

# Expert Evidence: A Refresher from the Court of Appeal on the Key Roles of the Judge, Expert and Counsel

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The Ontario Court of Appeal in [\*Parliament v. Conley\*, 2021 ONCA 261](#) has provided a refresher for judges, experts and counsel on the roles each plays when dealing with expert evidence:

1. Judges must exercise their gatekeeping role throughout the testimony of expert witnesses;
2. Experts must stick to the area of his or her expertise and not become advocates; and
3. Counsel are to properly instruct experts and object to inadmissible expert evidence.

## The Facts

Twenty-seven experts testified during this lengthy jury trial involving allegations of medical malpractice. The jury found the defendant medical doctors had met the standard of care and the judge dismissed the action. The evidence of one defence expert on the standard of care was found to be problematic; as a result, the Court of Appeal allowed the appeal, set aside the trial judgment and ordered a new trial.

One of the key issues at trial was the credibility and reliability of the plaintiff's mother and the defendant doctors (para. 17). There was a factual dispute about what the defendant doctors had said to the plaintiff's mother on the various occasions the defendants saw the plaintiff and whether the plaintiff's mother followed the instructions given by the doctors. The resolution of this factual dispute was central to the issue of the standard of care.

The expert whose evidence was problematic, Dr. Bruce, testified on behalf of the defendants about the standard of care. Dr. Bruce, a medical doctor, ignored the plaintiff's mother's evidence from her examination for discovery when he prepared his report because he did not think her recollection was accurate. He also expressed his opinion that the plaintiff's mother's memory was "probably mistaken" (para. 53). Consequently, he chose to accept the defendants' evidence over the plaintiff's mother's evidence when giving his opinion on whether the defendants had met the standard of care.

The plaintiff's trial counsel did not object to Dr. Bruce's opinion on the credibility and reliability of the witnesses during the trial and the judge permitted the expert to testify on this point. In her instructions to the jury, the trial judge commented on the expert evidence and the plaintiff's trial counsel made comments about this expert evidence in closing; however, the Court of Appeal found that that was not sufficient to cure the problems with the expert evidence (paras. 53 and 54).

## Judges are Gatekeepers

The Court of Appeal reminds us of the risk that the trier of fact, especially a jury, will defer to the expert's opinion rather than carefully evaluate it (para. 43). The role of the judge is to exercise a gatekeeper function to ensure that the expert evidence meets the four conditions for admissibility: (i) relevance, (ii) necessity in assisting the trier of fact, (iii) absence of an exclusionary rule, and (iv) properly qualified expert. The second stage of the analysis for admissibility of expert evidence requires the trial judge to conduct a cost-benefit analysis to determine whether admissible expert evidence should nevertheless be excluded because its probative value is outweighed by its prejudicial effect.

This gatekeeper function continues throughout the expert's evidence. The trial judge must ensure that the expert does not overstep the acceptable boundaries of expert evidence, continues to be independent and not become an advocate for a party (paras. 45 and 47). In this case, the Court of Appeal found that the trial judge did not properly exercise the gatekeeper function during the expert's evidence. This is to some degree understandable, given that the plaintiff's trial counsel did not object to the evidence.

The Court of Appeal found that the trial judge, in her continuing gatekeeper role, should have invited submissions from the parties regarding a mid-trial instruction that the jury ignore any and all of Dr. Bruce's opinions on the credibility and reliability of the witnesses. Alternatively, she could have included a very clear and specific instruction in the final charge on that point. The court found that the failure of the judge to so instruct the jury was a serious error on the part of the trial judge (para. 58).

### **The Role of the Expert**

The Court of Appeal found there were several problems with Dr. Bruce's evidence. He exceeded his role as an expert when he opined on the credibility and reliability of the doctors and the plaintiff's mother. The problem with this type of evidence by an expert is, of course, the risk that the jury would accept the expert's opinion on credibility and reliability rather than assessing the evidence on their own.

The Court of Appeal also found that an expert expressing an opinion on the credibility of witnesses is a breach of that expert's duty to be independent (para. 52). The expert had crossed over from being independent to being an advocate. Clearly this is inadmissible, and the evidence should have been excluded by the trial judge exercising her gatekeeping role.

An expert's opinion must be based on facts. Where the facts necessary to form an opinion are in dispute, it is not the expert's role to make findings of fact on which to base his or her opinion. When an expert does make such findings of fact, the expert has digressed well beyond expressing opinions based on hypothetical facts he or she was asked to assume (para. 52). When instructing an expert, counsel should set out for the expert the hypothetical facts to be assumed in giving an opinion. If the trier of fact determines that the assumed hypothetical facts are not proven, then of course the expert's opinion will be not accepted. However, it is the role of the trier of fact to determine the facts and not the expert.

### **Trial Counsel's Obligation to Object**

As noted earlier, trial counsel did not object to the admissibility of the expert's opinion on the credibility and reliability of the witnesses. The admissibility was raised for the first time on appeal. The general principle is that a party in a civil case should not bring an appeal based on some aspect of the trial court proceeding to which it did not object (para. 63). The general rule is that the failure to object at trial is fatal to an appeal on that point. Consequently, it is a key role of counsel to object to improper evidence, including evidence of an expert who has overstepped the boundaries of expert evidence and has lost his or her independence.

However, there is an exception to this rule. When the Court of Appeal is satisfied that a new trial is necessary in the interests of justice, it will order a new trial. Where a substantial wrong or miscarriage of justice has occurred, the Court of Appeal has discretion to grant a new trial or other remedy despite the failure of counsel to object to the evidence.

Since this was a jury trial, it was not possible for the Court of Appeal to assess with any certainty the impact of Dr. Bruce's evidence on credibility. Given that credibility was central to the case, the court found that there was a very real possibility that the evidence played a significant role in the jury's decision to find the standard of care was met by the defendants. Consequently, the Court of Appeal held there had been a miscarriage of justice and a new trial was required (para. 69).

## The Consequences

The failure of the judge, the expert and trial counsel to fulfil their roles when experts testify has resulted in a lengthy and most likely, expensive, second trial. Perhaps the most interesting aspect of this case is that nothing the Court of Appeal said is new. These principles are well established and have been for many years. They are, however, worth reviewing from time to time.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

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