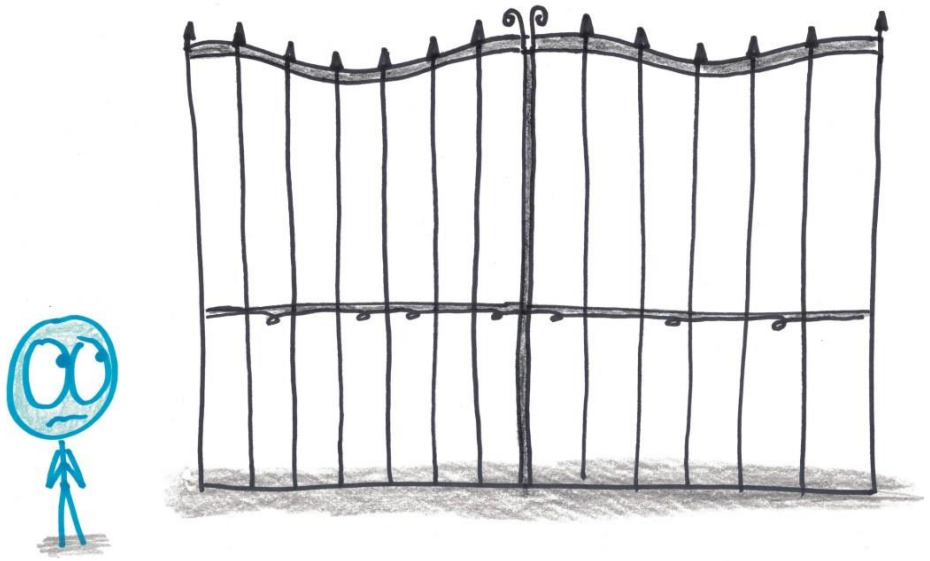
A defence lawyer's perspectives on some common issues associated with expert evidence in criminal trials


POLICE
POLICE

The Supreme Court of Canada has emphasized that admissibility of expert opinion evidence should be robustly scrutinized. *Criminal Code* notice requirements supplement admissibility requirements, imposing additional requirements on the party seeking admission of expert evidence.

I suggest that in practice, however, the special scrutiny that is intended to be applied to expert opinion evidence is more often honoured in the breach than in the observance.



The "qualifications" *voir dire*

There is, I suggest a "disconnect" between the manner in which expert evidence is routinely admitted through perfunctory "qualifications" *voir dires*, and the following foundational legal principles:

- **First, expert evidence is *prima facie* inadmissible.**

- **Secondly, the party seeking admission of expert evidence has the burden of establishing both threshold reliability (the *Mohan* criteria of relevance, necessity, absence of an exclusionary rule; a properly qualified expert) and that the balancing of the potential risks & benefits of admission justifies its admission (the gatekeeper assessment:) *White Burgess, p*aras. 23-24.**

The "qualifications" *voir dire* related to expert evidence is, I suggest, a misnomer, as it is an admissibility *voir dire. I*t is not confined to whether the expert is "properly qualified," but rather extends to all four of the *Mohan* criteria, as well as the gatekeeper assessment.

The "qualifications" *voir dire*

The focus of the qualifications *voir dire* should be the assessment of the admissibility of *those opinions in the expert report or willsay.*

Accordingly, it is certainly incorrect for the party qualifying the expert to frame the issue by advising the judge, for example, "I am seeking to qualify Dr. X as an expert in forensic psychiatry" as this entirely omits the opinions sought to be led.

More typically, the *voir dire* begins with the party seeking to lead the opinion providing some minimal outline of the nature of the opinion at the outset: for example, "I am seeking to qualify Dr. X as an expert in forensic pathology to provide an opinion on cause and manner of death." I suggest that this latter form of initiation of the "qualifications" assessment is insufficiently detailed, and that it would be preferable to summarizing the main points in the report or reference that the *voir dire* relates to admissibility of those opinions contained in the report.

Regardless of what is stated at the outset of the *voir dire*, the Court's scrutiny must be on the opinions set out in the report/willsay. This requires, I suggest, that the parties provide the trial judge with a copy of the expert report.

The "qualifications" *voir dire*

The *Mohan* criteria apply to expert evidence in civil cases. *White Burgess* was a civil case.

In CanLII's database of 2021 British Columbia decisions, there are 67 civil trial level and appellate decision that referenced *Mohan,* but only 8 criminal law decisions.

I suggest that defence counsel should approach the assessment of admissibility of expert opinion evidence much as civil lawyers do, including a sentence-by-sentence scrutiny of the expert's report to assess whether each and every opinion falls within the scope of the expert's purported expertise, and whether other potential bars to admissibility may exist.

Notice Requirements

s. 657.3 of the *Criminal Code* provides:

- **Parties who intend to call expert evidence shall, at least 30 days before the commencement of the trial, or another period fixed by the judge, give notice of their intention, including the witness' name, their area of expertise, and their qualifications.**

- **The Crown shall, within a reasonable period before trial, provide a copy of the report or will-say of the witness.**

- **The defence shall provide the defence expert's willsay or report not later than the close of the Crown case**

If there is non-compliance with these provisions, then s. 657.3 (4) provides that "the court shall" on request: grant an adjournment; order that a party provide the material (i.e., a report or willsay);order the calling or recalling of any witness unless the court considers it inappropriate to do so.

Exclusion of evidence is not contemplated as a remedy.

The "qualifications" voir dire and the Code notice requirements

- **The notice requirements in s. 657.3 typically result in pretrial service on the defence of Crown expert reports, and service on the Crown of defence reports just before the close of the Crown case.**

- **However, parties not infrequently seek to have the expert supplement or expand upon the opinions contained in the expert report. The first notice to the opposing party of new opinions may occur through counsel advising of the proposed new opinions, or may occur without notice.**

- **Counsel in my experience often fail to object to new opinions being elicited from experts testifying in chief.**

- **The appropriate focus for new opinions is on the requirements of notice and that admissibility of all opinions be screened through a "qualifications" *voir dire*.**

- **Thus, it is not simply that counsel require time to prepare for cross-examination on new opinions but that their admissibility may be in issue, and thus the opposing party has a right to formal prior notice.**

The "qualifications" voir dire and the Code notice requirements

- **I suggest that when counsel become aware after a qualifications *voir dire* that that opposing counsel seek to lead opinions not contained in an expert report, the first step in response should be to object to that evidence being led in the absence of proper notice in the form of an addendum report or willsay.**

- **Counsel should then consider whether the new opinions are such that the Court should consider their admissibility on a re-opened "qualifications" *voir dire.***

- **In any event, an adjournment to consider next steps and to consult with defence experts or otherwise investigate the new opinions should be considered.**

- **The slide that follows sets out how these matters played in out in one recent case.**

The "qualifications" voir dire and the Code notice requirements

***R. v. Lewis,* 2021 BCSC 1739 (CanLII):**

- **Ms. Lewis was charged with first-degree murder arising from the death of her child.**
- **The Crown sought to lead new opinion evidence from the forensic pathologist regarding time of death, a matter not addressed in the autopsy report. The defence objected to those opinions being led in the absence of formal notice.**
- **The testimony of the Crown's pathologist was stood down to allow for the formalities of notice, defence consideration of admissibility, and preparation for cross-examination.**
- **The adjournment resulted in additional defence expert investigations that disclosed the deceased child suffered from an undiagnosed pre-existing condition that may have played a role in her death.**
- **The accused was acquitted.**

Waiving the "qualifications" voir dire

I suggest that it should only be in rare circumstances that parties should agree to waive the inquiry into admissibility of expert opinion evidence. Waiver is difficult to reconcile with the Court's gatekeeper function and may contribute to confusion as to what evidence is to be led.

Potential dangers of such waivers are illustrated by the decision in *R v Manuel*, 2021 ABCA 134 (CanLII) (leave to appeal ref'd, 2021 CanLII 109582 (SCC)):

- **The defence consented to the Crown entering as exhibits an emergency room physician's consultation report, and the doctor's CV.**
- **The document contained both the doctor's observations (i.e. facts) and the doctor's opinions on causation of injuries. The defence claimed the latter were not admissible.**
- **The Court of Appeal held that while "it may have been preferable for the trial judge to have required counsel to specifically identify the purpose for which the report was being entered," there was "clear waiver of the *voir dire* to admit the report" and its expert opinions regarding the cause and extent of the injuries were admissible.**

Trial judges err if they assess admissibility of expert opinion evidence without applying the correct test

***R. v. Nield*, 2019 BCCA 27 (CanLII):**

The appellant, while in hospital, struck a psychiatrist, who sustained serious injuries. At trial he was found guilty of aggravated assault. The trial judge had not permitted the defence to cross-examine the psychiatrist on the drugs prescribed to the appellant, and their effects.

On appeal, the Court noted that this was expert evidence that could have gone toward establishing the available defence of automatism.

The BCCA commented on the casual nature of the qualification of experts at trial. It observed that inadequate notice of the expert opinion was no bar to admissibility. Further, while the trial judge's refusal to allow the cross-examination appeared to be based on a view that the doctor was biased as he was the trial complainant, any such bias could only preclude his testifying as an expert for the Crown. The Court found that the trial judge erred in failing to apply the correct legal test, which would have involved assessment of the costs and benefits of receiving the treating physician's opinion evidence.

Disclosure and Crown experts

It is not uncommon for expert reports to set out largely conclusory opinions. Assessments of whether admissibility requirements are met, and of weight, are assisted by disclosure of the expert's process of testing and/or evaluation, which are typically contained in file materials such as bench notes, raw data, and Crown and police communications with the expert.

If the expert relies on case materials, or summaries of those materials, disclosure of the materials relied on should be sought.

In some cases expert opinions may be based on hypothetical facts set out in a letter of instruction. Disclosure should be sought of instructing letters.

If a report is from an expert working in a laboratory setting, consider seeking disclosure of: the lab's operating procedures; lab accreditation details; data regarding the lab's error rate history (and in cases such as those involving DNA, contamination data.)

Disclosure and defence experts

The defence is obliged to make disclosure when the defence expert takes the stand. Privilege is waived once the expert testifies: *R. v. Stone*, 1999 CanLII 688 (SCC); *R. v. Minassian*, 2020 ONSC 7130 (CanLII)

When defence counsel refer to the defence expert opinion in opening submissions, that constitutes a waiver of privilege and the defence expert opinion and its foundation become disclosable: *R. v. Stone*, 1999 CanLII 688 (SCC)

***R. v. Frechette,* 2000 BCSC 182 (CanLII):**

- **defence opening submissions were made immediately after the Crown opened. The defence referred to the defence expert opinion.**
- **The Crown argued waiver of privilege and that the defence opinion was now required to be produced**
- **The trial judge held that there had been waiver of privilege. The Crown was entitled to immediate disclosure of the defence expert opinion, but could not use that evidence until the defence had begun to call evidence.**

Marking of Expert Reports as exhibits

Reports are provided so that the accused has notice of the expert opinion, but the evidence before the Court is the *viva voce* testimony.

I suggest it is no more appropriate to mark as an exhibit the expert report of an expert who testifies than it is to conclude the testimony of a civilian witness by marking as an exhibit their statement to police. Yet in my jurisdiction expert reports are often marked as full exhibits, without objection.

If an expert report is marked as an exhibit in the course of the expert's testimony, and the content of the report differs from the testimony, which is the evidence?

If an expert's opinion does not assist the opposing party, I suggest counsel should strongly oppose it being marked as an exhibit.

The need for caution re: anecdotal evidence from experts

***R. v. Sekhon*, 2014 SCC 15, para. 50:**

- **the "inherent danger" of admitting anecdotal evidence from experts is "obvious."**
- **anecdotal evidence does not speak to the particular facts before the Court, but has the superficial attractiveness of seeming to show that the probabilities are very much in the Crown's favour, and of coming from the mouth of an "expert"**
- **while such evidence is not relevant, it may be highly prejudicial.**

***R. v. Lewis,* 2021 BCSC 1739 (CanLII):**

- **the forensic pathologist observed water in the sphenoid sinus of the deceased and concluded the deceased would have been alive when submerged in water, based primarily on her anecdotal experience.**
- **The trial judge, following *Sekhon,* held that the foundation of this opinion was "more in line with the now-prohibited 'trust me' standard rather than with the required evidence-based or 'persuade me' standard for expert opinion evidence."**

The Tomas Yebes Case

In 1983 Tomas Yebes was convicted of second degree murder of his two young sons, who died in a house fire. He exhausted his conviction appeals.

Decades later the convictions were overturned by the Minister of Justice and a new trial ordered based on fresh evidence of new expert opinions that undermined the expert opinions that in the early 1980s had claimed that the fire was intentionally set and that the deaths were the result of a criminal act. The Crown called no evidence and acquittals were entered.

The Tomas Yebes Case

It is in part through the rigors of the criminal trial process that many of the scientific weaknesses in forensic science fields have, historically, been discovered.

Deficiencies in the expertise and methodology of some now-disgraced "experts" have similarly been exposed through the trial process.

A defence bar that is overly deferential to the claims of forensic science may not be able to prevent the next Charles Smith from emerging, or the wrongful conviction of the next Tomas Yebes.