UNBIASED OPINION: THE OBJECTIVE EXPERT WITNESS IN CANADA

MARCO P. FALCO
The author is a litigation partner at Torkin Manes LLP, Toronto, Canada.

Like litigation in the United States, cases in Canada often turn on expert testimony. Three recent developments in Canadian common law have clarified the standards for admitting expert evidence. In particular, decisions rendered by the Supreme Court of Canada and the Ontario Court of Appeal have emphasized that an expert’s role in litigation is to assist the court in as neutral and objective a manner as possible.

These decisions focus on three issues relating to the preparation and use of expert evidence at trial—namely, (1) the relationship between the lawyer and expert in preparing an expert opinion, (2) the circumstances in which an expert is required to provide a report and affirm her neutrality to the court, and (3) the test for challenging an expert’s bias at trial.

First Important Case
The first Canadian decision to have a major effect on the nature of expert evidence at trial is Moore v. Getahun, 2015 ONCA 55 (Can. Ont. Ct. App.). Moore was a medical malpractice case focused on whether the defendant was negligent in applying a full cast to the plaintiff’s wrist and forearm after a motorcycle accident. The resulting decision clarifies the permissible types of communications between lawyers and experts before the expert offers opinion testimony.

At trial in Moore, the judge was troubled by the fact that the defendant’s expert had reviewed his draft report with the defendant’s lawyer prior to the hearing. The court found that the lawyer made “more than simply superficial, cosmetic changes” to the expert’s draft report. Moore v. Getahun, 2014 ONSC 237, para. 293 (Can. Ont. Super. Ct.). The trial judge criticized the practice of lawyers reviewing draft expert reports and held that lawyers must disclose changes to expert reports that result from their corrections, suggestions, or clarifications in writing, in order to ensure full objectivity and transparency.

On appeal, however, the Court of Appeal for Ontario disagreed, finding nothing improper with the long-standing practice of lawyers reviewing draft expert reports prior to trial and deeming the practice a necessary part of trial preparation. Consultation and collaboration between a lawyer and an expert ensures that the report complies with the applicable rules of evidence and civil procedure, restricts the report to the most relevant issues at trial, and ensures that the report is written in a manner that is “accessible and comprehensible” to the court. Moore, 2015 ONCA 55, para. 63.

Further, the Court of Appeal held that preparatory discussions and drafts between the lawyer and the expert are not subject to automatic disclosure but are protected by litigation privilege—the rule safeguarding communications with third parties that occur in preparation for litigation. Still, the privilege is qualified and disclosure may be ordered in certain circumstances. Moreover, if a party can show reasonable grounds to suspect that a lawyer acted improperly in influencing the expert, the court can order disclosure of their communications.

The second major issue affecting the use of expert evidence at trial in Canada involves whether experts must always produce an expert report for trial if they were involved in the underlying facts giving rise to the litigation.

In Westerhof v. Gee, 2015 ONCA 206 (Can. Ont. Ct. App.), the Court of Appeal for Ontario heard two appeals arising from lawsuits involving separate car accidents. In the first suit, the trial judge held that “opinion evidence” about the plaintiff’s history, diagnosis, and prognosis offered by various medical professionals was inadmissible unless and until they were involved in the underlying facts giving rise to the litigation.

In so doing, it recognized three classes of expert witnesses in litigation, each with different obligations under the Ontario rules of civil procedure.
First, the court recognized “litigation experts”: witnesses who are retained by a party for the purpose of the case and who will be called as experts at trial. They must file an expert report, including a signed acknowledgment of the duty to provide neutral and impartial evidence, in order to testify.

Second, there are “participant experts”: witnesses whose evidence is based on their observations or involvement in the underlying facts. These may include treating physicians or accident reconstruction engineers in a personal injury case. A participant expert can opine at trial without having to file a report, so long as the opinion is based on the expert’s observations or participation in the events at issue and he formed his opinion in the ordinary exercise of his skill, knowledge, or training. Any more than this and the expert must file an expert report and acknowledgment of impartiality, just as a litigation expert would.

Third, the court recognized “nonparty experts” who are hired by a nonparty and who form a relevant opinion based on personal observations or examinations. Nonparty experts include witnesses who provide long-term disability opinions. They are subject to the same reporting requirements as participant experts.

The last expert-related issue addresses the admissibility of expert evidence where one party claims bias or a lack of independence by the expert. In *WBLI v. Abbott & Haliburton*, 2015 SCC 23 (Can.), shareholders sued the financial auditors of their company, claiming the auditors failed to follow general accounting practices. The auditors argued that the shareholders’ expert had a conflict because she worked for the firm that audited the company and discovered the defendants’ alleged negligence.

The Supreme Court of Canada held that no conflict existed and that an expert’s independence and impartiality go to the admissibility of the expert’s opinion, not just the weight it receives at trial. *Id.* at para. 34. Thus, expert evidence can be excluded where facts establish that the expert is biased or lacks independence. Expert testimony must first cross the threshold into the realm of fair, objective, and nonpartisan opinion evidence. The burden is on the party opposing admission 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.” *Id.* at para. 48. If this test is met, the trial court must then weigh the overall costs and benefits of admitting the expert’s evidence. The court should consider the relevance, necessity, reliability, and neutrality of the expert’s opinion. *Id.* at para. 54.

These decisions show that Canadian courts approach the issue of an expert’s neutrality on a case-by-case basis. While the rules of civil procedure may demand absolute objectivity from all expert witnesses, the courts retain discretion to apply the rules contextually and liberally. In this way, the court acts as a gatekeeper: It ensures that expert evidence is neutral, objective, and, most important, of value to the trier of fact.