NEWSLETTER

ACADEMIC AND PROFESSIONAL DEVELOPMENT

INTERNATIONAL BAR ASSOCIATION PUBLIC AND PROFESSIONAL INTEREST DIVISION

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FROM THE CO-CHAIRS

Committee developments and promoting membership

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The Academic and Professional Development Committee (APDC) commenced this year following the friendly merger of the Academics' Forum and the Legal Education and Professional Development Committee. Broadly speaking, our new committee represents the interests of law teachers (academic and professional, permanent and casual) as well as professional developers. Our aim is to provide:

- an opportunity for law teachers and researchers to share common concerns and support the development of the academic lawyer; and
- by combining these activities and including professional development the committee will cover all areas of lawyer education, from pre-admission to the Bar to post-admission continuing legal education or professional development.

In relation to legal education generally, the APDC is interested in legal curricula, law teaching and teaching methods, the scholarship surrounding law, and public policy development in relation to the role of law as society's main means through which justice is sought to be accomplished. The committee is also interested in the professional development of academics, practising professionals and judges.

While the APDC primarily focuses on the organisation and presentation of seminars and sessions within the annual and regional conferences of

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Contributions to the newsletter are always welcome and should be sent to the Newsletter Editor at the address below:

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Experts: a view from the trenches[1]

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I would like to share with you a few thoughts about experts in the litigation and arbitration process. I have previously written two articles on the subjects of the use of expert evidence in civil proceedings generally and in cases involving novel science. Those papers were published by the Advocates' Quarterly and are available on my website, **www.williamghorton.com**.

However, in the space available to me I do not want to repeat the detailed information on those subjects that might be found by looking at those papers. In this brief article, I would like to express more informally views that are based on my personal experiences – with whatever special insights or blind spots that may entail.

Experts and partisans

The first thing I have noticed about experts is that they usually know more than I do, at least on certain subjects. I am not one of those lawyers who practise so frequently or exclusively in a particular type of case that they become as expert as the witnesses with whom they work. The fields of construction and personal injury litigation come to mind as only two examples where this is quite common. If you are one of those lawyers, you will not learn anything from what I have to say.

The rest of us recognise that in working with experts, we are working with individuals who have unique knowledge or qualifications which may be of assistance to the court. Of course, the operative phrase is 'may be' since, as we all know, expertise may be used for the forces of good or for the forces of evil, depending on whether it is given in support of or against your position in the litigation.

Much of the law of evidence as it relates to experts relates to a desire of the courts to avoid being misled by experts who seek to guide the deliberations of the court in favour of the clients who hired them through the use of their superior knowledge in a particular field. Particularly in jury cases, the courts are concerned that too much weight is not placed on experts whose qualifications give them what Justice Michael Moldaver has termed an air of 'mystic infallibility'.[2]

In truth, there may be as much danger of judges and arbitrators being misled by experts who appeal to the all too human desire to demonstrate comprehension of difficult subject matter, ie not to look stupid.

Only recently, we have been presented in the newspapers with a fresh instance of our courts apparently having been misled by expert evidence, possibly in scores of cases involving infant deaths. This is by no means a new or isolated phenomenon. So it must be acknowledged that the danger posed by expert evidence is at least as great as its potential benefits.

Although the notorious example to which I have just referred may seem exceptional, my experience has shown that there is a tendency in all expert witnesses to seek to come to the assistance of the side that hired them. The extent to which the partisan flame is fanned is usually a matter of degree. Given the fundamental, adversarial nature of our judicial system, some element of partisanship of experts is probably inevitable.

Damages experts

It may even be argued that with respect to some types of issues, where there is in fact no one right answer, adversarial opinions expressed by experts are a good thing in that they help the court to arrive at conclusions for which no rational basis might otherwise exist.

For example, it is completely predictable that a plaintiff's damages expert will file a report projecting lost profits in stratospheric amounts whereas the defendant's expert (usually with identical professional qualifications) will file a report indicating negligible amounts.

In addition, damages experts have become habituated by the work they do to believe that they can claim or must claim expertise in any issue that impacts on damages. But, of course, damages are merely the net impact of a plethora of potential factors which may span all manner of legal, technical, business and economic issues. It would be the rare expert indeed who is truly qualified to speak to all factors which impact on damages. Multiple experts can cover important points but there are financial and time restrictions which make this a counsel of perfection in most cases.

Frankly, it would be difficult for practical justice to be done in most cases unless damages experts are given a fair degree of latitude in expressing opinions on issues that typically arise in the course of their engagements as opposed to issues on which they have specific training or experience.

It might be argued that the competing reports give the court broad parameters within which the damages might be assessed as well as the benefit of a dialectic process through which the merits of various components can be discussed. After all, our entire

system is based on the premise that an adversarial process can co-exist with high professional standards as it applies to lawyers.

I would suggest that as a practical matter, particularly in relation to the calculation of general damages and lost profits, this indeed is the basic approach adopted by our courts despite what the technical rules of evidence might say. The issue in such cases is whether or not the expert has been clear and fair in stating the scope of his or her review, the assumptions upon which the analysis is based and the extent to which the analysis or conclusions are beyond the expertise of the witness. The Canadian Institute of Chartered Business Valuators has developed standards which cover all these matters.[3] Both expert witnesses and counsel would do well to familiarise themselves with these guidelines.

This benign view of adversarial experts has obvious limitations. Even, in the context of evidence on damages, expert evidence can approach the downright fanciful. In one case, I sued the Blue Jays on behalf of a company with exclusive concession rights at Exhibition Stadium. My client's contract had been terminated when the Blue Jays moved to the SkyDome. A very well known and unquestionably knowledgeable baseball personality was called to testify that, if the Blue Jays had continued to play at Exhibition Stadium for the next three years, not only would they not have won a World Series and a couple of Division titles (as they did) but they would have actually have played worse than they did in any of the previous 11 years – with predictably disastrous results for the sale of hot dogs and beer. The trial judge rejected such expert evidence, no matter how unimpeachable its provenance, as simply an exercise in speculating about phantom seasons that were never played under the hypothesised conditions. He awarded damages based on the historical win–loss record of the club.

Investigative and technical experts

This somewhat pragmatic view of experts acting as advocates for a cause with respect to damages is certainly not applicable to experts who conduct investigations and present their findings to a court, for example in a case involving fraud, trade practices or personal injury. It is probably also not applicable where a description and explication of supposedly scientific, trade or technical standards or processes are involved. In situations such as these one might reasonably expect that the conclusions of two equally qualified experts giving expert evidence will be the same or very similar, such that the focus of the discussion becomes the language in which the opinion is couched – often language that has been influenced to some degree by the lawyers in the case.

The adversarial model of expert evidence assumes that experts are readily available to either party in a lawsuit to prove any valid proposition. This is often not the case.

I once had a case in which no industry expert was prepared to come forward and testify to the fact that a certain construction procedure (control joints in exterior masonry walls) was known to be necessary in cold climates at the time my clients' building was built. The defendant engineers had no difficulty finding a blue chip witness who would testify that the procedures were little known at the time of construction. Eventually, I was able to find one retired gentleman whose job it had been to publish technical bulletins for the Canadian construction industry at the time. In fact he had written and published to the industry several articles that pre-dated the construction of the buildings in question on this very point. He had also written an article after a number of buildings had experienced problems due to the lack of control joints. He pointed out that the need for control joints had been referred to in his earlier publications. Unfortunately for me, because he was employed by the industry, he found it necessary to offer the gratuitous comment in his later article that the failure to provide control joints had not in his opinion been 'negligent'. In the end, he was the only witness who was available to me to prove the fact that the need for control joints had been identified in industry-wide publications prior to construction of the building and I did call him as my witness. I will tell you shortly how I dealt with the additional gratuitous comment.

Nor was the 'control joint' case the only case in which I have experienced difficulty obtaining witnesses on technical issues where the most qualified experts with the most direct knowledge of the problem do not wish to get embroiled in a dispute between major industry participants for whom they do most of their regular work. This difficulty in obtaining expert evidence from individuals with direct and current industry knowledge has, as we all know, spawned a cadre of professional expert witnesses who are available for hire in any given case. Their qualifications tend to be of a more generic nature. Their professional and financial success as expert witnesses for hire will depend upon two things:

(1) the extent to which they are perceived by the courts to have high professional standards and to be expressing independent opinions; and
(2) the extent to which they help the parties who hire them win their cases.

Keeping experts within bounds

When I first meet an expert witness to review the work to be done on a case, I am careful to explain to the witness that my own strong preference is that my experts stay well within the bounds of their professional qualifications. I ask them to highlight for me specific issues which they feel are beyond the boundaries of those qualifications so that I can decide how I wish to cover the point, whether through the evidence of

another expert, through an assumption or through the calling of a fact witness in the case who has the necessary qualifications.

I am surprised how often I meet with mild resistance from experts who want to explore issues such as commercial reasonableness, technical viability or legal entitlement, which are clearly outside the bounds of their expertise. Often, the expert feels that the completeness and persuasiveness of their analysis will be compromised if they do not venture, however tentatively, into such issues.

I have been involved as a legal adviser to the Diploma in Forensic Accounting course at the Rotman School of Business at the University of Toronto from its inception and recently have been an adjudicator at the Capstone course in which graduating students submit to a simulated cross-examination. Even though the students are emphatically trained not to venture opinions on matters in which they do not have professional qualifications, they almost always succumb to this temptation in the mock cross-examination. It is fair to say that it is never done intentionally. There is just something in all of us that compels us to express an opinion on any question we might be asked once we are put on a pedestal as an 'expert'.

Any disagreement with an expert on such an issue in a real case can easily and properly be resolved by advising the expert that your retainer letter will provide specific confirmation that the expert's opinion is not required on certain specified issues which are acknowledged to be outside his or her area of expertise.

I also find that it is very useful to deal in the same way with any applicable principles of law which you would like the expert to use in performing the analysis which leads to the expert report. It is only right that you, as the lawyer, should take responsibility for correctly articulating the relevant legal principles and for the applicability of those principles to the case at hand. For example, if it is your position in the law suit that lost profits should not be included as a head of damage and you do not wish your damages expert to calculate lost profits for that reason, you should clearly say as much in the expert's retainer letter. Do not leave it to the expert to defend your legal position as part of his or her report.

Similarly, if you wish a non-legal expert to proceed on the basis of a specific interpretation of a contract, you as the lawyer should take responsibility for that interpretation by providing a specific, written instruction in that regard rather than leaving it to the expert to support your interpretation of the contract as part of his or her report on other issues.

Having your expert witness defend legal (or any other issues) outside his or her area of expertise – even if you are working with an enthusiastic volunteer – is ill advised because it takes away the advantage the expert will have when being cross-examined.

The 'ultimate issue'

I do not want to embark on a debate as to whether the prohibition on an expert opining on the 'ultimate issue' in the case still exists in legal theory. I would say that, as a practical matter this issue really turns on whether or not the 'ultimate issue' is squarely within the expert's field of expertise such that the opinion is of real value and assistance to the court. If the 'ultimate issue' is purely an issue of law or even a question of mixed fact and law, an expert's opinion will be of little value.

Indeed, this is how I tried to solve my problem regarding the expert who had lots of good evidence to give supporting my position on 'control joints' although he had written in one article that he did not consider the absence of control joints in buildings of a certain age to be 'negligent'. I led all the helpful evidence in chief and (contrary to accepted wisdom) I left it to my opponent to bring out the comment about lack of control joints not being negligent. In re-examination, I reminded the witness that he had provided the court with extensive evidence as to his qualifications with respect to building construction in general and control joints in particular. I then asked him what qualifications if any he had in the law of negligence. He answered that he had none. We received a new offer immediately after that evidence and settled the case.

I really have no idea whether the approach would have worked with the judge. But, in theory, if we really believe that expert witnesses' evidence should only be heard on matters on which they are qualified we should not be too concerned that they have the 'wrong views' on other matters, except possibly to the extent that such other 'wrong views' provide some evidence of bias or lack of independence.

Fairness and bias

This leads me to my next point about expert witnesses. Although they may know more than we do about their specific fields, those of us who toil in the field of justice, whether as lawyers, judges or arbitrators, have one skill which we like to think is more developed than in the general population. That is an instinct for fairness and the opposite of fairness – bias or partiality. When confronted with an expert with formidable qualifications in some recondite field of human knowledge, it may seem an impossible task to prove the expert wrong. Indeed, the best one might hope for is to counter the evidence of the opposing expert by calling your own contradictory expert, thereby creating doubt and confusion in the mind of the arbitrator or judge. This may not be enough in most cases and, in any case, most of us set our sights a little higher than that.

So cross-examination of the opposing expert is necessary. But taking an expert on in his or her own

field of expertise can be a daunting prospect. One reassuring thought is that it is not always necessary to prove the expert wrong if one can show that he or she is biased.

In domestic Canadian arbitrations and court proceedings the best road map for any cross-examination as to the lack of independence (or bias) of an expert is to be found in the case of *The Ikarian Reefer*[4] which is discussed at greater length in my paper on Expert Witness Evidence in Civil Cases. The key passage reads as follows:

'The duties and responsibilities of expert witnesses in civil cases include the

following:

1) Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation.
2) An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.
3) An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4) An expert witness should make it clear when a particular question or issue falls outside his expertise.
5) If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.
6) If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.
7) Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.'

Most of the points on this list are key indicators of the degree to which an expert's evidence is truly independent and free from bias notwithstanding that the expert is testifying for a particular side which has presumably remunerated him or her. The very best professional expert witnesses are well aware of the standards and strive to meet them. However, even experts who testify often do not always adhere to these principles.

Expert witnesses who have not recently testified in our courts or who come from other litigation cultures may also be unaware of the standards that have recently gained currency in England and Canada. But both counsel and expert witnesses who have recent experience in our courts recognise that a failure to meet these standards will only result in the evidence of the expert being discounted or disregarded.

I like to take positive steps with each expert witness who I retain to ensure that there is a common understanding and set of expectations around these issues. I make it clear that the expert must be prepared to justify all of the analysis and conclusions with work that he or she has independently carried out, on the basis of assumptions which are explicitly stated. I make it clear that I expect the expert to tell me whether the factual and documentary information that has been provided is sufficient to support the expert's work. Although it will obviously be necessary for me to have an ongoing discussion with the expert regarding the work in progress, including the provision of comments on draft reports and possible revisions, I make it clear that the expert must take responsibility for the final content of his or her report and testimony. Even though the law regarding disclosure of pre-trial communications between counsel and an expert who testifies at trial is not completely settled, I advise the expert that I prefer to operate on the basis that all of our communications are subject to disclosure to the court and that I expect the expert to be able to independently explain and justify any changes that are made to the analysis or the report as a result of our communications. My experience has been that when an expert proceeds on this type of an understanding, any cross-examination that is attempted on pre-trial communications tends to fall flat because the expert is able to explain the rational process by which previously imperfect ideas were rejected in favour of the final, improved conclusions.

The foundations

Such measures are also intended to foreclose the second most promising area for an attack on an expert after an attack on independence. I am speaking of an attack on the foundations of the expert's report. Much of this is implicit in the *Ikarian Reefer* principles and some of the other comments I have already made above. A few more observations may be added specifically in the context of cross-examining an expert.

The most highly qualified, unbiased and meticulous expert may give evidence that proves to be worthless if the foundations upon which the evidence is given are weak. Very often, this is the fault of instructing counsel. As lawyers, we have a strong impulse to control the evidence that our witnesses give. We may do this

in order to keep expert evidence within the bounds of the client's financial resources. Just as often, we seek to control the evidence itself by confining the work of the expert in a way which will produce the desired results. But, in cross-examination, an expert's evidence may be easily shown to bear no relationship to reality if the expert has failed to review key documents which bear on his or her conclusions, or if the expert has failed to independently investigate the conditions upon which his evidence is based, or if material assumptions the expert has been asked to make are proved to be untrue.

There is nothing more disconcerting to counsel than to watch his or her expert abandon ship when confronted with facts that the expert failed to consider. But there is little an expert can do against an attack based on facts or documents of which they were not made aware.

Experts and arbitration

Is there anything different about the phenomenon of expert evidence in the context of arbitration? I put this very question not long ago to a seasoned expert witness who had testified in both litigation and arbitration. The answer corresponded to something I myself had observed. In litigation, there is the sobering thought that must occur to every expert that an adverse finding on independence, qualifications or credibility will be public and potentially career limiting. In arbitrations, the lack of a public result may encourage some experts to take a more aggressive stance – to practise closer to the edge on some of the issues I have mentioned. In my opinion, it is an ill-advised calculus.

The selection process which is involved with arbitrators generally ensures that the tribunal consists of members, whether retired judges or senior counsel, with a high degree of sophistication and experience in the type of dispute which is before them. If anything, less cross-examination is required in arbitration than in a court trial to bring out the same points. Furthermore, although arbitration proceedings are not public, in most arbitrations of any substance, the members of the legal profession who are present form an adequate audience for reputational purposes. Indeed, when one considers the presence of other members of the same profession at the arbitration hearing, whether in the role of other experts, employees of the parties or as tribunal members, any expert should be well motivated to perform to the highest standards.

The expert as arbitrator

The possible presence of experts on the arbitral tribunal itself leads to another set of potential differences between arbitration and litigation. My own view is that all of the comments and observations made above apply with greater force where the adjudicator is an expert. This is particularly so where the tribunal member has precisely the same qualifications as the experts who are giving contradictory evidence. An expert adjudicator can be very impatient with members of his or her own profession who are not measuring up to the appropriate standards, either in terms of technical analysis or in terms of independence.

I had this very experience in an arbitration relating to closing adjustments on the sale of a business. The arbitrator was an accountant who chastised the accounting experts from both sides for having abandoned professional standards in favour of a partisan use of their professional skills.

A problem can arise where a tribunal member who possesses expertise in a field which is material to the dispute chooses to apply his or her own expertise in resolving that issue. Of course, the parties may choose to have an expert tribunal precisely for that reason. However, unless it is specified in the arbitration agreement that the tribunal may determine the matter by using its own expertise, arbitrators are expected to decide disputes on the basis of the record that is presented to them at the hearing.

This issue arose in the recent case of *IMI v Xerox*[5] in which that principle was reaffirmed with the qualification that any tribunal member may consider any portion of the record (whether or not it was specifically referred to in evidence) provided disclosure is made to the parties of the fact that that review is taking place and the purpose for which it is being done. As long as the parties have an opportunity to lead evidence or make submissions on the matter which is raised as a relevant concern by a tribunal member, there is no basis for setting aside an award merely because a tribunal member has applied his or her own expertise to an issue in the case in considering a portion of the hearing record. The case would clearly be different if a tribunal member were to make independent investigations or go outside the record to find facts that are not in evidence and then were to base his or her decision on such extrinsic information.

Another key point to be borne in mind when appearing before tribunal members who are not trained in the law is that they may define the problem or the core of the dispute differently from an adjudicator with a legal background. There is the old adage that if the only tool you have is a hammer every problem looks like a nail. To be fair, this adage probably applies equally to lawyers and non-lawyers. A lawyer is more likely to define the problem in legal terms whereas a non-lawyer is more likely to define the problem in non-legal terms. A mixed tribunal, which consists of both lawyers and non-lawyers, has the advantage that multiple perspectives may be brought to bear on the dispute. However, it is an unsafe assumption that the dynamics of any given panel will always be that a non-legal member of the tribunal will defer to a legal member on legal points. Therefore,

my recommendation is that legal arguments should be supported by commonsense explanations and appeals to basic fairness to a greater degree than would be the case when arguing before a tribunal that consists entirely of lawyers or retired judges.

All tribunal members, whether lawyers or non-lawyers, have the same desire to do the right thing and to arrive at a fair and objective determination of the dispute. They may process the information differently according to their professional backgrounds, but I am convinced that all tribunal members are alive to the basic issues that I have mentioned in this article as they relate to expert witnesses.

Additional tools

The flexibility of the arbitration process creates additional tools for dealing with expert witnesses which are not present or may not be as easy to use as in normal litigation. One example relates to a dispute which involves issues that are 'in the eye of the beholder' even though they are susceptible to some form of expert evaluation (eg issues relating to compensation, lost profits, valuation of intangible assets, etc). In such cases, the use of a final offer selection process which limits the tribunal to making an award by agreeing with one side or the other but not allowing it to pick its own number can provide a strong motivation to the parties and their experts to be reasonable and to try to occupy 'the middle ground'. Although Rule 52.02 of the Ontario Rules of Civil Procedure allows for the appointment of an expert by the court, thus presumably putting to rest the issue of independence, the use of this procedure might be easier to achieve in arbitration. In arbitration, the entire process is case managed from beginning to end by the same tribunal.

This aspect of continuity and interactivity between counsel and the tribunal should make it much easier for the parties and the tribunal to gain each other's trust and work in a cooperative manner to ensure that the tribunal receives the independent advice it needs to do justice in the case, particularly on generic technical issues on which the parties may not be in substantial dispute. The use of experts appointed by the court or by arbitral tribunals is more common in civil law litigation and in international arbitration, which tends to be based more on civil law norms. The trend is towards domestic arbitration in Canada adopting many of the more efficient procedures currently used in the international sphere and we may see greater use of the tribunal appointed expert in the future.

Another technique that does not yet appear to be extensively used in Canadian litigation, but is coming to be more commonly used in both international and American arbitration, is the examination of experts from both sides on a given topic as a group at the hearing. The experts are required by the tribunal to confer before the hearing and draw up a list of those matters on which they agree and those on which they disagree. They are then examined on the latter, *en banc,* at the hearing. I have heard from those who have used this technique that when experts are talking directly to their peers they tend to very quickly minimise as opposed to exaggerate their differences. Of course, this flies directly in the face of the desire of most counsel to control the evidence presented by their witnesses, at least in the first instance. There is also the challenge of choosing witnesses not only for their professional competence but also for their ability to stand up to their more aggressive peers. Finally, this approach clearly requires an extremely well organised and sophisticated tribunal to ensure that the group session is truly useful. Although I have not personally experienced this approach, I must say that it seems to fit with the overall informality, flexibility and pragmatism which are the hallmarks of commercial arbitration. Now it is just a matter of finding counsel who want to try it.

Conclusion

To the extent that expert witnesses can provide information and analysis which is not otherwise available to the tribunal, they are an indispensable feature of any case involving technical issues. The adversarial nature of the arbitration process (as with litigation) comes at a price in terms of having to deal with experts who go beyond the bounds of their expertise or use their expertise improperly and in a partisan manner. Fortunately, the tools exist in both litigation and arbitration for exposing experts who fall into that trap.

Notes

1 This article is an edited version of a paper given at the Conference on Advanced Advocacy in Arbitration of the Law Society of Upper Canada and the Advocates Society, 30 April 2007.
2 Moldaver J (as he then was) in *R v Melaragni* (1992), 73 CCC (3d) 348.
3 Canadian Institute of Chartered Business Valuators, Standards Nos 310, 320 and 330.
4 National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) [1993] 2 Lloyd's Rep 68 (QBD (Comm Ct)).
5 *Xerox Canada Ltd and Xerox Corporation v MPI Technologies, Inc and MPI Tech SA*, November 30, 2006, Ontario Superior Court of Justice, C Campbell J.