EXPERT EVIDENCE IN EMPLOYMENT LITIGATION AND THE NEW CIVIL RULES OF COURT

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Outline

Introduction

The frequency of use, and the range of issues on which expert evidence is sought and used in litigation has increased at an enormous rate in recent years – in all areas of law, including employment litigation. In a recent review of Ontario and British Columbia cases during the 2007 calendar year for a 2008 CLE paper we were doing on expert evidence, we found experts had testified in approximately 300 cases, and their expertise covered an astonishing array of issues - computers, chemistry, motor cycle gangs, the drug trade, mental health, weapons, alcoholism, psychiatry, orthopedic surgery, occupational therapy, appraisals, internal medicine, valuations, legal fees, negligence in relation to fires, anthropology, linguistics, demography, ecology, ethnobotany, custody and access, vocational testing, and marine surveying.

The new Civil Rules dealing with expert evidence are intended to bring a measure of control to the use of experts and the impact they have on the length and cost of trials.

The actual Rules dealing with experts are Rule 5-3 - Case Planning Conference Orders; and the main expert evidence Rule Part 11, Rules 11-1 to 11-7. I have only referred to the main changes affecting experts, based on my judgment and that of others familiar with the Rules and the amendment process. The text of these specific Rules can be found as an appendix to this paper.

Our new Rules have been greatly influenced by the English *Civil Procedure Rules* ("CPR"), in effect since April 26, 1999. The provisions of the CPR dealing with expert evidence can be found in Part 35, and a separate Practice Directive 35, is available on the Ministry of Justice website www.justice.gov.uk./civil/procrules. Case law on the rules is available on the public site – British and Irish Legal Information Institute (BAILII). An excellent introduction to these by a medical expert can be found in Dr. K. Rix, "The New Civil Procedure Rules", (2000) 6, *Advances in Psychiatric Treatment*, 219-225 (electronic version http://apt.rcpsych.org).

The impact of expert evidence on litigation costs in the U.K. was recently addressed by Jackson, L.J. in *Review of Civil Litigation Costs: Final Report*, December 2009, particularly at pages 379 to 385 (www.judiciary.gov.uk/about_judiciary/cost-review).

Views differ on this point, but mine is that there are six significant changes to the Rules on expert evidence:

1. Case Planning Conference Orders;
2. Appointment of Experts;
3. Duty of Experts;
4. Content of Expert Report;
5. Service of Expert Reports; and
6. Production of the Expert File.

Most lawyers do agree however that the changes on expert evidence constitute one of the most important of the many Rule changes. Some have even referred to the expert evidence changes as constituting a paradigm shift. Whether it will eventually qualify as a paradigm shift remains to be seen.

1. First Basic Change: Case Planning Conference (CPC) Orders (Rule 5-3)

This is the first of the six basic changes. There is a broad consensus that the impact of this Rule on expert evidence will be substantial. This is perhaps echoed in Michael Watt's presentation on the CPC generally a few moments ago.

Subrule 1(k) deals with experts. It is important to note that orders can be made under this Rule whether or not they have been applied for by a party. Orders on five issues are possible here:

- that the expert evidence on any issue be given by a jointly instructed expert;
- specifying the number of experts each party may call;
- requiring the party's expert to confer before the service of their reports [compare to the existing rule 35(4)(k)];
- setting a date by which an expert report must be served on the other parties; and
- respecting the issues on which an expert may be called.

Please note as well that if a CPC is held, a Court is unlikely to permit expert evidence at trial unless provided for in the CPC. [Subrule 11-1(2)]

If a CPC order has been made with respect to expert witnesses, you may wish to consult an important English Court of Appeal decision before seeking agreement of opposing counsel to vary that order without the consent of the Case Management Judge.

In *Stevens v. Gullis,* [2000] 1 ALL ER 527 (Court of Appeal, Civil Division), the trial judge made a very detailed seven-point order with respect to expert evidence in a construction dispute. The order included a joint meeting of experts; a provision that the experts prepare joint memoranda of matters agreed or disagreed; and an exchange of expert reports; all with attendant deadlines.

One expert retained by the defendant, Mr. S.J. Isaac, failed to comply with the order and was the subject of a specific and personalized order. When he still failed to comply, and despite the fact that his evidence was crucial to the defendant, the Court held:

> In my view it is in the interest of the administration of justice that Mr. Isaac should not give his evidence in the circumstances which I have outlined. It is essential in a complicated case such as this that the Court should have a competent expert dealing with the matters which are in issue between the defendant and third party. Mr. Isaac, not having apparently understood his duty to the Court and not having set out in his report that he understands it, is in my view a person whose evidence I should not encourage in the administration of justice (page 532).

He was debarred from acting as an expert witness, with the result that the third party's case succeeded before the main trial began. Despite the trial court's order, counsel for the parties then consented to Mr. Isaac's evidence being admitted.

On appeal Lord Woolf MR. stated:

> Under the CPR the court has power, as I have indicated, to control the evidence which is to be placed before the court. It would be wholly wrong, where a judge has appropriately exercised his discretion in relation to that matter, for the parties to override that discretion merely because the parties are content to allow the matter to be dealt with otherwise. The order of the judge in the proceedings between the claimant/builder and the defendant should stand and Mr. Isaac should not be allowed to give expert evidence (page 535).

Given this outcome, even if the parties do consent, it appears that a formal order is necessary and advisable.

Stevens v. Gullis is mentioned in the Alberta Court of Queen's Bench treatment of a similar issue of the duty of an expert to the Court: *Jacobsen v. Sveen* 2000 ABQB 215.

2. The Second Basic Change – Appointment of Experts (Rule 11-3 to 11-5)

There are three methods under the Rules for appointing experts:

- joint appointment of experts;
- party appointed experts; and
- court appointed experts.

Joint Experts (Rule 11-3)

The actual authority for the appointment of a joint expert is found in Subrule 5-3(k)(i). Rule 11-3 provides for the procedure for dealing with joint experts.

Subrule 11-3(1) provides for eight issues to be resolved before the expert is appointed including

- the issues on which the expert opinion is to be sought;
- facts or assumptions of facts agreed to by the party or not agreed to by the party;
- the questions to be considered by the expert;
- the deadline for preparation; and
- the responsibility for fees and expenses.

If there is disagreement on the identity of the joint expert or the terms of the appointment, these issues can be resolved by an application to the Court under Subrules 11-3(3) to (6). Once these matters are resolved, the parties must enter an agreement reflecting the terms. That agreement must be signed by each party to the agreement and the joint expert. A copy is then to be served on every party of record who is not a party to the agreement.

Each party, including the appointing party, has the right to cross-examine the joint expert at trial [Rule 11(3)(10)].

There is a good deal of skepticism about the value of these provisions. At the Continuing Legal Education Conference held here on April 26-27, 2010 one of the speakers on the new expert evidence rules, Mark Kazimirski, captured the difficulty when he described the use of joint experts as "contrary to our culture". He pointed to some fifty personal injury cases in his practice in which ICBC refused to agree on any expert, and indeed in many cases, would not agree even to the type of expert.

Of course opposing counsel and parties in employment litigation are always much more reasonable, aren't they?

I have attempted agreement on using joint experts on perhaps 20% of my employment law cases over the past five years and only succeeded in one. That was a case in which my client had mantle cell lymphoma, a rare type of non-hodgkins lymphoma. Once the

two counsel determined there was really only one specialist in B.C. with the necessary qualifications, and that she was truly an internationally recognized expert, agreement came fairly easy.

One of the more obvious difficulties in using a joint expert flows from the need to prepare a joint statement of facts. I suspect we have all had the experience of spending many hours carefully drafting a statement of facts and attempting to negotiate agreement, only to find at the end of the day that no final agreement could be reached.

There is no question however, in theory, that the appointment of joint experts would dramatically shorten the trial and dramatically reduce the cost. One can speculate that one of the few areas in which we may have some success in the use of joint experts would be areas in which experts would rely on data from a common source such as evidence of an economist, an actuary, or a statistician.

In an excellent article on the topic, chartered accountant Peter Weinstein suggests joint experts may also be useful in disputes with damage quantification components, commercial litigation, estate litigation, or shareholder disputes: see "Getting the Most from a Jointly Retained Expert: *The Lawyers Weekly*, February 8, 2010, page 21 [available at www.lawyersweekly.ca].

Appointment of Own Experts (Rule 11-4)

Parties may, of course, appoint their own experts but should bear in mind again the provisions of Rule 11-1(2) which require that the matter be dealt with by the CPC judge if a CPC is held.

Appointment of Court's Own Expert (Rule 11- 5)

The substance of the new Rule 11-5 will be found in the old Rule 32A with very few changes. The CLE *Civil Rules Transition Guide* points out that under the new Rules there is no provision for a party to apply for a Court appointed expert as there was under the old Rule 32A(1). It appears on the face of it that the Court may appoint an expert on its own initiative only. That may not be a difference of any significance.

Generally speaking, this is not thought to be an important provision. Recent cases have held for example, that it is a power that could only be exercised where the issue is "reasonably narrow": *Hiebert v. Hiebert*, 2006 B.C.S.C. 231, at paragraphs 19, 20, and 22. The Court has also held that an independent expert should not be appointed unless "all other avenues of investigation have been exhausted": *Shenzhen City Luohu Industrial Development Co. v. Yao* (1999) 86 A.C.W.S. (3rd) 584 at paragraph 24.

3. The Third Basic Change: Duty of Experts (Rule 11-2)

This subject is dealt with in Rule 11-2, and is intended to deal with the issue of experts who see themselves, or who act as, advocates.

The wording of the new Rule 11-2 is extremely important:

> 11-2(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.

The report must also:

- Include the certification that he or she is aware of their duty to assist the Court and not be an advocate;
- That he or she has made the report in conformity with that duty; and
- That he or she if called on to give oral or written testimony, gives that testimony in conformity with the duty.

The issue of 'expert advocacy' has been one that has plagued the Courts for years and remains an issue to this day. Perhaps the most compelling illustration of the problem with expert advocacy came from the testimony of Dr. Charles Smith, an Ontario pathologist, who in a recent public enquiry acknowledged that his expert opinion saw a number of innocent parents falsely accused of killing their children unjustly jailed. In his testimony, he stated that he did not realize it was his job to be impartial as a pathologist but rather believed:

> It was my role to support the crown attorney. I was there to make a case look good.
>
> (L. McGrady, "Using Experts in Employment Law" (Continuing Legal Education, April 2008 at page 13).

Surprisingly, that attitude persists, as can be seen from the recent cross-examination of an architect James F. Bussey providing expert evidence in *United City Property v. Tong*, [2010] B.C.S.C. 111 at paragraph 87. The Court cited this exchange in cross-examination, before rejecting the evidence entirely:

> Q. You see yourself as your client's advocate; isn't that correct?
> A. Of course I do.
> Q. And you see yourself as your client's advocate here today?
> A. Yes, I do.

That case incidentally contains an exhaustive review of the recent law on this issue, in paragraphs 35 to 70.

An excellent summary of the current English law can be found in *London Fire and Emergency Planning Authority and Halcrow Gilbert Associates Limited et al* [2007] EWHC 2546 (TCC). There the Court stated of the expert witness Evans:

> In my view Mr. Evans' written and oral evidence was partial, biased, and on occasions misleading to such an extent that it could not be described as independent. The errors in his written and oral evidence cause me reluctantly to question not only his reliability but his overall competence as an expert (paragraph 64).

Of another expert witness, the Court had this to say:

> If it had not been for the cross-examination of Mr. Walsh by Mr. Taverner Q.C., the Court might well have been misled into concluding that LFEPA's claim was close to a million pounds more than in fact it legitimately was (paragraph 77).

4. The Fourth basic change - Content of Expert Report (Rule 11-6 (1) and (2))

There are very significant changes to the content of the expert report. An expert's report must be signed and must contain the certification as to the expert's duty in Rule 11-2. In addition, it must contain the following:

(a) the expert's name, address, and area of expertise;

(b) the expert's qualifications, employment and educational experience in their area of expertise; [the assertion of the qualifications is evidence of them - Rule 11-6 (2)];

(c) the instructions received;

(d) the nature of the opinion being sought and each issue in the proceeding to which the opinion relates;

(e) the expert's opinion respecting each issue and, if there was a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range;

(f) the expert's reasons for his or her opinion including,

(i) a description of the factual assumption on which the opinion is based

(ii) a description of any research conducted by the expert that led them to form the opinion; and

(iii) a list of every document, if any, relied on by the expert in forming the opinion.

The most surprising feature of this Subrule is of course (e), the range of opinion on the issue or matter.

It can safely be said that there is a range of expert opinion on almost every issue in litigation. Requiring the expert to identify those opinions will expand the report to encyclopedic lengths. A number of persons have suggested that in order to make the system work that must be simply ignored or otherwise we would be facing a 250-page report. This doesn't seem like a particularly wise course, given the sanctions available to the Court and the opposing party.

In a letter to the Rules Revision Committee on November 13, 2009, the Trial Lawyers Association made a very sensible suggestion - that Rule 11-6(a)(f) only be applicable to responding and rebuttal reports. Thus, the initiating report of an expert would not have to include a review of a range of opinions. If the responding expert wishes to explain that the difference in opinion he or she expresses arose from such a range of opinion, he or she could do so. Then the initiating expert would have the opportunity to provide a rebuttal report concerning those matters. The analogy was drawn between that approach and the approach we are all used to akin to pleadings.

The critics have also pointed out there are few issues in medicine for which there is not a range of opinion.

> There is the potential for a lengthy and confusing discussion that will not assist the Court in understanding the medical issues, increases the time required to produce the report, and increases the length of the report.
>
> (November 26, 2009 Letter from Dr. H.A. Anton to Chair Rules Committee, Trial Lawyers Association).

5. The Fifth Basic Change: Service of Expert Reports (Subrule 11-6(3))

Service is now required eighty-four days before the scheduled trial date unless the Court orders otherwise.

The expert report must be served on every party of record along with written notice that the report is being served under this rule.

Responding reports must be served at least forty-two days before the scheduled trial date (11(6)(4)).

Supplementary reports where there is a jointly appointed expert must be provided as soon as practicable (11(6)(5)).

If after a report of one's own expert is served, that opinion changes in any material way, a supplementary report must be prepared and served as soon as practicable on every other party of record (11(6) and (7)). It must set out the change in the expert's opinion and the reason for it.

6. The Sixth Basic Change: Production of the Expert File (Rule 11-6 (8))

The following documents must be promptly provided to the party of record requesting them after service – Rule 11-6 (8)(a):

- Any written statement or statement of facts on which the expert's opinion is based.
- Any record of any independent observations made by the expert in relation to the report.
- Any data compiled by the expert in relation to the report.
- The results of any tests conducted by or for the expert or any inspection conducted, if relied on by the expert in forming his or her opinion.

Rule 11-6 (8)(b) requires a party, when asked by another party of record, to make available the contents of the expert's file relating to the preparation of the opinion set out in the expert's report. This must be done promptly after receipt of the request if the request is made fourteen days before the trial date, or in any event, at least fourteen 14 days before the trial date.

Conclusion

Early assessments of these changes are mixed. In my view, the first change – requiring the CPC Judge to make an order dealing with the experts a party intends to call – can only be beneficial to the process.

The second change - dealing with the expert appointment – would not change much in the long run, in my view.

The third – dealing with the expert's duty - has the potential for real change and real improvement. I say that despite the fact that several counsel have commented that it does not really constitute a change at all.

The fourth - the content of the expert report - has the potential of unraveling any improvements other changes achieve. It requires significant amendment.

The fifth – extending the time of service is a significant improvement.

The sixth – fuller production of the expert file is in my view a generally positive change. It serves the objects of greater transparency and facilitates what has been called the process of ‘front–end loading’.