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Expert Evidence in British Columbia Civil Proceedings

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Chapter 1: Expert Evidence in the Context of the Law of Evidence at Large

II. Opinion Evidence Exception [§1.8]

A. Introduction [§1.9]

The opinion evidence rule is a major exclusionary rule in the law of evidence. As Professor Thayer pointed out in the passage quoted at §1.5, the law of evidence consists of rules with exceptions. The admissibility of expert evidence is an exception to the opinion evidence rule. Under this exception, expert opinion evidence is admissible.

In R. v. Abbey, [1982] 2 S.C.R. 24 at 40, Dickson J., for the court, borrowed heavily from Professor Thayer in formulating the following wry comment on the admissibility of expert opinion:

A general principle of evidence is that all relevant evidence is admissible. The law of evidence, however, reposes on a few general principles riddled by innumerable exceptions. Two major exceptions to this general principle are hearsay evidence and opinion evidence. There are also exceptions to the exceptions: "expert witnesses may testify to their opinion on matters involving their expertise" (*Cross on Evidence*, 5th ed. (1979), p. 20) and may also, incidentally, base their opinions upon hearsay.

B. What Is an "Opinion"? [§1.10]

A definition of the word "opinion" is required to give meaning to the opinion evidence rule. In formulating the exclusionary rules comprising the law of evidence, terminology and definitions can be problematic. In the context of the opinion evidence rule, "opinion" is ambiguous. One meaning of the word "opinion" is belief, conjecture, speculation, or guess. In this sense, opinion means a deduction or conclusion without any basis in personal knowledge.

In another sense, opinion means an inference or conclusion drawn from personal knowledge. The opinion evidence rule requires witnesses to testify based on personal knowledge, not to guess or speculate in the absence of such knowledge (Canadian Pacific Railway v. Murray, [1932] S.C.R. 112 at 117; Osmond v. Newfoundland (Workers' Compensation Commission), 2001 NFCA 21). The opinion evidence rule prohibits witnesses from abstracting, based on the observed facts, to conclusions (R. v. Fisher (1992), 13 C.R. (4th) 222 at 226 (B.C.C.A.)). The role of the witness is to attest to the facts observed (Klein v. Bell, [1955] S.C.R. 309 at 317). It is the role of the trier

of fact to draw inferences from the facts. The opinion evidence rule requires witnesses to testify in detail about their personal observations, not to generalize from their observations.

However, in practice, the distinction between fact and opinion is difficult to draw and, hence, it can be difficult to limit witnesses strictly to giving testimony about facts alone. Many statements that would pass as statements of "fact" in ordinary parlance are really conclusions or inferences drawn from observed facts that serve as premises. As stated by Dickson J. in R. v. Graat, [1982] 2 S.C.R. 819 at 835:

Except for the sake of convenience there is little, if any, virtue, in any distinction resting on the tenuous, and frequently false antithesis between fact and opinion. The line between "fact" and "opinion" is not clear.

In this sense, the opinion evidence rule admonishes witnesses to testify about what they observed in as much detail as possible, and to refrain as much as possible from drawing conclusions or reasoning from their observations.

C. Exclusions under the Rule [§1.11]

In summary, the opinion evidence rule absolutely excludes speculation or guesswork by witnesses. Even triers of fact (judges sitting alone or juries) should not engage in speculation or guesswork unconnected with the underlying facts, and should decide the issues on the evidence.

The opinion evidence rule also excludes inferences or deductions by witnesses. Reasoning to conclusions from the proven or admitted facts is the function of the trier of fact. Moreover, if witnesses could testify in the form of generalizations or conclusions, they might confuse the trier of fact, not to mention the cross-examiner, with broad ambiguous pronouncements that might hide the truth. However, the exclusion of opinion cannot be strictly enforced because of the inherent impossibility of demarcating the line between "fact" and "inference".

D. Exception to the Rule [§1.12]

1. Policy Considerations [§1.13]

A result of the inevitable blurring of the distinction between fact and inference is the need for an exception to the opinion evidence rule.

As far as prohibiting witnesses from drawing inferences or conclusions is concerned, the opinion evidence rule is not absolute. The rule that witnesses should not draw inferences or conclusions is subject to two exceptions. First, lay or non-expert witnesses may draw inferences or conclusions that qualify under the exception known as "compendious statements of fact". The second exception concerns expert evidence.

Judges in earlier times developed the opinion evidence rule for the fundamental purpose of excluding evidence that lacked sufficient probative value to warrant consideration by the juries of the era. Under the adversarial system, courts were obliged to hear the litigants fairly and to

offer them their day in court. Bearing in mind the cost and inconvenience of trials, the court's obligation to hear out the parties was not inexhaustible. One of the limits was the rejection of evidence as supererogatory; that is, beyond the reasonable bounds of the adversarial system, because it was unnecessary, useless, and superfluous to the determination of the issues. Opinion evidence is inadmissible for this reason.

On the other hand, the exceptions to the opinion evidence rule for lay and expert opinion recognize that some forms of opinion evidence ought to be heard. The boundaries between admissible and excluded opinions are ill-defined and constantly shifting. The courts now seem quite sympathetic to admitting lay opinion, but are increasingly concerned about preventing the expert evidence exception from undermining the adversarial system.

2. Compendious Statement of Facts [§1.14]

A lay or non-expert witness may, with the tacit or explicit permission of the judge, testify in the form of an opinion if it qualifies as a compendious statement of facts (R. v. Graat, [1982] 2 S.C.R. 819; R. v. Jopowicz (1992), 11 B.C.A.C. 42 (C.A.)). The elements of a compendious statement of facts are as follows:

1. an inference or conclusion drawn by a witness who personally observed the facts from which the inference is drawn, and
2. the inference or opinion is one that an ordinary lay witness is capable of drawing, being based on a matter of common knowledge and experience.

The compendious statement of facts exception serves as recourse for honest and sincere witnesses who are having trouble making themselves understood by testifying to the trier of fact in the usual form of stating their detailed observations. Witnesses resort to testifying in the form of an opinion if they are unable to articulate the underlying specific details apart from the conclusions. Permission to express an opinion in this form rests ultimately in the trial judge's discretion, as the capability of particular witnesses to articulate their observations and the complexity of the issues on which they must testify vary enormously. It is within the judge's discretion to determine if recourse to a compendious statement of facts would assist a lay witness to testify more intelligibly.

Some of the recognized instances of lay witnesses testifying in terms of the compendious statement of facts include:

1. identification of documents, persons, or objects (see R. v. Bell, 2001 BCCA 99, leave to appeal refused [2001] S.C.C.A. No. 188 (QL));
2. estimates of a person's age;
3. assessment of a person's physical condition, state of health, degree of impairment, illness, or death;
4. assessment of a person's emotional state or mental health, including distress, anger, aggression, affection, depression, or other mental illness;
5. the physical condition of things, including worn, shabby, new, or used;

6. estimates of market value of real or personal property (see Thayer, *supra*, pp. 524–25; 12 *C.E.D.* (West. 3rd) §624); and
7. estimates of speed, time, and distance (see R. v. Graat, [1982] 2 S.C.R. 819 and Letourneau v. Clearbrook Iron Works Ltd., 2004 FC 1422 (Prothonotary)).

The compendious statement of facts exception does not permit a lay witness to testify in the form of a conclusion about a legal standard, as a legal standard is beyond common knowledge and experience. The application of a legal standard to the facts is a matter for determination by the trier of fact; that is, the judge sitting alone, or a jury. In the case of a jury, the judge instructs the jurors on the law before they retire to consider their verdict.

3. Expert Opinion Exception [§1.15]

a. Expert Witness Defined [§1.16]

The other exception to the opinion evidence rule permits the reception of expert opinion. An expert witness is a person qualified by special skill, knowledge, training, or experience. The inference or conclusion drawn by the witness is within the area of the witness's expertise. The trier needs the assistance of the expert to draw the correct inference. These requirements are matters for the judge to determine when a litigant offers an expert witness in the course of a trial.

From the beginning of modern trial by jury, common law judges received the opinions of experts to assist juries on "matters of science" (J.B. Thayer, *A Selection of Cases on Evidence at the Common Law*, 2nd. ed., pp. 672-3; Folkes v. Chadd (1782), 99 E.R. 589 (H.L.)). In the civil law systems of Europe, jurists have received expert evidence since the Middle Ages; the problems of experts' roles and functions that ensued in the past remain relevant today (Silvia De Renzi, "Witnesses of the body: medico-legal cases in seventeenth century Rome" (2002), 33 *Studies in History and Philosophy of Science* 219).

b. Development of the Law [§1.17]

Many of the leading cases in Canada on the admissibility of expert evidence concerned psychiatric evidence in criminal cases. Typically, these cases were murder trials, presided over by a judge sitting with a jury. The accused raised a defence that put his or her state of mind in issue. The prosecution and defence offered psychiatric evidence against or in support of the defence, respectively. In these leading cases, judges were concerned about the impact of psychiatric evidence on the jury, who, it was feared, might succumb to the mystique of science. The judges wanted to prevent trial by jury from turning into "trial by psychiatrist". These cases generally reflect the traditional caution of judges towards admitting expert evidence.

Throughout the Commonwealth, the English criminal case of R. v. Turner, [1975] 1 Q.B. 834 (C.A.), is a leading decision, urging judges to exercise caution in admitting expert evidence. In *Turner*, the accused was charged with murder and raised the defence of provocation. He was tried by a judge and jury. The accused testified that he had committed the crime in a blind rage, and called a psychiatrist, but the judge excluded the expert evidence. The jury convicted the accused. The accused appealed the conviction on the ground that the judge should have admitted

the psychiatrist's testimony. The English Court of Appeal dismissed the appeal, holding that psychiatric evidence was only admissible if the accused's mental state qualified as "abnormal", because the jury was assumed to be familiar with and capable of assessing matters of "ordinary human experience", without expert assistance. The court perceived a danger that the jury might defer to the judgment of the expert out of respect for or diffidence towards the expert's qualifications and special study of the matter. The court said (at 841 and 842):

An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does …
Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life.…
If any such rule was applied in our courts, trial by psychiatrists would be likely to take the place of trial by jury and magistrates. We do not find that prospect attractive….

According to *Turner*, psychiatric opinion is admissible if the mental state in issue qualifies as "abnormal". But to psychiatrists, the distinction between "normal" and "abnormal" mental states is at least as blurred as the distinction between fact and inference. In the judgment of the courts, however, the distinction must be drawn, no matter how untenable it may appear to psychiatrists.

For criticisms of *Turner* and its tests for limiting psychiatric evidence to "abnormal" mental states, beyond "ordinary knowledge and experience", see R.D. McKay and A.M. Coleman, "Equivocal Rulings on Expert Psychological and Psychiatric Evidence: Turning a Muddle Into a Nonsense", [1996] Crim. L.R. 88; and R.D. McKay and A.M. Coleman, "Excluding Expert Evidence: A Tale of Ordinary Folk and Common Experience", [1991] Crim. L.R. 800.

III. Mohan: the Four-part Test [§1.18]

A. Introduction [§1.19]

In R. v. Mohan, [1994] 2 S.C.R. 9, the Supreme Court of Canada set out the criteria for determining the admissibility of expert opinion evidence, by elaborating on the R. v. Turner principle. The accused, a paediatrician, was tried by a judge and jury on four counts of sexual assault on young female patients. Defence counsel offered the testimony of a psychiatrist to the effect that the perpetrator of the offences was a paedophile and a sexual psychopath. The psychiatrist had developed "profiles" of the culprit and the accused. Based on this profiling, the expert had concluded that the accused was neither a paedophile nor a sexual psychopath. The trial judge excluded the psychiatric evidence and the jury convicted the accused. The Ontario Court of Appeal allowed the accused's appeal on the ground that the trial judge erred in excluding the evidence. On a further appeal, the Supreme Court of Canada restored the convictions and upheld the judge's decision to exclude the expert evidence.

In its reasons for judgment, the court wanted to erect barriers to the admissibility of psychiatric profiling, because of its dubious probative value. In so doing, the court set forth restrictive criteria that apply to determining the admissibility of expert evidence generally. To qualify for admissibility, the court said expert evidence must meet four criteria:

1. relevance;
2. necessity in assisting the trier of fact;
3. the absence of any exclusionary rule; and
4. be given by a properly qualified expert.

This type of analysis originated in *R. v. Turner* and exemplifies the caution judges exhibit with regard to expert evidence. The court proceeded to define the criteria restrictively, with the intention of providing grounds for rejecting expert psychiatric evidence. In a trial by judge and jury, the judge would determine whether expert evidence met the criteria. The court's admonitions were directly applicable to judges presiding over criminal trials, but judges in civil cases and arbitrators follow them too. Each of the four criteria is discussed in more detail below.

Following the *Mohan* criteria, a judge has the discretion to exclude expert evidence that is marginal in its admissibility and probative value in relation to the issues in dispute (Homolka v. Harris, 2002 BCCA 262).

B. Relevance [§1.20]

As mentioned at §1.7, a fundamental principle underlying the law of evidence is that irrelevant evidence is never admissible in a proceeding. Conversely, relevant evidence is admissible unless it is excluded by a rule of law or as a matter of discretion. Relevance is a matter to be determined by the judge. Ordinarily, evidence satisfies the criterion of relevance if there is a minimal logical connection between the evidence and the "fact in issue" (R. v. Morris, [1983] 2 S.C.R. 190). According to *Morris*, relevance is a matter of logic and human experience. The "facts in issue" are defined by the parties, in the pleadings, and in their conduct of the case. According to *Morris*, "logical" and "legal" relevance are the same. Exclusion of evidence because of its low probative value, waste of time, cost, or confusion of issue is a matter of judicial discretion and is not part of the judge's determination of relevance.

According to R. v. Mohan, however, expert evidence that has low probative value may be excluded either on the basis that it lacks legal relevance or, more properly, as a matter of discretion. A special test of legal relevance, that involves going beyond ordinary logic and human experience into matters of trial administration, applies to exclude expert evidence of marginal logical relevance. The court said at paras. 18 and 19:

Evidence that is otherwise logically relevant may be excluded … if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability … The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.

There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.

Thus, expert evidence of minimal probative value may be rejected for lack of legal relevance or, as a matter of discretion, by weighing its marginal probative value against prejudicial effect (see R. v. Seaboyer, [1991] 2 S.C.R. 577 at 610, where it was held that prejudice must substantially outweigh probative value).

In a decision of the Supreme Court of Canada on expert evidence, R. v. D. (D.), 2000 SCC 43, the court divided four to three over the admissibility of a child psychologist's testimony, but reiterated the requirement of legal relevance for experts enunciated in *R. v. Mohan*.

Instead of introducing into Canadian law a confusing and ill-defined concept of legal relevance to exclude marginal expert evidence, it seems preferable to apply the more familiar framework of (logical) relevance, exclusionary rules, and judicial discretion, as providing all the legal tools that a judge needs to exclude objectionable evidence (expert or otherwise). In *R. v. Mohan* (at 20 and 21), Sopinka J. analyzed the concern about expert evidence as follows:

Relevance is a threshold requirement for the admission of expert evidence as with all other evidence. Relevance is a matter to be decided by a judge as [sic] question of law. Although *prima facie* admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs". See *McCormick on Evidence* (3rd ed., 1984) at p. 544. Cost in this sense is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule (see *Morris v. The Queen*, [1983] 2 S.C.R. 190). Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.
There is a danger that expert evidence will be misused and will distort the fact-finding process.

Contrary to the preceding reasoning, the consequences of excluding evidence under a "rule" of "legal relevance" (as a "question of law") differ from those of excluding evidence as a matter of discretion. In the trial, the effect of excluding evidence is the same only in the sense that the trier of fact cannot consider the evidence in making findings of fact, but on appeal the effect is different. The trial judge enjoys a degree of finality in making discretionary decisions that does not apply to decisions on questions of law.

In the process of deciding whether or not to admit a disputed item of evidence, the first consideration for a judge is its relevance (based on logic and human experience) to the issues. The judge must then consider its admissibility under the exclusionary rules of evidence, such as the expert exception to the opinion evidence rule. In this framework, the final consideration is the judicial discretion to exclude evidence. An erroneous ruling on a question of law, such as logical relevance or the application of an exclusionary rule, is subject to appeal as an error of law. A trial judge has more latitude to make a final decision on a matter of discretion; such decisions can only be overturned on appeal for abuse of discretion.

A cost benefit analysis as proposed in R. v. Mohan requires the judge to determine admissibility by weighing in the balance the possible effects of excluding or admitting the evidence on fact-finding at the trial and on trial administration. *R. v. Mohan* distinguished the impact of the disputed evidence on a jury as a primary consideration. The potential impact of disputed evidence on a jury is a matter for assessment by the judge in the context of a specific trial, rather than on the application of a rule. In numerous cases such as Draper v. Jacklyn, [1970] S.C.R. 92, the potential impact of an item of evidence on a jury is "essentially one for the exercise of the personal discretion of the trial Judge in the particular circumstances of each case". The trial judge has the advantage over an appellate court of sitting with the jury in the courtroom as the evidence and issues unfold, and is thus in a better position to "appreciate their reactions".

Contrary to the assertion in *R. v. Mohan* that in Canada "legal relevance" is frequently considered as ground for excluding evidence, the better view is "the law in Canada has never adopted that supercharged view of relevance" (Anderson v. Maple Ridge (District) (1992), 71 B.C.L.R. (2d) 68 at 74 (C.A.)). Expert evidence is exceptional, in that respect.

The leading criminal case R. v. Wray (1970), [1971] S.C.R. 272 states that the judicial discretion to exclude evidence requires a judge to evaluate the prejudicial effect, probative value, and admissibility of the evidence. If evidence is irrelevant, or inadmissible under a rule, it should be excluded on that basis, rendering consideration of judicial discretion to exclude superfluous. Judicial discretion should apply only to evidence that is potentially or arguably relevant and otherwise admissible. Thus, in Homolka v. Harris, 2002 BCCA 262, the British Columbia Court of Appeal held that where expert evidence was "at best, of thin relevance", and was not necessary to assist the jury, the trial judge made an error on a question of law in receiving the evidence at trial. The issue was described not as one of "legal relevance" but rather one of admissibility under the exclusionary rules of evidence. The appellate court regarded the error as one of law, rather than merely a weighing of cost benefit. Acknowledging that some aspects of admitting expert evidence might be matters of discretion for the trial judge to determine with finality, the appellate court preferred to overrule the erroneous decision in this case as one of error in failing to apply an exclusionary rule of evidence. The trial judge erred in admitting expert evidence that the Court of Appeal ruled was not necessary to assist the trier of fact. The Court of Appeal ordered a new trial.

The Supreme Court of Canada began to develop the rule of admissibility—that expert evidence must be necessary to assist the trier of fact—in a series of cases beginning with Kelliher (Village) v. Smith, [1931] S.C.R. 672, and reaffirmed the rule in *R. v. Mohan*, as discussed in §1.21.

C. Necessity in Assisting the Trier of Fact [§1.21]

In R. v. Mohan, the court said expert opinion is admissible only if it is necessary to assist the trier of fact. If the judge feels the jury can get by without the expert opinion, it is unnecessary and inadmissible. In this context, the "trier of fact" refers to the jury, or to a judge presiding at a trial without a jury. To limit the admissibility of expert opinion evidence to more complex matters, the court emphasized that the evidence must be *necessary* to the understanding of the jury, not merely helpful to them. Following the reasoning in R. v. Turner, judges should assume a jury is able to apply ordinary human knowledge and experience to the disputed issues in the case. Expert evidence on a matter within ordinary knowledge or experience is unnecessary in the sense that the jury can be expected to reach a reasoned conclusion without it, even though they might face some difficulty in so doing. Such expert evidence should be excluded to prevent expert witnesses from usurping the function of the jury.

If the issue is beyond ordinary human knowledge and experience, the ordinary lay juror requires expertise to reach a correct result. Where expert evidence is necessary to assist the jury, it is admissible.

The test is difficult to apply in practice. For example, in the leading case of Kelliher (Village) v. Smith, [1931] S.C.R. 672, the plaintiff brought an action for personal injuries suffered while trying to put out a fire with the village's fire extinguisher. The plaintiff claimed negligence on the part of the village in failing to keep the extinguisher in working condition. The village claimed contributory negligence on the part of the plaintiff in operating the extinguisher improperly. The court divided over the admissibility of expert evidence offered by the village that the plaintiff owed a duty to himself and those around him to make sure the extinguisher was properly tightened so that the sulphuric acid contained in it could not escape. The majority held that the expert evidence was inadmissible as invading the province of the jury. The majority felt the jury was as capable as the experts to form a correct judgment. On the other hand, the dissenting judges felt that the experts should have been allowed to testify as to the proper method of operating the fire extinguisher, and the extent to which the proper method was known and accepted in the local community.

Professor Thayer felt that expert and lay opinion should be excluded if the trial judge determined that "it will not be helpful to the jury": see Thayer, at p. 525. He also felt that appellate courts should be leery of overturning the decisions of trial judges. Although Professor Thayer's views have not prevailed in Canada or England, they have gained acceptance elsewhere.

Commonwealth appellate courts do not necessarily share the Supreme Court of Canada's deference to R. v. Turner. Other appellate courts have not accepted the necessary/helpful distinction drawn by *Turner* as authoritative, and admit expert evidence even if it is within the ordinary experience of the jury as long as it is *helpful* to them (Murphy v. The Queen (1989), 167 C.L.R. 94 (Aust. H.C.); R. v. Decha-Iamsakun, [1993] N.Z.L.R. 141 (C.A.); A.G. v. Equiticorp Industries Ltd., [1995] 2 N.Z.L.R. 135 (C.A.)).

In *Decha-Iamsakun*, the court said (at 146 and 147):

Matters which to a considerable extent are within the experience of a Judge trying the facts or a jury can arise, yet expert evidence may help materially in coming to a conclusion. The ordinary experience test need not be interpreted so as to exclude such evidence. The information provided may well be outside ordinary experience and cause the judge or jury to review impressions or instinctive judgments based on ordinary experience, and to do so in the direction of either confirmation or doubt of what ordinary experience suggests. Scientific knowledge is constantly advancing. The fear and risk of allowing trials to degenerate into contests of psychiatric or other expert evidence are entirely real, but the law would be reactionary if as a general rule it rejected the help of modern scientific insight into human behaviour and cognition.

Nevertheless, apparently undaunted by such criticism, in R. v. D. (D.), 2000 SCC 43, the Supreme Court upheld a ruling declaring a child psychologist's testimony inadmissible because it was unnecessary. It is clear that the court regards the necessity criterion as essential to confine expert testimony to those issues that are beyond the jury's ability. In *R. v. D. (D.)*, the complainant was 10 years old at the time of trial and five or six years of age when the offences of sexual abuse allegedly occurred. The complainant did not report the alleged abuse for two and one-half years afterwards. The Crown called a child psychologist to explain to the jury various legitimate reasons why a child might wait for such a period before reporting sexual abuse. For the majority of the court, Major J. held the evidence was inadmissible because it failed to meet the necessity requirement. For Major J., the traditional common law caution towards the admissibility of expert evidence was the correct approach, even in the current era of the "knowledge-based" society. In his view, judges should maintain the full force of the necessity criterion to prevent abuse of expert evidence. In the following passage, Major J. explained why the necessity criterion was essential to confining expert evidence within its proper bounds (at paras. 51 and 53 to 56):

Despite the emergence of the exception, it has been repeatedly recognized that the admissibility requirements of expert evidence do not eliminate the dangers traditionally associated with it. Nevertheless, they are tolerated in those exceptional cases where the jury would be unable to reach their own conclusions in the absence of assistance from experts with special knowledge.
…
The primary danger arising from the admission of any opinion evidence is that the province of the jury might be usurped by that of the witness. The danger is especially prevalent in cases of expert opinion evidence. Faced with an expert's impressive credentials and mastery of scientific jargon, jurors are more likely to abdicate their role as fact-finders and simply attorn to the opinion of the expert in their desire to reach a just result. …
The danger of attornment to the opinion of the expert is further increased by the fact that expert evidence is highly resistant to effective cross-examination by counsel who are not experts in that field. In cases where there is no competing expert evidence, this will have the effect of depriving the jury of an effective framework within which to evaluate the merit of the evidence.
Additional dangers are created by the fact that expert opinions are usually derived from academic literature and out-of-court interviews, which material is unsworn and not available for cross-examination. Though not properly admissible as evidence for the proof of its contents, this material generally finds its way into the proceedings because "if an expert is permitted to give his opinion, he ought to be permitted to give the circumstances upon which that opinion is based" (R. v. Dietrich (1970), 1 C.C.C. (2d) 49 (Ont. C.A.), at p. 65). In many cases, this

material carried with it prejudicial effects which require special instructions to the jury (*Abbey*, *supra*, at p. 45).

Finally, expert evidence is time-consuming and expensive. Modern litigation has introduced a proliferation of expert opinions of questionable value. The significance of the costs to the parties and the resulting strain upon judicial resources cannot be overstated. When the door to the admission of expert evidence is opened too widely, a trial has the tendency to degenerate into "a contest of experts with the trier of fact acting as referee in deciding which expert to accept" (*Mohan*, *supra*, at p. 24).

Although the Supreme Court in R. v. Mohan preferred "necessity" to "helpfulness", because it was a more rigorous standard of admissibility, the court blurred the distinction by saying that necessity "should not be judged too strictly". Opinion met the test of "necessity" by conveying to the jury information that was likely to be outside their knowledge and experience (*R. v. Mohan*, at 23; R. v. J. (J.-L.), 2000 SCC 51 at para. 56; R. v. Parrott, 2001 SCC 3 at para. 55; Homolka v. Harris, 2002 BCCA 262 at paras. 12 to 16).

D. The Absence of Any Exclusionary Rule [§1.22]

1. Character Evidence Rule [§1.23]

Even if expert opinion evidence satisfies the opinion evidence rule, its admissibility is not assured, because it might offend another exclusionary rule. Rules about leading questions and refreshing memory apply with full force to expert witnesses.

For example, in R. v. Mohan, evidence of a novel and untested psychiatric technique known as "profiling" was excluded not only because it failed to satisfy the requirements of the expert evidence exception to the opinion evidence rule, but also because it violated the character evidence rule. The character evidence rule prohibits lay witnesses from offering their personal opinion that an accused could not possibly have committed the offence charged because it was so far removed from the accused's personality as to be completely out of character. In *R. v. Mohan*, the Supreme Court held that because the defence psychiatrist was not offering valid expert opinion evidence formulated following generally accepted procedures, the testimony should be downgraded to inadmissible lay opinion. Opinion evidence lying outside the expert's area of expertise is simply lay opinion, and admissibility should be determined under the compendious statement of facts rule (see Trynor Construction Company Ltd. v. Canadian Surety Co. (1970), 1 N.S.R. (2d) 599 at 620 (C.A.)).

The character evidence rule generally prohibits lay or expert witnesses from testifying in the form of opinion about the character of a party or a witness as to truthfulness. Thus, in a personal injury case, expert evidence is usually inadmissible if it is merely the personal opinion of the expert as to the honesty or dishonesty of the plaintiff in advancing the claim for damages. On the other hand, expert testimony may properly be offered that can come very close to an opinion on the character of a party or witness. For example, a medical expert may offer an opinion that the plaintiff's symptoms were not caused by the defendant but by a form of psychological dysfunction such as "somatizing". On the other hand, an expert would offend the character

evidence rule by imputing dishonesty to the plaintiff, for example, by describing the plaintiff as a "malingerer" or a "liar". Even suggesting that the plaintiff's symptoms result from a psychological state such as a "nomogenic disorder" may be inadmissible evidence of bad character. Attributing a nomogenic disorder to the plaintiff is improper if it means that the plaintiff's symptoms are maintained without any physical cause for the purpose of the claim, and will end when the case is satisfactorily completed (see Baas v. Jellema, 2000 BCCA 24).

2. Polygraph Evidence and Credibility [§1.24]

Another controversial interpretive device, the polygraph or "lie detector", is inadmissible because it violates several exclusionary rules, and interferes with the role of the trier of fact in determining credibility. In two leading cases, the Supreme Court of Canada excluded evidence of the results of a polygraph test as inadmissible. In the first case, Phillion v. R., [1978] 1 S.C.R. 18, the accused did not testify. The accused had confessed to the police, but then repudiated his confession. At his trial for murder, the defence offered the evidence of an expert polygrapher that prior to the trial the accused had successfully undergone a lie detector test. The results of the test showed that the accused's confession was false and he was telling the truth when he proclaimed his innocence to the polygraph operator. The accused did not testify for the defence, so his version of the events was not tested under oath or by cross-examination. This prompted the court to reject the evidence of the polygraph test as an attempted end-run by the accused around the hearsay rule. The rule against hearsay prohibited the accused from avoiding the oath and cross-examination box by offering evidence of his story through the testimony of a polygraph operator. The majority of the court said the accused's statements to the polygraph operator were "self-serving, second-hand evidence tendered in proof of its truth on behalf of an accused who did not see fit to testify" (at 25).

In the second decision, R. v. Béland, [1987] 2 S.C.R. 398, the two co-accused testified for the defence, adding an offer to take a polygraph examination after testifying and to submit the results in evidence at the end of the trial. The co-accuseds hoped to improve their credibility relative to the Crown witness by passing the lie detector test. A majority of the Supreme Court of Canada held the polygraph evidence was inadmissible, as violating the general rule against oath-helping, the rule relating to character evidence, and the expert evidence rule.

The lie detector test would disrupt criminal and civil trials, and add very little to the assessment of credibility by the jury. Hence, the results of a lie detector test are inadmissible on the issue of credibility. However, the lie detector is widely used in the course of investigations, and the courts frequently receive evidence of the administration of a lie detector test as part of the background. Moreover, a civil litigant's willingness to take a lie detector test may be relevant and admissible (see Whiten v. Pilot Insurance Co. (1999), 170 D.L.R. (4th) 280 (Ont. C.A.), reversed on other grounds 2002 SCC 18). Statements made by an opposing party during the test may be admissible as evidence (Kerkowich v. Wawanesa Mutual Insurance Co., 2001 MBQB 30). Child welfare and custody disputes are a special category of proceeding in which some rules of evidence do not apply: polygraph evidence may be accepted in these hearings (Z. (M.F.) v. British Columbia (Director of Child, Family and Community Services), 2004 BCPC 441).

3. The Hearsay Rule: Expert Opinion Based on Out-of-court Statements [§1.25]

When an expert relies on information provided by others to formulate an opinion for use in court, a conflict between the opinion evidence rule and the hearsay rule can arise. The usual definition of hearsay prohibits the use of out-of-court statements as proof of the truthfulness of assertions contained in them. If evidence is hearsay, the trier of fact cannot determine its weight, because the witness is simply a conduit passing on to the court information from others. The witness lacks personal knowledge of the truthfulness or accuracy of the information provided. The other persons who are not the witnesses are described in this context as the "real witnesses", on whose credibility or truthfulness the weight of the hearsay evidence depends. Because these persons are not witnesses, the trier of fact cannot assess their credibility.

The opinion evidence rule, on the other hand, permits an expert witness to base an opinion for use in court on the same information that those in the same area of expertise would normally use in formulating their opinions for non-litigious purposes. The basis may include not only facts of which the expert has personal knowledge but also information of which the expert has no personal knowledge provided to the expert by others outside the court, as long as this is the usual practice in the field (R. v. B. (S.A.), 2003 SCC 60 at para. 63). The expert sets out the basis of the opinion in an expert report and in testimony even if it includes information that will not be proven in court by other evidence. The purpose for doing so is to enable the trier of fact to compare the facts assumed or relied on by the expert with the trier's own findings of fact. The weight of the opinion may depend on the degree of congruence or consistency between the facts assumed by the expert and the facts proven in court.

To the extent that the expert's explanation of the basis of the opinion is from facts not personally known by him or her, the basis is relevant only in determining the weight of the opinion. The trier of fact must not rely on the basis related by the expert from information provided by others as proof of its truthfulness, because to do so would violate the hearsay rule. However, exceptions to the hearsay rule and the principled approach might apply to permit the trier's use of the expert's testimony as proof of the truthfulness of the information even though the expert lacked personal knowledge (see Mazur v. Lucas, 2010 BCCA 473).

4. Compellability and Privilege [§1.26]

The adversarial system of trial and the rule of law require that courts can compel persons to testify against their will. A court has the right to every person's evidence. A court can issue a subpoena to a person, requiring attendance at court to testify. Service on a reluctant witness of a subpoena to testify ("under penalty") means that the consequences of non-attendance or refusal to testify may involve arrest under a bench warrant and/or imprisonment for contempt of court. For ordinary or lay witnesses, the maxim is "there is no property in a witness", meaning that any litigant can communicate with or compel a person to be a witness by serving them with a subpoena, as a matter of right, without obtaining permission from another litigant. The same maxim applies to expert witnesses. Otherwise a litigant with deep pockets could monopolize all the potential expert witnesses in a narrow field of expertise. However, a properly instructed expert witness will understand the limits, imposed by privilege, on what can and cannot be disclosed to others regarding his or her brief, and the *Professional Conduct Handbook*, Chapter 8, ss. 14 to 17, sets guidelines for counsel with respect to communicating with other parties' experts.

A litigant may call as witness as to facts or opinion an expert whom an opposing party or their counsel has consulted in connection with the current or a previous dispute. If the expert has received privileged, as distinct from merely confidential, communication in the course of the prior consultation by the opposing party or their counsel, the privileged information and an opinion based on it are inadmissible so as to protect the privilege, but the expert's evidence based on non-privileged information is admissible (Schober v. Walker, 2004 BCCA 205).

Legal professional privilege belongs to a client rather than to a lawyer. In litigation by a lawyer against a former client over fees, the lawyer's prior consultations with the same expert the former client has retained in the current litigation are not privileged at the behest of the lawyer. A lawyer owes a fiduciary duty of disclosure to a client that prevents the lawyer from invoking privilege as against the former client or their expert in a dispute over fees (*Schober v. Walker*).

E. A Properly Qualified Expert [§1.27]

In R. v. Mohan, the Supreme Court of Canada said the fourth criterion for the admissibility of expert evidence is the requirement that the expert be properly qualified. The party offering an expert must show the witness's special or peculiar skill through training, study, or experience. The qualifications, or lack thereof, of expert witnesses may affect the admissibility and weight of their evidence. Since often the boundary lines between distinct areas of knowledge cannot be drawn precisely, and the scope of cross-examination is not limited to what is covered in an expert's report tendered in evidence, the courts must allow some flexibility to expert witnesses exceeding the strict limits of their fields. Minor deficiencies in qualifications might affect only the weight of the opinion evidence, but serious excesses affect admissibility and may require a new trial (R. v. Marquard, [1993] 4 S.C.R 223 at 250; Hoskin v. Han, 2003 BCCA 220 at para. 69; Edwards (Guardian ad litem of) v. Moran, 2003 BCCA 687 at para. 37; Charlebois v. Vandas, 2004 BCCA 356).

To succeed on appeal on the ground that the trial judge erred in qualifying the expert witness or in allowing the expert's testimony too much latitude, the appellant must show that the error was "palpable and overriding". A palpable error is one that is clearly wrong, and an overriding error is one that discredits the outcome at trial (L. (H.) v. Canada (Attorney General), 2005 SCC 25 at paras. 69 and 110 to 120). An appellate court can take into consideration the parties' tactics at trial for consistency or inconsistency with the ground of appeal (at para. 118).

In Perera v. De Groot, 2007 BCCA 242, the trial judge erred by admitting an expert witness's opinion on an issue despite the witness's explicit disavowal of expertise.

A qualified expert witness must not only have the necessary expertise to offer an opinion in court, but must also appreciate the expert's overriding duty to the court of formulating the opinion impartially. Rule 11-2 requires an expert report to contain a certification by the expert that he or she is aware of the duty to assist the court and not to be an advocate for any party. The duty of assisting the court applies to making the report and to giving evidence (Rule 11-2(2)). The Rule reinforces ethical codes of professional associations that admonish expert witnesses to put their duty to the court ahead of their financial or litigious interests (see, for example, the Association of Professional Engineers, Geologists and Geophysicists of Alberta, *Guideline for*

the Professional Member as a Witness; Association of BC Forest Professionals, *Code of Ethics*; British Columbia Institute of Agrologists, *Code of Ethics*; and BC Association of Clinical Counsellors, *Code of Ethical Conduct and Standards of Clinical Practice*).

Bias or partiality is a ground for disqualifying an expert witness. Lack of financial independence from the parties can be a factor in bias, but not necessarily determinative of it. The expert's financial dependence on the party might only affect weight rather than admissibility (Hospira Healthcare Corp. v. Eli Lilly Canada Inc., 2010 FCA 282).

See §3.2 to §3.5, §5.22, and §8.7 to §8.11 for further discussion of expert qualifications.