EXPERT EVIDENCE

Expert witnesses disagree on truck crash

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TWO expert witnesses in accident reconstruction have presented dramatically different versions of what they thought led to a fatal logging truck accident in West Vancouver during a trial in B.C. Supreme Court.

Both experts were testifying at the trial of Port Alberni truck driver Perry Pelletier, 44, who faces two charges of dangerous driving causing death and six counts of dangerous driving causing bodily harm in connection with an accident on Nov. 11, 2004 that killed two West Vancouver women.

Const. Cal Shamper, a traffic expert who was a sergeant with the West Vancouver Police Department at the time of the accident, told Justice John Truscott he thought the accident was caused by excessive speed, based on skid marks left on the road.

But another traffic expert, Gerald Sdoutz, who testified for the defence this week, concluded that Pelletier's log trailer had rolled over because the load of logs had shifted, not because the truck was speeding.

"In Mr. Sdoutz's view, it did not appear the Pelletier truck had rolled over due to excessive speed," said defence lawyer James Bahen, summarizing Sdoutz's conclusions.

The two experts also disagreed on which of the two logging trucks on the road that day had caused the skid marks left on the highway that were used to calculate speed.

Sdoutz told the judge he thought the marks had been left by a second logging truck driven by Pelletier's colleague Tony Winters when Winters came to an abrupt stop on the highway right after the accident. Sdoutz said if the skid marks were left by Pelletier's trailer before it rolled over, he would expect the marks to fade to a thin line as the tires lifted from the road surface. "It wouldn't continue as a broad skid mark with an abrupt end," he said.

Sdoutz estimated the truck driven by Winters was going about 71 kilometres per hour.

Winters also testified for the defence on Monday, telling the judge he was sure it was his truck that had made the skid marks rather than Pelletier's truck. Winters said he didn't see any marks on the road when he came into the curve just after the Capilano Bridge behind Pelletier.

Crown counsel Kerr Clark questioned Winters on his recollections, suggesting he would probably be

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focused on not crashing his logging truck into the median right after the accident rather than looking for skid marks on the road.

Clark also asked Winters if the logging trucks had been properly loaded prior to the trip back from the log sort in Port Coquitlam. "The trucks were balanced so there wasn't a huge amount of weight on one side or the other?"

"Yes," Winters replied.

Winters also disagreed with earlier witnesses who testified they saw the logging trucks speeding on the highway prior to the crash, including one woman who told the judge she was driving over 100 km/h when she was overtaken by one of the logging trucks. Winters said in his mind that wasn't possible.

"It would sound from this that the trucks were going 110 kilometres an hour," said Clark in cross-examination.

"My truck doesn't go 120," said Winters.

Shamper, the expert witness who testified for the Crown, was also cross-examined by Bahen and questioned on Sdoutz's conclusions.

"I disagree with the conclusions," Shamper said. "I felt the rollover was caused by excessive speed."

Final arguments will be heard later this week.

DISCUSSION QUESTIONS

1. 1. What makes someone an "expert"?

2. Give some examples of people you consider "experts" generally.

3. What features (knowledge or experience) do you think the expert witnesses in this case possess that makes them "experts"?

4. How does the role and testimony of the expert witnesses in the B.C. truck crash case differ from the testimony of a bystander who witnessed the truck crash?

5. How does expert testimony contrast with eyewitness testimony?

INTRODUCTION TO EXPERT EVIDENCE

Expert evidence is a common part of many cases in today's justice system. Criminal trials can include testimony and written reports from specialists in a range of fields, from forensic pathologists to ballistics experts to accident reconstructionists to psychiatrists to psychologists to experts on eyewitness identification. These experts are asked to testify on matters such as the accused's intellectual capacity, the likely cause of death in a murder case, the chances that the accused can be rehabilitated, the analysis of a DNA sample, the social dynamics of a criminal gang, and much more. Expert evidence is also used in civil trials to prove the theory of either party.

Who Can Present Expert Evidence?

Either the Crown or the defence can present expert evidence. Sometimes each side calls its own expert to pronounce on a particular issue. In these situations, it is not unusual for experts to disagree.

Costs

Experts can be expensive to hire. The cost of experts is difficult for all parties, but especially so for those who rely on legal aid or cannot afford a complicated defence.

Concerns

The quality, reliability, and usefulness of expert evidence varies. While expert evidence can greatly help judges and jurors in uncovering the truth, it can also be confusing and misleading, and in some cases it has the potential to distract the judge or the jury from more important issues. If weak expert evidence is used to convict or acquit an accused, that verdict would be an unreliable one, causing the public to lose confidence in the justice system. To avoid these kinds of problems, the law has developed a set of rules to determine when and how expert evidence can be used. As with other types of evidence, not all expert evidence can be used in a trial.

General Rule Against Opinion Evidence

Opinion evidence is when a person is asked for an opinion on what happened rather than their observations or factual knowledge. In general, the law does not allow the use of opinion evidence. It is presumed to be unhelpful, potentially misleading and, given the ability of judges and jurors to form their own opinions, often redundant. It is inadmissible because it usually involves an expression of a viewpoint rather than a statement based on personal knowledge, observation or experience.

Expert Evidence: The Exception

Expert evidence, which is a type of opinion evidence, is a major exception to this general rule. Experts can provide information and analysis outside of the experience or knowledge of the average juror or judge. Therefore, the more technically complicated or specialized an area of knowledge is, the more likely a court will find expert testimony in this area to be helpful and therefore admissible. If it meets certain criteria, expert evidence can be admitted in a trial.

CHECK FOR UNDERSTANDING

Which of the following statements are examples of fact evidence that would make expert evidence unnecessary, and which are examples of opinion evidence? Write either **Fact** or **Opinion** beside each statement below.

1. The painting that has been hanging in Jessica's grandmother's house for the past 20 years is now worth over $20,000. _____

2. The probability that someone other than the defendant could have had the same DNA match is less than one in a million. _____

3. The speed of light is 299 792 458 metres per second. _____

4. $1000 Canadian dollars was worth $1002.50 American dollars three days ago. _____

5. If the hearsay evidence in this case were introduced in a court in France, it would be admissible. _____

6. Avril has trained her dog to bark at strangers, and to roll over the show its tummy to friends. _____

7. Ms. Khan's eyesight is bad, if she were to get her vision checked, she wouldn't be allowed to drive without glasses. _____

Answers: 1. Opinion 2. Opinion 3. Fact 4. Fact 5. Opinion 6. Fact 7. Opinion

PROCESS FOR INTRODUCING EXPERT EVIDENCE

Jury Trial vs. Judge-Alone Trial

In a judge-alone case, the judge must make all of the decisions, including decisions of fact and law, decisions concerning the admissibility of evidence, a finding of guilt or innocence and sentencing decisions.

By contrast, when a jury is present, it is assigned the task of resolving factual disputes and making the ultimate finding of guilt or innocence. Even in a jury case, however, the judge still makes important decisions on the law, including on what evidence the jury will be allowed to hear.

Judges as Gatekeepers

When parties seek to introduce expert evidence, the trial judge bears the important task of deciding which experts are allowed to testify and what they can discuss. As such, courts sometimes say that the judge plays the role of "gatekeeper" in relation to expert evidence. The trial judge's "gatekeeper" role in a jury trial does not extend to determining which party's experts are ultimately correct or more believable with regard to the points on which they disagree. This is the jury's role. The trial judge's role is limited to determining whether proposed expert evidence meets the minimum criteria of necessity or relevance and is being offered by someone with sufficient expertise. Once the trial judge has determined that expert testimony is admissible and can be presented to the jury, it is the jury that decides which expert's testimony is more persuasive when there is disagreement. The jury also decides how much weight it will give to any expert testimony that it hears. Even if the trial judge decides that expert evidence should be admitted, the jury has the right to decide that it does not find it at all believable or helpful.

Voir Dire

As with other evidence, the judge in a jury trial might determine the admissibility of expert evidence without the presence of the jury in a procedure known as a *voir dire*. This term simply refers to a preliminary examination, in which the judge hears proposed testimony and makes his or her admissibility decisions without the jury's presence, so as to prevent the jury from hearing inadmissible evidence. The admissibility decisions the judge makes during a *voir dire* are sometimes so important that some people refer to it as a "trial within a trial". Usually, the judge will want to organize the trial so as to conduct all of the required preliminary evidence in a single comprehensive voir dire that precedes the trial proper, so that the judge can minimize the number of times the jury is required to get up and leave the courtroom in the middle of the trial.

BENEFITS AND DRAWBACKS OF EXPERT EVIDENCE

SOME POTENTIAL BENEFITS INCLUDE:

- Specialized knowledge in a particular field that may help a judge or jury reach conclusions it would not otherwise easily reach (i.e. not opinion, but necessary evidence).
- The ability to provide more certainty in a particular case. For example, a haematologist (a doctor who specializes in blood diseases) provides expert evidence for the defence that the accused could not have poisoned the victim because an analysis of the victim's blood revealed that he suffered from an undiagnosed blood disorder that was the cause of his death.
- Expert evidence can provide clarity, (why/how/what/when/where), and as a result, help with judicial efficiency (i.e. less court time, less costs).

SOME POTENTIAL DRAWBACKS INCLUDE:

- **Time-consuming:** The court must take the time to determine the qualifications of the expert witnesses and determine admissibility of their evidence (sometimes through a sub-proceeding known as a *voir dire*). If the subject is complicated, the expert will have to provide the jury with necessary background information comprehensible to ordinary people/non-experts.
- **Overwhelming:** Highly complicated and technical testimony could confuse or overwhelm jurors. Or all of the details could distract jurors from the bigger issues.
- **Improper Influence:** There is the risk that jurors—and sometimes judges—may be improperly swayed by testimony that is accompanied by an aura of expert authority. Jurors may also place improper emphasis on the seemingly "objective" conclusions of scientists and technical experts, and forget that an objectively provable scientific conclusion on an issue (for example, someone's blood type) is not the same thing as the factual and legal conclusions they must draw (is the accused's blood, based on tests revealing blood type, the same blood found at the crime scene?).
- **Expensive:** Hiring experts to testify is expensive. If a defendant is relying on Legal Aid for their defence, it is unlikely that they will be able to fund the expense of expert testimony. Access to justice and who can afford what type of defence becomes an issue.

ADMISSIBILITY OF EXPERT EVIDENCE

The Mohan Test: Four Criteria for the Admissibility of Expert Evidence

In *R v Mohan*[1] (1994), the Supreme Court of Canada (SCC) set out the current test for whether an expert opinion should be admitted into evidence. This is known as the *Mohan* test. The *Mohan* decision established that a judge's decision on whether or not to admit expert evidence depends on an analysis of the following four factors:

1. Necessity
2. Relevance
3. The expert's qualifications
4. The absence of any other rule that would exclude the evidence

Judges apply the four *Mohan* factors on a case-by-case basis, meaning that every expert opinion must be analyzed in light of the facts of the particular case. Just because one kind of expert evidence has been admitted in a previous case does not mean it will be admitted in future cases.

1. Necessity

Expert evidence can add something important to the overall body of evidence in a case. In the language of the law, when courts want to say that expert evidence contributes something that goes beyond the knowledge and expertise of jurors and judges, they say that evidence is necessary. Evidence is necessary in areas where ordinary people would be unlikely to form a correct judgment without help. For example, an expert's opinion on the cause of a fire is an example of necessary evidence. On the other hand, expert evidence is deemed unnecessary where it presents an opinion that jurors and judges can form themselves, based on their own common sense. A psychologist's testimony that when people witness brief events, they have difficulty recalling what happened is an example of unnecessary evidence.

2. Relevance

In the view of the law, there is no point in presenting expert evidence unless it is relevant to the issues the court is trying to resolve. Therefore, a judge must decide whether a particular expert opinion is relevant before sending it to the jury. If the evidence is irrelevant, a judge will exclude it.

The relevance criterion in *Mohan* involves more than just assessing common sense relevance. It also involves a second step in which courts assess legal relevance. This second step involves a balancing of the benefits of admitting a particular piece of evidence with the risks of doing so. This is an important part of the *Mohan* test.

When assessing benefits and risks, courts focus on whether the evidence is reliable. In other words, whether the expert opinion is based on careful research and good science. Where the evidence is based on speculation and personal opinion and has

[1] *R v Mohan*, [1994] 2 SCR 9

not been backed up by sound evidence and scientific research, judges will often exclude it. Even where the expert has impressive credentials – degrees, awards, publications, titles, etc. – the law tells judges to be skeptical, and to make sure the expert's opinion has a sound scientific basis before allowing the jury to hear that opinion. The evidence of an expert using technical terminology can be very convincing to a jury. If the expert evidence is not relevant, it can confuse the jury and produce an unreliable verdict.

When assessing the benefits and risks of expert evidence, courts also consider factors such as:

- How much time hearing the evidence will consume;
- Whether the evidence is likely to confuse the jury; and
- Whether the evidence will unfairly prejudice the jury against the accused.

In analyzing the relevance criterion, judges ask two questions:

1. Does the evidence help resolve an important issue in the trial?
2. How do the benefits of admitting the evidence compare with the risks?

If the judge determines that the evidence is relevant and the benefits of including it outweigh the risks, the expert evidence will be included at trial.

3. The Expert's Qualifications

Just because a person is an expert (or calls themselves one) does not mean that they will be able to present an expert opinion in a trial. Before a witness will be allowed to testify as an expert, the trial judge must ensure that the witness is actually qualified to testify about the specific issue that they are being called to give an opinion about. In determining whether an expert is qualified to pronounce on a certain subject, judges look at factors such as education and other training, work experience, and research and publications.

A party calling an expert witness must inform the other parties and the court of the identity of the witness, and give a description of the witness' area of expertise and qualifications, usually by submitting the curriculum vitae that the witness would provide for a job interview. The party calling the expert must also provide either a summary of what the expert will likely say, or the report prepared by the expert.

When the expert appears at trial, the trial judge will often personally ask the expert questions about their background and areas of expertise before permitting the expert to provide the substance of their testimony. The entire process of examining the credentials and background of a witness to ensure that they can testify as an expert is called qualifying an expert witness.

Even if the expert is allowed to testify, they are not allowed to say whatever they want.

Rather, the expert must stay within their area of expertise. When an expert starts expressing an opinion on a subject that they are not an expert on, the judge can instruct the witness to stop. For example, a police officer who has been trained to identify footprints cannot be asked about shell casings.

4. The Absence of Another Exclusionary Rule

This fourth factor is a reminder that, as well as being subject to the first three factors in the *Mohan* test, expert opinion evidence is also subject to the rules that apply to all kinds of evidence. Therefore, even if expert evidence meets the first three factors – in other words, if it is necessary, relevant, and based on the opinion of a well-qualified person – it may still be excluded if it violates another rule of evidence. Examples of such other rules of evidence include the character evidence rule, the hearsay rule, and the rule that evidence obtained through an unreasonable search and seizure should sometimes be excluded. Thus, for instance, if a particular expert's opinion meets the first three *Mohan* factors, but its main effect would be to show that the accused is a bad person, it will probably be excluded as a violation of the rule on character evidence.

ADMISSIBILITY OF EXPERT EVIDENCE SCENARIO 1

Apply the *Mohan* test to the following scenario and record your answers in the chart provided.

A 40-year-old man is charged with sexually assaulting his son's 10-year-old friend. The child does not report the incidents until several years after they allegedly occurred. The child's description of the events is inconsistent in places. For example, one time he said that he was assaulted five times and another time he said that he was assaulted 20 times. At trial, the Crown wants to call as a witness a social worker who works with children who have experienced sexual abuse. According to the Crown, the social worker would testify that child victims of sexual abuse often delay reporting the abuse for several years. The social worker would also testify that children who experience traumatic life events, such as sexual abuse, often have difficulty remembering the details of those events when asked about them at a later date. The social worker has a Master of Social Work from Ryerson University and 20 years of experience working with children.

Scenario 1	
Necessary?	
Relevant? **1. Helps resolve important issue?**	
2. Benefits outweigh risks?	
Qualified?	
No other exclusionary rule?	

ADMISSIBILITY OF EXPERT EVIDENCE SCENARIO 2

Apply the *Mohan* test to the following scenario and record your answers in the chart provided.

The accused is charged with stealing Shakespeare's original manuscript for The Merchant of Venice from a museum. The museum owns the original versions of several of Shakespeare's plays. The Crown's theory is that the accused, who loves Shakespeare, has a special obsession with the Merchant of Venice. To support this theory, the Crown wants to call a handwriting analyst to testify as a witness. The proposed witness has 5 years of experience in handwriting analysis and holds a PhD in English literature, specializing in Shakespeare. According to the Crown, the handwriting analyst would present a new and controversial theory called "passion detection" – a way to judge how strongly people feel about something based on shapes and patterns in their handwriting. The Crown says that the expert would analyze the accused's diary, in which the accused writes extensively about Shakespeare, and show through passion detection that, of all Shakespeare's plays, the accused was most passionate about The Merchant of Venice. While passion detection has attracted some support among handwriting analysts, many handwriting experts say more research must be done before the theory can be accepted as valid.

Scenario 1	
Necessary?	
Relevant? **1. Helps resolve important issue?**	
2. Benefits outweigh risks?	
Qualified?	
No other exclusionary rule?	

TEACHING JURORS ABOUT EXPERT EVIDENCE

Use the following template to design a postcard that would help a potential juror understand expert evidence.