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Insurance Law:
Practical Guide to Expert Opinion Under the New Rules

Tips in Obtaining Reports: An Expert's Perspective

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TIPS IN OBTAINING REPORTS: AN EXPERT'S PERSPECTIVE

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The following paper provides a review of important items which the expert may require to be able to provide an impartial report. Particular attention is paid to the instructions that are provided to the expert, given the focus placed on them by the New Rules of Civil Procedure. We describe various aspects relating to the instructions which may potentially be problematic.

1.0 Introduction

The new Rules of Civil Procedure have focused attention on the roles of experts and how their evidence must be impartial. Of course, this requirement is not new. At our firm it has always been our goal to provide such impartial evidence. Many of the systems, policies and procedures we have had in place since our inception were designed to ensure impartiality:

- We are not exclusively a plaintiff or defence firm – we assist whoever first walks in the door; the answers will be the same;
- We bounce our opinions off one another to make sure we are being reasonable and objective and have another expert internally review our reports before they go out the door;
- We don't believe that the person with seniority or "his name on the door" is always right - we believe that all our staff can provide insight and generate worthwhile and relevant opinions (sometimes fresh thinking brings better clarity to a subject).

So, for our firm, the new Rules have not created a new paradigm in which we must operate. Their introduction has, however, formalized specific requirements which an expert must meet.

2.0 Items Required by the Non-Medical Expert

The expert of course requires instructions regarding what he or she is required to assess. Section 3.0 provides a detailed discussion on the issue of instructions. In addition to the instructions, however, in our experience the following items may also be required. It should be noted that specific types of cases may require more or less of the information noted, and sometimes additional requirements are not identified until the investigation is underway. A brief discussion with the expert may be of assistance to determine the full extent of the items required.

2.1 Information for a Conflict Search

Prior to discussing a case with the expert the lawyer should provide sufficient, non-confidential information for a conflict search to be performed. Plaintiff and defendant names and the names of any third parties, the date of loss and the location of loss are usually sufficient for the purposes of a conflict search.

The lawyer should avoid discussing the file with the expert until it has been confirmed that the expert has no conflicts and that the lawyer is in fact retaining the expert. We prefer "hypothetical" discussions in situations where the lawyer is not willing or able to provide sufficient information on which a proper conflict search can be performed. In our opinion, the lawyer should assume that the expert is free to be retained by other parties in the action if that lawyer has not expressly indicated that they will be retaining the expert. Otherwise, shrewd lawyers would simply call all the good experts and have a discussion about the case, so as to conflict them all out.

2.2 Terms of Payment

It is important that the expert is provided with clear information as to how he or she is going to be paid for the services rendered. In particular it is important that the expert's fee not be contingent on the outcome of the trial. Further, to avoid a dispute later, it is important to clarify whether or not the lawyer has retained the expert (and guarantees the account) or the plaintiff/defendant has (in which the expert should request a retainer). It is much easier to provide prompt and unbiased work when you are not worried about whether or not your account will be paid when/if you give the client "the bad news".

2.3 Reports from Police, Fire, Fire Marshal, etc.

Any reports from agencies having jurisdiction over the incident investigation typically are useful. In motor vehicle accidents, that typically would be the Police. For fires, it typically would be the Fire Department, Ontario Fire Marshal (OFM) and/or the Police. For incidents where a worker was injured, the Ministry of Labour may also be involved. There are too many other potential sources to list here, so it is best to consult with the expert on that issue.

Unfortunately some agencies have long timelines for turning around any request for information, so in many cases we have been forced, for limitations reasons, to proceed without the benefit of that agency's report. In a case where that occurs, expect that the expert's report may have some disclaimer in the event that the agency's report contains additional evidence or information.

2.4 Transcripts of Examinations for Discovery (E/D)

Obvious sources of potentially useful information for the expert are transcripts of E/D. In our experience some lawyers circumscribe the E/D information, providing only the

passages that they deem relevant. In most cases this has not been an issue, because most lawyers have a fairly good idea when the E/D is touching on aspects that are relevant to the expert. However, is it really such a good idea to run the risk that there is a "smoking gun" admission buried in the passages that were not provided to the expert? Rarely does a case hinge on a few words, but we have seen it happen. We have also been involved in cases where the provision of only selected portions of an E/D is portrayed to a jury by opposing counsel as 'guiding the expert's opinion'. Thus we recommend simply providing complete transcripts to the expert, and letting the expert decide what is relevant.

2.5 Medical and Financial Records

Medical records would appear, at first glance, to be only relevant for a medical or biomechanical expert. However, there are many instances where medical records could be of relevance to a non-medical expert. For example - when performing a fire origin and cause assessment, medical records generally are not required. However, if the issue is whether the fire was intentionally set, medical records of individuals treated for fire-related injuries may be of assistance (to see if they have burns on their hands, for example).

Medical records could also be relevant to assist the expert on how an action could or could not have occurred or been performed. For example - consider a case involving a piece of equipment which was alleged to have failed, causing injury to a person. That person may have had a pre-existing condition which prevented them from using the equipment in a certain manner. It would be important for the expert to know this, as it would help him or her to eliminate one or more possibilities for the occurrence. It may also present a defence, if the equipment was clearly labeled to be used only by persons with certain capabilities.

Financial records would be relevant to the expert only if there was a financial question at issue, such as in a divorce, a business valuation, a construction claim, etc.. One must be careful in providing financial records to certain experts as it could be seen to be directing the expert to a certain finding. For example, in a fire origin and cause investigation, the financial records would not be relevant. If there was a questionable credit history of a person living in a house that burned, providing that information to the fire investigator could suggest a cause (intentionally set), prior to the investigator ever having found an origin. It would be preferable to allow the investigator to come to an independent fire origin finding first, before providing any apparent "motive" for the fire.

A brief discussion with the expert should be able to clear up any questions regarding whether or not he or she needs to see the medical or financial records.

2.6 Other Documentation

In addition to agencies that have a legislated mandate to investigate an incident, there are also private firms, such as ours, that may have investigated the incident. Further, large companies typically have their own procedures for investigating incidents that occur at their premises, and also concerning preventative measures or maintenance. For example, in a slip and fall claim at a grocery store, the expert would want to see the store's maintenance logs and procedures to see not only when the floor was last cleaned, but what exactly is the store's procedure to ensure that the floors are kept reasonably clean.

There are a myriad of possibilities of types and sources of documentation that could be relevant on a file. Obviously, if the matter has proceeded to the stage where documents are exchanged, much of the information should be included in the Affidavits of Documents. Should is underlined because in many cases there are additional documents which the party may not believe to be relevant but which an expert might deem relevant for their purposes. Consultation with the expert regarding any additional sources of information is important. Missing but yet potentially relevant information from an affidavit, may, in and of itself, be of assistance to the expert and/or the lawyer.

2.7 Timelines

It cannot be stressed enough: experts need a realistic deadline! It is particularly important to stress the basis for the deadline: if the deadline is court imposed and a failure to meet that deadline could have a major impact on the case, tell the expert, in no uncertain terms, that this is the case. Credible expert reports are very meticulously and comprehensively prepared documents, and they require time to prepare, in addition to the time required for investigation. They should not be rushed!

3.0 The Instructions

This section presents scenarios where various types of instructions are discussed; where certain types of instructions may be more appropriate than others, and issues that may arise with one type of instruction versus another.

3.1 The Scope of the Retainer: All Encompassing or Restricted?

From a "first principles" basis, if our purpose as experts is to assist the trier of fact, then all materials which are relevant to the matter at issue should be provided AND the expert should be given an unrestricted, "tell me everything about this incident" mandate. For example, if the incident involves a person who fell down a staircase and became injured, then it is our opinion that the trier of fact would be assisted best if the expert assessed all aspects which could have caused or contributed to the incident, including: the person's footwear, what they were doing or carrying while on the staircase, the available lighting

level, the geometric construction of the staircase, the colour and composition of the stair treads, the handrail type and location, and so on.

However, the expert is not in control of the litigation process and thus his or her involvement is, to a significant degree, dictated by the lawyer's instructions. At first glance, using the staircase example, if a lawyer instructs an expert to only assess the lighting, it might appear that the lawyer was directing the expert in a manner which assured a certain result (i.e. – he or she knew the stair itself was problematic but wanted to highlight the fact that the lighting was excellent). In a case where the expert was directed only to look at lighting, a good expert is going to report that the lighting was excellent and yet make it very clear that the overall cause of the incident was not assessed, merely that the lighting was assessed and was in compliance with the relevant codes and/or standards. In this sense, if followed, the new rules are going to make it absolutely clear that the full incident has not been assessed due to the manner in which the expert was instructed and not due to an inherent bias of the expert. Some inference might be drawn from such a limited investigation (the stairs must be bad because the lawyer specifically asked the expert NOT to look at them but rather to focus only on the lighting).

Of course there may be good reasons why the lawyer would want an expert to assess only a small component of an incident. Again using the staircase example, the lawyer may be defending a party whose sole responsibility it was to ensure that the lights were properly maintained. In that case, the lawyer might not wish to spend money doing a full assessment because he or she is only concerned whether or not the lighting was adequate. In such cases, were there is a sound reason for directing an expert to only a small component of a typical incident investigation, it would be helpful to the expert to understand why he or she is being directed to limit his or her investigation. For example, the instructions could include a statement as follows:

> *"Our client was responsible for maintaining the lighting at the incident staircase. It has been alleged that the lighting contributed to the person falling down the staircase. Please assess the lighting at the staircase and provide your opinion as to its adequacy".*

While the additional information is not required to execute the specific instructions provided by the lawyer, it does give the expert comfort knowing that he or she is not being used by the lawyer to somehow advance the argument that the entire staircase was not deficient. While such comfort may not seem relevant, lawyers should realize that, especially with the current added attention to the expert's impartiality, good experts may become reluctant to be involved in a case if he or she believes that they are "being used" in a way which could affect their future livelihood. One judgment which casts doubt on an expert's credibility could be ruinous to that expert's professional career.

We would also suggest that limiting an expert to one particular aspect of a case could prove detrimental to an expedient resolution of the case. Again using the staircase

example, even if a lawyer was defending a party whose only involvement related to the lighting, would it not be advantageous for that party to have a report which showed not only that the lighting was excellent, but also that the staircase itself was deficient? Would it not likely result in that party being let out of the action at a much earlier date?

Further, if we assume that the lighting was not excellent, then limiting the expert to only that aspect of the investigation would now be harmful to the lawyer's client, as, without any information regarding other staircase deficiencies, it would appear that the lighting was the sole cause of the incident. If the lawyer then chose to expand the scope of the expert's retainer, does it not now look like the lawyer is "fishing" for the right result? Has the lawyer not also potentially harmed the expert's reputation by drawing him or her into this fishing expedition? It may reasonably be deduced that the scope was expanded after the investigation to accommodate selected aspects of the case. Surely the court would not look favourably on such an interaction. While the court might recognize that the expert was not in control of the situation, might the court not also chastise the expert for not being more forthcoming with objections to being limited in his or her scope? Needless to say, it our firm's position that we will be very careful in situations where our scope of retainer is being significantly restricted.

3.2 Conflicting Instructions

Sometimes the lawyer, in an effort to "make certain" that the expert has full instructions, will add additional wording which might conflict with the primary theme of the instructions. For example, again using the staircase example, the lawyer might say:

> *"Please assess the staircase incident and determine whether or not the lighting caused or contributed to the fall".*

Is the expert supposed to review and comment on all aspects of the case, including the lighting, or review all aspects and just comment on the lighting? Better wording would be:

> *"Please assess the staircase incident and comment on the cause of the claimant's fall and any aspects which may have contributed to it, including lighting".*

If the lawyer wants the expert to review only the lighting and comment on only the lighting, as per the staircase example where the lawyer's client was responsible for maintaining the lights, then the wording should be:

> *"Please review the lighting that was involved in this incident and comment on its adequacy".*

3.3 Leading Instructions

We have seen instructions where the lawyer specifically states what opinion they are looking for. They use words such as "confirm", "refute", "disprove", "prove", "validate", etc., in sentences such as *"please confirm that our client did not….."*, or *"please refute the plaintiff's theory as to the cause of this incident"*.

Clearly any instructions which suggest an opinion are not acceptable. Good experts will know to still pursue an unbiased investigation, but the production of an improperly worded retainer letter at trial (or before) may be damaging. It is our policy to review the instructions we have received from our clients and, if the wording is suggestive or even hints at a desired outcome, we follow up with a clarifying letter setting out an independent scope of retainer. For example, we might clarify with the following wording:

> *"We understand our scope of retainer to be to perform an independent and objective assessment of the circumstances surrounding this incident and provide you with our opinions regarding the likely cause and any contributory factors".*

While these may just be words on a page, in our opinion they indicate that the expert recognizes that leading instructions may have an impact on that expert's ability to provide an unbiased assessment. Addressing such leading instructions with a follow up provides the expert and the lawyer with clarity of purpose. I personally have seen honest, credible experts unwittingly moving away from evidence which was detrimental to their client's case. Is that not the very reason why the New Rules have a requirement that the expert sign Form 53? To make the expert stop and think about what he or she is supposed to be doing?

3.4 Vague Instructions

In certain types of cases simple instructions can provide clear direction to an expert. Instructions such as:

> *"Determine why the bolt failed"*,
>
> *"Determine the speed of the vehicles"*,
>
> *"Determine the ignition temperature of the incident material"*,

and so forth are clear and unambiguous as to what the expert's scope of retainer is. In each of these examples, the role of the expert was to assess one specific issue alone.

Ambiguity can arise when the lawyer provides the expert with instructions regarding a specific issue and then throws in some additional verbiage about the incident overall. Using the previous set of instructions, we could have:

"Determine why the bolt failed and whether or not it caused the loss",

"Determine the speed of the vehicles and whether they were contributory to the incident", and,

"Determine the ignition temperature of the incident material and whether or not the material was involved in the ignition of the fire".

At first glance it may seem logical to add the verbiage in each of the three examples. However, since the thrust of each of the three instructions is to look at an individual issue, which suggests that the lawyer wants to limit the scope of the expert's retainer (for costs or some other reason), when the additional wording is considered, the expert might assume that the entire incident is to be assessed, because in many cases simply looking at one aspect is insufficient to determine whether or not that aspect caused or contributed to the loss. Thus the expert may expand the scope of the retainer beyond what the lawyer intended. The findings of that expert cannot be curtailed in the report as it would suggest that the lawyer is directing the expert in a manner that is specifically designed to elucidate only the helpful aspects of the expert's findings. It would appear that this is exactly what the New Rules are trying to avoid.

It would be preferable to either keep the scope of the retainer focused on the specific aspect of the incident which the lawyer wants an opinion on, or, better yet, not direct the expert to focus on that one aspect but, rather, request a full and complete assessment of the incident. Further commentary on the risks of a focused investigation is presented in the next section.

In our experience lawyers may direct the expert to a specific aspect of a case because other parties have specifically raised those aspects themselves. Thus it is understandable that the lawyer would want to ensure that the expert is aware of those claims as those aspects may not ordinarily have been considered as part of the expert's normal scope of retainer in similar previous investigations. In those situations it would be preferable to provide it as background information to the case and then include it as a subset of the specific directions or instructions to the expert. For example, using the failed bolt example, the lawyer could state the general circumstances of the case and then indicate that other parties have suggested that a particular bolt was involved. The instructions could be as follows:

"Please review the circumstances surrounding this incident and provide us your opinion as to the cause of the incident and any contributory factors, including but not limited to the alleged defective bolt".

3.5 Lawyer-Focused Investigations

The title refers to those situations where the lawyer has reviewed the circumstances surrounding the incident and determined what, in his or her opinion, are the relevant aspects which warrant investigation and commentary by the expert. In our experience such a situation can result in relevant aspects being ignored or overlooked. These can be aspects which are helpful or harmful to the client's case. Either way, in our experience, not investigating those aspects can be problematic.

Prior to the current revisions to the Rules, it would not be uncommon for our legal clients to send us a package of documents, ask us to perform a preliminary review of the documents and then say "*give me a call to chat about the case*". In our experience the majority of our clients were not intentionally doing this to direct our assessment away from those aspects which are harmful to their client; they were doing this so as to be better able to understand the case and determine what the scope of our retainer should be. It would appear that this type of "preliminary assessment" could now be viewed as a way of "skirting" the new Rules: after the verbal communications between lawyer and expert, the lawyer could carefully craft a set of written instructions which are designed to focus on the "good news" from the investigation. Thus we would suggest that any investigation (including a "preliminary review") prior to receiving final instructions should be avoided if possible. Even if the expert carefully documents that phase and provides, in his or her report, a written synopsis of the preliminary discussions and/or any verbal instructions that occurred, along with the lawyer's written instructions, the court may ultimately draw a negative impression from that type of activity.

If the lawyer is uncertain about what the instructions should be, it would seem appropriate for the lawyer to have a brief and non-case specific discussion about the case with the expert, without exchanging any documents. In such a case, assuming that both the lawyer and the expert would be able to demonstrate that very little time was spent discussing the matter (e.g. – there wasn't a 4 hour telephone conference call) and that no exchange of documents occurred prior to written instructions being provided to the expert, one would not expect that any meaningful adverse inference would be drawn.

The lawyer could also request that, prior to engaging the expert in discussion about the incident at issue, the expert provide a short list of typical issues or aspects that they might consider in a particular type of incident assessment. In most cases such as typical fire origin and cause determination and motor vehicle collision reconstruction, if the lawyer is already familiar with those types of cases such a list would not be required. However, in cases that are out of the ordinary or where the lawyer does not have the familiarity with that type of case such a list could guide the lawyer in developing a reasonably clear set of instructions.

3.6 Scenarios Involving Situations not Reasonably Contemplated by the Instructions

Unfortunately, even when the lawyer is familiar with the type of case at issue and/or the expert has provided some assistance as to what aspects could be investigated in a typical case, there always exists the possibility that some relevant factor exists which was not reasonably foreseeable in advance of the expert's review of the documents, evidence and/or scene. In such a case the lawyer's written instructions have already been provided to the expert and the scope of retainer has been defined. What is the appropriate action to take? If the lawyer's instructions were not sufficiently broad, (i.e. – they were focused on a particular aspect or aspects) then the expert risks the appearance of conspiring with the lawyer if he or she provides a broader opinion than what was originally requested.

If the lawyer provides a second set of instructions to broaden the scope to include what was discovered by the expert, it might appear that the lawyer is "tailoring" the investigation for the "right" answer. It is also possible, however, that additional instructions are defensible, especially if the unforeseen relevant factor is truly out of the ordinary. Nonetheless, it would be much cleaner if that type of a scenario could be avoided.

3.7 Unlimited Scope

With all of the potential for conflicts and misunderstandings and concerns about "leading the expert", it might seem appropriate to simply let the expert "loose on the case" and ask him or her to provide a report of their findings. Not so quick: in Dulong v. Merill Lynch, the judge had concerns with that approach:

> *(2) At the outset of his report, Mr. Malcolmson does not set out any specific questions on which he was asked to opine. Rather, he simply states that he is responding to a request to "report [his] conclusions following [his] examination of the pleadings, the transcripts from the examinations for discovery and the documents produced by the parties." This is improper – it is essential that an expert report clearly indicate the scope of the expert's opinion.*

The New Rules specifically indicate that the scope of the experts' opinion must be presented in the report, so one would hope that any lawyer (and expert) who reads the new Rules would not fall into the predicament presented in Dulong v. Merill Lynch.

3.8 Joint Retainers

There are many circumstances where a number of co-defendants may band together and retain one expert to assess the incident or specific issues pertaining to the incident. A good expert should have no difficulty agreeing to that arrangement. The caveat, however, is that the instructions must be very, very specific as to the scope of the

retainer and provide a firm basis for determining whether or not the expert is to produce a report.

In our experience, if all of the co-defendants are not paying careful attention to the technical nuances of the case, one of them may be "left out in the cold" if the expert finds an unexpected detail. We are aware of one particular case where a number of defendants banded together with a very specific set of instructions: the expert was to answer two questions, but not provide commentary on the overall cause of the incident. It turned out that the expert's answer to the two questions was of no assistance to the co-defendants (thus no report was to be produced), but an assessment of the overall cause of the incident would have been extremely helpful to one of the co-defendants. That co-defendant wanted the expert to provide a report, but the others held him to the initial retainer agreement and he was "left out in the cold".

The joint retainer should also explicitly state how the expert is to communicate with the co-defendants. Is he or she to call one of the lawyers who has been appointed as the "point person"? Is the expert to talk only via conference call? Is the expert to communicate in writing? Previously, one might have said that the expert should not communicate in writing, however with the new Rules and some recent decisions; does a long phone conversation or conference call not provide greater opportunity for the court to draw an adverse inference?

4.0 Summary

In our opinion, the new Rules of Civil Procedure should not represent, for experts that have not been acting as advocates, a significant departure from their normal operating practice. The one aspect which presents a potential for tripping up even those well-intentioned experts relates to the specific requirement that the lawyer's instructions to the expert be included in the expert's report. This is especially the case if insufficient attention is paid by the lawyer and the expert to the specific wording of the instructions. Careful and thoughtful instructions should help avoid any such issues. If the lawyer does not have sufficient experience with the particular type of case at hand, it is recommended that the lawyer consult with the expert on a hypothetical or general basis (i.e. - do not have case-specific discussions) to develop an appropriate set of instructions to the expert.