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What's New with Opinion and Expert Evidence
By Malte von Anrep
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When a dispute finds its way into the court experts are often hired to advance and explain a Plaintiff's or Defendant's point of view. In fact, it is not unusual in complicated cases to have a number of experts testify. If one side hires an expert the other side invariably shopped around to find an expert who would be willing to give a contrary opinion. All that has changed as of January 1, 2010.

Firstly, let's consider why experts are brought into a trial at all as they are not a witness to the events giving rise to the dispute. Experts are required in cases where the issues in dispute are not in the common experience or knowledge of a judge or jury members. For example, without the assistance of an expert a judge and jury will not know what the proper medical procedures are in a medical malpractice action or what the proper inspection procedures are when a bridge collapses. The unique feature of an expert's evidence is that a person qualified as an expert is the only type of witness permitted to give opinion evidence. All other witnesses are required to give "first hand" evidence, i.e. what they saw, what they heard, what they experienced.

Over the years, many experts established a career of giving evidence in court for either the claimants or the defence, thereby acquiring the mantle of the "hired gun" to advance the case of the party that hired them.

The well publicized career of pathologist Dr. Charles Smith as an expert witness in criminal trials involving deaths of babies changed all that. Subsequent autopsies in a number of cases showed that Dr. Smith's findings and opinions were incorrect and a number of people convicted of killing young children based on his opinion evidence later had their convictions overturned.

This resulted in Justice Stephen Goudge of the Ontario Court of Appeal being assigned the task of reviewing the rules governing expert evidence and making recommendations that would avoid these problems in the future. Justice Goudge made a very thorough review and made many recommendations which fundamentally changed the way the evidence of experts is to be treated by the courts; recommendations which came into effect on January 1, 2010.

The days of the expert as a hired gun advancing the views of the party who retained and paid that expert are over. There is now a positive obligation for an expert "to provide opinion

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evidence that is fair, objective and non-partisan; to provide opinion evidence that is related only to matters that are within the expert's area of expertise and to provide such additional assistance as the court may reasonably required to determine a matter in issue".

This is emphasized by a specific provision that this duty "prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged".

Furthermore, the expert is now required to sign an acknowledgement that they understand and have adhered to this duty to the court.

If a judge, reviewing the expert's evidence, comes to the conclusion that the expert has assumed the role of an advocate on behalf of the party who hired him or her or the expert has expressed opinions outside of his or her field of expertise, the entire evidence of that expert witness can be disregarded.

Before an expert can give evidence at trial the expert must provide a report disclosing his or her qualifications pertaining to the area of expertise on which the opinion is given; give a detailed account of what evidence was examined and assumptions made upon which the opinions are based, and signed by the expert.

Before an expert's evidence is accepted it must be shown to be reasonably necessary to assist the court in coming to an understanding of the issues involved. There is also a recommendation that experts hired by the parties meet before a trial to discuss and clarify their differences.

It is anticipated that these changes will eliminate or at least greatly reduce the miscarriage of justice cases we have experienced in the past.

***The foregoing information is provided to you for information purposes only.
We caution you to obtain legal advice specific to your situation in all circumstances***

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