EXPERT WITNESS

OR

LITIGANT EXPERT? :

DON'T TAKE YOUR EXPERT FOR GRANITE

Prepared by:

Neil S. Abbott
Partner, Gowlings LLP
1 First Canadian Place
100 King Street West
Suite 1600
Toronto, Ontario
M5X 1G5 Canada
Tel: 416-862-4376
Fax: 416-862-7661
Email: neil.abbott@gowlings.com

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Experts (n): those who know more and more about less and less until they know everything about nothing

The Law on Expert Liability: A Cautionary Tale

The paper is an overview of "dos and don'ts" in Expert opinions. But first, a cautionary tale illustrating why this is important:

> An Expert in a trial regarding flooding prepared a report for the City of Ottawa. Homeowners had claimed that the City failed to ensure that the City drainage system was adequate. The City used the Expert report, which stated that the drainage was adequate, to defend the action against those homeowners. In addition, the City relied on the Expert's report in planning not to upgrade their drainage system in the future.
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> Lo and behold, there was another incidence of flooding, and the City was sued again. In response to this suit, the City tried to sue its own Expert witness from the initial trial, claiming that they had reasonably relied on the Expert report and that the report was negligent.
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> The court stated that the law was unsettled, but decided the case on procedural grounds.[1]

This is a case of good news and bad news.

First, the good news. For the past 400 years, in England, where most Canadian common law comes from, Expert witnesses have been immune from litigation arising from their testimony in trial.

The bad news? That rule was abolished in May of 2011 by the U.K. Supreme Court in *Jones (Appellant) v. Kaney (Respondent)*.[2]

Jones v. Kaney

In *Jones*, the U.K.S.C. reviewed the purposes of Expert witness immunity including:

1. "To protect witnesses who have given evidence in good faith from being harassed and vexed by unjustified claims;"[3]

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[1] *Robinson v. Ottawa (City)*, [2009] O.J. No. 262 at para 53:
> "There are no decisions of the Court of Appeal for Ontario, or any other Canadian court which has decided the issue of whether witness immunity should be extended to prevent a party from suing his or her own Expert witness in negligence or for breach of contract, based on the opinion evidence given in a Court proceeding. Given the absence of any Canadian authority directly on point, I conclude that the law is unsettled on this issue."

[2] [2011] UKSC 13 [*Jones*].

2. "To encourage honest and well meaning persons to assist justice; in the interests of establishing the truth and to secure that justice may be done;"[4] and

3. "To secure that the witness will speak freely and fearlessly."[5]

The theme running through these purposes is the chilling effect that potential liability would have on witnesses who testify before the courts.

But if the rule is not broken, why abolish it?

The Court made a distinction between witnesses of fact (ordinary witnesses) and Experts on the basis that Experts owe a duty to their client, stating:

> "A significant distinction between an expert witness and a witness of fact is that the former will have chosen to provide his services and will have voluntarily undertaken to provide a duty to his client for a reward under contract whereas the latter will have no such motive for giving evidence."[6]

Lord Phillips reasoned that there was no empirical evidence to support or disprove the thesis that immunity is necessary to ensure that *Expert* witnesses give full and frank evidence to the Court. Instead, the Court reasoned that the "witness of integrity" will do so and questioned whether a fear of being sued would actually encourage a witness to breach his or her duty to the Court.[7] The Court wrote,

> "It is paradoxical to postulate that in order to persuade an expert to perform the duty that he has undertaken to his client it is necessary to give him immunity from liability for breach of that duty."[8]

The Court also doubted whether there is a realistic basis for the argument that a diligent Expert witness will be harassed by vexatious claims for breach of duty. The Court wrote, "the rational Expert witness who has performed his duty is unlikely to fear being sued by the rational client."[9]

Ultimately, the U.K.S.C abolished immunity for Expert witnesses.[10]

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[3] *Ibid.* at para. 16.
[4] *Ibid.* at para. 16.
[5] *Ibid.* at para. 16.
[6] *Ibid.* at para 18.
[7] *Ibid* at para 56.
[8] *Ibid*. at para 56.
[9] *Ibid.* at para 58
[10] Important note: The abolishment does not extend to the absolute privilege that Expert witnesses enjoy in respect of claims of defamation. See *supra* note 2 at para. 62. The Court acknowledged that it is easy for a litigant bring a claim of defamation against an Expert witness, while the Court found it "far less easy for a lay litigant to mount a credible case that his Expert witness has been negligent." (para 58).

What about Canada?

Although in Canada the law still remains unsettled, at $60,000.00 on average for a three-day trial in Superior Court, with no certain outcome and the real prospect of going all the way to the Supreme Court, you do not want to be the test case.

Furthermore, regardless of whether you may be liable for negligence in your report or testimony, you are certainly liable if you breach the retainer agreement between you and your client.

How does all of this affect you?

As geotechnical engineers, you may be asked to prepare an Expert report which will be used in a trial to support a case. You will be required to enlighten the Court on technical, professional, and/or scientific matters. In preparing and presenting your findings, keep in mind the following suggestions.

GETTING QUALIFIED

The first questions you will be asked when you take the stand are intended to qualify you as an Expert. If you are not, then your opinion cannot be heard at trial. Consequently, when you are approached by a lawyer for a case, you should ensure the following:

1. Make sure you are an Expert

> "One person in the Grande Prairie court room did not know how a grain truck unloads grain. Unfortunately for the defence case, that person was its expert accident reconstruction witness."

Labbee v. Peters (1997), 201 A.R. 241 at para. 72 (Q.B.), aff'd 1999 ABCA 246.

> "The GVWD did not call any expert who was qualified to refute these opinions. Neither Mr. Gummow nor Mr. Wise, the two experts GVWD relied on, were chemists and neither had the expertise to opine on the impact of trapped vapours and gasses and what impact the seal coat would have on trapped vapours and gasses."

Greater Vancouver Water District v. North American Pipe & Steel Ltd. and Moody International Ltd. 2011 BCSC 30 at para. 102.

The above quotes are included because otherwise this point might seem insultingly obvious. However, it is important to note that you are not entitled to give opinion evidence because of a generalized expertise in the area of engineering or rocks. To be an Expert, you must have some knowledge in the specific area of the case that would not be already available to the judge or to a lay jury.

That is essentially the definition of Expert opinion evidence.

2. Know the facts of the case

This may just as easily belong with the above heading, but to determine if you are Expert in the field, you need to meet with your client and get an explanation of the facts in the case. Lawyers, despite what they may believe after 3 weeks of reading, are not Experts, and may overlook facts that they do not realize are pertinent if you do not bring them up.

3. Know the leading publications and seminal texts in the area of your expertise

When a lawyer seeks to cross examine you on your methodology, it is very likely the recognized works in the relevant field of expertise will enter into the conversation. You need to be up to date on these works, and be able to intelligently explain why the method in your report differs from others in the field.

4. Know your resume

When counsel attempts to qualify you as an Expert, the opposing counsel will examine your resume for weaknesses. If they find a weakness, padding, or any issue which you do not seem to be capable of discussing intelligently, they will bring it up in trial. If you do not want your cross examination to sound like a sketch comedy bit entitled "A Very Polite Man Conducts the Meanest Job Interview You Have Ever Heard of in Front of a Room Full of People", it is important that you be honest in your CV, update it, and be able to talk about it.

PREPARING THE REPORT

5. Write the report yourself

This is not a task you want to delegate. Every line of the report will be combed through so you should ensure that not only have you written it yourself, but you have also edited with this question in mind: "Can I swear an oath that this, as it is written, accurately represents my educated opinion?" You must be comfortable standing by every word in your report.

6. While we're on the topic of editing

> "Pleadings are supposed to be a road map – but not of all the roads in the world – but only how to get from Point A to Point B. Was this a road map? I think not, unless it be by Pablo Picasso."

National Trust Co. v. Furbacher, [1994] O.J. No. 2385 at para. 15 (Gen Div.), per Farley J.

Although this quote is evidently about pleadings, it can just as easily be said of export reports. Edit your report; edit not only for content, but also for things like grammar, typos, formatting, and indexes that lead the reader to the facts they are looking for.

Finally, avoid meaningless or confusing expressions. In particular, the expression "consistent with" has come under a lot of fire for being misleading. In the field of science, "consistent with"

merely means that it does not disprove the hypothesis, whereas in a court this tends to be taken as indicating a causal relationship. For example, in *R v. K.(A.)*[11], a social worker testified that bedwetting, fighting and depression were consistent with the child being sexually abused. Those traits, however, are also consistent with a child not being sexually abused. They fail to disprove sexual abuse, but are legally irrelevant to whether it occurred.

If you find yourself using similarly meaningless terminology, eliminate it.

7. Write the report neutrally

This is a big one.

Rule 4.1 of the *Rules of Civil Procedure*[12] states:

> DUTY OF EXPERT
> 4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,
> (a) to provide opinion evidence that is fair, objective and non-partisan;
> (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
> (c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.
>
> Duty Prevails
> (2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

Simply put, you are not there to make one side's case. Your job is to aid the court with the benefit of your Expert testimony. This distinction can be confusing because you are hired by, and work for, one side or the other.

However, the lawyer paying you has asked you to give your *honest opinion* at trial on the facts as you see them. If, in meeting with the lawyer before trial, it becomes apparent that your opinion is not helpful, you will not be called on by that lawyer. But your opinion must be honest and your credibility must be above reproach because it most certainly will be under scrutiny.

Furthermore, it is not enough for you to not be biased. You must not appear to be biased either. All of the communications between you and the lawyer who retains you will be provided to the opposition so that they may cross examine you as to whether you considered any facts in forming your opinion that were irrelevant, or failed to consider any facts that were relevant.

In *Flinn v. MacFarland,*[13] an engineer was retained to provide an accident reconstruction report. The Expert returned a preliminary report to the lawyer who provided comments on it. Upon receiving the comments, the Expert revised his report. The lawyer attempted to withhold the

[11] [1999] O.J. No. 3280.
[12] RRO 1990, Reg 194.
[13] [2002] NSJ No. 547 [*Flinn*].

correspondence from the Court by claiming privilege[14] on the basis that the correspondence discussed "tactics and strategy." The Court took a dim view of "the propriety of discussing with such an *independent* Expert questions of 'tactics and strategy'".[15](emphasis added)

The Court in *Flinn* was also concerned that the lawyer had influenced the engineer's final opinion. This issue arose again in *GVWD:*

> In performing and reporting his statistical analysis, Mr. Aben was selective in the test results he used, and ignored the test results that were favourable to NAP. Mr. Aben testified that he was told by the GVWD to ignore the favourable results on the 60" diameter pipes and to only use the failures of the 84" diameter pipes in his statistical analysis regarding the extent of the adhesion failure.[16]

You will want to avoid these sorts of embarrassing revelations by writing a neutral report and not having any communications with the lawyer retaining you that would reveal any sort of bias.

Along the same lines, your report is not a soapbox for defending your thesis, or railing about the biases of some publication or academic institution, etc., unless, of course, that is the question that has been asked of you in your retainer. Which brings me to…

8. Answer only what is asked in your retainer

This means you must first read and understand exactly what is being asked for in your retainer. This is not a grade 8 science project; there is no extra credit. Only answer the question you've been hired to answer.

9. Maintain confidentiality

Confidentiality is a big deal in the law, which means it's a great way to get sued if you do not pay attention to this rule. Quite simply: do not tell anyone about the contents of your report; do not get it peer reviewed without the approval of your law firm; do not let anyone edit your report; do not lose anything important anywhere ever. Keep your notes, but number and burn your drafts.

10. Check your instruments

Questioning the calibration and upkeep of instruments is another classic fall back for lawyers seeking to discredit Experts. It is important before you conduct the tests necessary to put together your report, that you have checked your instruments in a manner consistent with whatever guidelines their manufacturer told you to use. This will come up.

11. Include a Limitations clause

[14] Litigation privilege is a legal construct that allows a lawyer to withhold documents prepared in contemplation of litigation. This is an exception to the general rule that all relevant documents must be disclosed during a process called discovery.
[15] *Flinn ibid.* at para. 29.
[16] *GVWD, supra*. at para. 63.

Remember the cautionary tale we started with about the City of Ottawa relying on an Expert report beyond the testimony it was prepared for? That would not have happened if the Expert had provided a simple limitations clause stating, among other things, that the report was to be used solely for the purpose of the litigation.

You must include in your reports a statement that explains any facts that the report relied upon, any facts that you had to assume, and that outlines that the report is limited to a specific use and no others. If you have any questions on how to do this please refer to my previous presentation at this conference "Don't Rely on my Advice: A Practical Guide to Disclaimers."[17]

PROFESSIONALISM AT TRIAL

12. Dress well

Just like in high school, your credibility will be judged by how you look. Unlike in high school, leaning on a Trans Am that is blasting The Rolling Stones, wearing a leather jacket and white undershirt while you smoke a cigarette will not get you where you want to go. As a general rule, you want to dress like the defendant at a criminal trial. Wear a suit, shine your shoes, shave your face, no piano key neckties.

13. Be cooperative

This goes along with presenting a neutral report. If you come across as standoffish, you will likely appear biased. The cross examining lawyer may act like your friend or like a playground bully, but your role is the same. Be congenial, give full and honest answers to questions, and clarify any issues you may have with a question before you answer it.

14. K.I.S.S.

K.I.S.S. is not just an epic band with a ridiculously egotistical front-man. This hackneyed acronym, used by middle managers and high school hockey coaches throughout the English-speaking world, is important to you as an Expert, as well. I assure you that your ability to concisely explain complex issues in layman's terms without belittling your audience is far more impressive than confusing the court with a string of words it sounds like you made up. My 12 year-old daughter can do that, and when she does, I only pretend to listen to her, too. So, Keep It Simple Stupid.

15. Have fun!

This is what you do. You have an opportunity to educate; to be qualified as an Expert for future cases. All cases are reported. Your name will forever be carved in the granite of law.

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[17] Seriously.