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EXPERTISE, NOT ADVOCACY: RECENT JUDICIAL CONSIDERATION OF THE ROLE OF EXPERTS IN BC

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Requiring objectivity from experts is not new; however a review of some recent BC decisions has demonstrated increased willingness of judges to disregard expert evidence for failing to meet this duty.

Scope of Rule 11-2

Rule 11-2 (1) of the BC Supreme Court Civil Rules sets out the duty of an expert witness:

> (1) In giving an opinion to the court, an expert appointed under this Part by one or more parties or by the court has a duty to assist the court and is not to be an advocate for any party.

An expert must be impartial, independent and objective. Concerns about these issues generally go to weight, however if the bias fundamentally affects the probative value of the opinion, the court can rule the opinion to be inadmissible (*Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2014 BCSC 851).

A review of recent BC decisions has demonstrated the risk of relying on a report which contains advocacy.

In *Odian v Carriere*, 2016 BCSC 112, the plaintiff sustained a neck injury in a motor vehicle accident which she said impacted her vocational functioning. She worked as a homebuilder and carpenter. The defence had an occupational therapist conduct a functional capacity. The therapist concluded that a kinesiology program would “likely improve” her condition. The occupational therapist testified at trial. Justice Dley criticized the expert’s opinion, holding that her conclusion on improvement was “not well based,” and that there were insufficient details to justify the opinion. He found that her testimony in court was, at times, evasive and non-responsive. These factors lead him to conclude that she had become an advocate for the defence and as a result, he gave no weight to her opinion.

When experts opine on subjects more properly the purview of the trier of fact, the court may conclude the expert lacks objectivity. In *Workers' Compensation Board of British Columbia v. Flanagan Enterprises (Nevada) Inc.*, 2016 BCSC, Grauer J. reached this conclusion with respect to an aviation expert who had been asked to opine on the safety of an aircraft after a plane crash. The expert was unaccustomed to providing expert reports, and the judge stated that his lack of familiarity

> …may help to explain why his report is so far removed from what is normally admitted into evidence in these courts as a statement of expert opinion. He does not, for instance, set out his opinion as to the accepted standards in the industry, against which I can measure the facts as I find them from the evidence. While he does speak of standards to a certain extent, it is not always possible to discern when he is speaking about standards, and when he is speaking about his own personal views. Moreover, he repeatedly invades the province of the trial judge by going on to pass judgment on the (in)adequacy of conduct. No doubt this is due to a lack of understanding of the appropriate delineation between expert opinion evidence and conclusions of fact and law. Regardless of the reason, the fact remains that [he] is entitled to tell me all about what standards are accepted and routinely applied; he is not entitled to tell me how to judge the conduct of those purporting to apply them. In this respect, his personal judgment is irrelevant and inadmissible.

As a consequence, the judge ruled that large portions of the report were inadmissible.

In *Ferguson v. McLaughlin*, 2015 BCSC 2432, Griffin J. was critical of an expert who relied wholly on ICBC for income and had not practiced medicine for almost two decades. The doctor's approach was to ask the patient to explain her complaint, and if the patient did not verbalize pain, he would conclude she was not in pain and therefore did not have a lasting injury. The judge found that he was overly confident in this approach, and unreceptive to the potential for patients to misunderstand his questions. This approach was superficial, and at worst, it displayed "such a degree of cynicism regarding patients advancing claims against ICBC that he is not independent and his evidence is unreliable." The judge denied to place any weight on the doctor's evidence.

In *Bricker v. Danyk*, 2015 BCSC 2404, Skolrood J detailed the deficiencies in a defence psychiatrist's report. The expert's conclusions, which included that anxiety was inconsistent with a predilection for watching shark TV shows, and that having a wide range of interests was incompatible with PSD or depression, were argumentative. He ruled that the report lacked "in its entirety…the degree of objectivity expected of an expert witness". Again, the result was that no weight was given to the opinion.

Whether advocacy is intentionally performed by an expert to assist the client or accidental, courts are increasingly willing to disregard expert evidence when it veers too far into the role of the trier of fact, or is argumentative. These cases should remind counsel of the importance of vetting the experts before retaining them to ensure they have a balanced practice and have not been the subject of prior judicial criticism. As well, counsel should remind the expert of their duty to assist the court rather than advocate to ensure that the opinion produced will be of value.

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