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EXPERT REPORTS

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An effective expert report will apply a reliable theory or methodology to the facts of a particular case in an objective manner. The importance of choosing a credible expert cannot be overstated. In complex litigation, an expert report that stands up to the rigours of cross-examination can make or break a client's case in the eyes of the trier of fact, especially in the commercial litigation context. Experts must ensure that they apply reliable theory to uncontrovertable facts, without being perceived as an advocate or "hired gun" for the litigant who retains them. Counsel must ensure that the expert has the facts required to deliver the opinion, that those facts are proved in evidence at trial, that the expert is properly prepared for cross-examination, and that there is no perception that the expert's opinion has been improperly influenced by counsel.

In this paper, we offer some thoughts on the following issues:

1. Reliability as a Pre-requisite to Admissibility
2. Compiling and Proving the Necessary Factual Foundation for a "Weighty" Report
3. The Expert as Advocate
4. Scrutiny of the Expert's File and Draft Reports at Discovery and Trial

1. RELIABILITY AS A PRE-REQUISITE TO ADMISSIBILITY

To be admissible, expert evidence must be relevant, necessary to assist the trier of fact, not otherwise excludable by any other rule of evidence, and offered by a properly qualified expert.[1] To be relevant and of assistance to the trier of fact, the expert evidence must also be reliable.

[1] *R.* v. *Abbey* [1982] 2 S.C.R. 24

In the United States, from 1923 until 1993, the reliability (and admissibility) of expert evidence was measured by the "general acceptance" test set out in *Frye* v. *United States*[2] which required, as a pre-condition to admissibility, that the scientific theory advanced by an expert be generally accepted by his peers.

In *William Daubert et al* v. *Merrell Dow Pharmaceuticals Inc*.[3], the U.S. Supreme Court laid down new rules for the admissibility of expert scientific evidence, which have since been held to apply to all expert testimony in the United States.[4] For expert testimony to be admissible in U.S. courts, there must be a reliable foundation for the testimony measured by factors such as peer review or publication, the known or potential rate of error or existence of standards, and the degree to which theory or technique is generally accepted. In addition, the existence of a relevant identifiable scientific community and the degree to which the expert's methodology has been accepted in that community, although not required, was mentioned as a factor to be considered by the U.S. Supreme Court.

Before 1994, Canadian courts generally admitted expert evidence provided that it was relevant, assisted the trier of fact, was not excluded by any other rule of evidence, and was offered by a properly qualified expert.[5] The "assisting the trier of fact" criteria was generally considered to be met where the court determined that the expert evidence would be "helpful". In *R.* v. *Mohan*[6], the Supreme Court held that "helpfulness" was too low a standard and emphasized the important role of the judge as the "gate-keeper" for admissibility. Expert evidence which advances a novel scientific theory or technique was held to be subject to special scrutiny in order to determine whether it meets a basic threshold of reliability and whether it is essential, that is, that the trier of fact would be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the expert evidence approaches an opinion on the ultimate issue, the more strict the application of this principle.

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[2] (1923) 54 App DC 46
[3] 509 U.S. 579 (1993)
[4] *Kumho Tire Co. Ltd.* v. *Carmichael,* 526 U.S. 137 (1999)
[5] *R.* v. *Abbey* [1982] 2 S.C.R. 24
[6] [1994] 2 S.C.R. 9

Although the *Mohan* decision contains similar *dicta* to and was argued and released after *Daubert,* the Supreme Court of Canada did not specifically address or adopt the *Daubert* decision or its reliability pre-requisites to admissibility in its reasons. *Daubert* was viewed as a significant change in the admissibility criteria for expert evidence in the United States. In Canada, the courts generally continued to admit "helpful" expert evidence, addressing any reliability concerns by emphasizing the weight to be attributed to the evidence, rather than questioning its admissibility.

In December 2000, the Supreme Court of Canada tightened the reliability standards for admissibility of expert evidence and adopted the *Daubert* principles. In *R.* v. *J.-L.J.*[7], the Court examined the reliability of scientific evidence from an expert who used a penile plethysmograph to offer the opinion that the accused was not a member of an identifiable group capable of committing sexual offences against young boys. The Court referred to the *Daubert* test in concluding that the evidence was unreliable for the purpose for which it was offered and was therefore inadmissible. The admissibility of expert evidence was held to be subject to careful scrutiny and should not be "allowed too easy an entry on the basis that all of the frailties of the evidence could, at the end of the day, go to weight rather than admissibility."

The accused's counsel had failed to provide evidence on the acceptance of the techniques for diagnostic purposes and the level of acceptance for that purpose amongst the expert's peers. The court therefore held that the device was "not necessarily sufficiently reliable to be used…to identify or exclude the accused as a potential perpetrator of the offence."

In cases decided since *R.* v. *J.-J.L.,* the reliability criteria has been applied to exclude expert evidence, ending the long-standing trend of allowing reliability to go to weight, not admissibility.[8] It may therefore be increasingly necessary for experts and counsel to be prepared to demonstrate not only the qualifications of the expert, but also the degree of acceptance of the theory and methodology supporting the expert opinion, in order to ensure that it gets heard by the trier of fact. On the other hand, it may be strategically expedient to challenge the reliability and

[7] [2000] 2 S.C.R. 600
[8] See for example, *L.J.M.* v. *K.A.M.* (2001), 193 N.S.R. (2d) 66 (N.S.S.C.), aff'd (2002) 201 N.S.R. (2d) 55 (N.S.C.A.); and *Italy* v. *Seifert* [2003] B.C.J. No. 726 (B.C.S.C.)

admissibility of an expert report by gathering evidence from other sources and experts questioning the acceptance and reliability of an opposing expert's methodology. It will be interesting to see whether the admissibility of expert reports will now increasingly be determined by the credibility and popularity of an expert's theory with his peers, rather than the utility in assisting the trier of fact.

2. COMPILING AND PROVING THE NECESSARY FACTUAL FOUNDATION FOR A "WEIGHTY" REPORT

As a general rule, all of the facts upon which an expert report is based have to be proved in evidence. It is important for counsel and the expert to ensure that the expert has the facts necessary for his or her report, and that those facts are capable of being proved at trial.

In *R.* v. *Lavallée*[9], the Supreme Court examined whether expert evidence that relied on hearsay was inadmissible due to its reliance on facts not proved in evidence. The Court determined that the following factors ought to be applied to determine the admissibility and weight of an expert opinion:

1. An expert opinion is admissible if relevant, even if it is based on second hand evidence.

2. This second hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence of the truth of the facts on which the opinion is based.

3. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist, that is, they must be independently proven.

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[9] [1990] 1 S.C.R. 852

For the expert, a persuasive opinion that carries significant weight with the trier of fact will apply the expert's theory to the facts of the case that are likely to be proved in evidence at trial. A report based on data or admissions obtained from the opposing party during the discovery process, or which is from a reliable source (such as audited financial statements or certified public records, for example) is more likely to be admitted and effective. Counsel and the expert should be careful to ensure that information obtained through interviews or otherwise by the party who retained them is from a reliable source and can be proven at trial. Counsel and the expert should be careful that the expert does not rely on evidence which does not have a solid foundation, such as where proof of the fact in issue will depend on a finding of credibility of one or more of the witnesses.

To ensure that the expert has the relevant, reliable facts required to produce a persuasive report, counsel should consult the expert prior to and during the discovery process. It is counsel's job to ask the opposing party for and make sure the expert receives all of the relevant information that he requires. In addition, counsel should ensure that he is aware of the information that the expert has been provided by the client, and that the information is reliable and produced to opposing counsel in accordance with production obligations under the rules of procedure for the relevant forum. This will minimize any risk that the evidence will be excluded at trial. At trial, it is counsel's job to ensure that each and every fact relied upon by the expert in his report is independently proved in evidence in order to avoid any argument that the report or testimony of the expert ought to be accorded less weight.

3. THE EXPERT AS ADVOCATE

Expert reports are submitted because they advance the argument or theory of one of the litigants to the dispute. The expert report acts to bolster or support the argument of one side. The expert who prepares the report fully understands that. Yet, it is said that the expert must not be an advocate. In some jurisdictions, if it appears that the expert is being an advocate, that could prevent a report from being considered at all.

There is a line of British Columbia cases, which has received broadening recognition from other jurisdictions, that an expert report which is determined to be advocacy is inadmissible. In *Yewdale* v. *Insurance Corporation of British Columbia*[10], the court ruled two reports inadmissible because the authors "made findings of fact on disputed issues and attempted to perform the function of the court and of counsel by articulating what were essentially legal conclusions and opinion based on their understanding of the facts." In doing so, the court, relying on *Surrey Credit Union* v. *Willson et al,*[11] stated:

> "Given the special privilege accorded to experts to testify as to their opinion, they must not become advocates. They must express their opinion as opinions and must leave for the court the required conclusions of law. In theory at least, the court "knows the law" - in practice it has the responsibility of finding and applying it. Thus the expert should express his or her opinion in an objective and impartial manner, and must not present argument in the guise of expert evidence."

This line of cases has been applied in subsequent cases in British Columbia, including the British Columbia Court of Appeal[12]. In addition, *Yewdale* has been cited with approval by the New Brunswick Court of Appeal[13], the Federal Court of Canada[14] and by the Saskatchewan Court of Queen's Bench[15].

The cases in which expert evidence has been excluded on the basis of advocacy have tended to involve allegations of professional negligence where an expert was tendered to give evidence about the standard of care, and where the expert went on to offer legal opinions and a mere recitation of facts without any superadded technical expertise. However, the broadening acceptance of this line of cases means that all experts and the counsel who liase with them have to be cautious that the expert report avoids language which could be perceived as "advocacy".

In our view, while it is reasonable to say that experts should not make legal conclusions or factual finding, the idea that experts should never be advocates of their opinions is troublesome. An expert who is revealed to be the shill of the party retaining him is of no assistance to the court. However, where a credible, well-qualified expert objectively considers the facts and formulates an opinion, there is nothing wrong with the expert then forcefully defending that

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[10] [1995] B.C.J. No. 76 (B.C.S.C.)
[11] (1990), 45 B.C.L.R. (2d) 310 (B.C.S.C.)
[12] *R.L.L.* v. *R.L.* [2001]B.C.J. No 1116 (B.C.C.A.)
[13] *Baniuk* v. *Filliter* [2003] N.B.J. No. 181 (N.B.C.A.)
[14] *Squamish Indian Band* v. *Canada* [1998] F.C.J. No. 330 (F.C.T.D.)
[15] *Fesser* v. *Patterson* [1998] S.J. No. 400 (Sask. Q.B.)

opinion. Preventing experts from engaging in that sort of advocacy, in our view, will not assist the courts in their search for the truth.

4. SCRUTINY OF THE EXPERT'S FILE AND DRAFT REPORTS AT DISCOVERY AND TRIAL

The issue of disclosure of draft expert reports or other papers or working materials of an expert may arise in the context of cross-examination or earlier as part of the discovery process. Although litigation privilege protects communications between a solicitor and third parties made for the dominant purpose of actual or contemplated litigation, this privilege has been held in some cases to be waived the moment an expert takes the stand, opening the expert to cross-examination on, and production of, preliminary drafts and working papers compiled in the course of formulating his opinion. In addition, Rule 31.06(3) of the Ontario *Rules of Civil Procedure* provides that an opposing party may obtain discovery with regard to the "findings, opinions and conclusions" of an expert retained by a party being examined, unless the party undertakes not to call the expert as a witness at trial.

Until recently, the courts emphasized the importance of balancing the protection of litigation privilege attaching to certain documents in an expert's file and allowing the court to assess all information and assumptions on which the expert's conclusions are based. The scales now appear to be tipping in favour of open access to the expert's file, including draft reports.

In Ontario, the leading authorities were *Bell Canada* v. *Olympia & York Developments Ltd.*[16] and *Piché* v. *Lecours Lumber Co.*[17], which held that tendering an expert at trial does not operate as an automatic waiver of privilege over the entire expert's file, but only of the facts and assumptions provided to the expert by counsel, if those facts and assumptions formed the basis of the expert's opinion. The court in *Piché* identified the following four principles as operative to determine whether and to what extent privilege has been waived:

[16] (1989), 68 O.R. (2d) 103 (H.C.J.)
[17] (1993), 13 O.R. (3d) 193 (Ont. Gen. Div.)

(a) Principles of waiver relating to a privilege claim for documents in an expert's file cannot be said to have been waived simply by calling that witness to give evidence;

(b) The privilege can be waived in respect of those facts or premises in the expert's file which have been used to based the expert's opinion and which came to the expert's knowledge from documents supplied to that expert;

(c) Whether there is a privilege or not can be ascertained by one of two ways. The judge can examine the documents or materials for which privilege is claims or counsel, through cross-examination of the expert can determine whether all or part of the file is privileged;

(d) As a general rule, if facts are supplied that are not found in other evidence or if certain assumptions are asked to be made in the instructing documents, privilege claimed for those facts or assumptions should be considered waived.

In the *Bell* case, the defendants' counsel at trial sought production of the file of the expert retained by the plaintiff, including drafts of reports by other experts. Defendants' counsel relied on the British Columbia case of *Vancouver Community College* v. *Phillips, Barratt*[18] which held that any privilege which attaches to the expert's file ceases to exist the moment an expert is tendered as a witness. The rationale for the automatic waiver was stated by Finch J. in *Vancouver Community College* to be as follows:

> "It seems to me that in holding out the witness's opinion as trustworthy, the party calling him impliedly waives any privilege that previously protected the expert's papers from production. He presents his evidence to the court and represents, at least at the outset, that the evidence will withstand even the most rigorous cross-examination. That constitutes an implied waiver over papers in a witness's possession which are relevant to the preparation or formulation of the opinions offered, as well as to his consistency, reliability, qualifications and other matters touching on his credibility."

In a subsequent judgment in the same case, Finch J. ordered the production of the drafts of the expert's report from the file of counsel who had retained the expert, because the

[18] (1987), 20 B.C.L.R.(2d) 289 (S.C.)

expert no longer held copies of the drafts in his own files.[19] The *Bell* decision declined to follow *Vancouver Community College,* holding that the interests in maintaining a "sphere of privacy" so as to allow a party to the litigation the ability to procure legal advice, including the obtaining of expert opinions, outweighed the interest in testing the credibility of a party's expert witness.[20]

In a recent Ontario Superior Court decision, the Court leaned more towards the automatic waiver of privilege approach espoused in *Vancouver Community College*. In *Browne (Litigation Guardian of)* v. *Lavery*[21] , Ferguson J. reviewed the development of the case law in relation to waiver of litigation privilege with respect to the contents of an expert's file and concluded: "This area of the law cries out for appellate review"[22]. Relying on the Supreme Court of Canada's decision in *R.* v. *Stone*[23], Ferguson J. held that once an expert is called as a witness at trial, the opposing party is entitled to production of the foundation of the expert's opinion, including those facts and assumptions that were **not** relied upon by the expert in formulating his opinion. In addition, the court questioned the validity of the *Bell* and *Piché* decisions.

Perhaps most significantly, the court determined that the term "findings" in Rule 31.06(3) of the Ontario *Rules of Civil Procedure* ought to be given a broad interpretation, extending to a draft report of an expert who would not be called at trial, but whose report was reviewed by an expert who would be called at trial. In making this finding, Ferguson J. implied that prior cases, which had taken a narrow interpretation of "findings", should not be followed, including *Kelly* v. *Kelly*[24] which held that preliminary draft expert reports need not be produced.

In cases decided since *Browne*, the tendency has been towards ordering production of drafts and expert file materials. In production motions, parties have been ordered to produce all documents provided to an expert in preparation of the expert report[25], draft expert reports[26], and even

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[19] (1987), 28 C.L.R. 277 (B.C.S.C.)
[20] supra, footnote 10, at 108.
[21] (2002), 58 O.R. (3d) 49 (Ont. Sup. Ct.)
[22] Ibid at paragraph 70.
[23] [1999] 2 S.C.R. 290
[24] (1990), 42 C.P.C. (2d) 181 (Ont. U.F.C.)
[25] *Allerex Laboratory Ltd.* v. *Dey Laboratories L.P.,* supra.
[26] *Aviaco International Leasing Inc.* v. *Boeing Canada Inc.(* See also *Hosh(Litigation Guardian of)* .v *Black* [2003] O.J. No. 2374 (Master) where Master Beaudoin ruled that counsel can decline to answer discovery questions related to the findings of an expert retained provided they undertake to advise the examining party of their election to call

comments of counsel on draft expert reports[27]. In the absence of a definitive appellate decision, the current trend in the case law has important implications, especially for cases where more than one expert is retained and collaboration between them occurs during the preparation process.

The practice of not retaining draft expert reports has been a longstanding practice of many counsel and experts. Given the broadening of the production obligations evident in recent cases, it now appears to be at least arguable that there is an obligation on counsel to retain any draft reports he or she receives from an expert who may be called to testify at trial.[28]

Although no Canadian cases to date have specifically commented on the practice of discarding drafts, some recent cases in the United States have imposed an obligation on counsel to retain draft reports received from experts. The Federal Rules of Civil Procedure in the United States provide for disclosure of "information considered by the expert in forming his opinions."[29] In two recent decisions of district courts in New York state, this has been held to apply to draft reports and attorney work product supplied to an expert in formulating his opinion.

In *Amster* v. *River Capital International Group Inc.*[30], the plaintiff's lawyer had made possible edits on documents from an expert, as well as various other types of handwritten notes, at least some of which related to legal strategy and were intended for use only by counsel. Counsel talked with the expert to discuss the comments, but did not show the edits to the expert. The defendant sought production of all of the notes in an unredacted form in order to determine the evolution of the plaintiff's expert opinion. The Southern District Court of New York drew a distinction between counsel notes that were actually "transmitted" to the expert, which were producible, and counsel notes that may have been "communicated" to the expert, which were redactable. In denying the defendant's motion to gain access to the unredacted notes, the court noted that if the plaintiff's expert was unable to testify as to how his report evolved, and more specifically, as to which changes from draft to draft were suggested by counsel, the defendants could renew their motion to have counsel's notes on the draft reports produced.

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the expert as a witness at trial within a reasonable period of time (but at least before the settlement conference) and failing such an undertaking the court could order a party to advise of such an election and produce findings of an expert. ([2002] O.J. No. 3799 (Ont. Sup. Ct.))

[27] *Flinn* v. *McFarland* [2002] N.S.J. No. 547 (N.S.S.C.)

[28] In any event, with today's computer systems, discarding or destroying a draft is unlikely to render it irretrievable.

[29] Rule 26(a)(2)(B) of the United States Federal Rules of Civil Procedure

[30] 2002 U.S. Dist. LEXIS 13669 (S.D.N.Y)

In *W.R. Grace & Co.-Conn* v. *Zotos Int'l Inc.*[31], the court examined counsel's responsibility regarding draft expert reports. The plaintiff sought sanctions against defence counsel who advised an expert to discard earlier drafts, even though they had not been requested in discovery. The court held that the drafts were subject to disclosure pursuant to the Federal Rules of Civil Procedure and that the lawyer's direction to destroy drafts could constitute spoliation, that is, the intentional destruction of evidence in pending litigation. The court did not actually make a finding of spoliation, pending a computer search for retrievable deleted drafts.

As a result, counsel must be mindful that every communication with an expert, and every draft report, may ultimately be subject to scrutiny by opposing counsel and the trier of fact. Where draft reports and communications with retaining counsel are extensive and indicate involvement with the substance of the opinion by counsel, the weight of the report may be decreased in the eyes of the trier of fact. In *Marchand (Litigation Guardian of)* v. *Public General Hospital Society of Chatham*[32], the court explicitly commented on the practice of having an expert submit an unsigned draft report which is then revised in accordance with counsel's comments prior to submitting the final signed report. Granger J. affirmed that this practice could have an impact on the trier of fact's perception about the impartiality, or lack thereof, of the expert, leading to "the inevitable perception that opinions can be purchased."

A particularly egregious example of how the weight of the report of a pre-eminent expert can be undermined by the influence of counsel and the inattention of the expert is the Illinois District Court Decision in *In Re Brand Name Prescription Drugs Antitrust Litigation*[33]. Although the decision on the merits of the District Court was varied on appeal, the Court's *dicta* in relation to the pitfalls of counsel's interference with the drafting of the expert opinion, and the blind reliance on facts supplied by counsel for the party for whom he was retained, makes good reading for potential expert witnesses and the counsel who retain them.

A Nobel Prize winning economist, Dr. Lucas, was retained by counsel for a proposed class of plaintiffs in an antitrust case to give expert evidence regarding the effect of alleged collusion on the part of the defendants. Dr. Lucas' reputation was so solid that the Court declined the

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[31] 2000 U.S. Dist. LEXIS 18091 (W.D.N.Y.)
[32] [1996] O.J. No. 4420 (Ont. Gen. Div.) aff'd (2000) 51 O.R. (3d) 97 (Ont. C.A.)
[33] 1999 U.S. Dist. LEXIS 550; 1999-1 Trade Cas. (CCH) P72, 446

defendant's request for a *Daubert* hearing. Despite his pre-eminent qualifications, the court accorded Dr. Lucas' evidence no weight whatsoever:

> "Dr. Lucas reached his conclusions within forty hours of his engagement and before he undertook any substantial or detailed study of the prescription drug industry. Most of the facts upon which he based his opinions and conclusions were supplied by Class Plaintiffs' counsel, although he admitted he did not expect Class Plaintiffs' counsel to have made a balanced presentation. His expert's report was redrafted by Class Plaintiffs' counsel in its entirety and included what counsel wanted. In Dr. Lucas' own words: "I don't think there's a single sentence in this affidavit that's intact from the first draft that I proposed…
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> …Significantly, the falsity of Dr. Lucas' beliefs was established by the testimony of witnesses offered during the Class Plaintiffs' case in chief - evidence which was supposed to supply the foundation for his opinions. The knowledge, position, and experiences of the Plaintiffs' witnesses foreclose any probity which could attach to Dr. Lucas' views."

While the facts regarding Dr. Lucas' case were extraordinary, the case illustrates the rationale underlying the argument for opening up experts' drafts and communications with counsel to greater scrutiny. If all of that were privileged, the problems with Dr. Lucas' evidence would not have been revealed. Fortunately, similar situations are likely to be rare. In more typical cases, the benefit to be gained from obliterating the privilege that attaches to counsel's communications with experts and for draft reports, is questionable. We echo the comment of Ferguson, J. that this is a matter worthy of appellate guidance.

Clearly, expert reports and the process of their evolution are becoming subject to great scrutiny. How are counsel to manage this environment? Should counsel instruct experts not to provide any drafts, and instead hope for the best in the final report? Should counsel avoid communications with the expert altogether? We think not. However, to be prudent, counsel should proceed on the basis that their communications with the expert, and any draft reports they receive from the expert, will be subject to examination. That means, among other things:

(a) Ensuring that counsel's retainer letter to the expert does not suggest the opinion desired;

(b) Ensuring that the expert receives an objective set of facts;

(c) Limiting communications between counsel and expert while the expert is reviewing the facts and formulating the substance of his or her opinion;

(d) Discussing the expert's views orally before he or she provides anything in writing;

(e) Limiting the number of drafts provided to counsel; and

(f) Keeping counsel's editing of the report to a minimum.