BIAS: THE (DIS)QUALIFICATION OF AN EXPERT WITNESS

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"Expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers. To guard against them, the Court over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role".[1]

Introduction

This paper will briefly review how bias can impact upon an expert's (dis)qualification and/or the weight his[2] opinion is given.

An Expert Has a Duty to be Unbiased

An expert's overriding duty is to assist *the Court* – not the party or lawyer by whom he was hired.

In *White Burgess*, the Supreme Court of Canada stated:[3]

> Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance…
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> …The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another.

These principles have been codified under rule 4.4.01 of the *Rules of Civil Procedure*,[4] which prescribes that the duty of an expert engaged by or on behalf of a party to provide evidence in relation to a proceeding must, amongst other things, "provide opinion evidence that is fair, objective, and non-partisan." Further, under rule 53.03(2.1) an expert report must be accompanied

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[1] *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 1 (CanLII) [*White Burgess*].
[2] The pronoun "he" has been selected arbitrarily and will be used throughout this paper for consistency.
[3] *White Burgess*, *supra* note 1 at paras. 2, 32.
[4] R.R.O. 1990, Reg. 194 [the *Rules*].

by a signed Expert's Duty (Form 53), wherein the expert confirms that his opinion was or will be formulated in keeping with the duty prescribed under rule 4.4.01.

A Biased Expert May Not be Properly Qualified

The general test for the admissibility of expert evidence, set out by the Supreme Court of Canada in *R. v. Mohan*, involves four criteria:[5]

1. Relevance;
2. Necessity in assisting the trier of fact;
3. The absence of any exclusionary rule; and
4. A properly qualified expert.

The Supreme Court later clarified that the test for admissibility involves a two-step process:[6]

- Step 1: The Court applies the *Mohan* criteria, otherwise known as the "threshold requirements for admissibility;" and
- Step 2: The Court balances the potential risks and benefits of admitting the evidence, as a matter of discretionary gatekeeping.

The issue of bias may be considered at both Step 1 and Step 2. Along the spectrum, bias can result in the outright disqualification of an expert from testifying, it can result in a portion of the expert's testimony being excluded, or it can result in the fully testimony being admitted but given less weight. As stated by the Supreme Court in *White Burgess*:[7]

> In my view, expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. If they do not meet this threshold requirement, their evidence should not be admitted. Once this threshold is met, however, concerns about an expert witness's (*sic*) independence or impartiality should be considered as part of the overall weighing of the costs and benefits of admitting the evidence…

[5] *R. v. Mohan*, 1994 CanLII 80 (SCC) [*Mohan*].
[6] *White Burgess*, *supra* note 1 at para. 24; *R. v. Bingley*, 2017 SCC 12 at para. 14 (CanLII).
[7] *Ibid*. at paras. 10, 45.

> …I would hold that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted…

With an increasing emphasis on the trial judge's role as a gatekeeper to preventing experts from overstepping their boundaries,[8] there has become more willingness on the part of trial judges to disqualify experts from the outset as opposed to allowing them to testify then reducing the weight of their opinion.[9] To the extent it is possible to determine the admissibility of the expert's evidence at the stage the evidence is proffered and the expert is qualified, the Ontario Court of Appeal has stated "it should be the norm."[10]

The standard of review of a trial judge's ruling on the admission of expert evidence is well established."[11] Specifically, deference is owed to the trial judge's decision unless the trial judge "commits an error of principle, materially misapprehends the evidence, or reaches an unreasonable conclusion."[12]

The Burden of Proving/Disproving Bias

There is a shifting burden when it comes to the onus to (dis)qualify an expert on the issue of bias. As the Supreme Court stated in *White Burgess*:[13]

> … While I would not go so far as to hold that the expert's independence and impartiality should be presumed absent challenge, my view is that absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.
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> Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on

[8] *Parliament v. Conley*, 2021 ONCA 261 at para. 45.
[9] *Denman v. Radovanovic*, 2022 ONSC 4401 at paras. 11, 35 (CanLII) [*Denman* Admissibility Ruling].
[10] *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502 at para. 60, leave to appeal to SCC dis'd 2018 CanLII 11147 (SCC).
[11] *Denman v. Radovanovic*, 2024 ONCA 276 at para. 123 (CanLII) [*Denman* (Appeal)].
[12] *R. v. Whatcott*, 2023 ONCA 536 at para. 34 (CanLII).
[13] *White Burgess*, *supra* note 1 at paras. 47-48.

> the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or impartiality, should be excluded. This approach conforms to the general rule under the *Mohan* framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.

No Strict Test for Determining Bias

There is no standardized test for determining whether an expert is biased; it is a holistic assessment to be determined on the evidence and the circumstances of the case. As the Supreme Court of Canada stated in *White Burgess*: "The acid test is whether the expert's opinion would not change regardless of which party retained him or her…"[14]

That said, in the matter of *Wise v. Abbott Laboratories*, the Honourable Mr. Justice Perell provided a non-exhaustive list of factors that may assist with ascertaining bias (the "*Wise* Factors").[15] In *Denman*, the Ontario Court of Appeal endorsed the trial judge's reliance upon the *Wise* Factors since Her Honour, at the same time, acknowledged that the Wise factors did not represent a strict test, nor did she rely exclusively on those factors when making her decision.[16]

***Non-Exhaustive* Examples of Bias**

Below is a *non-exhaustive* list of factors that have been considered by the Court when determining whether bias may exist. It is worth repeating that this list is not a formal test, nor does one exist. It is possible that satisfying just one of these factors may result in a finding of bias or satisfying all of them may not. It likely goes without saying that some factors may be more persuasive than others (i.e. more egregious "offences") and that the more factors at play, the more risk of a finding of bias.

- The *Wise* Factors:[17]
    - The nature of the stated expertise or special knowledge.

[14] *Ibid*. at para. 32.
[15] *Wise v. Abbott Laboratories*, 2016 ONSC 7275 (CanLII) [*Wise*].
[16] *Denman* (Appeal), *supra* note 11 at paras. 125-128.
[17] *Wise*, *supra* note 15 at para. 70.

- Statements publicly or in publications regarding the prosecution itself or evidencing philosophical hostility toward particular subjects.

- A history of retainer exclusively or nearly so by the prosecution or the defence.

- A long association with one lawyer or party.

- Personal involvement or association with a party.

- Whether a significant percentage of the expert's income is derived from court appearances.

- The size of the fee for work performed or a fee contingent on the result in the case/

- Lack of a report, a grossly incomplete report, modification or withdrawal of a report without reasonable explanation, a report replete with advocacy and argument.

- Performance in other cases indicating lack of objectivity and impartiality.

- A history of successful attacks on the witness' evidence.

- Unexplained differing opinions on near identical subject matter in various court appearances or reports.

- Departure from, as opposed to adherence to, any governing ethical guidelines, codes or protocols respecting the expert witness' field of expertise.

- Inaccessibility prior to trial to the opposing party, follow through on instructions designed to achieve a desired result, shoddy experimental work, persistent failure to recognize other explanations or a range of opinion, lack of disclosure respecting the basis for the opinion or procedures undertaken, operating beyond the field of stated expertise, unstated assumptions, work or searches not performed reasonably related to the issue at hand, unsubstantiated opinions, improperly unqualified statements, unclear or no demarcation between fact and opinion, unauthorized breach of the spirit of a witness exclusion order.

- Expressed conclusions or opinions which do not remotely relate to the available factual foundation or prevailing special knowledge.

- Factors considered in other cases:

  - Argumentative *viva voce* testimony, including asking questions rather than answering them.[18]

[18] *Leckie v. Chaiton*, 2021 ONSC 7770 at paras. 70, 72, 74 (CanLII).

- Making improper fact-finding and/or credibility assessments, thereby taking on the role of judge and jury.[19]

- Engaging in circular and/or conclusory reasoning.[20]

- Using inflammatory language used for the purpose of evoking strong feelings.[21]

- "Cherry-picking" from the evidence by highlighting what is favourable to a party's case and leaving out evidence that would otherwise be unfavourable.[22]

- Providing a new/revised opinion that is not based upon any new information.[23]

- Reviewing only medical chronology created and sent by counsel, without reviewing the underlying source medical documents.[24]

- Providing an opinion before even asking to review the complete file.[25]

- Misrepresenting key documents and assuming the validity of assessments performed by other professionals.[26]

- Having a teacher-student/mentor-mentee relationship with a party.[27]

- Collaborating with a party on clinical research studies, papers, or presentations.[28]

- Refusing a retainer by one of the litigants, while agreeing to a retainer by the other.[29]

- Failing to voluntarily and expressly disclose a prior relationship, professional or personal, with a litigant.[30]

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[19] *Parliament v. Conley*, 2021 ONCA 261 at paras. 28, 49, 51-52 (CanLII).
[20] *Thornhill v. Chong*, 2016 ONSC 6353 at paras. 278-280, 283 (CanLII).
[21] *Lane v. Kock*, 2015 ONSC 28 at para.9-12 (CanLII) [*Lane*].
[22] *Ibid*. at para. 19.
[23] *Boone v. O'Kelly*, 2020 ONSC 6932 at paras. 28-29 (CanLII) [*Boone*].
[24] *Ibid*. at paras. 32-33, 41.
[25] *Ibid*. at para. 43.
[26] *Ibid*. at para. 92.
[27] *Denman* (Ruling on Admissibility) at para. 33(viii).
[28] *Ibid*.
[29] *Ibid*. at para. 33(xxii).
[30] *Ibid*. at para. 33(vii).

Conclusion

It is not enough for litigants or the Court to assume that because an expert has signed a Form 53, he is unbiased and is properly qualified in that respect to testify.[31] One has to carefully consider all the circumstances of the expert's relationship to the litigants, his practice as a medical-legal expert, his prior involvement in reported decisions, the "flavour" of his reports, and the content and demeanor of his *viva voce* testimony. As the Supreme Court of Canada stated in *White Burgess*: "A proposed expert witness who is unable or unwilling to comply with [his duty to the Court] is not qualified to give expert opinion evidence and should not be permitted to do so."[32]

[31] *Boutcher v. Cha*, 2020 ONSC 7694 at para. 37 (CanLII).
[32] *White Burgess*, *supra* note 1 at para. 2.