

# Using Experts at Trial

Prepared For: Legal Education Society of Alberta

*Running Your First Trial*

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For Presentation In:

Edmonton – January 21, 2015

Calgary – February 4, 2015

## USING EXPERTS AT TRIAL

### Introductory Comments

Anyone getting ready for trial has one driving concern – winning. When expert evidence is part of your case you want your expert to not only support your client's position, but to do that more effectively than any opposing expert. You obviously want your expert to be on your side. Your expert may feel much the same; that they are in the role of a service provider and want to help.

All of this makes it more difficult, and more important, that both you and your expert keep in mind that the expert's core function is to assist the Court and that they are to be impartial and objective. This is not only required by your duty as an officer of the Court, it also makes your expert's evidence more credible and effective.

As a matter of practical strategy, you have to understand what role your expert's conclusions play in your theory of case. The basic objective, which you want to be very sure to meet, is to get your expert's opinion admitted in evidence at trial.

When you feel confident of the basic objective of getting your expert's evidence admitted in evidence, you can work on the next level, figuring out what evidence or argument you can present to the convince the court that your expert's opinion is to be preferred to the opposing expert's opinion.

### Are You Ready to Lead Your Expert's Evidence at Trial?

#### *1. Is the expert evidence admissible?*

You need to be ready to establish that your expert's evidence is admissible. Even if the lawyer on the other side has not raised any objection, even if they have expressly agreed that your expert's evidence is admissible, the trial judge may have concerns and you should be ready to answer them.

The key test is in *R v. Mohan* [1994] 2 S.C.R. 9:

"17 Admission of expert evidence depends on the application of the following criteria:

18 (a) relevance;

19 (b) necessity in assisting the trier of fact;

20 (c) the absence of any exclusionary rule;

21 (d) a properly qualified expert."

(a) Relevance

There is a broad array of potential experts in civil litigation. On liability issues there are experts on the cause and spread of fires, on failures and design standards for commercial products, and from a host of medical and engineering specialties. For just about every professional negligence claim there probably needs to be an expert who can speak with authority on the standard and accepted practices in that profession and whether they were followed by the Defendant. On damages issues there are business valuation and loss experts, accountants, economists and experts in valuing costs of future care and on vocational abilities and opportunities.

Whether, and why, an expert opinion on any of these areas is relevant to your case depends on your theory of the case in support of your client's position. At the risk of stating the obvious, it is of fundamental importance to understand what element or proposition of your case you need the expert's opinion for. If you know that, then you know why the expert's evidence is relevant.

(b) Necessity

Generally speaking, the more specialized and technical a field becomes, the more evident it is that the trier of fact will need the assistance of an expert to come to the right conclusion. From *Mohan*:

"26 This precondition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provides information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in *R. v. Abbey*, supra. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. In *Kelliher (Village) v. Smith*, [1931] S.C.R. 672, at p. 684, this court, quoting from *Beven on Negligence* (4th ed. 1928), p. 141, stated that in order for expert evidence to be admissible, "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge." More recently, in *Lavallee*, supra, the above passages from *Kelliher* and *Abbey* were applied to admit expert evidence as to the state of mind of a "battered" woman. The judgment stressed that this was an area that is not understood by the average person.

27 As in the case of relevance, discussed above, the need for the evidence is assessed in light of its potential to distort the fact-finding process. As stated by Lawton L.J. in *R. v. Turner*, [1975] Q.B. 834, at p. 841, and approved by Lord Wilberforce in *Director of Public Prosecutions v. Jordan*, [1977] A.C. 699 at 708, at p. 718: