THE SO-CALLED OPINION EVIDENCE RULE

By Richard C. Halpern

Long ago *Wigmore* referred to the rule governing the admissibility of expert testimony at trial as the "so-called opinion evidence rule" because, he said, "there is no instance in which the use of a mere catchword has caused so much error of principle and vice of policy". [1] Error and vice continue to this day. It is my contention that a comprehensive appreciation for the historical foundation of this rule is necessary to address the errors of principle, perpetuated by the case law, and vice of policy, perpetuated in some rules of civil procedure. Simply put, the rule is poorly understood. Appreciating the historical foundation of the rule will also lead both lawyers and judges to a better understanding of the role of Litigation Experts in the adversarial system and the scope of permissible interaction between lawyers and experts.

There is no comprehensive statement of the "so-called" opinion evidence rule in Canadian case law. As *Wigmore* pointed out, "the so-called opinion rule is in its scope much narrower than the term 'opinion'; it deals with opinion in a special sense only".[2] In this sense, the rule is not intended to exclude "opinion evidence" generally, but rather applies only to a subset of "opinion" evidence – that offered from witnesses engaged specifically to help the trier of fact with technical or scientific matters beyond the knowledge of the trier of fact. Thus, the rule is intended to apply only to Litigation Experts and not Participant Experts, as those terms were described by Justice Simmons in the recent Court of Appeal decision in *Westerhof* v. *Gee*.[3]

No single Canadian case offers a complete statement of the rule. To cobble together a firm understanding of the rule, in my view, one needs to consider 4 pivotal cases together, two from the Ontario Court of Appeal and two from the Supreme Court of Canada. From the Ontario Court of Appeal the cases are *Moore* v. *Getahun*[4] and *Westerhof* v. *Gee*. The Supreme Court of Canada cases are R. v. *Mohan*[5] and *White Burgess* v. *Abbott*.[6]

The starting proposition is that it is not now the rule, nor has it ever been, that there is a general exclusion to witnesses testifying as to their opinions. A

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[1] See *Wigmore on Evidence* ((1978), volume VII, page 1 and page 14.
[2] Ibid, at page 1.
[3] *Westerhof* v. *The Estate of William Gee and Kingsway General Insurance*, 2015 ONCA 206.
[4] *Moore* v. *Getahun*, 2015 ONCA 55.
[5] *R.* v. *Mohan*, [1994] 2 S.C.R. 9.
[6] *White Burgess Langille Inman* v. *Abbott and Haliburton Co.,* [2015] 2 S.C.R. 182.

misapprehension that the rule is designed to exclude all opinions, subject to certain exceptions, has led to the folly in trying to distinguish between "opinion" and "fact" – an impossible task. Many courts have mistakenly referred to the role of a witness as one to recite the facts, from which the trier of fact must then opine on the meaning and significance of the facts. Indeed, this error has been perpetuated recently by the Supreme Court of Canada in *White Burgess* in the following passages:

> Witnesses are to testify to the facts which they perceive, not as to the inferences – that is, opinions – that they drew from them.[7]

The Court went on to say:

> Not all opinion evidence is excluded, however. Most relevant for this case is the exception for expert opinion evidence on matters requiring specialized knowledge.[8]

With due respect, this statement is, at a minimum, incomplete. The Court should have provided a more comprehensive, and therefore more accurate, statement of the rule, describing its somewhat narrower application. The failure to do so is, again, the consequence of not having due regard to the antecedents of the rule. Taking these two quotes from *White Burgess* together inevitably leads to confusion about the rule. The distinction between strangers to the dispute and those with personal knowledge or observations is crucial to the application of the rule. Witnesses, in general, are not limited to the 'facts'. This notion led to the errors made by the Ontario Divisional Court in *Westerhof,*[9] later corrected by the Ontario Court of Appeal. The rule does not apply to witnesses, with or without expertise, who testify as to their opinion while observing or participating in the events giving rise to the matters in issue.[10]

From such pronouncements has come confusion about the application of the opinion evidence rule and the spawning of rules of civil procedure designed to address expert bias, partisanship and potentially misleading expert testimony – what has been referred to as the 'dangers' of opinion evidence.

While we may call the rule the "Opinion Evidence Rule", the admissibility of such evidence does not depend upon any distinction between fact and opinion at all. Rather, the rule is concerned with the need to hear ready-made conclusions, from skilled strangers to the matters in issue, where it is required to assist the trier of fact in making fair inferences, conclusions and deductions from the facts.

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[7] See *White Burgess* at paragraph 14.
[8] See *White Burgess* at paragraph 15
[9] See note 3 above.
[10] See *Westerhof* at paragraph 62. Also see *Marchand* v. *Public General Hospital Society of Chatham* (2000), 51 O.R. (3rd) 97 (Ont. C.A.) at paragraphs 95, 96 and 120.

In all respects the rule is really one of common sense. Generally the trier of fact should not hear from witnesses offering their own conclusions without any personal knowledge or observations of the matters in issue because such witnesses are simply not competent to testify. They offer nothing that will advance the inquiry of the trier of fact, so that hearing their evidence is a waste of time. These witnesses can be in no better position to express an opinion than is the trier of fact and, therefore, should not be heard.

There are, however, situations where the trier of fact is unable to arrive at a just conclusion based on hearing the facts; where to do so requires some special degree of skill, training or education. It is the "skilled stranger" that has necessarily spawned the opinion evidence rule. Where the evidence is such that the ability to render a just and fair verdict depends on special skill or knowledge, it follows that the trier of fact needs to hear from the skilled witness, otherwise a stranger to the case, in order to reach the proper verdict. Thus, though Litigation Experts have no personal knowledge about the circumstances of the litigation, the need to have their skilled perspective provides an exception to a rule that excludes evidence from strangers altogether. It is important to understand that, historically, the testimony of witnesses unknowledgeable about the case was not excluded because they were offering opinion evidence, but rather excluded because their opinions could not advance the matter. It follows, as stated earlier, that the exclusionary rule applies only to these witnesses.

The Supreme Court of Canada in *Mohan* stated:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "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 the expert is unnecessary".[11]

Some authors and case law promote the notion that testimony that goes to the "ultimate issue" or that "usurps" the function of the trier of fact is inadmissible. This, too, in my view, reflects a fundamental misunderstanding of the rule. Long ago, *Wigmore* called for the repudiation of this theory[12], yet it continues to be perpetuated in our courts. Litigation Experts are routinely called to offer inferences and conclusions that the trier of fact must decide. Such testimony should not be objectionable on some notion that it might usurp the function of the trier of fact. The trier of fact is free to reject the evidence. The idea that a trier of fact might be so

[11] See *Mohan* page 23.
[12] See *Wigmore* at page 18.

swayed by the credentials of the expert witness, is to give little credit to the intelligence of the trier of fact or the ability of the adversarial system to tease out those inferences or conclusions that are not adequately supported by the facts.

Again from *Wigmore*:

> The fallacy of this doctrine is, of course, that, measured by the principle, it is both too narrow and too broad. It is too broad, because, *even when the very point in issue is to be spoken to, the jury should have help if it is needed*. It is too narrow, because opinion may be inadmissible even when it deals with something other than the point in issue.[13] (emphasis added)

Where technical knowledge is needed by the trier of fact, and the expert is in a position to help with that technical knowledge, the evidence should be heard. The trier of fact needs help. Therefore, this type of "opinion" witness is permitted to testify only if the witness is going to help the trier of fact. It is from this fundamental underlying principle that the duties of expert witnesses are derived.[14] Rules of civil procedure that describe the need for experts to be impartial, unbiased, non-partisan and objective should be seen as mere codification of long-standing, but inadequately recognized, common law duties.[15]

Other witnesses with expertise who have personal knowledge of the matters in issue, Participant Witnesses, will not have their evidence excluded by the rule; should not be expected to declare an over-riding duty to the court; and, will be permitted to testify as to their opinions formed as part of the ordinary exercise of his or her skill while observing or participating in events.[16]

Many cases have referred to the dangers of admitting expert evidence. Concerns are expressed about: usurping the role of the trier of fact; the trier of fact being over-awed by highly credentialed experts; hired guns; junk science; distorted evidence dressed up in complicated jargon; having trial by expert rather than trial by judge (or judge and jury); and, giving expert testimony more weight than it deserves. In *White Burgess* the Supreme Court of Canada refers to the "well known" dangers of expert evidence.[17]

These putative "dangers" are substantially over-stated and, in many situations, for all practical purposes, non-existent. Once again, support for this view is provided by the historical underlying rationale for the rule itself. If the evidence of the expert

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[13] See *Wigmore* at page 22.
[14] Indeed the Supreme Court of Canada in *White Burgess* confirmed at paragraph 31 that "Many of the relevant rules of court simply reflect the duty that an expert witness owes to the court at common law."
[15] See the comments of Justice Sharp in *Moore* v. *Getahun*.
[16] See Westerhof v. Gee, at paragraph 62.
[17] See *White Burgess* paragraph 17.

witness meets the threshold test for admissibility, then the potential dangers are of little or no consequence. In other words, if the trier of fact requires some help on technical matters to render a fair result, and if it has been established that the proposed witness is in a position to render that help, then the dangers are of little consequence. Some will argue that the court must still be on guard for those dangers given the exalted position of some experts, but this inappropriately diminishes the function of our adversarial system in teasing out the truth. The fact is that rarely does expert testimony go unchallenged with like-qualified experts on the other side. In this way, through effective advocacy, the court ought to be presented with all points of view. Further, it is the role of the able advocate to put the expert testimony to the test and careful scrutiny through properly prepared cross-examination. Finally, in the context of hearing experts on both sides exposed to vigorous cross-examination, emphasis on the supposed "dangers" underestimate the ability of judges and juries to properly assess the case after having heard all of the evidence.

Therefore, when the Supreme Court of Canada comments that "the point is to preserve trial by judge, not devolve to trial by expert"[18], the focus, in my respectful view, is misplaced. If the trial judge determines that the expert witness meets the first threshold test of admissibility, by definition the matter is not a trial by expert. A properly functioning adversarial system ought to ensure that the trier of fact is in a position to critically evaluate all the evidence, including the scientific or technical evidence.

Admissibility of Litigation Expert testimony depends on getting over 3 hurdles before the evidence can be heard: first, the court must be satisfied that the witness is capable of complying with the duty to be fair, objective and non-partisan, what I will call the "initial threshold"; second, the testimony must meet the 4-part test described in *Mohan*; and, third, if the testimony passes the first 2 hurdles, the court must still be satisfied that the "benefit" of hearing the expert evidence outweighs the risks, what I will call the "Risk/Benefit assessment". This article will not cover the risk/benefit assessment, although it is arguably a superfluous step.

The initial threshold is concerned with whether the proposed witness is "capable" of meeting the obligation to provide assistance to the court, or whether there is a sufficient degree of independence and impartiality that would permit the court to hear the testimony. In other words, if the witness, due to bias, cannot reasonably be expected to "help" the trier of fact, then the evidence must not be heard. That is the fundamental historical principle underlying the rule itself. The case of *White Burgess* clearly establishes that this initial threshold sets a low bar for admissibility.[19]

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[18] See *White Burgess* paragraph 18.
[19] See *White Burgess* paragraph 49.

An important observation to be made from the initial threshold is that expert testimony that is not thought to have a sufficient degree of impartiality and independence does not get heard. It is a matter of admissibility and not a matter of weight. This is where the gatekeeping function of the judge comes in that will exclude evidence that cannot be expected to be helpful, and therefore poses the "dangers" of expert testimony that some courts have cautioned to avoid. On the other hand, once this threshold is met, the "dangers" should no longer be considered a factor. If the evidence has the potential to help the trier of fact, it is then up to the trier of fact to decide the use to which the evidence is put.

To understand the initial threshold we need to take a closer look at what it means to be fair, objective and non-partisan. Importantly, one should recognize that the duty to help the court is a duty that overrides, but does not displace, the duty the expert might have to the party who retained the expert. This notion must be considered in the context of the *Moore* case, describing the scope of permissible interaction between Litigation Experts and counsel.[20] This is the only way to derive a comprehensive understanding of the role of Litigation Experts and the admissibility of their testimony.

In defining the meaning of fair, objective, impartial, unbiased and independent the Supreme Court is also careful to note that these concepts must be applied "to the realities of adversary litigation".[21] My concern is that the Supreme Court has not done enough to guide counsel on how one should reconcile the expert's duty to the court with the realities of adversarial litigation. In my view *White Burgess* ought to be read together with the Ontario Court of Appeal decision in *Moore* v. *Getahun* in order to better appreciate how the expert's duties and the adversarial system intersect. The realities of litigation are such that the expert's duty to the court does not preclude extensive consultations and strategizing with Litigation Experts. The Litigation Expert is being consulted and called to help prove the case of the retaining party. That is a reality that should not be perceived as an obstacle to impartiality.

"Independence" means that the expert opinion is the "product of the expert's independent judgment".[22] Without more, this definition is troubling. The test of independence must be qualified by an appreciation for the need for lawyers to interact with their experts on matters of both form and substance. Done ethically, such interactions should not be seen as undermining the expert's independence. The notion of independence should not be seen as requiring that the retaining party and the expert be independent. Rather, the word independence must be seen to apply to the opinion itself, only in the sense that, apart from the particular matters at stake in the litigation, the opinion is justifiable and reasonably capable of proof. If the opinion is formed in collaboration with or input from counsel, it does not mean the opinion is not independent in the sense it must be for admissibility purposes.

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[20] See *Moore*, paragraphs 51-52, 55-66, 68 and 73.
[21] See *White Burgess* at paragraph 32.
[22] Ibid.

"Unbiased" means that the opinion "does not unfairly favour one party's position over another".[23] This is very straightforward and requires little analysis. Although trite, it must be observed that the expert testimony will always favour one party's interests over another. It just can't do so unfairly.

Once the court has determined that the expert testimony meets the initial threshold for admissibility, the proposed evidence will be scrutinized under the four-part test described in *Mohan*. The *Mohan* criteria are:

1. Relevance;
2. Necessity in assisting the trier of fact;
3. The absence of an exclusionary rule;
4. A properly qualified expert.[24]

The focus will be on necessity. A properly conducted analysis of the necessity of the expert testimony obviates any need to do a cost/benefit analysis. The necessity criterion can be broken down into the following propositions, all formulated from the historical foundations of the rule:

1. Where the trier of fact is able to reach appropriate inferences without expert guidance, the evidence of an expert is entirely superfluous;
2. Some evidence is too technical for the trier of fact to reach appropriate inferences;
3. Where the evidence is too technical for the trier of fact, it is necessary to obtain help from a skilled witness;
4. Where the evidence of a skilled witness ought to be admitted, that skilled witness is permitted to offer 'ready-made' inferences for the trier of fact to consider.

Where the court is satisfied that the evidence is too technical for the trier of fact, it follows that inferences ought not to be made without the help of an expert. This, in my view, obviates any need for a risk/benefit analysis – either the trier of fact needs the help or the help is not needed. By definition the required information is outside the experience of the trier of fact and without the help the trier of fact will be unable to fully appreciate the matters due to their technical nature,[25] as suggested by proposition (3). The evidence is "such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge".[26] Where this is the case, the risk/benefit analysis should be seen to be subsumed by the necessity criterion. Moreover, once the evidence is deemed necessary, the dangers cited earlier become largely irrelevant.

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[23] Ibid.
[24] See *Mohan* page 21.
[25] See *Mohan* page 23.
[26] Ibid.

Proposition (4) allows the expert witness to offer what the court has described as 'ready-made' inferences. These inferences will frequently be on the ultimate issues that the trier of fact is expected to determine. This is precisely why these experts are testifying. If the evidence is needed to allow a correct judgment to be formed, then the fact that the opinions touch on the ultimate issue to be determined is not an argument against the admissibility of the evidence. This, in my view, is an answer to the supposed 'dangers' of expert testimony. The admission of the evidence has already established its value. Once admitted, the trier of fact is still free to reject it. The idea that the trier of fact may be overwhelmed by a highly credentialed witness delivering technical evidence must be addressed by the ways our adversarial system has for exposing the weaknesses of the testimony.

To conclude, a more precise understanding of the opinion evidence rule, based on first principles, will help lawyers and courts in the proper and consistent application of the rule. As well, lawyers and experts may better appreciate the permissible scope of interaction between them; and, courts will better understand the criteria that applies to the admissibility of evidence from strangers to the litigation. Finally, the importance and effectiveness of the adversarial process needs more prominent recognition as a balance to any perceived problems with Litigation Expert testimony. The right balance depends on good advocacy.