



Bias Concerns

Duties of Expert Witnesses in Canada

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As in the United States, expert evidence in Canada has long created concerns over bias, qualifications, and the need for pre-trial disclosure. Responses vary across common law jurisdictions.

Ontario reformed its rules of civil procedure to impose new requirements for admitting expert evidence. These changes have brought the underlying considerations and principles to the fore, generating a great deal of discussion and interesting jurisprudence. Applying new rules to old concerns, Ontario's experience offers insight to all those who deal with expert evidence. As straightforward as the reformed rules appeared, the questions of to *whom* and *what* they apply were immediately controversial.

Broadly stated, common law courts grant the privilege of giving opinion evidence when a witness's expertise is recognized and the evidence is needed to assist the trier of fact. Some expert witnesses fail to recognize or accept that with this privilege comes responsibility. Sometimes a witness offers opinions outside his or her expertise or testifies with a predisposition that favors the party that called the witness, distorting the fact-finding process.

The procedural rules in Ontario now impose certain requirements regarding an expert opinion report. The report must address the expert's qualifications, instructions, opinion, and the opinion's foundations. Further, it must include an express acknowledgement of the expert's duty to the court, as opposed to a party: to provide evidence that is fair, objective, and nonpartisan; to stay within the bounds of the witness' expertise; and to provide any additional assistance that the court may require.

These requirements ensure that expert witnesses understand their responsibilities to the courts and recognize the parameters of their expertise. Fewer surprises should arise during trials because the rules require attorneys to serve these reports in advance of trials, very early in the process.

While the requirements seemed simple, their application has been controversial. Particularly problematic was the question of what sorts of opinions the rule captured.

In some early decisions, courts applied the requirements only to experts specifically and exclusively

retained to provide an opinion to a court. That is, the manner in which the witness came to be involved in the litigation would determine whether the requirements had to be met. This approach focused more on assumptions about certain types of witnesses than on principles of evidence. Expert witnesses retained for the purposes of litigation were presumptively treated as 'hired guns' and biased, whereas other types of witnesses, such as treating doctors, were implicitly treated as less suspect.

The courts based the hired gun distinction on incorrect assumptions about other experts. Other experts may have biases, testify in areas beyond their expertise, or have relationships that require disclosure. For example, a treatment provider such as a family physician may feel professionally bound to be a passionate advocate on behalf of a patient, and without safeguards advocacy can be brought improperly into a courtroom. Similarly, a family physician may not be a proper expert to give a particular specialized opinion. Further, without disclosure requirements, surprises might ambush the other side at trial.

This distinction between specifically hired and other experts has now been rejected by Ontario's Divisional Court. The first appellate review of the new requirements has determined that the important consideration is not the role or the nature of the involvement of a witness, but the type of evidence that would be admitted through the witness. The proper question then, is not *who*, but *what*. If a witness is to give expert opinion evidence, then the new requirements will apply.

Accordingly, opinion evidence triggers Ontario's expert procedural requirements, while fact evidence does not. The distinction turns not only on the content of the evidence, but its use.

For example, the existence of an opinion may be admissible as a fact to explain a resulting course of action. Returning to our example of a treating physician, a diagnosis may be the catalyst for treatment, and thus be a fact in that respect.

Further, a treating professional who limits his or her evidence to observations of a plaintiff and a description of the treatment provided does not need to be qualified as an expert or treated as an expert. Ontario's procedural requirements must be observed, however, should the witness seek to offer opinions on matters such as diagnosis, causation, or prognosis.

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As in other jurisdictions, Ontario's procedural rules and common law have sought to balance the courts' need for expert assistance with concerns over bias, the scope of an expert's true expertise, and the desirability of full pretrial disclosure of evidence. The revisions to the Ontario Rules of Civil Procedure and subsequent lower court decisions and case commentary left practitioners with considerable uncertainty over how the new requirements applied, in terms of both to *whom* and to *what* they applied. After a period of healthy debate, the Ontario Divisional Court has now clarified the state of the law: any witness who is called to give evidence that is an opinion based on expertise must first commit to impartiality, to staying within the bounds of the expertise, and to disclosing in advance of trial the opinion and its basis. 