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CONSTRUCTION CONTRACTS & CLAIMS

Presented by W.J. Kenny

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EXPERT EVIDENCE

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Presentation Roadmap

1. The Rules Concerning Opinion Evidence
2. Three Types of “Expert” Witnesses
3. The Independent Testifying Expert
4. Consulting Experts: Improperly Called “Experts”
5. The Ordinary Witness with “Expertise”

Rationale for Restriction on Opinion Evidence

- Over the last 20 years, the Supreme Court of Canada has progressively tightened the rules concerning admissibility of expert evidence
  - *White Burgess Langille Inman v Abbott and Haliburton Co,* 2015 SCC 23
- The Court's concern about expert evidence includes:
  - The potential prejudice for the trier of fact to be blinded by the expert's credentials and accept his/her opinion and inferences without question
  - The expert may rely on unproven facts or material that are immune to cross-examination
  - The risk of admitting "junk science"; and
  - The risk that a "contest of experts" detracts from, or adds confusion to, the fact-finding process

Why are Experts Allowed to Give Opinion Evidence?

1. To educate the trier of fact on technical subjects that are beyond comprehension of a reasonable lay person; and

2. To assist the trier of fact in drawing accurate inferences from facts that require technical expertise to understand or specialized knowledge to comprehend.

Test for Admitting Expert Evidence

Overall cost-benefit analysis: does benefit of admitting the opinion evidence outweigh its potential prejudice

- Threshold requirements of admissibility:
  - The evidence must be logically relevant;
  - The evidence must be necessary to assist the trier of fact because the subject matter is technical and beyond comprehension of a lay person;
  - There must be no other applicable exclusionary rule;
  - The expert must be properly qualified:
    - Impartial and unbiased; and
    - Independent.

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Who is an “Expert”?

Kon Construction Ltd v *Terranova Developments Ltd and Scheffer Andrew Ltd*, 2015 ABCA 249

Witnesses with "Expertise"

The Court has identified three categories of "Witnesses with Expertise", who in some respects are witnesses of fact, and in other respects are opinion witnesses:

1. **Independent or Testifying Experts**: witnesses who are retained by a litigant to provide technical opinions about the issues in the litigation, but were not otherwise involved in the underlying events or associated with the litigant.
2. **Experts Involved in Litigation/With Parties**: witnesses with expertise who were involved in the events underlying the litigation, but are not themselves litigants. E.g. a treating doctor of the injured plaintiff in personal injury case
3. **Ordinary Witnesses with Expertise**: The witnesses called by a litigant, or the litigant themselves, including the officers and employees of corporate litigants, who have expertise in the subject matter, and who are actually involved in the events underlying the litigation.

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1. The Independent or Testifying Expert

External, Objective Expert

- A testifying expert is an “external” professional retained by a litigant solely to provide an independent, objective opinion to assist the Court
- Must be independent, impartial and unbiased from the litigant calling them
- Cannot be an advocate or affiliated with litigant in any other way
- Entire file is producible to opposing party, including drafts of reports and all documents reviewed

Technical Requirements for Calling an Expert

- Must provide notice to opposing party of intention to call expert at trial
- Expert must prepare and deliver a written report
- The Expert's entire file, including drafts of the report, become producible to the opposing party upon the expert becoming a witness.
- Qualification of the expert must be established at trial
  - Necessity, relevance and credentials
- Influence of the Expert by counsel or the party may give rise to an appearance (or actual) bias on the part of the Expert, which may prevent the report from being admitted, or minimize the weight/consideration given to it

What Can Experts Review and Rely On?

- Experts can rely on "hearsay" or secondhand information when formulating their opinion:

"…it is unrealistic to think that experts work alone, most professionals work in teams and depend on input from a number of different sources within their organizations." (*White Burgess,* 2015 SCC 23)

- Typically, experts are given a set of "hypothetical facts" that mimic the dispute in question and are asked to provide their opinion on the same
- Experts can review, consider and have regard to:
  - Electronically stored documents;
  - Data gathered by others;
  - Publically available information;
  - Business records; and
  - Textbooks and publications in their field

Independent versus Consulting Experts

- Frequently, parties will try to call experts who fall into a "gray area" – Consulting Experts
  - They have technical expertise and specialized knowledge in the subject matter of the dispute
  - BUT they are not truly independent – they are associated with one of the litigants in terms of providing strategic or tactical advice
  - They frequently review or comment on the litigants' documents and provide tactical advice about strengths and weaknesses of case
- Consulting Experts should not be called to testify at trial on behalf of the litigant because of their association with the litigant during the course of the dispute and their "advocate" role

Experts do not Testify as to Primary Facts

- QUESTION → Can experts give "fact" evidence? How far can an expert go in examining and reporting on facts and in suggesting what facts the trier of fact should find?

- ANSWER → No. This is the difference between expert and lay witness evidence
  - Lay witnesses testify to the facts
  - Experts give opinions that assist the trier of fact in drawing conclusions from the facts before him/her

The Basis of an Expert Opinion

An expert's opinion is based on facts or assumptions of facts provided to them

- But it is the trier of fact's job to make findings of fact – the trier of fact can either accept or reject the facts on which the expert's opinion is based
- This is why an expert's opinion evidence is typically and properly given as an answer to hypothetical fact patterns/assumptions
- Hypotheticals make it clear to the trier of fact that only *if* they accept the facts or assumptions on which the opinion is premised can they rely upon the opinion proffered
  - E.g. *If* a person had drunk 25 ounces of whisky, would he, in your opinion, be capable of forming an intent to murder?

Experts Provide Opinions or Ready Made Inferences from Facts

- Experts do not give direct, factual evidence, they give an opinion or ready-made inference based on the facts presented to them or assumed by them
- This is why expert evidence is only admitted when necessary: i.e. when a trier of fact needs help interpreting or drawing correct conclusions from the facts, which cannot be comprehended without the assistance of specialized knowledge.
- Examples:
  - Accident or incident reconstruction.
  - Geotechnical investigations.
  - Failure Analysis
  - Scheduling

Acceptance of an Expert's Opinion

- The relevance of, or weight given to, an expert's opinion is based on:
  - The degree to which the underlying assumptions or facts have been proven by admissible evidence and accepted as true; or
  - The reliability of the hearsay on which the expert's opinion is partly based.
- If there is no admissible evidence to support the critical facts on which the expert's opinion is based, it cannot (and should not) be accepted or relied upon by the trier of fact as there is no foundation for the opinion.

The Problem Encountered

- Parties frequently call a company executive to explain the theory of their case, followed by a claims consultant who supports that theory with his analysis or recitation of the “facts” and events that transpired.
- They avoid calling, and exposing to cross examination, the real witnesses who bid, planned and performed the work.
- Instead, parties are now hiring claims consultants or other third party “experts”:
  - They review all of the documents and the dispute in question.
  - They then are called as experts at trial
  - Their testimony essentially consists of a summary of the facts and events that transpired, despite their lack of any first-hand knowledge of, or involvement in, the project in dispute.

"Claims Consultants": Improper Experts and Witnesses

- Attempting to call a claims consultant as an expert at trial poses a risk that their evidence may not be admissible
- The following issues are engaged:
  - What is the claims consultant's area of expertise as it relates to the discipline of construction being examined?
  - What expertise, science or experience is engaged, if any at all?
  - Are they simply reciting facts as they perceive them based on their review of the documents?

The Prejudice Posed

- These witnesses are effectively and impermissibly “usurping” the role of the trier of fact in making findings of fact
- They are also providing extremely prejudicial evidence, as they are likely biased in their recitation of the facts in favor of the litigant who hired them
- Yet expedience and convenience of having an “expert” summarize millions of complicated documents and a protracted dispute cause triers of fact to incorrectly accept this evidence without challenge.
- This is precisely the “prejudice” or danger associated with expert opinion evidence – the Court is accepting the evidence of someone who should not be giving evidence at all

Dhaliwal v Bassi, 2007 BCSC 549

"Ordinarily, counsel will provide the factual assumptions to the expert that counsel will then proceed to prove in evidence. Those factual assumptions should be clearly stated in the statement of the expert. It is not for an expert to merely review a number of documents, many of which will not be in evidence and make certain findings of fact."

Summary

It is NOT proper for a claims consultant to opine or provide evidence on the following:

- o What events are compensable and what a party is entitled to under a contract
  - This involves an application of legal principles and is beyond the expertise of a claims consultant

- o A summary of the facts or events underlying the dispute based upon their review of the documents
  - The actual individuals directly involved in the project ought to be called to provide this evidence

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2. Experts Involved in Litigation

2. Experts Involved in Litigation

- It is sometimes argued that experts in this category are not really providing “opinion” evidence: they are testifying about what they observed and what they did in relation to the events underlying the litigation
- But it is difficult for them to explain why they acted the way they did, or describe what they observed without engaging their technical expertise
  - E.g. A doctor treating the injured plaintiff will inevitably have to engage his medical expertise when explaining his diagnoses and treatment of the plaintiff
- Preferable to qualify them as experts

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3. Ordinary Witnesses with "Expertise"

Technical Requirements for Calling Lay Witnesses

- Litigants themselves are entitled to testify
- Individuals associated with the litigant who were directly involved in the events underlying the litigation are also entitled to testify because they have directly relevant information
- No need to:
  - Give notice of an intention to call these witnesses as experts,
  - Qualify this class of witness as experts, or
  - Require them to prepare an expert report.
- They are simply subject to the earlier discovery process

Issue: When a Lay Witness has Relevant Expertise

- Litigants or witnesses called by litigants may be experts in their field; however, they cannot be called or qualified as testifying experts because of their affiliation with the litigant or involvement in the events underlying the dispute

- When these ordinary witnesses testify about what happened and what they did, it might be inevitable that their specialized knowledge is engaged and their explanations involve “expert opinion” to some extent

The Exception to the Rule Against Opinion Evidence

- Recall → general rule is that lay witnesses cannot express or testify to their opinions
- There is an exception for ordinary witnesses with expertise to testify as to their opinions and into their expertise:
  - *When it is necessary for the witness to explain the manner in which they acted and doing so engages their expertise and requires the expression of an opinion on why they acted as they did.*
- These witnesses can explain what they did and why, even if it strays into "opinion" evidence and engages their expertise.
- They are entitled to defend themselves by explaining what they did and why they did it

How Far does the Exception Extend?

- How much can an ordinary witness with expertise testify as to their opinion on the events in the litigation?
  - Can they testify about what they believe should have happened?
  - Can they testify what impact would have resulted if x, y or z occurred?
  - E.g. What could production have been if not impacted by an event giving rise to liability?
- Ordinary witnesses cannot provide opinions based on hypotheticals.
- Scope of ordinary witnesses testifying within their expertise is limited to defending their actions and explaining the events that did occur. This may include explaining what would have or should have happened, as they are in the best place to describe that.
- Preferable to then hire an independent expert to express an external opinion against this background as to whether standard of care met.

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