

**Reliability Takes Its Colour From Its Context:
Some Recent Developments in the Law Respecting Expert Evidence and How
They May Complement Each Other**

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A. Introduction

The last twenty years have seen important changes in approaches to expert evidence in the courtroom. Transformative decisions such as *Daubert v Merrill Dow Pharmaceuticals* in the United States, and *R v Mohan* in Canada, represent a paradigm shift in the way advocates and judges approach it. At the same time, tragic circumstances have put more starkly the potential dangers of expert evidence; most notably, the miscarriages of justice revealed by the Inquiry Into Pediatric Forensic Pathology in Ontario (the “Goudge Inquiry”).²

While the Goudge Inquiry concerned cases in which liberty was at stake (and, in some cases, wrongful convictions and wrongful incarcerations), issues with expert evidence remain central to the civil justice system, perhaps now more than ever. As we continue to see both a proliferation of new fields of expertise and the development of entire industries of expert witnesses, counsel place ever-greater emphasis on expert evidence. This has forced stakeholders in the administration of justice to develop new ways of managing “trials by expert”.

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² See, e.g., the concerns expressed by a panel of the Ontario Court of Appeal in the criminal context respecting “trial by experts” in *R. v. Clark* (2004), 69 O.R. (3d) 321 at para. 107 (C.A.). The Goudge Report is available online at: <http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/index.html>

The purpose of this paper is to provide an overview on certain emerging issues in Canadian approaches to expert evidence in civil proceedings. We briefly consider two issues. The first is how to approach the assessment of the reliability of novel and non-scientific expert evidence once it has been admitted. The second is concurrent expert evidence in civil proceedings.

In addition, we make the further point that, taken together, these two developments complement each other, augmenting the court's ability to fulfil its role as a truth-seeker. Courts are now more vigilant in assessing the credentials of proffered experts properly. They are also, since the Goudge Inquiry at least, more aware of the problems that arise when expert testimony descends into advocacy. Proper attention to these concerns can provide a basis for disqualification of the witness or affording an expert's evidence little weight. However, the evaluation of expert evidence should not end at these criteria. In an age in which the categories of expertise know no bounds other than the imagination of counsel,³ the actual (as distinct from the threshold) reliability of expert evidence is critical, and should be carefully considered by the trial judge when assessing what weight to afford an expert's opinion.

Evaluating an expert's reliability is one area in which concurrent expert evidence may be of assistance. If, as the recent jurisprudence suggests, the reliability of novel or non-scientific evidence is best tested by comparing an expert opinion against accepted standards drawn from the same discipline, then a good way to test the reliability of this

³ For example, in the recent Ontario case *Fairview Donut et al. v. The TDL Group et al.*, 2012 ONSC 1252 (S.C.J.), Justice Strathy (of the Superior Court, as he then was) reviewed the expert evidence of the plaintiffs, which included the opinion of an expert concerning the "excellent" quality of a sandwich compared to its price (para. 143). Justice Strathy ultimately afforded this expert's evidence very little weight, largely due to the expert's tendency to be an advocate (see, e.g., paras. 152-154).

evidence may be to allow or perhaps require the experts to meet and confer in advance of trial, or, better yet, to give evidence concurrently in court.

B. *Expert Evidence and the Truth-Seeking Function of the Courts*

Anecdotally at least, the use of experts has increased significantly in civil proceedings. Increased use of expert witnesses raises important issues both about the reliability of expert evidence, as well as how courts and lawyers can manage cases with competing experts more effectively. Underlying both of these concerns is the truth-seeking role the courts play in our civil justice system. If unreliable expert evidence is given too much weight because its reliability is insufficiently tested, then expert evidence could well lead to miscarriages of justice and negatively affect perceptions of the administration of justice.

These concerns are not new. As the Honourable John Pitt Taylor stated in his *Treatise on the Law of Evidence*, from 1885:

Perhaps the testimony which least deserves credit with a jury is that of skilled witnesses [i.e. experts]. These gentlemen are usually required to speak, not of facts, but to opinions: and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them.⁴

However, they may have become more acute. While lawyers may be relying more than ever on expert evidence in their cases, studies in the United States demonstrate that lawyers and judges share low appraisals of experts' value in the

⁴ *A Treatise on the Law of Evidence*, John Pitt Taylor, 1885 cited in Canadian Institute of Chartered Business Valuation, *The Recent Evolution of Expert Evidence in Selected Common Law Jurisdictions Around the World* by Erik Arnold & Errol Soriano, January 23, eds (Toronto: Campbell Valuation Partners Limited, 2013).

courtroom.⁵ Courts have also frequently highlighted the hazard that expert evidence potentially represents to the judicial truth-seeking function. For instance, in the seminal case of *R v Mohan*, the Supreme Court of Canada held that:

There is a danger that expert evidence will be misused and will distort the fact finding process. Dressed up in scientific language, which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.⁶

Where novel or non-scientific evidence is at issue, the dangers of expert evidence *vis à vis* the truth seeking function of the courts may be even greater because the evidence is untested or more difficult for laypeople (including judges) because there are fewer – or even no - accepted standards against which it can be to evaluated.

C. Focussing on Actual Reliability

Notwithstanding the potential dangers of expert evidence, trial judges, as gatekeepers, are not required to determine more than threshold reliability to admit expert evidence. This is as it should be, certainly in civil trials where the stakes are lower than in criminal cases. The potential for civil trials to get bogged down in *voir dires* if more than threshold reliability is at issue is very real; the precautions necessary in light of the potential consequences to the parties in a civil trial less so.

The importance of the trial judge's gatekeeper function is even more attenuated in judge-alone civil trials. The concerns of courts and critics of expert evidence frequently focus on the potential negative impact of expert evidence in jury trials; more

⁵ For example, an American study found judges and lawyers to be skeptical of expert evidence. See generally Carola Krafska, et al, "Judge and Attorney Experiences, Practices and Concerns Regarding Expert Testimony in Federal Civil Trials" (2002) 8 Psychol, Pub Pol'y & L 309.

⁶ [1994] 2 SCR 9 at 21.

specifically, criminal jury trials. The issues are somewhat different in judge-alone civil trials (as most civil trials are), even where a trial judge sitting alone is asked to admit and assess novel expertise. As Justice Lax held in *Chan v Erin Mills Town Centre* in the context of novel scientific evidence:

It is difficult to find a civil case tried by judge alone, where novel scientific evidence was excluded because it failed to meet a threshold test of reliability. The reason may be that the metaphor of the judge as gatekeeper loses much of its symbolic force when it is the judge who is the trier of fact. This is not to say that a trial judge is excused from scrutinizing evidence as improperly admitted evidence can surely have an impact on a trial, but the likelihood of a judge being overwhelmed by the “mystic infallibility” of the evidence and misusing the evidence to distort the fact-finding process, is far more remote. The dangers that the principles are designed to avoid begin to fall away.⁷

In a judge-alone civil trial, the judge is both gatekeeper and trier of fact. In this context, in most cases, it may make more sense to take a less restrictive approach to the threshold reliability of expert evidence and pay more attention to the issue of proper weight of expert evidence.

That is not to say judges cannot or should not exclude expert evidence that is not necessary, or not probative, or barely deserving of the “expert” characterization. Admitting “off the wall” expert evidence or advocacy parading as expertise is a greater waste of resources than any expense occasioned by a robust *voir dire*. But in most cases, assuming the evidence is both necessary and probative, threshold reliability is sufficient. Everything else can go to weight, after the parties in an adversarial process have had the opportunity to test and challenge their opponent’s expert.

⁷ 2005 CanLII 43678 at para 31 (ON SC). The case concerned a plaintiff who contracted polio as a child. He later slipped and fell at a Loblaws, breaking a bone in his knee. It was later determined that the plaintiff had developed Post-Polio Syndrome (“PPS”). This resulted in further degeneration of his knees. He had to wear leg braces. The issue in dispute was whether the PPS was inevitable or whether it was caused by the trauma of the slip and fall.

A good example of how this should work is the recent case of *More v Bauer Nike Hockey* of the British Columbia Supreme Court. The case was a judge-alone civil trial concerning an accident that occurred during a minor league hockey game. The plaintiff, the injured player, was suing the manufacturer of his hockey helmet and the Canadian Standards Association, which had established the safety standards to which the helmet had been manufactured. The plaintiff led expert evidence in the area of biomechanics. Unusually, the defendants waited until after the expert had completed his evidence to challenge its admissibility on the basis that the expert had become an advocate and that his evidence was unreliable. From Justice Macaulay's reasons, it appears that at least some of the defendants' concerns had a foundation. However, he nonetheless admitted the evidence, holding:

I do not discount the possibility that an expert may demonstrate partiality or even untruthfulness but the time to consider those questions is at the end of the trial in the context of all of the evidence...

So long as the evidence is probative, and, in my view it is, there is little danger, *in a trial without a jury*, of a judge making improper use of the evidence to the prejudice to the defendants. Accordingly, my residual discretion to exclude marginally probative evidence to avoid prejudicial effect does not arise in the present circumstances.⁸ [Emphasis added.]

In other words, it was appropriate to admit the evidence, but that does not mean the concerns the defendants raised were not important; only that the appropriate time to consider them in a judge-alone civil trial is after the evidence has all been entered and the trier of fact turns to the task of assessing the evidence.

If a trial judge adopts a generous admissibility standard, it is critical that she evaluate carefully the actual (as distinct from threshold) reliability of tendered expert

⁸ *More v Bauer*, 2010 BCSC 539 at paras 48-49.

evidence after all evidence is in. This is particularly so when she is assessing the weight to be given to expert evidence that may not be susceptible to scientific standards of reliability. Most triers of fact have a sufficient working sense of the scientific method to appreciate the hallmarks of reliable scientific evidence in established fields. The same is not likely true of novel or non-scientific fields of expertise.

Some assistance on the right approach to evaluating novel or non-scientific evidence can be had by reviewing Justice Doherty's decision on behalf of a panel of the Ontario Court of Appeal in *R v Abbey*.⁹ While the case was a criminal trial and the issue was admissibility, not actual reliability, Justice Doherty's approach is nonetheless instructive for judges sitting in civil trials.

In *R v Abbey*, the accused, a gang member, was charged with killing a victim whom the accused believed was a member of a rival gang. The accused had a teardrop tattooed on his face following the murder. At trial, the Crown offered the expert evidence of a sociologist who had studied the culture of urban street gangs in Canada. The Crown proposed to have the expert give his opinion as to the meaning of a teardrop tattoo within urban street gang culture, and to give his opinion as to the meaning of the respondent's teardrop tattoo specifically. The trial judge did not admit the evidence. On appeal, the main issue was its admissibility.

Justice Doherty recognized that not all expert evidence can or should be "scientifically validated". He noted that scientific standards of validity are not a pre-

⁹ 2009 ONCA 624 [*Abbey*].

condition to admissibility.¹⁰ When approaching this type of opinion evidence, he emphasized two important and complementary considerations: (1) whether it is derived from “specialized knowledge gained through experience and specialized training”;¹¹ and (2) whether the evidence meets “accepted standards and protocols” within the discipline.¹² The second consideration is of special importance for the purposes of this paper. The central consideration when evaluating expert evidence in the context of the court’s truth seeking mandate is ultimately its actual reliability; if the opinion is reliable and the facts underlying it have been proven, then the “seductive” power of the expert is not a valid fear; rather, the trier of fact is being properly persuaded by a reliable opinion based on a solid factual foundation.

As Justice Doherty identified, reliability is a standard that takes its colour from its context. Assuming as a condition precedent that the expertise in issue is drawn from a specialized area,¹³ the principal way to evaluate its reliability is by applying the standards recognized as valid by others operating within that field. With this important insight in mind, Justice Doherty went on to consider an open list of possible questions that may be relevant to assessing an expert’s reliability. These questions focus the issue squarely on whether the expert has used standards or applied protocols that are accepted in the expert’s specialized field. As he held:

As with scientifically based opinion evidence, there is no closed list of the factors relevant to the reliability of an opinion like that offered by Dr. Totten [i.e., the impugned expert]. I would suggest, however, that the following are some questions that may be relevant to the reliability inquiry where an opinion like that offered by Dr. Totten is put forward:

¹⁰ *Ibid* at para 109.

¹¹ *Ibid*.

¹² *Ibid* at para 115, citing the Goudge Inquiry’s Report at 493.

¹³ Which may not be a high threshold: see, e.g., *supra* note 2.

- To what extent is the field in which the opinion is offered a recognized discipline, profession or area of specialized training?
- To what extent is the work within that field subject to quality assurance measures and appropriate independent review by others in the field?
- What are the particular expert's qualifications within that discipline, profession or area of specialized training?
- To the extent that the opinion rests on data accumulated through various means such as interviews, is the data accurately recorded, stored and available?
- To what extent are the reasoning processes underlying the opinion and the methods used to gather the relevant information clearly explained by the witness and susceptible to critical examination by a jury?
- To what extent has the expert arrived at his or her opinion using methodologies accepted by those working in the particular field in which the opinion is advanced?
- To what extent do the accepted methodologies promote and enhance the reliability of the information gathered and relied on by the expert?
- To what extent has the witness, in advancing the opinion, honoured the boundaries and limits of the discipline from which his or her expertise arises?
- To what extent is the proffered opinion based on data and other information gathered independently of the specific case or, more broadly, the litigation process?

The significance of testing the expert's methodologies against those accepted in the field was highlighted in *Kumho Tire Co.*, at p. 152 U.S.:

The objective of that requirement [the gatekeeper function] is to ensure the reliability and relevancy of expert testimony. *It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigour that characterizes the practice of an expert in the relevant field.*¹⁴ [Emphasis added.]

Although we are not advocating for a higher standard of reliability at the admissibility stage in civil judge-alone trials, Justice Doherty's analysis is, in our view, of great assistance to a trial judge when evaluating novel or non-scientific evidence even after it has been admitted. As we discuss below, this suggests an appreciable benefit to having

¹⁴ *Abbey*, *supra* note 8 at paras 119-120.

experts testify together, one that augments the truth-seeking function of our courts and may help to prevent miscarriages of justice.

D. *The Importance of Non-Scientific Evidence to Civil Litigation*

Before turning to the issue of concurrent evidence, it is important to pause and recognize the importance of expert evidence that cannot be validated by the scientific method to civil litigation, since evidence of street gang symbology may seem far removed from the experience of most civil litigators. As Justice Doherty noted, most expert evidence, even if it is derived from a scientific field such as psychiatry, would not meet scientific standards for the purposes to which it is used in court. As he held:

Most expert evidence routinely heard and acted upon in the courts cannot be scientifically validated. For example, psychiatrists testify to the existence of various mental states, doctors testify as to the cause of an injury or death, accident reconstructionists testify to the location or cause of an accident, economists or rehabilitation specialists testify to future employment prospects and future care costs, fire marshals testify about the cause of a fire, professionals from a wide variety of fields testify as to the operative standard of care in their profession or the cause of a particular event. Like Dr. Totten, these experts do not support their opinions by reference to error rates, random samplings or the replication of test results. Rather, they refer to specialized knowledge gained through experience and specialized training in the relevant field. To test the reliability of the opinion of these experts and Dr. Totten using reliability factors referable to scientific validity is to attempt to place the proverbial square peg into the round hole.¹⁵

Non-scientific evidence runs the gamut from the commonplace to the novel. For instance, in the recent Ontario case, *Andersen v St. Jude Medical*,¹⁶ a class action, the defendants sought to tender an expert report written by Professors Michael Trebilcock and Edward Iacobucci, both of the University of Toronto Faculty of Law, and to examine Professor Trebilcock in court. The professors were opining on the impact of recognizing

¹⁵ *Ibid* at para 109.

¹⁶ 2011 ONSC 2178 (CanLII).

the doctrine of waiver of tort in order to give context to the main issue in dispute, which was the standards for product development of innovative technologies. The defendants attempted to qualify the professors as experts in law and economics. Justice Lax admitted their evidence and accepted that law and economics was a distinct area of expertise despite the plaintiff's submission that the defendant was really trying to qualify them as experts in domestic law. She held that the evidence was necessary since it was an area in which the court did not have expertise, and reliable within the standards applicable to the discipline.

On the other hand, consider two examples of novel, non-scientific evidence that trial judges refused to admit:

- *Meady v Greyhound Canada Transportation et al.*¹⁷ In this case, the plaintiffs commenced an action against, among others, two Ontario Provincial Police Constables alleged to have breached a legal duty to the passengers on a bus after a person they had earlier detained and then released had assaulted the passengers. The plaintiffs sought to lead evidence of an expert on police procedures in cases of investigative detention when handling mentally ill persons who may pose a danger to others. The putative expert was a retired Toronto Police Officer. The trial judge excluded the evidence because, among other reasons, the proffered expert did not have expertise in the *Mental Health Act*, his evidence was not necessary and it descended into legal opinions; and

¹⁷ 2010 ONSC 4519.

- Rees v Toronto District School Board:¹⁸ The plaintiff fell on a high school's volleyball court, injured her knee and brought an action against the school board. The plaintiff proposed to call the former Director of Education of a different county board of education as an expert witness. The Director stated in his report that, in his opinion, the volleyball coach failed in her duty of care by not being able to produce a copy of the parents' permission form, failed to respond to a request for safety gear, and provided less than adequate first aid to the plaintiff. The trial judge excluded the evidence because it was unnecessary and the jury could come to its own conclusions on these issues.

In short, the possible categories of expert evidence are only limited by the areas of specialized knowledge and the creativity of counsel in determining that evidence in a particular subject matter might be of assistance to the court (and their case). However, novel expert evidence or expert evidence that cannot be scientifically validated presents unique challenges to the justice system; challenges which may be addressed through means such as the use of concurrent expert evidence in appropriate cases.

E. Concurrent Evidence or “Hot-Tubbing”: Recent Rule Changes

Concurrent expert evidence, better known by the colloquial name “hot-tubbing,” is a process whereby experts meet and confer prior to trial, or sit on a panel and testify contemporaneously. Proponents of hot-tubbing argue that it has many benefits, including increasing the impartiality and reliability of expert testimony, better enabling the understanding of scientifically and technically complex issues, streamlining litigation

¹⁸ 2010 ONSC 6677.

and preserving judicial economy.¹⁹ Critics argue that hot-tubbing may allow overly aggressive or gregarious experts to overshadow less vocal experts, may raise procedural fairness concerns, such as having highly prejudicial or inadmissible information tendered by experts during their discussion, and may increase preparation costs because counsel will have to assist experts in preparing questions for opposing experts.²⁰

Concurrent expert evidence is a relatively new and untested procedural development in civil litigation. However, the procedure is well-established in many administrative proceedings. For example, the rules of procedure of the Ontario Environmental Review Tribunal,²¹ the Competition Tribunal,²² and the Alberta Energy and Public Utilities Board²³ all provide for expert panels. Similarly, public inquiries frequently make use of expert panels.²⁴

Recent rule changes in certain Canadian jurisdictions have permitted hot-tubbing in specific circumstances. For example, the Federal Courts Rules of Procedure (“Federal Courts Rules”) were amended in 2010 to provide for expert hot-tubs in civil proceedings. Rule 282.1 is the relevant rule:

282.1 The Court may require that some or all of the expert witnesses testify as a panel after the completion of the testimony of the non-expert witnesses of each party or at any other time that the Court may determine.

¹⁹ Ken Anderson & Tracy Ayodele, “Hot-Tubbing in Canadian Patent Litigation: A Preliminary Assessment” (2012) 24 IPJ 201 [*Anderson & Ayodele*].

²⁰ Freya Kristjanson, “Hot-Tubs and Concurrent Evidence: Improving Administrative Proceedings” (2012) 25 CJALP 79 at 86-89.

²¹ Ontario, Ontario Energy Board, *Rules of Practice and Procedure*, rr 13A.01 – 13A.02.

²² *Competition Tribunal Rules*, SOR/2008-141, ss 75-76.

²³ *Alberta Energy and Utilities Board Rules of Practice*, Alta Reg 101/ 2001, r 39.

²⁴ Anderson & Ayodele, *supra* note 19.

282.2 (1) Expert witnesses shall give their views and may be directed to comment on the views of other panel members and to make concluding statements. With leave of the Court, they may pose questions to other panel members.

(2) On completion of the testimony of the panel, the panel members may be cross-examined and re-examined in the sequence directed by Court.²⁵

The Federal Courts Rules are expressly structured so as to permit the presiding judge to control expert testimony and restrict interaction or debate between experts. For example, experts may only pose questions to other panel members with leave of the court.

The Federal Courts Rules also allow for pre-trial hot-tubbing:

Expert conference

52.6 (1) The Court may order expert witnesses to confer with one another in advance of the hearing of the proceeding in order to narrow the issues and identify the points on which their views differ.

Presence of parties and counsel

(2) Subsection (1) does not preclude the parties and their counsel from attending an expert conference but the conference may take place in their absence if the parties agree.

Presence of judge or prothonotary

(3) The Court may order that an expert conference take place in the presence of a judge or prothonotary.

Joint statement

(4) A joint statement prepared by the expert witnesses following an expert conference is admissible at the hearing of the proceeding. Discussions in an expert conference and documents prepared for the purposes of a conference are confidential and shall not be disclosed to the judge or prothonotary presiding at the hearing of the proceeding unless the parties consent.

Ontario's *Rules of Civil Procedure* ("*Rules*")²⁶ also underwent amendments in 2010. The amendments did not incorporate a procedure for concurrent evidence, except

²⁵ *Federal Courts Rules of Procedure*, SOR/98-106, r 282.1.

²⁶ RRO 1990, Reg 194.

in the context of a dismissed summary judgment motion. If a matter is ordered to trial, a judge may, however, order experts to “meet on a without prejudice basis” to identify areas of agreement and disagreement and “to attempt to clarify and resolve any issues that are the subject of disagreement”:

Powers of Court

20.05(1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

Directions and Terms

(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

...

(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

(i) there is a reasonable prospect for agreement on some or all of the issues, or

(ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

One notable difference between the pre-trial hot-tubbing procedure in the Federal Courts Rules and in Ontario’s *Rules* is the express requirement in Ontario that the pre-trial hot-tub session is without prejudice. By contrast, the Federal Rules attach privilege to the discussion and documents for the hot-tubbing but expressly state “[a] joint statement prepared by the expert witnesses following an expert conference is admissible at the hearing of the proceeding” and even permit an order that “an expert conference take place in the presence of a judge or prothonotary.” It is unclear why hot-

tubbing in Ontario might only be relevant at the pre-trial stage stage of the proceedings, as distinct from at trial, or why it should only be used on a without prejudice basis. However, presumably, the parties could agree to a different process, subject to judicial approval.

Other provinces have also amended their rules of court to permit some form of hot-tubbing procedure. In British Columbia, for example, the Supreme Court Civil Rules, implemented in July of 2012, provide that a judge may order, with or without an application by a party, “that the parties’ experts must confer before the service of their respective [expert] reports.”²⁷ In Alberta, the Rules of Court give broad powers to case management judges to “order that steps be taken by the parties to identify, simplify or clarify the real issues in dispute” or “make an order to facilitate an application, proceeding, questioning or pre-trial proceeding”, which could also arguably allow for hot-tubbing.²⁸

F. Recent Judicial Considerations of Concurrent Evidence

To date, hot-tubbing has only been used very infrequently, if reported cases are a good guide. The procedure is only discussed in one reported decision, *Apotex v AstraZeneca Canada*,²⁹ which involved damages in a patent case. The decision provides a good example of how hot-tubbing can focus competing experts’ testimony onto the real points of disagreement. In that case, the Court first heard direct examination of the experts, cross-examination and re-direct in the normal course. The Court then heard the experts testify concurrently to answer questions under oath from

²⁷ *Supreme Court Civil Rules*, BC Reg 168/2009, r 5-3(1)(k)(iii).

²⁸ *Alberta Rules of Court*, Alta Reg 124/2010, rr 4.14(1)(a) and (c).

²⁹ 2012 FC 559.

the judge and they were permitted to respond to the answers given by each other.

Justice Hughes described the process as follows:

At the end of the testimony of Ms Wehner and Dr Garven I conducted a "hot tubbing" examination in which each of them took the stand at the same time, remaining under oath. They answered questions put to them by me and responded to the answers given by each other. At the end of this process, each Counsel was invited to put follow-up questions to these witnesses. I will repeat part of the dialogue at the beginning (page 773) and at the end of the "hot tubbing" session (pages 779 - 780):

JUSTICE HUGHES: Where are you different, if at all, Ms. Wehner?

MS. WEHNER: I think the primary difference is the interpretation of whether a notifiable change is part of the regulations or apart from the regulations. I think it really boils down to that.

JUSTICE HUGHES: Dr. Garven, where do you say the two of you are apart?

MS. GARVEN: From a regulatory practice perspective I believe that the difference is whether a notifiable change is required or not and would require approval from Health Canada prior to implementing the change.

...

JUSTICE HUGHES: They would carry on manufacturing any way?

MS. GARVEN: From a regulatory perspective I would say they shouldn't be manufacturing for sale until they received that letter of no objection.

JUSTICE HUGHES: Anything to add to that, Ms. Wehner?

MS. WEHNER: This is a bit of an unusual situation but, in my experience, Health Canada would tend to work with the company in order to expedite the change, especially in this situation there would be a lengthy patent hold. It may be a moot point. I've seen Health Canada on a number of occasions working in close association with the companies to work things out.

JUSTICE HUGHES: Dr. Garven, what do you say about that?

MS. GARVEN: They do tend to work with the companies to work things out, but they would want it worked out in the sense that they would have to file that notifiable change and get the letter of no objection.

JUSTICE HUGHES: Have we then discussed the areas in which you were apart? Any other areas you were significantly apart?

MS. WEHNER: I don't believe so.

MS. GARVEN: No, I don't believe so either.³⁰

³⁰ *Ibid* at para 10.

Each litigant's counsel was then permitted to ask follow-up questions (to both experts) arising from the hot-tubbing exchange with the judge.

While the process may not yet have been used frequently, some judges have suggested that hot-tubbing would be useful, but have not invoked the procedure. For example, in *Paul v Oliver Fuels*,³¹ Justice Edwards held that the case was not amenable to summary judgment and ordered that the case proceed to trial. The case involved a tort claim against a company that installed and inspected a fuel line that caused an oil spill after the fuel line was damaged by falling ice. On the issue of trial management, Justice Edwards held that counsel should consider and make submissions on the advisability of pre-trial hot-tubbing:

Given the nature of the conflicting expert evidence, counsel may want to consider the advisability (if any) of adopting rule 20.05(2)(k) to allow for some form of "hot tubbing" of the experts. Counsel may also wish to consider whether this is the type of case that could proceed largely on the basis of an agreed statement of fact where the real issue may be the competing expert opinions.³²

There is no reported indication as to whether counsel made submissions or whether the process was ultimately employed.

Further, in *Eli Lilly and Co v Apotex*, Justice Gauthier held that, "I truly believe that the use of hot-tubbing would have been particularly useful here."³³

Finally, in *George Weston v Domtar*, Justice Edwards made it clear that judges can and should take a more active role in designing creative trial procedures to ensure optimum fairness and efficiency:

³¹ 2012 ONSC 978.

³² *Ibid* at para 46.

³³ [2009] FCJ No 1229 at para 234.

Where the nature of the issues and the quality of the evidentiary record in a case do not permit a motion judge to gain a "full appreciation" of the issues in dispute, the result need not be propelling parties towards a costly, full-blown conventional *viva voce* trial. Creative, and less costly, alternatives do exist. The 2010 amendments to the *Rules of Civil Procedure* made available to judges and counsel alike a big box of LEGO-like building blocks with which they can construct a wide variety of modes of trial: witnesses testifying by *viva voce* evidence, witnesses testifying, in whole or in part, by affidavit; using pre-hearing affidavits and cross-examinations as examinations for discovery; using pre-hearing affidavits as part of the trial evidence-in-chief of a witness and pre-hearing transcripts as part of the trial cross-examination of a witness; placing time limits on examinations at trial; using written opening statements; pre-trial hot-tubbing by experts, and filing an agreed statement of facts. The range of alternatives is not limited by the specific examples identified in the *Rules* because a judge "may give such directions or impose such terms as are just" in respect of the trial and make such order as the judge "considers necessary or advisable with respect to the conduct of the proceeding".³⁴ [Emphasis added]

G. Concurrent Evidence and Novel or Non-Scientific Expert Evidence

Judges have clearly identified that concurrent evidence can be a useful tool in civil litigation. Rule changes have authorized courts to use these tools (though they probably could do so pursuant to their inherent jurisdiction to regulate their own processes in any event).³⁵ But nonetheless, to date, these tools are not being used very often in civil litigation. This is perhaps because courts and litigants have not been able to find ways to make concurrent evidence a relevant and appropriate tool.

There are many benefits to hot-tubbing experts (such as increasing trial efficiency and limiting advocacy from an expert's opinion), and some possible pitfalls. However, one important benefit of hot-tubbing is that it may increase a judge's ability to assess the actual reliability of expert evidence generally, and evidence that is novel or which cannot be validated scientifically in particular.

³⁴ 2012 ONSC 5001 at para 36.

³⁵ For a lengthy recent consideration of the superior court's inherent jurisdiction to manage its own process see Justice D.M. Brown's decision in *Abrams v Abrams*, 2010 ONSC 2703 at paras 30 *ff.*

As Justice Doherty identified, the reliability of expert evidence is best evaluated from the vantage point of the field of expertise itself. Judges are mostly generalists, and no judge (or any other person) will have sufficient knowledge to evaluate all types of expertise. Hot-tubbing provides a process through which to better assess the reliability of expert evidence. Civil lawyers already know that having access to an expert who will not testify, but who shares the same expertise as an opponent's expert is helpful to both preparing one's own "testifying" expert and cross-examining the other side's. For this reason, many lawyers retain "litigation" experts in addition to testifying experts. Unlike testifying experts, who must remain independent and above the fray, litigation experts are part of the litigation team. One of the most important roles assumed by the litigation expert is critically evaluating the other experts' opinions in light of accepted standards within that particular area of expertise, something the lawyer in most cases cannot do.

It is not generally possible for courts to retain their own experts to serve a similar function. However, hot-tubbing experts can be a proxy for the litigation experts some cases warrant, particularly on the range of expert issues that may be involved in assessing damages. Concurrent evidence in the courtroom permits two opposing experts to challenge each other from the perspective of accepted standards and protocols, but, as importantly, to articulate those standards and protocols for the judge. While this can be done through conventional processes, such as examination and cross-examination, hot-tubbing allows the comparison to be made more starkly and permits the criticized expert the opportunity to respond. The opportunity to testify together also may permit experts to achieve consensus on the relevant standards in a

given field. To the extent necessary, the process also permits greater scope for judicial intervention in aid of better understanding the issues in dispute.

Although certainly not a cure all, concurrent evidence has advantages when compared to conventional methods of leading expert evidence. Relying on Justice Doherty's insight that reliability is context specific, these benefits should hopefully increase the reliability of expert evidence, especially in unfamiliar areas of expertise. In an unfamiliar area such as forensic information technology, the trial judge may not be able to assess whether an expert's opinion has sufficient indicia of reliability in the context of a specific field of which he or she is entirely unfamiliar. Another information technology expert is likely better situated to assist the court with making that determination. Using this approach in the appropriate circumstances should facilitate the court's ability to benefit from expert evidence, while mitigating at least some of the costs associated with it.

H. Conclusion

Judges have identified that expert evidence has its benefits, but often comes at a cost. While experts are routinely relied on in courtrooms, including experts whose opinions cannot be subjected to scientific standards of validity, stakeholders remain sceptical of the value of expert evidence. Recently, courts have begun to explore concurrent expert evidence. Although the tools may be available, judges (and litigants) are not yet using them. It is worthwhile considering whether in a particular case concurrent evidence is appropriate. There is an obvious synergy between concurrent evidence and reliability, as reliability is a function of practices and norms within a particular area of expertise. By testifying together, experts can identify best practices

within a particular discipline, and hopefully reach consensus. This should result in better quality evaluations of expert opinions, and ultimately augment the courts ability to capture truth.

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