CHAPTER 10

Problematic Procedural Issues

THE *VOIR DIRE*

UNLESS THE SUBJECT of agreement by the opposing party, an expert witness must first be qualified as such upon a *voir dire* regarding qualifications.

> In some cases it may be possible to rule on the admissibility of the proposed evidence on the basis of counsel's submissions alone. However it may at times prove necessary to hold a *voir dire* in order to properly consider all relevant factors. Where the trial is before a jury and the questions of admissibility cannot be clearly determined in a summary fashion, it may indeed be prudent to scrutinize the evidence during the course of a *voir dire* before admitting it. While in some cases the ruling can be made early in the proceedings, in other cases, it may be only later in the trial that the value of the proposed evidence can be properly assessed.[1]

Whether the *voir dire* is done in the absence or presence of the jury will depend upon the nature of the proposed evidence and expert and any prejudice that might be occasioned to the adducing party by an unsuccessful application. It is generally done in the presence of the jury when only qualifications are in issue since the jury is entitled to hear such evidence in any event as relevant to its assessment of the weight of the evidence. If the witness is qualified as an expert, the evidence heard on the *voir dire*, both in chief and cross-examination, will

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1 *R. v. A.K. and N.K.* (1999), 27 C.R. (5th) 226 (Ont. C.A.).

be useful to the jurors in determining weight, and if the witness is not qualified, generally no harm is done. Of course, if an unsuccessful attempt to qualify the witness will not be harmless to one or other party in the particular circumstances, a request can be made to hold the *voir dire* in the jury's absence.

The party tendering the witness has the onus to demonstrate admissibility. The tendering counsel adduces evidence in chief on the *voir dire* regarding the witness's qualifications and the areas of proposed expert testimony. The opposing party has the right to cross-examine the witness regarding the issues on the *voir dire*, including qualifications.[2]

HEARSAY EVIDENCE

THE RELATIONSHIP BETWEEN the hearsay evidence rule and expert opinion evidence remains somewhat problematic. It is clear that expert evidence can be based on technically hearsay evidence, as it will almost inevitably be, but it is also clear that expert evidence does not render hearsay evidence admissible.[3]

Courts have stated that an expert opinion can be based on a *mélange* of admissible and inadmissible information, although there must be some admissible evidence presented to establish the factual foundation on which the expert opinion is based.[4]

Further, the expert can describe both the admissible and the inadmissible information that he has relied on to explain the foundation for his opinion to the trier of fact. The inadmissible information is received solely to enable the trier of fact to understand and assess the expert opinion. It cannot be relied on to support the truth of the facts it asserts.[5]

Also in a jury trial, the judge must warn the jury that the more the expert relies on inadmissible information, the less weight may be given to the opinion. The Supreme Court of Canada stated in *R. v. Abbey*[6] that although an opinion based on inadmissible information may be admissible, "[b]efore any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist . . . through properly admissible evidence."

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2 See generally Robert White, *The Art of Using Expert Evidence* (Aurora, ON: Canada Law Book, 1997) at 40.

3 *R. v. Mathieu* (1994), 90 C.C.C. (3d) 415 (Que. C.A.), aff'd [1995] 4 S.C.R. 46.

4 *R. v. Abadom* (1982), 76 Crim. App. R. 48 (C.A.); *R. v. Moase* (1989), 51 C.C.C. (3d) 77 (B.C.C.A.).

5 *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. Babcock* (1984), 16 C.C.C. (3d) 26 (Alta. C.A.).

6 [1982] 2 S.C.R. 24 at 39.

Logical consistency is not a hallmark of these disparate pronouncements. The best one can say is that the expert opinion is viewed as having a separate existence from its factual underpinnings, so that the former can be technically admissible even if the latter is inadmissible hearsay. However, though admissible, it will be of no weight. How weightless evidence is nevertheless admissible has never been made clear.[7]

PRESENTING THE EXPERT EVIDENCE

THERE IS A certain preferable logical development to the direct examination and cross-examination of expert witnesses. First, the expert is introduced and her involvement in the case — the issue on which she is going to opine — is explained. How the witness came to be retained and the purpose of her evidence is brought out.

It is generally useful at the outset to make clear the issue that is going to be addressed in evidence, at least in summary form, so the trier of fact does not have to wait until the end of the evidence to hear its essence. Thus, it should be brought out that the witness will be providing an opinion "on the accused's mental state at the time of the killing" or "what the accused's blood-alcohol level was at the time of the driving," even if the actual opinion is postponed until after the following areas are dealt with.

The witness's qualifications relevant to the particular area in issue should be brought out to emphasize the credibility of the opinion. Specific expertise presented in a pleasant manner is preferred. An endless repetition of degrees, publications, professional memberships will dull the interest of the keenest judge or juror. Articles directly on point, relevant practical experience, any qualifications lacked by the opposing expert, and previous court appearances should especially be emphasized.

Next in logical order is the opinion itself. After the opinion, any underlying theory should be set out to assist the trier's understanding. The theory or underlying principles are the logical link between the data or investigation carried out and the opinion reached.

If the foundational facts are not in dispute, they can be expressed by the expert witness without special qualification. But if they are in dispute, then the expert witness is in effect assuming or hypothecating those facts in forming his opinion. To keep clear the logic of the situation, the device of the hypothetical question is utilized. The expert witness is questioned by the examiner along the

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7 *R. v. Fontaine*, [2005] M.J. No. 230 (C.A.).

lines of "Assuming that . . ." followed by the facts the examiner hopes will be accepted.[8]

After the opinion and theory have been explained, the expert can be taken in detail through the investigation and resulting data and any calculations performed. The data should be presented in a comprehensive and understandable fashion. Any assumptions made will also be set out at this point. The scientific principles involved in general and in particular should be set out, with references, as well as the premises relied on. If testing is involved, issues of methodology should be described, explained, and justified.

Facts or information obtained first-hand should be so delineated, and any special techniques utilized explained and justified. Facts or information from other sources should be described and explained. Any potential sources of reliability can be identified and protections taken described, including protections against falsification. If an opposing expert has or will be giving contrary opinions, it is useful at this point to differentiate the other expert's theory or assumptions or, rarely, data, to explain the divergence of opinion.

The witness should be prepared to testify in plain language, avoiding long speeches, and using examples and analogies that will be persuasive to the trier of fact. Visual aids may be useful. If the testimony covers a lot of ground, internal summaries at various points will be a useful repetition of important points and allow listeners to recognize a change of subject matter.

Since expert evidence is an opinion, a conclusion, its assessment requires complete knowledge of the facts and principles leading to it.

> Before a Court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless.[9]

In some cases, the expert witness may be able to testify to such matters, such as pathological findings or physical examination results from personal knowledge. In other cases, the expert witness has only hearsay knowledge of foundational facts. Then the foundational facts must be proved by admissible evidence from other witnesses, though they can be assumed by the expert during his testimony.

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8 See generally Earl J. Levy, *Examination of Witnesses in Criminal Cases*, 4th ed. (Toronto: Carswell, 1999) c. 14, "The Expert Witness" at 293–306.

9 *R. v. Turner* (1974), 60 Crim. App. R. 80 at 82 (U.K.C.A. (Crim. Div.)). See generally Levy, *ibid.* at 289.

The examination in chief will generally conclude with an effective and (you hope) memorable restatement of the opinion.

CROSS-EXAMINATION OF EXPERT EVIDENCE

CROSS-EXAMINATION OF EXPERTS requires first and foremost a knowledgeable counsel, educated through reading and studying the subject matter, especially all the relevant articles and other items listed on the expert's résumé. Counsel must also be educated by her own expert witness.

If the witness has published in the area relevant to the issues at trial, counsel must carefully review these publications to see if the witness has expressed opinions that are contrary to what the witness is expected to express at trial. If the witness has not published in the area relevant to the issues at trial, this point should be stressed in the cross-examination.

All expert witnesses should be fully researched in the legal databases, such as Quicklaw, to locate prior cases or decisions in which their names have been mentioned. Other online databases, such as newspapers, can also provide important information or even quotations or comments by the witness that may be of use. Communication with other counsel involved in previous cases in which the witness has testified may secure transcripts of previous testimony of the witness, which may provide valuable materials for cross-examination.

An interview with an opposing witness is invariably a useful exercise. A good expert witness will make clear the limitations and qualifications of his opinion. A bad expert witness will say things that with investigation and reflection can be extremely useful in undermining his credibility.

Areas of attack in cross-examination[10] include first of all the witness's credentials. Any missing credentials or credentials lesser in status than one's own expert's credentials should be stressed. A telling argument will always be if the qualifications of the other side's expert in the area in question are far less impressive than that of your own expert's qualifications. It will also tell against credibility if the witness has overstated or misled the court as to her qualifications. Further, the importance of *relevant* credentials should not be overlooked. If the majority of the expert witness's expertise is in a field unrelated to one or more of the issues upon which she has been called to testify, that fact should be emphasized. One author wrote:

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10 See generally Levy, *ibid.*, c. 14, "The Expert Witness" at 306.

It is common for prosecutors deliberately to mislead juries by introducing testimony of the over-qualified expert, thereby lending specious dignity to a questionable case.

If asked by his family physician to go to the Mayo Clinic for the simple purpose of having his blood pressure taken, any juror would instantly and instinctively object to such absurd medical overkill. The Mayo Clinic is no better qualified to take one's blood pressure than is the average nursing student. Yet, that same form of overkill frequently appears impressive and logical when performed by the prosecution in a criminal case.

. . .

Accordingly, two fundamental questions to be considered by the defense lawyer faced with a prosecution expert should be:

1. To what degree, if any, is this witness's education relevant to the opinion which he will render in this case?
2. On what scientific principles does he rely, and at what stage of his training was he familiarized with the principles?

It is sometimes very effective to force the witness to concede before the jury that his impressive statement of qualifications was almost completely irrelevant to the opinion which he rendered, thereby demonstrating to the jury that in a very real sense it has been "conned" by the prosecution.[11]

Cross-examination can also bring out favourable information. An honest expert witness will concede appropriate points.

The witness's credibility can be attacked by challenging her impartiality if grounds for such challenge exist. Fees being paid and her history of testifying are relevant matters.

In cross-examination, omissions may render an expert witness vulnerable, such as omissions to perform certain tests or omissions to carry out her investigation in accordance with applicable standards.

Obviously, cross-examination of the witness will test the validity of the opinion if the assumed facts, or some of them, are not borne out, or if other additional facts are found. Cross-examination may consist of changing the information or data upon which the opinion is based. Assumptions can be questioned and changed. Relevant facts may be challenged and changed, or the dependence

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11 Melvin B. Lewis, "The Expert Witness in Criminal Cases: General Considerations" (undated, unpublished paper) at 7–8, reproduced with permission in Mark J. Mahoney, "Materials on Examination of the Expert Witness" (Ontario Criminal Lawyers' Association for the Program "Experts and Junk Science," Toronto, 5 April 1997).

of the opinion on other testimony to supply crucial facts emphasized. Finally, the techniques or theories used by the expert witness can be challenged.

It is especially important to examine all references that a witness claims as support for crucial principles of the science involved. Counsel will soon learn how often the references do not support the proposition put forth, or are distinguishable, or have their conclusions couched in much more modest or restrained terms, or are even being misunderstood by the witness. Nothing should be assumed or taken for granted if an expert witness's evidence matters.

As well, the trier of fact will have to decide that the "facts" are as hypothesized for the opinion evidence to have any value. If the trier of fact finds facts materially inconsistent with the hypothetical question, the opinion becomes useless.

The most important general aspect of cross-examination will be to utilize the general principles involved in the scientific method to demonstrate any and all available methodological and logical problems involved in the evidence given.

THE USE OF WRITTEN AUTHORITIES

REFERENCE WORKS SUCH as books and articles are hearsay when they are being relied on to provide accurate information. An expert witness can refer to, and even quote from, other authorities while testifying in chief so long as he adopts the opinions contained in those authorities as his own by expressing his agreement with them, and thus adopting them as his own.

The expert can be cross-examined using reference materials such as texts, articles, and studies, but only where the expert witness acknowledges that the works being used are authoritative.[12] Where the witness acknowledges the authority of the work, if she adopts the opinions of the author, such opinions become part of the expert's evidence. Where the witness acknowledges the authority of the work but rejects its conclusions, she can be asked to explain why, and her responses can be of relevance in assessing the credibility of the opinion being offered.

The use of authorities in cross-examination even if the expert does not recognize their authority has sometimes been misunderstood. The rule in some American jurisdictions allows that, so long as the reliability of the work is established independently or by judicial notice, it can still be used in cross-examination. However, in Canada, an expert unfamiliar with the authorities in his field cannot be confronted with them. This has been misinterpreted to make "ignorance into bliss" for expert witnesses. It does not.

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12 *R. v. Conroy* (1993), 84 C.C.C. (3d) 320 (Ont. C.A.). See generally Levy, above note 8, c. 14, "The Expert Witness" at 314–23.

An expert witness's lack of familiarity with the authoritative texts, periodicals, research papers, or other publications in the field in issue is (and certainly should be) a serious blow to his credibility. An expert witness unfamiliar with the authoritative works in his field can be confronted with that very fact as a measure of his lack of expertise. Such a witness should be clearly pinned down as to his lack of familiarity with the leading references. Then, evidence can be adduced that no competent expert in that field would suffer from such unfamiliarity; that any competent expert would be familiar with, and acknowledge, such authoritativeness. The expert witness's ignorance can thus be made into a damning credibility deficiency.

An ingenious example of cross-examination on "leading authorities" has been reported as follows:

> I had occasion to hear such a cross-examination many years ago when I was in Court waiting for my case to be called and listening to a criminal trial in which an experienced Defence counsel was cross-examining a handwriting expert who had been called by the Prosecution. The cross-examination went something like this:
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> Q. Are you familiar with the leading texts in your field?
> A. Yes, I think so.
> Q. In particular are you familiar with Patterson on Forged Documents?
> A. Yes
> Q. When was the last time you had occasion to consult Patterson's book?
> A. When I was working for the R.C.M.P. on a case in Ottawa. I checked it out of their library.
> Q. What about Ligner on Handwriting Analysis?
> A. Yes I am familiar with that work.
> Q. When was the last time you had occasion to read Ligner?
> A. I don't remember but certainly within the last five years.
> Q. Do you have a copy of Ligner in your library?
> A. Not now, but I did when I worked for the R.C.M.P.
> Q. Are Patterson and Ligner authoritative in your area of expertise?
> A. Yes
> Q. Would it surprise you to know that I made up the names of these authors and books this morning?
> A. (pause) I guess it would . . .[13]

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13 Harvey Spiegel, "Attacking the Defence Expert's Qualifications" (Paper presented at the Fall Conference of the Ontario Trial Lawyers Association, Toronto, 7–8 November 1997).

STATUTORY EVIDENTIARY PROVISIONS

PROVINCIAL EVIDENCE ACTS, the *Canada Evidence Act*, and the *Criminal Code* contain statutory provisions relevant to expert witnesses.

One type of provision limits the number of experts that a party can call without leave of the court. These provisions, of which the *Canada Evidence Act*[14] is an example, generally limit the number of experts a party may call to five unless leave to call more is granted by the court. However, a breach of the section seems inconsequential.[15]

Another type of provision allows expert evidence to be given by documentary evidence. An amendment to the *Criminal Code*[16] (in force 23 September 2002) adds subsections 657.3(3)–(7), which provide for notice of expert testimony and set out the consequences if notice is not given.

Notice of expert testimony has to be given by prosecutors and defence at least thirty days before the beginning of the trial or within such other period fixed by the court. The notice has to include the name of the proposed expert witness, a description of the witness's area of expertise, and a statement of the witness's qualifications. A copy of any report prepared by the expert or, if no report has been prepared, a summary of the opinion expected to be given by the witness, has to be provided to the other side — in the case of the prosecutor within a reasonable period before trial and in the case of the defence not later than the close of the case for the prosecution.

When a party calls an expert without having complied with the notice requirements, the court shall grant an adjournment of the proceedings to the party that requests it to allow her to prepare for cross-examination of the expert witness; order the party that called the expert witness to provide the other party and any other party with a copy of the report, or where it does not exist, a summary of the anticipated evidence, so as to allow for preparation for cross-examination; and order, where appropriate, the recalling or calling of any witnesses.

Even when a party has complied with the notice provisions, the court may — where a party has not been able to prepare properly — adjourn the proceedings, order that further particulars be given of the evidence of the proposed witness, and order the calling or recalling of any witness for the purpose of giving testimony on matters related to those raised in the expert witness's testimony.

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14 R.S.C. 1985, c. C-5, as amended, s. 7.
15 *R. v. Vincent* (1963), 40 C.R. (3d) 365 (Man. C.A.).
16 R.S.C. 1985, c. C-46.

DISCLOSURE ISSUES WITH EXPERT REPORTS

IN *R. V. STONE*,[17] the Supreme Court of Canada considered whether the trial judge erred in compelling defence counsel to disclose to the Crown a copy of an expert report in circumstances where defence counsel commented with respect to the anticipated evidence of the defence expert in his opening address to the jury.

The Court held disclosure was properly ordered because defence counsel had waived privilege in the contents of the report by his conduct of the trial. That was the limited basis of the decision. However, the Court in *R. v. Stone* went on to enunciate a more general proposition that merely by calling an expert witness to testify, the defence thereby waived all privilege and had to turn over to the Crown the reports from the expert, including any prior inconsistent statements by the accused, no matter how inconsequential they were with regard to the psychiatric opinion.[18]

Although the law of privilege is beyond the scope of this book,[19] it should be kept in mind that in general, privilege applies to experts retained as part of the defence function, and also that privilege applies to communications and not to information, so that even if a third party acquires the same information from an external source, a solicitor-client privileged communication remains privileged. To the extent that *R. v. Stone* appears to have created a broad exception to privileged reports merely because the expert witness is called to testify, it also stands for the proposition that there is little good and much harm that flows from obtaining such reports. Of course, the expert witness should carefully document the foundational facts upon which his opinion is based and be prepared to fully and completely convey them to opposing counsel during a pretrial interview or courtroom questioning, as well as to the court, but there seems little to be achieved by defence counsel securing a detailed report in advance of trial.

R. v. Stone also provides the valuable caution that defence counsel should do her utmost to ensure there are no significant inconsistencies between the expert's information and other defence evidence, for obvious reasons.

Finally, the importance of pretrial interviews of expert witnesses for the opposing party cannot be overestimated. The fact that "there is no property in a witness" applies with greatest force to an expert witness, whose credibility is

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17 (1999), 24 C.R. (5th) 1 (S.C.C.).

18 See also *R. v. Frechette*, [2000] B.C.J. No. 373 (S.C.).

19 See the U.K. case *R. v. Davies*, [2002] EWCA Crim 85, holding that privilege barred the Crown from subpoenaing as a witness a psychiatrist retained by the defence.

founded upon a presumed neutrality and an agenda of assistance to the trier of fact. For an expert witness to refuse to be available to the opposing counsel for an interview in advance of trial can and should lead to adverse comment. Such an interview with any competent expert witness is an invaluable source of information to assist counsel in preparing the best cross-examination that the facts will allow.

CONFLICTING EXPERT EVIDENCE

IT IS NOT unusual for expert witnesses to disagree. *R. v. Parnell*[20] considered the proper jury directions to be given in a case of conflicting experts:[21]

> The proper direction to be given in a case of conflicting expert evidence is summarized in a case summary and comment in *R. v. Platt*, [1981] Crim. L.R. 332. In that case, two pathologists, one called by the prosecution and the other for the defence, had expressed differing opinions as to the maximum time between the infliction of certain injuries and the brain death of the victim. In relation to the conflicting doctors, the jury was directed "You have to decide whose evidence you prefer." Allowing the appeal from a conviction for manslaughter, the Court of Appeal said, in summary, at p. 333:
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> > The only safe way of directing the jury was either to tell them that before they accepted the opinion of the prosecution's pathologist they must feel sure that he was correct, or else to tell them that they were to assume that the [page 364] defence pathologist was right and, therefore, to approach the case on the other evidence solely and not base their approach on the pathologist's evidence at all. Unfortunately the judge had done neither but had asked the jury to decide which of the two bodies of medical evidence they preferred. In the extraordinary circumstances, that was a misdirection and the conviction would be quashed.
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> In cases of competing expert evidence, it is not proper to limit the jury by asking whose evidence is preferred or who had the better opportunity to observe. It is correct to point to the latter, as a factor only, to be considered in resolving the question whether the Crown has proved guilt beyond a reasonable doubt. See *R. v. Laverty (No. 2)* (1979), 47 C.C.C. (2d) 60 at p. 62, 9 C.R. (3d) 288.

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20 (1983), 9 C.C.C. (3d) 353 (Ont. C.A.), leave to appeal denied 7 February 1984.
21 *Ibid.* at 355.

Thus, it is misdirection to leave the jury to simply select between the opposing experts. Rather, the jury is to be directed by telling it either it must be sure before it accepted the opinion of the prosecution's expert that he was correct, or else the jury could approach the case by assuming that the defence expert was right and then consider the case on the other evidence solely and not base its approach on the prosecution expert's evidence at all.[22]

22 See also *R. v. Anderson*, [2000] 1 V.R. 1 (Vict. C.A.), regarding conflicting evidence whether wounds were self-inflicted or not. The jury had to be satisfied beyond a reasonable doubt that the incriminating opinion was correct.