of law, the solicitor’s duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the Court’s function to decide.”³³

³³*Midland Bank Trust Co. Ltd. v. Hett Stubbs & Kemp*, [1978] All E.R. 571 (Q.B.) at p. 582; see also *Bown v. Gould & Swayne*, [1996] P.N.L. 130 (C.A.), in which the English Court of Appeal expanded upon the comments of Oliver J.

The Ontario Court of Appeal ruled against the admissibility of expert evidence on matters of law in *Regina v. Century 21 Ramos Realty Inc.*³⁴ In that case, the president of a real estate company was charged with income tax evasion as the result of the alleged appropriation of certain property within a particular tax year. The Crown called an expert, one Claerhout, who testified that a certain transaction constituted an appropriation of a mortgage in a particular year. On appeal, the Court of Appeal stated:

“With respect, we do not believe that the witness Claerhout should have been permitted to give an opinion as to when the appropriation occurred. It was a question of law for the judge as to what constitutes an appropriation. It was for the judge to determine, in compliance with the legal definition, if and when an appropriation took place. This was not something on which an expert witness could give evidence.”³⁵

Generally, the interpretation of a document is a question of law, and therefore not a matter for expert evidence.³⁶ However, expert evidence may be admitted as to related matters, such as the reasonable expectations of the parties if an insurance contract were found to be ambiguous: *ING Ins. Co. v. Sportsco International LP*.³⁷ Accordingly, even in contract cases, there may be scope for the admission of expert evidence on some factual matters, even though the ultimate interpretation of the contract itself may be outside the scope of expert opinion evidence.

PROCEDURAL PRE-REQUISITES

In addition to the substantive evidentiary rules summarized above, there are also procedural requirements to the admissibility of expert evidence, mandated by the provincial and federal *Rules of Civil Procedure* and the relevant *Evidence Acts*. Generally, a party will not be permitted to call an expert to testify at trial unless these procedural requisites are met.

The list of points below is not intended as an exhaustive procedural manual, but merely touches on the key points;

³⁴(1987), 58 O.R. (2d) 737 (C.A.), leave to appeal to SCC dismissed 62 O.R. (2d) ix.

³⁵*Ibid.*, at pp. 751-2.

³⁶See *Century 21 v. Tsang*, [1992] 4 W.W.R. 668, aff'd (1992), 3 Alta. L.R. (3d) 21 (Alta. Q.B.).

³⁷[2004] I.L.R. 1-4314 (S.C.J.).

Rules of Civil Procedure

The following are some of the Ontario *Rules of Civil Procedure* which regulate various aspects of expert opinion evidence:

(a) *Rule 31– Disclosure of Expert Opinions During the Discovery Process*

Rule 31 provides that the findings, opinions and conclusions of experts retained by a party are discoverable on an Examination for Discovery. The Rule is broad enough to include the field notes, raw data and records made and used by the expert in preparing the report.³⁸ However, this information, and the identity of the expert, is not required to be disclosed if the information was obtained in preparation for contemplated or pending litigation and, in addition, the party undertakes not to call the expert as a witness at trial.³⁹

(b) *Rule 32– Inspection of Property*

Rule 32 provides for the inspection of real and personal property where it appears to be necessary for the proper determination of an issue in a proceeding, and may include:⁴⁰

- **taking temporary possession of any property;**
- **measuring, surveying or photographing of property;**
- **making observations;**
- **taking samples; and**
- **conducting tests or experiments.**

(c) *Rule 33 – Medical Examination of a Party*

Rule 33 supplements Section 105 of the *Courts of Justice Act*, and empowers the Court to order physical and mental examinations by physicians, dentists and psychologists. The *Rule* requires

³⁸ *Award Developments (Ontario) Ltd. v. Novoc Enterprises Ltd.* (1992), 10 O.R. (3d) 186 (Gen. Div.).

³⁹ Rule 31.06(3).

⁴⁰ Rule 32.01(2).

the exchange of medical information relating to the person examined (usually the plaintiff in a personal injury action).

Prior to the examination, the party to be examined must provide opposing counsel with a copy of any report made by a health practitioner who treated or examined the party in respect of the condition being investigated and, further, any hospital records or other medical documentation that may be relevant.

On receiving the health practitioner's report, the examining party must serve a copy of the report on every other party to the action, even if it is "adverse".⁴¹

(d) *Rule 53 - Service of Expert Reports*

As a pre-condition to calling an expert, a copy of the expert's report setting out the expert's qualifications and the substance of his or her proposed testimony must be served on every other party. Generally, the expert report must be served at least 90 days before trial, however, an expert's report which merely responds to another report may be served 60 days before trial, and supplementary reports in reply may be served 30 days before trial. Where these requirements have not been met, the expert may not testify, except with leave of the Court.⁴²

Evidence Acts

Both the Ontario and Canada *Evidence Acts* contain provisions governing content, service and admissibility of expert reports and opinion evidence at trial.

In Ontario, and in many other provinces, no more than three expert witnesses may be called by either side without leave of the judge.⁴³ The *Canada Evidence Act* permits a party to call five professional or expert witnesses without leave of the Court.⁴⁴ These statutory restrictions are meant to save the court's time and to acknowledge the fact that the case is not to be decided on

⁴¹ Rule 33.06(2).

⁴² Rule 53.03.

⁴³ *Ontario Evidence Act*, R.S.O. 1990, c. E.23, s. 12.

⁴⁴ *Canada Evidence Act* R.S.C. 1985, c. C.-5, s.7.

the basis of a numerical count of experts called on each side.⁴⁵ The provisions grant the trial judge a discretion to control the number of experts, so that relevant evidence may be included in complex cases which require the testimony of a number of expert witnesses. Leave may be granted at any time during the trial, and even after one or more of the experts has testified.

Counsel should also be mindful of section 35 (dealing with business records) and section 52 (on the production of medical reports) of the *Ontario Evidence Act*, which address the manner in which relevant documentary evidence needs to be proved, and the corresponding obligations on counsel to call certain witnesses.⁴⁶

For example, in the case of a business record, the individual author of the document does not generally need to be called as a witness or tendered for cross-examination; the documents may be proven as business records by calling a person with first-hand knowledge of the system by which the records were created.

Similarly, s. 52 of the Act provides that medical reports from most members of a regulated medical profession, if served prior to trial in accordance with the Act, may be filed at trial without calling the author of the report (although the author must be produced for cross-examination if demanded). This facilitates the introduction of medical evidence without the necessity of calling the physician to testify, at least in cases where the evidence is non-controversial and the physician will not be required for cross-examination.

When Leave Will Be Granted

Where a party fails to comply with the time requirements governing the service of expert reports, leave of the Court will generally be granted to introduce the evidence, on terms. In particular, Rule 53.03(4) provides for the extension or abridgement of time for service of an expert report or supplementary opinion by a judge or case management master, or by the Court generally, by way of motion. Similarly, Rule 53.08 allows for the trial judge to admit expert opinion, which was

⁴⁵ Sopinka, *supra*, note 4, (main text), at p. 665.

⁴⁶For a helpful discussion on the interplay between Sections 35 and 52 of the *Evidence Act*, see D. Orlando, “The Battle of the Experts: Plaintiffs’ Perspectives on Motions for Expert Assessments and Expert Testimony at Trial”, *Practical Strategies for Personal Injury Lawyers: ‘Tricks of the Trade’: Plaintiff and Defence Strategies for Success in a Bill 59 Environment*, The Advocates’ Society (Ontario), 2002.

not properly served, on such terms which are just and with an adjournment, if necessary, unless to do so would cause prejudice to the opposite party or undue delay in the conduct of the trial.

This issue has been addressed in a number of cases, and the result depends on the facts of each particular case. As a general rule, however, expert evidence will not be excluded solely on the grounds of technical non-compliance with procedural requirements, if the interests of justice require its admission. For example, in *Hunter v. Ellenberger*,⁴⁷ Justice Barr held that expert evidence would not be precluded for lack of timely service of an expert's report prior to trial, unless the court was satisfied that the prejudice to justice involved in admitting the evidence exceeded the prejudice involved in excluding it. Justice Barr allowed the admission of an expert report that was served well after the time lines set out in Rule 53.03(1), with a costs penalty and an adjournment in the proceedings to allow opposing counsel to call responding evidence. See also *Robb Estate v. St. Joseph's Health Care Centre*,⁴⁸ where, 3½ months into trial, the plaintiffs were allowed to deliver two new expert reports, on terms, where the plaintiff's primary expert had been unexpectedly disqualified at trial.

THE FACTUAL FOUNDATION FOR EXPERT OPINION EVIDENCE

In litigation, factual findings are made by the judge or jury. Although the expert witness may, in appropriate cases, draw inferences from the facts, it is beyond the scope of an expert's role in the litigation process to make the factual findings upon which his or her opinion is premised. In some cases, the expert investigates the circumstances and thereby acquires direct personal knowledge of the facts upon which his or her opinion will be based. In other cases, the facts may be unclear, or in dispute, in which case, a series of assumptions or hypothetical questions is generally required, so as to avoid placing the expert in the untenable position of having to weigh evidence, assess credibility and choose among witnesses in order to determine the premises upon which his opinion is based.

As expert reports are generally prepared well in advance of trial (and delivered in accordance with the legislative requirements set out above), the expert is often provided with a series of assumed or hypothetical facts upon which to draw an opinion. His report should clearly set out the assumptions, the results of his investigations, and the conclusions or opinions reached. It is

⁴⁷ [1988] O.J. No. 49 (H.C.).

⁴⁸ [1999] O.J. No. 854 (Gen. Div.).

important to ensure that the premises contained in the report are matters that counsel will be able to prove at trial through other witnesses.⁴⁹ Extraneous assumptions or conditions will only invite unnecessary and potentially damaging cross-examination.

While the expert may be permitted to testify on the basis of unproven factual assumptions or hypotheses, ultimately, the underlying facts must be proven by properly admissible evidence if the expert's opinion is to carry any weight with the trier of fact. If the expert opinion depends on the existence of facts which are not proven in evidence, the expert opinion may be given little weight.

For example, in *Robb v. St. Joseph's Health Centre; Rintoul v. St. Joseph's Health Centre; Farrow v. Canadian Red Cross*,⁵⁰ the plaintiff did not lead direct evidence to establish the dates of HIV testing, or the results. The plaintiff attempted to rely upon statements concerning the dates and results of the blood tests which were contained in the expert opinion of one Dr. Blanchette. The trial judge accepted the evidence of Dr. Blanchette as proving the dates and results of the testing. The Court of Appeal rejected this approach, stating:

“In the Blanchette Letters, Dr. Blanchette expressed certain opinions with respect to Mr. Farrow's treatment. The Blanchette Letters also referred to the results of Mr. Farrow's HIV testing. As noted earlier, one letter referred to the last negative test as being in May 1985 and the other in September 1985. Dr. Remis's opinion on the date of infection, which was accepted by the trial judge, was based on the May 1985 date.

Even disregarding the ambiguity with respect to the date of Mr. Farrow's last negative test, the reference to Mr. Farrow's May 1985 record cannot be accepted for its truth. *The admission of Dr. Blanchette's opinion, whether it be under s. 52, or by way of oral testimony, does not establish the facts upon which the opinion is based.* The facts reported by Dr. Blanchette with respect to the results of the HIV testing for Mr. Farrow are admissible as having been accepted as true by Dr. Blanchette but they are not admissible for their truth. Put another way, the facts on which Dr. Blanchette's opinion was based must be established: See *Reimer v. Thivierge* (1999), 46 O.R. (3d) 309 at 314 (C.A.); see also *McGregor v. Crossland*, [1994] O.J. No. 310 (C.A.), at para.6.

⁴⁹ It is for this reason that it may be beneficial to have the expert participate in the discovery process by developing areas of questioning which will later assist in laying the proper factual foundation for his or her opinion. Failure to involve the expert at the discovery stage in a complex case is often a lost opportunity.

⁵⁰(2001), 9 C.C.L.T. (3d) 131 (Ont. C.A.). The writer acted as counsel for the defendant, Province of Ontario.

Even assuming that Dr. Blanchette's reference to the timing of the negative testing could be considered as an opinion rather than a statement of the basis for the opinion, the weight of that opinion would have to be properly assessed. In this case, it becomes apparent, when the Blanchette Letters are considered as a whole together with Dr. Blanchette's testimony, that very little weight, if any, can be given to Dr. Blanchette's opinion on this issue given the following factors: no supporting documentation was adduced; the date of last negative testing is uncertain in the Blanchette Letters; no record was kept of the HIV testing; Dr. Blanchette did not perform the HIV tests himself, and was not involved in the taking of the blood samples that were tested; Dr. Blanchette could not recall precisely how the results of the tests were communicated to him; and the results were not communicated to Mr. Farrow or his family when the tests were completed. In any event, it is our view that the reference to the HIV testing is not an opinion but a fact upon which the opinion is based, the truth of which was not proven.

Hence, it is our view that the plaintiffs, having failed to prove the facts upon which Dr. Remis based his opinion regarding the dates of infection, have failed to prove the dates upon which they were infected. Without evidence to support the trial judge's conclusions on the dates of infection, the plaintiffs have not established that the negligence of the CRCS, as found by the trial judge, caused the plaintiffs to contract HIV." *[italics added]*⁵¹

EXPERTS AND PRIVILEGE

As indicated above, a party is entitled to broad pre-trial disclosure of an expert's findings, conclusions and opinions, as well as receiving a copy of the expert's written report, and qualifications, in advance of trial.

At trial, the expert will be subject to cross-examination with respect to credit, or credibility, and not merely with respect to substantive issues relating to the opinion. In addition, the expert will usually be cross-examined as to the facts and assumptions upon which the opinion is based, and the source of those facts and assumptions. This may involve some exploration of the expert's instructions or retainer, and may include a request for production of the expert's complete file, including correspondence from counsel, notes, prior drafts and other documents, which may raise questions concerning privilege over communications between the party, or their counsel, and the expert.

The traditional position was set out in *Bell Canada v. Olympia & York Developments Ltd.*,⁵² and holds that an expert may not be compelled to disclose privileged information received from counsel for the party calling the expert. Subsequently, in *Piche v. Lecours Lumber Co.*,⁵³ it was

⁵¹*Ibid.*, at paras. 153-56.

⁵²(1989), 68 O.R. (2d) 103 (H.C.J.).

⁵³(1993), 13 O.R. (3d) 193 (Gen. Div.).

affirmed that privilege is not lost over an expert's file by calling the expert as a witness, but it was held that privilege will be waived regarding facts or assumptions provided to the expert by counsel if such facts or assumptions form the basis for the expert's opinion and are not otherwise in evidence. In *Cousineau v. St. Joseph Health Centre*,⁵⁴ it was held that an expert witness consulted but not retained by one party could be called at trial by the opposite party, but many not, due to litigation privilege, disclose confidential information received from the first party's counsel.

A recent decision by a single Justice of the Court of Appeal in *Horodynsky Farms Inc. v. Zeneca Corp.*⁵⁵ may represent a marked departure from the traditional protection afforded communications between counsel and an expert.

In *Horodynsky Farms Inc.*, the plaintiffs were farmers who had brought action for damages against the manufacturer of an allegedly faulty pesticide. The action was dismissed at trial, in large part due to the evidence of an expert called to testify by the defendant. That expert had delivered a new report shortly prior to trial which was considerably more favourable to the defence than a prior report delivered by that expert.

During the cross-examination of that expert, an issue arose as to whether the expert had been retained by the defendant's former counsel, a Ms. Fox, several years prior to trial, and whether the expert had provided an undisclosed, earlier opinion to Ms. Fox, (i.e., which might differ from the opinion expressed by the expert at trial). The expert testified that he could not recall the lawyer, any particulars of any discussions they may have had, whether he provided a report, or what he knew of the case at the time.

Trial counsel then requested production of the expert's notes and records, on the grounds that counsel should be entitled to the expert's underlying data, including prior draft opinions. Counsel for the defendant responded that there was no note⁵⁶ of any such discussion between Ms. Fox and the expert when the file was inherited from Ms. Fox. In light of that answer, counsel for the plaintiff did not pursue the matter further.

Several months later, in the course of making costs submissions, dockets were produced which showed that Ms. Fox had retained the expert and had had a lengthy, recorded telephone discussion, after which, Ms. Fox spent an hour revising or editing the transcript of their conversation, resulting in a single-spaced, 24-page "Memorandum".

The plaintiffs then asked for production of the Memorandum, which was refused by the defendants, *inter alia*, on the grounds of privilege. The plaintiffs brought a motion to re-open the

⁵⁴ (1990), 49 C.P.C. (2d) 306 (Ont. H.C.).

⁵⁵[2006] O.J. No. 3012 (C.A., In Chambers).

⁵⁶Subsequently, defence counsel recalled that he had said "a" note (rather than "no" note), but the court reporter certified and later confirmed that the transcript correctly recorded counsel stating that there was "no note".

trial and obtain production of the expert's complete file and the Memorandum, but the judge dismissed the motion on the grounds that he would have reached the same conclusion even if he had ignored the expert's evidence.

Prior to the hearing of their appeal, the plaintiffs brought a motion for production of the Memorandum of Ms. Fox's discussion with the expert, to determine whether they should bring a motion to admit the Memorandum as fresh evidence on the appeal. They argued that, given the length of the discussion between Ms. Fox and the expert, the expert must have conveyed an oral opinion which was then reduced to writing, and "they were deprived of their right to properly test Dr. Grafius's conclusions at trial because they did not have access to the Memorandum."⁵⁷

The defendants opposed production on the grounds that the Memorandum was work product of the former solicitor, Ms. Fox, and consisted of a general discussion of technical issues and did not contain any findings, opinions or conclusions:

"They argue that notes, letters, memoranda and other materials prepared by counsel in anticipation of, and during the course of, litigation are protected by litigation privilege and that privilege is not waived by production of the expert's report."⁵⁸

The matter came on for hearing as a motion for production of the Memorandum before Gillese, J.A., who raised an issue as to whether a single Judge of the Court of Appeal could decide the question of production,⁵⁹ however, the parties declined to argue jurisdiction and requested that the issue be decided.

The court proceeded from the starting point that findings, opinions and conclusions of an expert who will be called at trial are subject to disclosure on discovery pursuant to Rule 31.06(3), and therefore, "no privilege can attach to the findings, opinions and conclusions".⁶⁰ The court noted that the trend in cases such as *R. v. Stone*⁶¹ and *General Accident Assurance Co. v. Chrusz*⁶²

⁵⁷*Ibid.*, at para. 21.

⁵⁸*Ibid.*, at para. 22.

⁵⁹ The failure to produce the memorandum had been raised as one of the grounds of appeal by the plaintiffs. Gillese J.A. was concerned that ordering production on the motion before a single Judge might conflict with R. 61.16(2.2) of the *Rules of Civil Procedure*, which provides that a motion for an order determining an appeal (other than dismissal on consent) must be made by a panel of at least three judges.

⁶⁰*Supra*, note 55, at para.26.

⁶¹[1999] 2 S.C.R. 290.

⁶²(1999), 45 O.R. (3d) 321 (C.A.).

support a broad interpretation of Rule 31.06(3) and a corresponding narrowing of litigation privilege in the area of expert's reports. Justice Gillese approved and quoted extensively from the decision of Ferguson J., in *Browne (Litigation Guardian of) v. Lavery*⁶³, which held that a report of one expert (who had not been called to testify) had to be produced because it was referred to by an expert who had been called. Justice Gillese agreed with the "expansive view" of the word "findings" in Rule 31.06(3), and the view of Ferguson J. in *Browne* that,

"...our system of civil litigation would function more fairly and effectively if parties were required to produce all communications which take place between counsel and an expert before the completion of a report of an expert whose opinion is going to be used at trial."⁶⁴

Justice Gillese then stated:

"Expert opinion tendered by a party is a unique type of evidence. Although generally retained by one side to the litigation or the other, experts are expected to be neutral. Their testimony is meant to assist the court and the trier of fact, not to bolster the theory of the case presented by one of the two sides. Their status as experts derives, in significant measure, from the assumption that they will offer the court objective opinions on which the court is entitled to rely.

Rule 31.06(3) is to be interpreted bearing in mind the role of the expert and the recent jurisprudence of the Supreme Court of Canada and this court. As such, a broad approach is warranted, one that— in the words of the Supreme Court of Canada in *Stone*— would enable opposing counsel to have access to the 'foundation' of the expert's opinions. This approach would require disclosure of all foundational information for the expert's report, whether or not the final findings, opinions or conclusions expressly reflect that information.

Consequently, in my view, the Memorandum should have been produced prior to trial and I would order its production now. As I have not seen the Memorandum, I cannot know whether it contains preliminary findings, opinions or conclusions. However, given its length, and the timing and duration of the conversation that led to its creation, it is fair to assume that it contains foundational information for Dr. Grafius's final findings, opinions and conclusions. Production will enable the appellants to determine whether they were improperly denied the right to test Dr. Grafius's evidence at trial. Production will also ensure that confidence was properly reposed in Dr. Grafius's opinions by the trial judge. As the

⁶³(2002), 58 O.R. (2d) 49 (S.C.J.).

⁶⁴Para. 66 of *Browne*, *supra* note 63, cited by Gillese J.A. at para. 36 of *Horodinsky Farms Inc.*

Memorandum appears to record information from Dr. Grafius, I see it as part of the foundation for his final findings, opinions and conclusions, rather than the work product of Ms. Fox.”⁶⁵

The defendant appealed to the Court of Appeal to set aside the Order of Gillese J.A. ordering production of the Memorandum. The Court allowed the appeal, and set aside the order for production.⁶⁶

The Court noted that the plaintiff’s demand for production of the Memorandum was founded upon Rule 31.06(3), which provides that,

“A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined...”⁶⁷

The Court observed, at paragraph 11, that:

“The rule is about the information that a party may obtain on discovery concerning the findings, opinions and conclusions of another party’s expert. It speaks to the right to obtain disclosure, whether the information is to be disclosed is contained in a document or not. It does not speak to the production of documents. The privilege attaching to a document is not erased simply because some or all of the information in the document must be disclosed if asked for on discovery.

With respect to the scope of disclosure mandated by Rule 31.06(3), the Court of Appeal rejected the approach taken in *Browne, supra*, but declined to otherwise particularize the nature of the information required to be disclosed:

“There is an area of debate concerning the scope of information that may be obtained pursuant to this rule. It clearly encompasses not only the expert’s opinion but the facts on which the opinion is based, the instructions upon which the expert proceeded, and the expert’s name and address. How far beyond this the right to obtain foundational information (as our colleague called it) extends, need not be determined here. Suffice it to say that we are of the view that it does not

⁶⁵*Supra*, note 66, at para. 43.

⁶⁶*Horodysky Farms Inc. v. Zeneca Corp.*, [2006] O.J. No. 3716 (C.A.).

⁶⁷As noted above, disclosure may be avoided if the opinion was prepared solely for the purpose of actual or contemplated litigation, and the party retaining the expert undertakes not to call the expert as a witness at trial.

yet extend as far as is tentatively suggested in *Browne (Litigation Guardian of) v. Lavery* (2002), 58 O.R. (3d) 49. We simply proceed on the basis that the rule entitles the appellant to obtain on discovery the foundational information for Dr. Grafius' final opinion. As will become clear, we need not decide in this case the precise extent of the information that is discoverable."⁶⁸

The Court found that Rule 31 permitted the appellant to obtain disclosure prior to trial, but did not apply to authorize disclosure of the information after trial. Upon receiving Dr. Grafius' final report, the appellants could have asked for disclosure of the foundational information any time prior to trial, but did not do so:

“[T]he appellants knew of Dr. Grafius' final opinion months before trial. They had been served with a copy. They were entitled then to seek discovery of the foundational information for that opinion pursuant to Rule 31.06(3). It appears that they did not do so.

In our view, there is no basis for them to do so now. Rule 31.06(3) applies to the discovery stage of litigation, which is closed. It gives the appellants no right to obtain disclosure after trial. Nor should they be otherwise entitled to disclosure at this late stage to cure their own failure to properly exercise their right to obtain this foundational information on discovery.

We do not think it is an answer to say that the appellants did not know of the memorandum until after trial. The rule does not give them the right to production of the memorandum but rather to obtain discovery of the foundational information for the findings, opinions and conclusions of Dr. Grafius contained in the memorandum. That is a right they had right up to trial. There is no basis in the rule or in fairness to give them the same right, by means of the production of the memorandum, now that the trial has been concluded. For the trial process to function fairly and properly, parties must exercise their right to obtain discovery at the discovery stage not seek to do so after trial.”⁶⁹

Although not necessary to decide the appeal, the Court also stated:

“[I]n our view, this case does not suggest a need to modify the rule of litigation privilege where experts are concerned. There is no doubt that litigation privilege attached to the March 14, 2000 memorandum. It was prepared by counsel as part

⁶⁸*Supra*, note 66 at para. 14.

⁶⁹*Ibid.*, at paras. 17-9.

of defending the lawsuit. That was its substantial if not its only purpose... there can be no doubt that this privilege continues because the litigation continues.

Taken as a given that a document protected by litigation privilege and part of counsel's work product contains the foundation for an expert opinion, there is no need to remove the privilege for the document itself to do justice. The foundation information in the document is available under Rule 31.06(3), if it is sought on discovery. Removing the privilege for the document itself is not necessary to obtain that information, but does run the risk of requiring disclosure of properly privileged information that is often intertwined with discoverable information in the lawyer's work product."⁷⁰

The court therefore set aside the order of Gillese J.A., and dismissed the appellants' motion for production of a copy of the Memorandum.

In our view, the decision of the Court of Appeal represents the correct approach to the disclosure on discovery of the findings, opinions and conclusions of an expert called to testify at trial, while respecting privilege in the work product of the lawyer.

WHEN DO YOU RETAIN THE EXPERT?

Experts may testify at trial if the substantive and procedural requirements for the receipt of expert evidence, outlined above, are met. If experts were retained solely for the purpose of providing opinion evidence at trial, it would generally not be necessary to retain an expert until shortly prior to trial, subject to compliance with the procedural requirements regarding service of reports. In addition to providing expert evidence at trial, however, experts may provide critical assistance as advisors to the client, or to counsel, at an early stage, even before the commencement of litigation, and then throughout every stage in the litigation process.

Experts may be retained to investigate the facts of a problem or dispute prior to the exchange of any pleadings, and may assist in developing theories and strategies to advance the client's case. For example, in case of physical damage to property, an architect, engineer or other expert may help direct the investigation and uncover relevant facts that might otherwise be overlooked.

An expert may also facilitate access to information, such as standards and other technical data established or compiled by professional bodies, trade organizations or similar outside agencies.

⁷⁰*Ibid.*, at paras. 20-1.

The expert may be able to identify potential fact witnesses, or other expert witnesses, who may have knowledge or documents relevant to the case. The expert may also be used as a resource person to interpret technical documents or perform complex calculations that arise on the facts of a case.

An expert opinion may be required to determine whether a valid cause of action exists. For example, in a professional negligence action, experts may be retained to express an opinion as to the standard of care applicable to a professional in the position of the defendant. In a product liability or professional negligence action, an expert may assist with respect to general or specific causation. The expert may identify (and exploit) weaknesses in the other side's case. The expert may help identify liability and damages issues, and assist in their quantification.

Experts may assist with respect to the formulation of the theory of the case, and the preparation of pleadings. As the case progresses, the expert may assist in developing questions for use on examination for discovery, or to evaluate the fact and opinion evidence presented by the opposite side in the case. Your expert will need to be made aware of all relevant evidence and documents, and of the opinions of the experts retained by the opposite party, and should be prepared to comment upon those opinions as may be appropriate and required.

As the case approaches trial, you will need to serve an expert's report to comply with the Rules, and will thereby communicate your expert's opinion to the other side. The other side will therefore be aware of your expert's opinion and will take that opinion into account in its pre-trial decisions regarding settlement, or the decision to proceed to trial, so that experts' opinions may directly influence the settlement value of the case, or the decision to proceed to trial.

The other side will also communicate your expert's opinion to its own expert, who may be less inclined to over-reach or make extravagant statements in the knowledge that your expert will be available to contradict unwarranted opinions. Your expert can also assist with preparing your cross-examination of the opposite side's expert, whether or not the decision is ultimately made to call your expert to testify.

All of these factors will be taken into account in deciding whether to retain an expert, and if so, the timing of that retainer. Generally speaking, however, the sooner the expert is retained, the better.

WHEN DO YOU CALL THE EXPERT TO TESTIFY?

An expert retained to comment on the strengths and weaknesses of a case may not necessarily be an appropriate witness to be called to testify at trial. In addition to possessing the necessary knowledge, training and experience, the expert witness must also have the communications skills to persuade the trier of fact. The evidence of a well-qualified expert is of little value to a judge or jury if the expert is unable to express his or her opinion in a clear, logical and understandable manner. Accordingly, it is not enough that an expert witness is knowledgeable; unless the expert is specifically retained solely for the purpose of providing advice, one must take into account the expert's general presentation as a witness. It is easy for a judge or jury to reject an opinion tendered by an expert who is pompous, argumentative, or otherwise lacks the necessary sense of impartiality that makes his opinion defensible in the wake of cross-examination.⁷¹

A consulting expert's duty is to the client alone, and he or she is not bound by any duty of impartiality and independence (apart from those which may be prescribed by the rules of any professional body or similar association). Where the same expert serves both an advisory function behind the scene, and then also testifies at trial, the consulting or advising expert may be viewed as an advocate due to his or her assistance in having formulated the claim, advised the client, and otherwise assisted that party with trial preparation and providing a critical review of the expert evidence of other parties.⁷² Scrupulous care must be taken to preserve the appearance of impartiality and neutrality in communications with the expert. In an appropriate case, an expert may be retained to advise behind the scenes, separate and apart from the experts who may be retained to give evidence.

Accordingly, a determination must be made as to whether the expert you have consulted should also become an expert witness. This decision may occur at the initial meeting with the expert, or it may be reserved for later. However, the decision must be made in sufficient time as to permit another expert to be identified and retained if necessary, and all pre-trial requirements to be met.

⁷¹ Gregory P. Kelly, "The Expert Witness Before Trial", *Civil Litigation: Proving and Improving Your Case*, Institute of Continuing Legal Education, Toronto, 1990.

⁷² Paul Michell & Renu Mandhane, "The Uncertain Duty of the Expert Witness", (2005) 42 *Alberta Law Review*, at pp. 635 - 675.

Simply because an expert has been retained, and a report obtained and served in accordance with procedural requirements, does not mean that the expert will necessarily be called to testify at trial. As in the case of any potential witness, counsel will consider whether it is necessary or advisable to call the expert to testify on the particular facts and circumstances which arise in any given case. However strong the expert's opinion may be on paper, the expert will be subject to cross-examination which may weaken the opinion or elicit other evidence from the expert which is not helpful to the case.

It is sometimes possible to obtain admissions through discovery and the use of Requests to Admit, or at trial, which may avoid the need to call an expert on a particular issue. If the opposite party fails to admit the facts, which are subsequently proven through expert evidence, it can be argued that some costs penalty should be imposed for failing to make the admission.

Similarly, resort should be had in appropriate cases to the provisions of s. 52 of the *Ontario Evidence Act*, which provides for filing of reports from physicians and other regulated health professionals in lieu of calling them to testify at trial. Section 52 includes provision for costs sanctions for unnecessarily requiring the attendance of such experts.

Accordingly, in the case of physicians and other health professionals governed by the relevant legislation, one may serve and file a copy of the physician's report in lieu of calling that physician as a witness to testify in chief. The other side, however, will be entitled to cross-examine the practitioner. However, the authorities appear to be divided as to whether the responsibility to ensure the availability of the practitioner for cross-examination rests with the person filing the report, or the person wishing to cross-examine.

If you are the defendant (or, if the opposite side has the burden of proof on a particular issue), you will usually have the opportunity to hear the other side's expert (and cross-examine that expert) before deciding whether to call your own expert to testify. You may succeed in opposing the admission of the plaintiff's expert, or restricting the scope of the other side's expert evidence. Or, you may sufficiently weaken or neutralize the expert in cross-examination, so as to avoid calling your own expert. Obviously, you will need to have your expert ready and available to testify if required. And, it is usually a good idea to have your expert present while the other side testifies, to assist in dealing with any unexpected issues which may arise, and in cross-examination of the other side's expert. However, if you have the opportunity to hear and cross-examine the other side's expert before calling your own, you will wish to carefully weigh the

evidence elicited from the other side's expert (in chief, and in cross) before deciding whether you need to call your own expert to testify.

As indicated above, if the necessary factual foundation for the expert's opinion has not been established, the opinion will be irrelevant, carry little weight and be potentially worthless. In extreme cases, it may be preferable to decline to call an expert, rather than put the expert in the box to give an opinion that bears no relation to the evidence.

Overall, one will wish to consider the possible strategic impact of the proposed expert opinion, and how it fits into the evidence and legal issues as a whole.

CONCLUSION

The determination of whether you need to call an expert requires a principled approach and the application of the *Mohan* criteria on a case-by-case basis. The approach is case-specific and requires consideration of the facts, issues and law in the particular case. There is no general principle that a particular type or category of expert evidence will always be admissible or inadmissible.⁷³ What may be required in one case may not be required in another.

The most important consideration in determining whether you need to call an expert is whether the proposed expert evidence is necessary to assist the court in drawing inferences relating to technical or other matters beyond common knowledge. This is the threshold question for determination. If the answer is "yes", you probably need to call an expert, unless the evidence can be obtained through other means.

⁷³ *R. v. D.(D.)*, [2000] 2 S.C.R. 275 at paras. 12, 13 and 47.