Address to the Nova Scotia Medical - Legal Society

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The View from Here: Medical Evidence in General, and Experts in Particular, as seen by a Justice of the Court of Appeal

The Honourable Mr. Justice Jamie W.S. Saunders
Nova Scotia Court of Appeal

Introduction

After listening to Wayne's kind and far too generous introduction I thought there might be an objection from the back of the room saying that the qualifications of the intended speaker had not been admitted, the *curriculum vitae* had not been circulated in advance, a comprehensive report had not been filed in compliance with the **Rules**, and there ought to be cross-examination to satisfy you – the triers of fact – that the assumptions upon which the introduction was based, are sound! At the very least this might have added some balance and objectivity to Mr. Cochrane's hyperbolic introduction!

Seriously, I was very flattered to be asked to speak to you this evening. The added bonus was the chance to enjoy a fine meal in a spectacular setting, see old friends, and make the acquaintance of others whose names are so familiar to me. Allow me to pay particular tribute to two people in the audience: Dr. Syed Akhtar and Mr. Charles MacIntosh, Q.C., men who are respectively virtual deans in forensic psychiatry and law, and to whom we in the professions owe so much. I am thrilled that you both could be here this evening.

So thank you very much for your kind invitation and the warmth of your hospitality. I hope that what I have to say to you this evening will prove to be enlightening and perhaps – insofar as my position permits – somewhat provocative. Your President has crafted an impressive title to my talk:

The View from Here: Medical Evidence in General,
and Experts in Particular,
as seen by a Justice of the Court of Appeal

Obviously whole texts and treatises have been written on the subject. All I can hope to do in the next 30 minutes or so is to paint a picture, in broad strokes, of an area in the law which continues to evolve, and attract controversy, as it has for almost 500 years.

When discussing the role of experts and the presentation of opinion evidence at the trial or appellate level, I intend to offer both a retrospective and prospective view.

I have organized my presentation into three discrete parts labeled:

Yesterday, Today and Tomorrow. I will start with a brief historical overview intended to give you some insight as to when and how the evidence of experts came to be admitted and used in courts of law. Then I will explain the current rules for the admissibility of such evidence and how your expertise as professionals has played such an important role in helping those called upon to judge, to ascertain the truth or as close to it as we can get. I will briefly canvas the tension that often arises in cases involving so-called new or novel science. I will discuss how our respective professions have come to explain predictability. Finally, I will conclude with a look ahead by offering some modest predictions of what you and I (or our successors) might face in litigation, in the years ahead.

So let me begin with some history.

But before traveling back in time almost 500 years let me quickly share with you my first personal exposure to the world of an expert witness. It wasn't auspicious, but the lessons learned were lasting.

Here I will just turn the dial of the clock back a notch, to 1974. I had graduated from law school the year before. I had completed my one year articling period and had been admitted to the Bar. I was representing a young fellow charged with possession of narcotics for the purpose of trafficking. The amount of drugs seized was not insubstantial. A jail term, upon conviction, was a certainty. The trial was in the Provincial Court in Truro. Halfway through the Crown's case the prosecutor advised the judge (called a magistrate in those days) that he wished to call "Robert Smith" as an expert for the Crown. His expertise was intended to assist the court in the vocabulary and customs of the drug trade as well as the intricacies of electronic surveillance. It probably won't surprise you that in those days the "rules" were rather silent in providing any meaningful advance notice of the intention to produce an expert, let alone any disclosure of the content of the expert's opinion.

Upon hearing the Crown prosecutor's remarks, the magistrate leaned over his dais, looked down at me and said "Mr. Saunders, do you wish to proceed with a *voir dire* on qualifications?"

In pushing my chair back and rising slowly to my feet I simply had no clue what the judge was talking about. Yes, I appreciated that in criminal cases one often entered into a *voir dire* to establish the voluntariness of an accused's

statement. But I had never had explained, let alone seen, a *voir dire* to challenge an expert's qualifications.

Boy did I learn quickly!

I still remember the grin on the face of the Crown prosecutor – much like the cat who has snagged the mouse – as he called out the person's name. At least I had been smart enough to ask for an exclusion of Crown witnesses at the beginning of the trial. So everyone – except for the informant – had been excused from the court room and were obliged to sit in chairs down the hallway until their name was called. The Crown prosecutor said "Your Honour, if it please the court, I call (grinning at me) Robert Smith .... (then added, and grinning even more) .... Staff Sergeant Robert Smith". Through the swinging back doors at the rear of the court room entered a well-muscled, tattooed long-haired male who appeared to be in his late 30's, wearing tattered jeans, leather boots, a t-shirt and a sleeveless jean jacket, and two or three necklaces. He looked like the late Jim Morrison, famous front man for The Doors!

After taking the stand and being sworn, Staff Sergeant Smith regaled the court with his experience as a seasoned RCMP undercover officer who had spent most of his 20 years infiltrating drug cartels and biker gangs.

I can tell you that my cross-examination of the officer during the *voir dire* was rambling, unfocused and ineffective.

But the experience taught me one very important lesson: understand the role of an expert in a court room and develop skills in effectively presenting or challenging expert opinion evidence and the assumptions upon which the opinion is based.

Yesterday

Having now shared with you this personal nightmare let me turn the clock back a good deal further, to a case that arose in England almost 500 years ago. Here let me express my appreciation to Philip Carpenter, one of our law clerks at the Court of Appeal this year, for his assistance in preparing tonight's presentation. Philip's painstaking research left me with a mother lode of archival treasures which I hope you will find as interesting as I did.

Most of the leading texts and academic journals which touch upon the subject of opinion evidence start with **Buckley v. Rice Thomas**, a case tried in the English King's Bench in 1554. Yes, you did hear me correctly ... 1554. Even more startling is the fact that this judgment was written by a Lord Justice Saunders! And even more impressive is the record that the defendant Rice Thomas was represented by a lawyer named Carpenter!

In the **Buckley** case the facts are not important. It is enough to know that a Knight of the King of England took an action in debt for £100 against a Sheriff in Wales. The issue was whether the action could be sustained, and that involved statutory interpretation of certain legislation including the Act which annexed Wales to England. What is significant for our purposes is that Lord Justice Saunders referred to the practice of seeking recourse to experts, to explain his reliance upon various authorities in written Latin. In the case report at p. 192, this is what he said:

> ... if matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns. Which is the honourable and commendable thing in our law. For thereby it appears that we do not despise all other sciences but our own, but we approve of them and encourage them as things worthy of commendation. . .

In support of his judgment, Lord Justice Saunders referred to precedent which included an earlier case where he said:

> Judges of our Law are used to be informed by Surgeons ... because their Knowledge and Skill discern it.

And so here we have an example, a very early example in the English common law where a judge openly declares his reliance on science, medicine and high ecclesiastical authority!

Speaking of Latin, the etymology of the word "witness" comes from the Latin *videre* meaning "to have knowledge of", "to know as a fact", or "to perceive" and the suffix "ness" to denote the person possessing that knowledge. And so a

witness, generally, is called to testify as to his or her knowledge of the facts that are in issue based on his or her personal observation of events.

A basic tenet of our law is that a witness may not give opinion evidence, but must testify only to facts within his or her knowledge, observation and experience. This is seen to be a commendable principle because it is the responsibility of the fact-finder – whether a jury or a judge alone – to decide what inferences, in other words, what opinions or conclusions may be drawn from the facts proved.

Thus, admitting an "expert opinion" is an exception to that general principle.

For the origins of the expert opinion exception, scholars suggest that we must go back to a time before witnesses were even allowed to appear before the jury. Remember that up until the 15th century it was the jury that went about the countryside, typically on horseback or by coach, before or during the trial to inform themselves as they might of the facts in issue. They then became witnesses before the judge. During this time experts were also used, but they provided their opinion directly to the court, who then instructed the jury upon the points on which the expert aided the judge. From this we can see that neither expert witnesses, nor lay witnesses, actually testified before a jury.

Of course, eventually, witnesses were permitted to offer testimony to the jury directly. At that point there arose a need to regulate the information that was placed before the jury. And so we see the laws of evidence truly begin to develop. Key among these principles was the requirement that testimony be restricted to personal observation or knowledge. Opinion was prohibited as it was seen to be based on mere belief or faith.

This same principle of personal observation or knowledge of events also underpins the rule against testimony based on hearsay. Thus, lay witnesses who had not required any special education or skills were only allowed to testify to matters within their personal knowledge because that was all they were competent to do.

We see in a number of criminal trials towards the end of the 17th century a more robust use of experts, such as we would expect today. For example, the case reports in 1678 refer to the murder trial of the Earl of Pembroke which was heard

before the full Parliament, in which both sides and the Lord Justice presiding over the trial all called medical experts to testify as to the cause of death.

It was not until the 18th century that any sort of modern opinion rule, and expert opinion exception, can be discerned. We see this development in the famous case of **Carter v. Boehm** where the judgment of Lord Mansfield signals the development of the modern opinion rules in the law of evidence. That was an insurance case where the Governor of the fort on the Island of Sumatra had insured his belongings against destruction or capture by an enemy, which of course occurred when a French man-of-war vessel attacked, captured the fort and later delivered it over to the Dutch. The defendant insurer sought to rely upon the opinion of the broker who had negotiated the policy and thus had some knowledge of the facts. The opinion of the broker was that certain, somewhat dated, letters about possible French attack should have been disclosed in spite of their age and limited relevance. Lord Mansfield, in upholding the verdict of the special jury of merchants, held that the broker's opinion should <u>not</u> have been put to the jury because in his words it was:

> ... Mere opinion, which is not evidence. It is opinion after an event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the Court and jury were to determine the cause : and therefore it is improper and irrelevant in the mouth of a witness.

And so in language very similar to what one would read in today's case reports, Lord Mansfield excluded the testimony of somebody who had personal knowledge of the general facts, yet whose opinion was rejected as being unnecessary since it was the very (ultimate) issue that the jury was called upon to decide.

In contrast, 16 years later, Lord Mansfield sat on appeal from a case commonly referred to as **Wells Harbour**. A land owner sued the trustees of a harbour for trespass after they tore down a dyke which he had built around certain lands. The harbour trustees claimed that the dyke had caused the harbour to decay as it filled up with silt and sand. The facts were not in dispute but the affect of the protective dyke was. At the first trial the plaintiff called the construction engineer to testify that the dyke did not cause the decay in the harbour. The defendants

protested that they were taken by surprise and were granted a retrial in which the plaintiff called another engineer who also testified as to circumstances that had arisen in other harbours. Again the defendants objected. On appeal, Lord Mansfield affirmed the admissibility of that expert evidence during the trial. He said in part:

> The facts in this case are not disputed. In 1758 the bank was erected, and soon afterwards the harbour went to decay. The question is, to what has this decay been owing? . . . It is a matter of judgment, what has hurt the harbour. . . in matters of science, the reasonings of men of science can only be answered by men of science. ... I cannot believe that where the question is, whether a defect arises from a natural or an artificial cause, the opinions of men of science are not to be received. . . . The cause of the decay of the harbour is also a matter of science, and still more so, whether the removal of the bank can be beneficial.

And so in these two leading cases we see two practical illustrations of how the courts came to deal with opinion evidence based on factors which are still very much in play, today. In **Carter v. Boehm**, Lord Mansfield determined that if the jury or judge could form the opinion, then the lay person's opinion was unnecessary. Thus he grappled with notions of necessity and redundancy. Sixteen years later in **Wells Harbour** , he approved the admissibility of the opinion, concluding that it was vital (in other words satisfied the requirement of necessity) as it went to the issue of scientific causation.

About the same time we see more frequent reference to experts in the field of medicine, especially in the sordid history of trials for witch craft and false accusations of witch craft.

In the *Witches' Trial* of 1665 (***A Trial of Witches*** (1665) 6 St. Tr. 687) Lord Hale preferred the evidence of a Dr. Brown, given in open court, as to his opinion of the condition afflicting the seven supposedly bewitched children over that of several lay people who personally observed the children in the presence of one of the accused witches. The children suffered from fits, distemper and vomited pins and nails. Dr. Brown testified to his opinion that the witches likely used a method common in Denmark at the time "of afflicting persons, by conveying pins into them". Lord Hale preferred Dr. Brown's evidence and ultimately sentenced the two women to death for witchcraft.

I wish I could tell you the role of witchcraft were merely of historical interest, but that is not the case. Today's ***Criminal Code***, R.S.C. 1985, c. C-46 s. 365 prohibits people from fraudulently *pretending* " to exercise or to use any kind of witchcraft, sorcery, enchantment or conjuration". If someone could prove they were a witch or they actually did practice witchcraft, they would not be guilty of committing this offence at least since they would not be pretending. Thus, expert evidence of witchcraft could still be relevant!

Well that's enough history. But I think the thumbnail sketch I've given you offers some insight into the evolution of the admissibility of opinion evidence, and the variety of uses to which such evidence has been put.

Let me turn now to the present.

Today

Here I am sure you will be pleased to hear that I won't spoil the evening with a quiz on the leading jurisprudence. At this stage of my presentation I would prefer to simply review with you certain principles that I have extracted from the case law, and then briefly canvas how those principles might impact upon your work, whether as experts giving the evidence, or as lawyers attempting to either present it, or impugn its worth.

Trial judges in Canada have a recognized "gatekeeper" role in admitting evidence, be it direct evidence, documentary evidence, or expert evidence.

In simple terms the general rule is that all relevant evidence is admissible unless it is subject to some exclusionary rule, or should otherwise be prohibited on grounds of public policy. Given those overarching principles, the following helpful four-step template is seen to apply in the case of expert evidence.

- First, it must be relevant.
- Second, it must be necessary to assist the trier of fact.
- Third, it must come from a properly qualified expert.
- Finally, there must not be any exclusionary rule or policy reason to prohibit its admission.

To these four I must also stress that like all evidence, admissibility is also

contingent upon probative value exceeding prejudicial effect.

The application of this template to well-established areas of knowledge is not typically a problem. Where we see a tension arise, is the accommodation of so-called novel science.

The Supreme Court of Canada grappled with novel science in **R. v. J.-L.J.**, 2000 SCC 51.

J.-L.J. was a case in which the accused was charged with sexual assaults on two young boys. The accused tendered evidence of a psychiatrist to establish that in all probability a serious sexual deviant had inflicted the abuse, and no such deviant personality traits were disclosed by the accused in various tests including penile plethysmography. After a *voir dire*, the trial judge excluded the expert's opinion and a conviction for sexual assault resulted. A majority of the Quebec Court of Appeal allowed the appeal and ordered a new trial. On appeal to the Supreme Court of Canada the Court unanimously (7:0) allowed the Crown's appeal and restored the conviction. Binnie J. wrote:

> A penile plethysmograph may not yet be generally accepted as a forensic tool, but it may become so. A case-by-case evaluation of novel science is necessary in light of the changing nature of our scientific knowledge: it was once accepted by the highest authorities of the western world that the earth was flat.

Noting that a penile plethysmograph was generally accepted as a therapeutic tool for known and admitted sexual deviants but not as a forensic tool, Binnie J. went on to consider the expert's novel forensic use of the penile plethysmograph at para. 35:

> While the techniques he employed are not novel, he is using them for a novel purpose. A level of reliability that is quite useful in therapy because it yields some information about a course of treatment is not necessarily sufficiently reliable to be used in a court of law to identify or exclude the accused as a potential perpetrator of an offence.

In **J.-L.J.** we see the Supreme Court dealing squarely with the issue of whether or not a judge should admit evidence based on novel science, and adopting certain key principles which have evolved in American jurisprudence. From this I distill four factors which will likely be applied in evaluating the soundness of novel science and determining its admissibility:

1. Whether the theory or technique can be and has been tested.
2. Whether the theory or technique has been subjected to peer review and publication.
3. The known or potential rate of error or the existence of standards, and
4. Whether the theory or technique used has been generally accepted.

I hasten to add, however, that these criteria are not always the essential, or the only factors, by which the admissibility of expert opinion evidence will be determined. Judges are reminded that the reliability inquiry must always be a flexible one.

Some of these issues were again revisited by the Supreme Court of Canada in ***R. v. Trochym***, 2007 SCC 6, [2007] 1 S.C.R. 239. After being put under hypnosis a key witness provided a statement which placed the accused at the scene on a certain date, which was different than an earlier account she had given to the police. The man was convicted. The jury was not told that the witness had been hypnotized or that there were discrepancies in her two statements. Nor did the jury hear expert evidence on the reliability of post-hypnotic evidence. On appeal to the Supreme Court of Canada the conviction was set aside and a new trial ordered. The Court observed that hypnosis and its impact on memory were not understood well enough for post-hypnotic testimony to be sufficiently reliable in a court of law.

The case offers guidance to trial judges concerning the extent to which expert scientific evidence ought to be examined. While all novel science must be scrutinized, even well-established science should be carefully assessed for relevance and reliability. Deschamps J., began her judgment for the majority by highlighting the spectre of wrongful convictions:

> In recent years, a number of public inquiries have highlighted the importance of safeguarding the criminal justice system — and protecting the accused who are tried under it — from the possibility of wrongful conviction. As this Court has previously noted, “[t]he names

> of Marshall, Milgaard, Morin, Sophonow and Parsons signal prudence and caution in a murder case": *United States v. Burns*, [2001] 1 S.C.R. 283.

This is especially true in criminal cases where forensic science is so often used to prove guilt and obtain a criminal conviction. This places a tremendous responsibility upon lawyers, judges, juries and physicians to get it right. We need only look to the Goudge Inquiry in Ontario last year to be reminded of the horrible consequences of our collective failures in critically challenging the work of one of that province's leading forensic pathologists.

We must also recognize that our base of knowledge is always evolving. At paras. 31-33 Deschamps J. writes:

> Not all scientific evidence, or evidence that results from the use of a scientific technique, must be screened before being introduced into evidence. In some cases, the science in question is so well established that judges can rely on the fact that the admissibility of evidence based on it has been clearly recognized by the courts in the past. Other cases may not be so clear. Like the legal community, the scientific community continues to challenge and improve upon its existing base of knowledge. As a result, the admissibility of scientific evidence is not frozen in time.
>
> While some forms of scientific evidence become more reliable over time, others may become less so as further studies reveal concerns. Thus, a technique that was once admissible may subsequently be found to be inadmissible. An example of the first situation, where, upon further refinement and study, a scientific technique becomes sufficiently reliable to be used in criminal trials, is DNA matching evidence, which this Court recognized in *R. v. Terceira*, [1999] 3 S.C.R. 866. An example of the second situation, where a technique that has been employed for some time comes to be questioned, is so-called "dock", or in-court, identification evidence. In *R. v. Hibbert*, [2002] 2 S.C.R. 445, 2002 SCC 39, at para. 50, Arbour J., writing for the majority, stated that despite its long-standing use, dock identification is almost totally unreliable. Therefore, even if it has received judicial recognition in the past, a technique or science whose underlying assumptions are challenged should not be admitted in evidence without first confirming the validity of those assumptions.

And so too does our approach to expert evidence continue to evolve. I wish to now refer to a case decided just two months ago, **R. v. Abbey**, 2009 ONCA 624. Toronto street gangs were engaged in a bloody turf war. Rival gang members who "trespassed" in the other's territory might be shot on sight. The Crown's case was largely circumstantial. Certain evidence including cell phone records, shell casings and shoeprint impressions, pointed to Abbey as being the shooter who was alleged to have shot a rival gang member in the back at close range. Abbey had a teardrop tattoo inscribed on his face about four months after the murder. As part of its case, the Crown offered its expert, Dr. Totten, a sociologist, and recognized expert in the culture of urban street gangs in Canada. The Crown proposed to have Dr. Totten give his opinion as to the meaning of a teardrop tattoo within the urban street gang culture. He testified on a *voir dire* and his report was filed on consent. In his report and testimony, Dr. Totten stated his opinion that a teardrop tattoo on the face of a young male member of an urban street gang signified one of three things:

- The death of a fellow gang member or family member of the wearer of the tattoo;
- That the wearer of the tattoo had served time in prison; or
- That the wearer of the tattoo had murdered a rival gang member.

The trial judge refused to admit Dr. Totten's evidence for consideration by the jury. The judge rejected the evidence as being insufficiently reliable. The defence did not call any evidence but argued that Abbey had nothing to do with the shooting and that others were responsible. A jury acquitted Abbey of first degree murder. The Crown appealed saying the trial judge erred in excluding Dr. Totten's evidence.

The Ontario Court of Appeal allowed the Crown's appeal, quashed the acquittal and ordered a new trial. Justice Doherty wrote for the Court and emphasized that "scientific validity is not a condition precedent to the admissibility of expert opinion evidence." While Dr. Totten could not speak to the reason <u>the accused</u> had placed a teardrop tattoo on his face, he could speak to the culture within urban street gangs in Canada and specifically the potential meanings to be taken from the inscription of a tear drop tattoo on the face of a young male member of that culture. The court said that the proper question to be answered when addressing the reliability of Dr. Totten's opinion was whether his research and experiences had permitted him to develop a specialized knowledge about gang

culture and specifically gang symbology that was sufficiently reliable to justify placing his opinion as to the potential meanings of the tear drop tattoo within that culture, before the jury. I commend this judgment to you for detailed consideration, when time permits.

We shouldn't think that these are challenging problems for judges only in Canada. Let me conclude this part of my presentation by referring to a decision released only six days ago from the England and Wales Court of Appeal in a case called **Atkins and Atkins v. The Queen**, [2009] EWCA Crim. 1876 dated October 2, 2009. The facts were essentially these. In November 2006 a team of three men committed two armed robberies, at different locations in West London. Both offences were clearly planned ahead of time. In the first robbery the victim was bludgeoned to death. In the second, a family was terrorized. By the time of trial it was common ground that one of the robbers was a man called Carty who had been arrested, but killed himself while on remand. The other two arrested robbers, the Atkins, were brothers who admitted to having been in Carty's company not long before the offences. All were charged with murder, aggravated burglary and firearms offences. The men were convicted by the jury on all counts. Each of the accused Atkin brothers advanced an alibi for the night in question. At the house of the second robbery there was a CCTV camera outside, covering the front door. The three robbers wore balaclava masks but the camera showed that at one stage one of them came to the doorway and looked out, not then wearing the mask. It was this footage that was examined by Mr. Neave, an expert in facial comparison, and which forms the basis of the court's judgment in the case.

Mr. Neave was described as a medical artist of over 40 years experience in service at the University of Manchester. His specialty was in facial features and their relationship to the underlying anatomy. For the last 20 years he had specialized in facial comparison. Over the course of two weeks, and some 16 hours spent concentrating on the comparison between the camera footage and the photograph of Dean Atkins, Mr. Neave eliminated Carty, and Michael Atkins, and some 20 other men. In relation to Dean Atkins he said that he could find no difference between the man's photograph and the CCTV image. After explaining his techniques, Mr. Neave offered his conclusions to the jury by reference to a range of expressions. His conclusion that Dean Atkins and the offender were one and the same person was said to fall between similarities described as "it lends support" and "it lends strong support" to that conclusion.

In dismissing the appeals from both conviction and sentence the court approved the admissibility of Mr. Neave's evidence and offered sound and very practical advice concerning the reception of what it termed "new areas of expertise". I also commend that decision to you for further review.

The Rules

Having now highlighted for you the principles in play today concerning the reception of opinion evidence, let me switch gears and offer a brief comment on the new **Civil Procedure Rules** which came into effect in Nova Scotia in January of this year and changed the landscape quite dramatically on the use of experts in court rooms in Nova Scotia.

In 1972 Nova Scotia led the way in proclaiming into force its new **Civil Procedure Rules**. They were thought to be revolutionary at the time, especially in terms of clarity of language and the expectation that full disclosure and discovery would be the rule, limited only by certain specified exceptions, or leave of the court.

Over the years certain provisions were amended from time to time but their operation and the underlying notions upon which they were based remained largely undisturbed.

Then, two years ago, the courts embarked upon a wholesale review, restructuring and re-writing of the **Rules**.

Obviously, entire conferences have been devoted to the changes effected in the new **Civil Procedure Rules**. This evening it is enough for me to mention that the change from old **Rule** 31.08, which dealt with experts, to the new **Rule** 55, is described by the Nova Scotia Barristers' Society as the most controversial of the new **Rules** because it eliminates oral discovery of experts, except by consent. In lieu of oral discovery, Nova Scotia's **Rule** 55 requires experts to make representations regarding their independence, prescribes a much more detailed form of expert's report, and permits counsel one opportunity to deliver written questions to the expert which must be answered in writing. And all of this is done within certain fixed deadlines.

Rule 55.04 sets out the obligations of the expert in filing a report including objectivity and a responsibility to promptly notify each party in writing of any change in the expert's opinion, or of a material fact that was not considered that could reasonably affect the expert's opinion.

Rule 55.11 prohibits obtaining a subpoena to compel discovery or delivering interrogatories to an expert. Instead, each party receiving an expert's report has 30 days to deliver written questions to be answered by the expert. The **Rule** also provides for an interview or discovery with the consent of the offering party and the expert.

The expert must provide full and meaningful answers to the questions in writing, sign the answers, and deliver the responses no more than 30 days after the questions were delivered. Failure to respond makes the expert's opinion inadmissible. Questions considered oppressive or inappropriate may be dealt with by a motion to a judge to set them aside or limit the questions.

Rule 55.14 allows treating physicians to submit a narrative in lieu of the detailed reports required from other experts. Obviously this **Rule** was drafted with family doctors in mind, but it really extends to any treating physician. The party offering the narrative must be able to justify that it is sufficient to permit an opposing party to determine whether to retain an expert and prepare adequately for cross-examination or the narrative will be excluded.

I cannot tell you how well the new procedures are working. Nothing has yet found its way to the Court of Appeal and so it is too early to say what issues may become litigious.

Medical Certainty vs. Legal Probability

I believe there is a difference in the way our two professions describe the standard by which an outcome may be predicted or proved. Having thought about it a good deal and considered some of the leading texts on medicine, it would appear to me that the discrepancy in what I call descriptions of proof may be more a matter of form than substance. But I think it is worth mentioning, especially in the context of tonight's discussion.

Let me start with medicine. Some scholars opine that diagnosis is the

essence of medicine. Medical care is defined as the art of making decisions without adequate information. Uncertainty is seen to be intrinsic to the practice of medicine. Patients do not show up at their doctors' offices with identified diseases, but with symptoms and signs and other abnormalities which the physician must then narrow down to some range of diagnostic certainty. But doctors must live with uncertainty in their diagnosis even though they strive to eliminate it. In some ways medicine is an exercise in the reduction of uncertainty.

The uncertainty in diagnosing and rationalizing treatment and predicting outcome may be why doctors when asked to talk about probability, are so often invited to provide an opinion with a reasonable degree of medical certainty.

I suspect that phrase comes from American case law, or movies. I can tell you it is not the legal standard applied in Canada. Proof in civil cases in Canada is one that requires an assessment of the facts based on a standard or balance of probabilities. In other words, the trier of fact asks "is it more likely than not that X result was caused by Y action or omission? If the answer is yes the plaintiff has succeeded in establishing liability.

Until very recently, there was a long line of authority going back almost 40 years or more which suggested that there might be a kind of sliding scale in civil cases such that the degree (i.e., quality or quantity) of proof was proportionate to the seriousness of the claim. In other words, "greater" proof would be required to satisfy a civil claim of arson or fraud than say a motor vehicle accident.

In a case heard last year, **F.H. v. McDougall**, 2008 SCC 53, the Supreme Court of Canada laid that notion to rest. As stated by Rothstein, J.:

> 40 ... I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. ...
>
> 46 Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. ...
>
> 49 ... In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

Some Examples

It may interest you to hear a quick list of some, but not nearly all, of the specialists I've either retained as a lawyer, or had appear before me as a judge, over the past 35 years. Consider this spectrum of specialities:

- Accident Reconstruction
- Actuarial Science
- Anthropology
- Architecture
- Arson
- Audiology
- Ballistics
- Business Valuation
- Chemistry (propane explosion)
- Construction
- Forensic Pathology
- Forensic Accounting
- Forensic Biology and DNA Typing
- Hair and Fiber Analysis
- Kinesiology (after a weight lifting mishap)
- Land Surveying
- Laparoscopic Surgery
- Marine Surveying
- Medical Malpractice
- Metallurgy
- Ophthalmology
- Orthodontistry
- Orthopaedic Surgery
- Pharmacology
- Physical and Rehabilitative Medicine
- Physics (coefficient of friction and biomechanics following a slip and fall on a dance floor)
- Plastic and Reconstructive Surgery
- Psychiatry
- Psychology
- Serology

- Urban Planning

Tomorrow

As we look ahead over the next 10, 20 or 50 years I suspect that judges or juries will be faced with deciding guilt, or liability, and awarding damages or other relief in situations which 50 years ago would have hardly seemed imaginable. Consider these:

#1 To what extent will directors of financial institutions be liable for life savings lost through the actions of a rogue fund-manager whose misdeeds were never discovered until it was too late?

#2 What law, of what jurisdiction will be applied when debris from an international space station sent into space by the United States but commanded on that particular mission by a Canadian astronaut, falls from the sky somewhere over India thereby causing an explosion, fire and loss of life at an elementary school, and the falling parts are said to have resulted from negligent maintenance at the Johnson Space Center?

#3 In employment law will a hospital be entitled to dismiss a team of nurses who refuse to report for work because their own children have become very ill during a pandemic?

#4 Will citizens in a rural community bring a class action for sickness and damages they claim are the result of wind farm turbines being erected too close to their homes?

#5 Will lobster fishermen sue – and if so whom – if their catches are depleted and income lost because the 17-meter fins installed underwater to harness the energy from tidal power have churned up the sea bed.

#6 When subduing and arresting an agitated machete-wielding burglar, police officers use the newly developed “spider man” net which they can trigger and eject from their metal batons. Unfortunately during the ensuing struggle, the suspect, while tangled in the net, falls

backwards down a flight of stairs and is rendered a quadriplegic. He sues the officers, the RCMP, the Solicitor-General, and the designer and manufacturer of the spider man net claiming substantial damages for, among other things, negligent and excessive use of force, product liability, etc. What is the likely outcome?

#7 A tsunami strikes the northeast coast of Australia killing hundreds, leaving thousands homeless, and resulting in an economic and ecological disaster. Information gathered by the intelligence agencies of six western countries establishes that the likely cause of the tsunami was state-sponsored climactic modification at the hands of a rogue state, employing their new top secret SLM (Satellite Laser Missile) aimed at the cloud cover over southeast Asia. The people and Government of Australia claim damages. Where, and with what chance of success?

I don't know the answer to any of these questions. But I do know this: We shouldn't be at all surprised if scenarios very much like these arise in court rooms in Canada and other countries. My background as a judge does not include studies in meteorology or rocketry. My expertise in tidal power, espionage and ballistics is rather limited. The people who serve as judges or juries in these types of cases will undoubtedly require the assistance of experts.

For the most part, judges in Canada pride themselves on being generalists. They come from a wide variety of backgrounds and are used to dealing with a broad spectrum of cases covering a whole host of subjects ranging from tax to admiralty, constitutional references to serious crime, family law to medical malpractice. Judges are neither expected nor obliged to have taken courses at the university level so that they will be proficient in such matters. Rather, they are able to depend upon the relevant opinions of properly qualified experts to assist them in finding the facts and arriving at a just conclusion. This is the approach we have taken in common law countries for the last 500 plus years. I have no sense that this will change any time soon!

Conclusion and Appreciation

Tonight we have traveled back in time 500 years, and also peered through the telescope at what may lie ahead. I hope I have not exhausted you on the journey. Let me conclude by thanking you for your attention, and the wonderful evening we've spent together, but more importantly for the assistance you have provided in such difficult cases.

Jamie W.S. Saunders
JUSTICE

* The Appendix that follows offers a list of some of the qualities possessed by experts whose evidence is highly regarded.

Appendix

What makes an impressive and persuasive expert?

Someone:

- who demonstrates a mastery of the facts and the record relative to the expert's area of expertise.
- who displays balance and objectivity.
- who is willing to concede the obvious but also defend a position firmly when required.
- who is responsive to questions.
- who is able to explain complex information in plain language, ideally with diagrams, pictures, models or metaphors.
- who is willing to clearly state the facts and assumptions upon which the expert bases the opinion.
- who is patient and confident and never appears condescending towards counsel or the court.
- who appreciates that the expert's role is to assist the judge or jury in their fact-finding responsibilities.
- who looks directly at counsel, the jury, and the judge when responding to questions.
- who avoids overstatement or hyperbole.
- who is willing to accommodate the court's schedule when things do not always go as expected.
- who demonstrates respect for the proceedings and those who hold a contrary opinion.
- who exhibits impartiality and professional independence in stating an opinion and taking a position.