

Counsel's Role in Preventing Humiliated Experts

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Expert witnesses, especially those with little experience testifying in court, do not always appreciate their duties.

Justice Tzimas stated in a recent decision that counsel have an obligation to ensure that their experts are not humiliated in cross-examination.

In *Pentalift Equipment Corporation v. 1371787 Ontario Inc.*, 2019 ONSC 4804, there were serious concerns with an expert in materials failure and metallurgy, who was testifying in court for the first time.

Justice Tzimas said that the expert was biased and either unable or unwilling to appreciate the nature of his duties to the court.

When pushed on some of the more difficult questions, the expert said that he followed his client's instructions. He did not question any of the information provided to him and did not conduct sufficient background investigations. Further, he failed to follow his own methodology.

Justice Tzimas indicated that counsel must ensure that an expert understands his or her unique role in a trial, in particular, that he or she is there to assist the court.

This must be distinguished from counsel interfering with the substance of an expert's opinion. An expert has to prepare an independent analysis and conclusion.

Referring to a paper by Justice Paciocco, Justice Tzimas said that counsel must guard against:

1. selection bias (why the expert is chosen);
2. association bias (whether the expert might demonstrate a desire to do something serviceable for his or her customer/employer);
3. professional bias (whether an expert might be defending his or her research or own credibility);
4. noble cause distortion (whether the expert might demonstrate a willingness to distort evidence, believing that he or she is on the side of good); and
5. dogmatism and rigidity.

Justice Tzimas stated that any one or more of these flaws will render the expert's views unreliable and useless. She further indicated that, when counsel fail to guard against these risks, they may bring the administration of justice into disrepute.

In the case at bar, the expert compromised his standard methodology because ostensibly he was given very little time to investigate and reach his conclusions.

Justice Tzimas stated that counsel should have been vigilant over such limitations. It was incumbent on counsel to scrutinize the expert's efforts and ensure that his opinion was not compromised.

In conclusion, counsel have responsibilities when selecting and preparing an expert witness. Counsel must ensure that the expert's opinion is of assistance to the court and that the expert understands his or her role.

This is necessary for the proper administration of justice and to prevent the expert from being humiliated in the witness stand.