



Expert Witnesses – Hired Guns or Truth Seekers

BY RON KOERTH

Anyone who is a fan of spaghetti westerns will instantly know a hired gun is someone who was paid by the wealthy, evil rancher to gun down anyone who stood in his way. These days, in the context of expert witnesses, a hired gun does not use a deadly weapon, instead his or her weapon of choice is a pen and the tongue.

Why is it that some expert witnesses do more than seek the truth and go beyond merely assisting the trier of fact, which is the legal foundation for their role as an expert witness, and cross the line, becoming a true hired gun or advocate? One observes the obvious economic element and may assume that the expert witness merely does it for profit. But that would not explain why there are a raft of cases that have come to light in the past few years involving state experts (pathologists, coroners, etc.) whose testimony convicted people of heinous crimes. Of recent note are the cases involving



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Toronto pathologist Dr. Charles Smith, including the case of an Ontario woman charged with stabbing her seven-year-old daughter to death, based on Dr. Smith's evidence. After spending two years in pre-trial custody, the woman was released after another pathologist determined the wounds on the child were likely caused by a pit bull, which is what the woman had asserted all along. Similar cases involving experts of the state providing faulty testimony can be found across the globe. Are these recently publicized cases simply evidence of incompetence, of the human capacity to make mistakes? Or do these cases hint at a bigger problem?

Consult Each Other

In our role as forensic engineers, clients regularly call us to determine the root cause in a particular loss. It could be a fire, a motor vehicle accident, a slip and fall injury, a building

collapse or any number of peculiar circumstances. Experts are supposed to be independent, but it can be assumed that they are not truly independent since often only one side in a potential multi-party dispute has hired the expert. However, does that automatically make the expert a hired gun? No, it does not, and for a number of reasons. In a firm that does not support the hired gun mentality, the experts within that firm consult one another on cases in order to bounce ideas off another less involved party. This gives the expert some confidence that if more than one person comes up with the same conclusions, they are likely on the right track. Further, no person at such a firm should be afraid to challenge the opinion of another. If a junior engineer disagrees with a senior partner, the matter should be discussed and debated until it is resolved. In addition, they should not distinguish between plaintiff and defence: an expert should not care which side hires them, because the truth is still the truth. Most insurers appreciate this last point—there is no better way to be able to remain objective and truly see both sides,

alcohol could not have played a part in the incident. The jury saw the complete absurdity of that argument (they, like most of us, probably have felt the effects of alcohol at some point in their life) and returned a verdict that was 100% in favour of the defendant and ordered that the plaintiff pay costs. I believe that the opinions expressed by the plaintiff's expert in this case was affected partially by economic interests (if plaintiff wins, plaintiff's expert gets more work in the future, etc.) and partially by the lack of a competing, objective voice. No one at the plaintiff's expert firm stood up and said, "your theory has some problems." Further, my suspicion is that the plaintiff expert never thought that the case would go to trial!

Testimony Based on Accepted Science

Fortunately, the current climate in the court system is leaning away from simply accepting expert witness testimony at face value. Daubert and other cases from the United States dictate that the findings of an expert witness must be based on accepted science. Many of those cases where the expert

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unless you have actually seen the case from both sides. This can be problematic for someone employed by the state, for example, because a private individual would never employ them, thus they would never see the "other side." This is why state experts must be governed by a rigid set of checks and balances.

Know When the Case is Bad

A truth seeker is not always able to help their client in the manner that a hired gun can. A truth seeker does, however, help a client that has a bad case by making that client fully aware that they do, in fact, have a bad case. This can avoid hundreds of thousands of dollars of legal expense for the client in a losing case. So why is it then that some lawyers and adjusters still hire the firm that they know will say things in a certain way? In our experience, in cases where we have come up against these hired guns it appeared that their client was optimistic of a settlement, which would have a much better outcome if they had a strong report. In some cases the other expert's report was so strong as to be almost ludicrous. Case in point: one of our engineers recently testified in a slip and fall case for the defendant. A man slipped and fell on a tiled floor, which both experts agreed had excellent slip resistance. The plaintiff expert therefore concluded that the man must have slipped and fell because of some contaminant on the floor. Ice cubes were found on the floor close to the plaintiff's head, but these were reportedly brought to the plaintiff after the man fell. The plaintiff's expert, in his report, made absolutely no mention of the fact that the man was found to be intoxicated. At trial, the plaintiff's expert stated that, due to the type of injuries sustained by the plaintiff when he fell,

gave the client a strong report, which was primarily based on the expert's opinion, will end up costing the client in the long run. The good old days where the suave and articulate hired gun could win the day on the strength of his or her presentation are slipping away. The expert must now be both articulate and technically correct.

Hired Guns Need Not Apply

So what should the insurance industry do to protect itself? Obviously, make sure that the expert is technically qualified. Can the expert communicate effectively? Inquire as to the nature of their expert's clients: do they only do defence work or will they accept plaintiff work? How is the expert company structured? Is it a sole proprietorship or one that embraces the opinions of all of its employees and supports internal peer review of its findings? Do some research on past cases that the expert has been involved in—go online or ask around the industry; most people know which experts have the tendency to cross the line. Has the expert ever been disciplined by their professional organization or disqualified from testifying in any legal proceeding? Most importantly, be very careful of the expert that seems too willing to give you good answers—play devils advocate and ask about some of the weaknesses you yourself have identified in your case. Finally, be very wary of the expert that is unwilling to admit a mistake—we all make them. 🍁

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