EVIDENCE

The Learned Treatise as Shield and Saber

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Overview[1]

A psychiatrist qualified to testify about reliability of purportedly recovered memory of an adult plaintiff claiming compensation for alleged childhood abuse is challenged on cross-examination with contrary published opinions of other psychiatrists.

During examination-in-chief, a surgeon offering opinion testimony on behalf of Jehovah's Witness parents in support of their request for bloodless surgery for their young child is invited to adopt medical journal conclusions of other surgeons congruent with those of the witness.

Published results of psychology studies critical of child care by lesbian partners are cited to the partners' expert witness, whose opinion supports upbringing of a child by same gender couples.

When may published scientific opinions of authors, not themselves witnesses, be cited to expert witnesses? Or be admissible in evidence? To what extent may such opinions, whether merely cited or whether, additionally admitted in evidence, be depended on by a court? Procedurally, how should published scientific opinions in treatises by authors, not called to testify, be introduced in support of a litigant's case? And what initiatives are advisable, involving employment of such treatises, to impeach an expert witness?

Historically, nominated "learned treatises," published expert opinions are currently often also described as "scientific publications." In practice, treatises may take the form of "a journal article, a book chapter, a book, an accepted set of standards or taxonomies, or even a newspaper clipping of statements by an authority."[2] Treatises have customarily been used to attempt to enhance or impugn either the expert witness's knowledge (acquired by formal training and/or experience) or methodology or conclusions.

Among principal rationales for employing learned scientific treatises are: (i) to assert or augment one's expert witness opinion; (ii) to discredit or detract from the perspective of the opposition's expert witness; or (iii) to challenge other learned treatises depended on by expert witnesses.

Where Expertise Acknowledged

If an author is familiar to an expert witness and is acknowledged by that witness to be authoritative in a pertinent subject or aspect of a subject in which that author has published, and the witness expressly adopts "as his own" that author's opinion[3] as a basis for reaching the witness's opinion, "counsel is allowed to read extracts to him or her and obtain his or her judgment thereon. The written view of the author thereby becomes the opinion of the witness."[4] (This is so where the witness has already relied on the specific treatise or treatise excerpt, cited to him or her in court, in formulating the opinion he or she is offering in testimony in court. Or, although not having specifically depended on the treatise in preparing to testify, where the witness is acquainted and in agreement with the treatise's views that are drawn to his or her attention in court. Or, where the witness is familiar with the views of a particular author in a treatise other than the treatise produced to him or her in court.) Generally, if the expert witness adopts the author's opinion – for example, a

[1] This commentary is prompted by the decision of Berger, J. of Alberta's Court of Queen's Bench in *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* in 1991 and by the counsel of W. Glen How, QC and Mr. John M. Burns, constitutional lawyers who have practised in most of Canada's provincial/territorial jurisdictions and in the Supreme Court of Canada.

[2] Brodsky, Stanley L., *Testifying In Court [:] Guidelines & Maxims For The Expert Witness* (American Psychological Association, Washington, 1991), at 119.

[3] *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1991), 3 C.P.C. (3d) 231 (Alta. Q.B.), Berger, J. at 232.

[4] Sopinka, John; Lederman, Sidney N., and Bryant, Alan W., *The Law Of Evidence In Canada* (Toronto: Butterworths, 1992), at 560.

sentence or a paragraph of the author's work – without qualification, as his or her own, then that sentence or paragraph, without qualification, qualifies as substantive evidence in the proceeding in which elicited. Alternatively, "if the witness has adopted the ... designated passage as his own but has qualified it by specific reference to the 'context,' "the substantive evidence becomes the witness-adopted passage subject to qualifications expressed or implicit in other passages that the witness identifies as 'context'."[5]

If an author is familiar to an expert witness and is acknowledged by that witness to be authoritative in a pertinent subject or aspect of a subject in which that author has published, but the witness does not adopt that author's opinion as his or her own, in forming the witness's opinion, the published opinion remains hearsay and, thus, does not deserve to be treated as substantive evidence. Rather, "as in the case of the cross-examining tool of prior inconsistent statements, it is utilized to challenge the expert's credibility; to test whether the witness has intelligently and competently read and applied what has been authoritatively written on the subject."[6] Berger, J., in *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*[7] accredits, as an exception to this proposition, however, the following circumstance: A cross-examiner fails to procure an endorsement of a published opinion from opposite's expert witness. In direct examination of his or her own expert, that witness adopts the same published opinion as his or her own. In that event, "the opinion of the author becomes substantive evidence in the cause."[8]

Where Expertise Not Acknowledged

What if an author is not familiar to an expert witness, or is either not acknowledged or is discounted by an expert witness as being authoritative in a subject in a subject or aspect of a subject in which the author has published? For example, what if the expert witness either declines to endorse an author, with whom the expert witness is familiar, as being authoritative or declines to adopt the authoritative author's opinion on the pertinent subject; as a ploy to avoid that author's views being deployed to challenge the witness's opinion? Should cross-examining counsel, in such circumstance, asks Berger, J. in *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*,[9] "be foreclosed the opportunity to test the opinion of such a witness simply because she refuses to acknowledge a particular work as authoritative?" To that question he answers negatively. What is required, in that event, he states:

> ... is an undertaking by cross-examining counsel that he intends later to lead evidence from another expert [if so qualified] who will acknowledge that the author is authoritative and who will adopt the author's opinion as his own.

Compliance with these conditions licenses cross-examining counsel to "put the author's opinion to the expert witness notwithstanding that the latter has failed to acknowledge that the author is authoritative"[10] (and, in that manner, at least call into question the expert witness's competence to provide and/or the witness's rationale for his opinion).

If the cross-examiner anticipates that the opposition's expert will deny familiarity with a particular text that counsel submits to be authoritative, or will decline to acknowledge that the text, although familiar to him or her, is authoritative, or will not agree with specific contents of the text, the cross-examiner may consider the approach suggested by Mr. Justice Roger E. Salhany in *Cross Examination [:] The Art of the Advocate*:[11]

> ... be prepared to use several leading texts and ask the witness if he is familiar with [and regards as authoritative] any of them ... If the expert refuses to acknowledge familiarity with [or the authoritativeness of] any of the leading texts which you have put to him, ... [you nonetheless retain the right to] call your own expert to testify that the particular texts are written by the leading experts in the field.

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[5] *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1991), 3 C.P.C. (3d) 231 (Alta. Q.B.), Berger, J., at 234.

[6] Sopinka, John; Lederman, Sidney N., and Bryant, Alan W., *The Law Of Evidence In Canada* (Toronto: Butterworths, 1992), at 562.

[7] (1991), 3 C.P.C. (3d) 231 (Alta. Q.B.), at 232.

[8] Ibid. at 232.

[9] Ibid. at 233.

[10] Ibid. at 233.

[11] Revised (Toronto: Butterworths, 1991), at 141.

Thus, the cross-examiner may establish a foundation to advocate that the opinion of the opposition's expert deserves diminished, if any, weight.

Preparation

Whether scientific treatises are to be relied on as shields of protection (or agents of endorsement) of a party's expert witness or, instead, are employed as sabers of impeachment, counsel who is considering their use must

(i) clearly understand and be capable of accurately introducing them;

(ii) have identified and marked all salient portions (including, where applicable, their contexts);

(iii) be satisfied of their potential relevance;

(iv) be certain the treatise does not elsewhere harbour opinions which may spanner the thrust of the identified and marked opinion which counsel seeks to introduce in evidence;

(v) possess sufficient copies (which include publishing information and any peer group reviews or endorsements) to enable the trier(s) (that is, judge or jury) and other counsel, not to mention the witness, to follow counsel's questioning about the published opinion.

The effluent of failing to prepare, or of so doing inadequately, are illustrated by George Colman, QC in his *Cross Examination [:] A Practical Handbook*:[12]

> Q. Now that you have agreed that this is an accepted authority, I shall ask for your comments on a passage in it. It begins on page ..., with these words: 'The test commonly used is ...' Do you agree with that?
>
> A. Yes. That is the test I've relied upon.
>
> Q. That is all you relied upon, isn't it?
>
> A. It's all I could rely on. If that book mentions any other test I'll be surprised.
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> [...]
>
> Q. You have no substantial doubt?
>
> A. ... [No.]
>
> Q. You will see why I chose the word 'substantial' when I read you the next sentence from the book: 'The validity of that test is, however, open to substantial doubts.' Do you agree?
>
> A. I'm afraid not. I don't know why he says that.

Technique

Referring to Treatises

A decidedly pragmatic treatment of techniques for use of scientific treatises is George Colman, QC's cross-examination handbook.[13] Drawing on his experience as barrister and Judge of the Supreme Court of South Africa, he counsels[14] that:

> ... in making use of a technical work, counsel should do more than put to the witness the conclusion of the writer. It will be better to use that conclusion in its context. A passage of appropriate length is selected, and put to the witness, sentence by sentence, ... [and likewise, with other passages].

The context may, for example, qualify the conclusion; or lend to the clarity of the conclusion; or enlarge on – hence assist in explaining – the conclusion.

At very least, this technique, properly employed, should contribute to the trier(s) understanding of the opinion and its pertinence to issues in a proceeding.

Tendering Treatises

In most Canadian jurisdictions, copies of scientific treatises or excerpts from them (as the case may be), whose views are adopted by an expert witness as his or her own, will be received and marked as exhibits. The practice in the United States, at least under the Federal Rule of Evidence on treatises, appears to be different. The Rule – 803(18) – reads:[15]

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[12] (Cape Town: Juta & Co., Ltd., 1970), at 126-127.

[13] Ibid.

[14] Ibid. at 126.

[15] As cited in: Tigar, Michael E., *Examining Witnesses* (Chicago: Section of Litigation, American Bar Association, 1993), at 243.

> To the extent called to the attention of an expert witness upon cross-examination, or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert or by judicial notice ... may be read into evidence but may not be received as exhibits.

Shield and Saber

At least two choices are open to counsel who possesses a scientific treatise or treatise excerpt from a recognized authority: (i) use it as a shield to help protect or endorse her expert's opinion; or (ii) use it as a saber to impeach the opposition's expert. Counsel's choice will, as George Colson, QC explains, be "dependent upon the circumstances and his assessment of the witness."[16] [Parenthetically, such considerations influence virtually every advocacy decision.] Colson, QC writes:

> ... [counsel] may think it desirable to reveal his authority to the witness before the latter has committed himself, or committed himself too deeply, upon the specific point, so as to make it easier for the witness, if he is so disposed, to agree with the writer, or to disagree with reservations. In another case, more particularly when the aim is to discredit the witness generally, counsel will draw the witness out fully on the point in issue, let him commit himself fully, and then produce his authority.[17]

Treatise Advice to Expert Witnesses

Psychologist Stanley L. Brodsky has authored a text dedicated to instructing experts who testify; entitled *Testifying In Court [:] Guidelines & Maxims For The Expert Witness*.[18] The text includes treatise advice for expert witnesses.

If asked to acknowledge the expertise of an author with whom the witness is acquainted, the expert could answer: "I cannot speak at all for [or: for all of] the writings, experiences, and knowledge of ... [the expert]."[19]

If suggested, for example, that "the *American Journal of Psychiatry* [is] the most prestigious, most read, most cited, and most respected journal in your field," the expert could answer: "With over 700 journals and 40,000 articles published every year in my field, no one journal and no one article is by itself important."[20]

If read an excerpt from a treatise that contradicts one's own testimony, the expert could ask to see the document or book from which the excerpt has been read. Psychologist Norman G. Poythress recalls counsel reading to him a passage from the *Physicians' Desk Reference* ("PDR") that appeared to contradict his testimony which was to the effect a particular medication did not cause hallucinations, delusions and seizures. When he examined the text from which the statement was read to him he was able to testify that questioning counsel had omitted a single, critical word. What the PDR stated was that the particular medication "rarely" caused hallucinations, delusions and seizures.[21]

If handed a document familiar to the expert and asked to read an underlined portion or to peruse and at least agree that the author's views comprise one authoritative perspective on the trial matter in issue, the expert could demur; explaining that:

> ... although I could read the underlined excerpt aloud [or: "peruse the entire document"], it would have no meaning to me unless I first had a chance to look at the full context of the article.

The expert could, additionally, ask for time (whether a few minutes or several days) to examine the treatise, if counsel wishes to persist in having the expert read or peruse and comment on the published opinion cited to him or her.[22]

If confronted with a commentary which the expert witness has written, that appears inconsistent with the expert's testimony, the expert could answer that the appearance of inconsistency amounts to misinterpretation by counsel; or that the opinion was published several years ago, since when the experience of the expert and his or her confreres in the

[16] Ibid. at 125.
[17] Ibid. at 125-126.
[18] Supra note 2.
[19] Ibid. at 120.
[20] Ibid.
[21] Ibid. at 121.
[22] Ibid.

area of specialty has caused them to revise their views to those expressed in the expert's testimony.[23]

If writings of a universally recognized scientific authority are expressly contrasted with the expert's testimony, the expert could reply:

> Are you asking me whether I am generally familiar with the writings of Dr. Prominent or whether I agree with every statement she has ever written? If it is the latter, I don't – and I think most psychologists don't agree with every statement that anyone has written.[24]

The global maxim for expert witnesses: never accept the learned treatise as expertise unless master of the treatise.[25]

Not least of the publications recognized as a learned treatise, at least in the United States, is *Coping With Psychiatric And Psychological Testimony*, a three-volume work with occasional updating supplements, of considerable value to family law and other litigators and negotiators.[26]

Summary

Assuming the author of a treatise is not called to testify (and have his or her opinions tested by cross-examination) the treatise is hearsay; hence inadmissible.

If familiar to and recognized as authoritative, on direct examination, by a witness, the treatise or treatise excerpt (as the case may be) may be adopted as the witness's own opinion. Thus, the treatise opinion is relieved of its hearsay nature.

On cross-examination, a witness may be confronted with a treatise, such as where he or she is familiar with the treatise and acknowledges it to be authoritative, in an effort to impeach the witness's testimonial opinions with contrary conclusions from the treatise. Except in the unlikely event the cross-examined witness adopts the treatise opinion, the treatise, while remaining hearsay, is a valid means of testing the reliability of the expert witness's conclusions.[27]

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[23] Ibid.
[24] Ibid. at 121-122.
[25] Ibid. at 12.
[26] Marina del Rey: Law and Psychology Press, (1988), at 40.

[27] See: *R. v. Anderson* (1914), 22 C.C.C. 455 (Alta. C.A.); per Harvey, CJ at 459-460; Beck, J. at 476.