

## When an Expert Goes Too Far

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A recent decision of the Ontario Court of Appeal demonstrates the importance of expert witnesses being fair and objective.

In *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502, Justice Hourigan, for the Court of Appeal stated:

The law regarding expert witnesses has evolved considerably over the last 20 years. Gone are the days when an expert served as a hired gun or advocate for the party that retained her. Today, expert witnesses are required to be independent, and their function is to provide the trier of fact with expert opinion evidence that is fair, objective and non-partisan.

The case arose out of a motor vehicle accident in 2008. The plaintiff alleged that the accident caused a chronic pain condition, along with anxiety and depression. After a 23 day trial, the jury awarded non-pecuniary general damages of \$23,500 and nothing for all other heads of damages.

The Court of Appeal set aside the trial judgment and ordered a new trial. This was based on a miscarriage of justice resulting from the improper conduct of a defence psychiatry expert.

The defence expert was criticized by the Court of Appeal on a number of fronts, including:

He hunted for discrepancies between a short interview with the plaintiff and medical records which dated back several years, and did not give the plaintiff an opportunity to explain the apparent discrepancies.

He came dangerously close to usurping the role of the jury by negatively commenting on the plaintiff's credibility.

He unfairly criticized the plaintiff's treating health care practitioners.

He "torqued" test results to support his conclusion.

The Court of Appeal stated that the expert went beyond a mere lack of independence and appeared to have adopted the role of an advocate for the defence. The expert did not properly understand his role.

The Court of Appeal referred to the two step analysis in terms of the admissibility of expert evidence, as outlined by the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 S.C.R. 182.

First, the trial judge must consider the four traditional threshold requirements for expert evidence: (i) relevance; (ii) necessity in assisting the trier of fact; (iii) absence of an exclusionary rule; and (iv) the need for the expert to be properly qualified.

Secondly, the trial judge must exercise a "discretionary gatekeeping step" by balancing the potential risks and benefits of admitting the evidence. The judge has to consider whether the probative value of the expert evidence outweighs its prejudicial effect.

The Court of Appeal held that, although the trial judge did not permit the expert to testify in certain areas, he failed to properly exercise his role as a gatekeeper. The expert's

report made it evident that he would be a troublesome witness, one who was intent on advocating for the defence.

However, the Court of Appeal acknowledged that it is difficult to predict with certainty how an expert may testify based on the expert's report. For this reason, the trial judge's gatekeeper role is an ongoing one. The trial judge has residual discretion to exclude expert evidence even after admitting it. A mid-trial or final instruction can be given to a jury to exclude all or part of an expert's testimony. If the prejudice is too great to be corrected, a mistrial should be declared.

In the end, the Court of Appeal stated that, although a new trial would be costly and time consuming, "...it is necessary because the defence proffered the evidence of a wholly unsuitable expert witness".

This case is a clear statement from the Court of Appeal that "hired guns" are not welcome in the courts. An expert's primary duty is to the court, not to the party that retains him or her. Lawyers need to ensure that experts are aware of their responsibilities. As stated by the Court of Appeal in *Moore v. Getahun*, 2015 ONCA 55, consultation and collaboration between counsel and expert witnesses is essential to ensure that the expert witness understands his or her duties.