

The future is clear now: Expert evidence under the new civil rules

I previously penned an article on this subject in June 2008. The article was based on the proposed changes to the Rules of Court in British Columbia. As it goes with legislation, there were many revisions and rewrites before it was passed. The final changes to the rules, which have now been legislated, will come into force on 1 July 2010. Part 11 deals entirely with experts.

There have been further changes to the rules regarding expert evidence from those initially proposed. The overriding principle, however, remains the same: experts have a duty to assist the court and are not to act as advocates for any party. This neutrality must be explicitly certified within the report itself. Reports must be drafted and oral testimony must be given in conformity with this principle. It is not yet clear what the consequences will be of a failure to provide or comply with such a certification; however, it could result in exclusion of the evidence or possible censure against the expert personally.

Each party is free to appoint their own expert; however, the new rules make provisions for parties to appoint a joint expert. In such a case, the joint expert is the only expert who may give expert opinion evidence in the action on a particular issue unless the court grants an order allowing additional experts. A joint expert may be cross-examined by each party of record.

The court may also appoint its own expert if it considers that expert opinion evidence may help the court in resolving an issue in the action. An expert may be appointed by the court even if the expert has already prepared a report for one of the parties to the action. Such an appointment would, of course, be subject to the expert's consent.

The previous draft rules provided for mandatory conferences between opposing experts. This had been subject to some criticism and, in the final form, such a conference is no longer mandatory. The court may, however, make such an order at a case-planning conference. The court may also make orders for a jointly instructed expert,

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limiting the number of experts a party may call, setting a date for service of reports, and narrowing the issues on which an expert may be called. If such an order is made, expert opinion must not be tendered at trial except as provided for in the order.

The new rules also include more detailed requirements for reports. In addition to the expert's signature and the certification mentioned previously, reports must also include the following:

- The expert's name, address, and area of expertise.
- The expert's qualifications, employment, and education experience in his or her area of expertise.
- The instructions provided to the expert in relation to the proceeding.
- The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

- The expert's opinion on each issue and, if there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
- The reasons for the expert's opinion, including a description of the factual assumptions, research conducted, and documents relied upon.

The last requirement serves as a useful reminder that expert evidence should be based on facts that can be proven at trial and on reliable and accepted scientific principles.

Reports must be served at least 84 days before the scheduled trial date and responding reports must be served at least 42 days before trial. The rules also impose an obligation on the expert to prepare a supplementary report, as soon as practicable, if his or her opinion changes in any material way.

Gone are the days of producing the medical expert's file when and if the expert takes the stand to give evidence at trial. The new rules provide that a party who has served a report must, upon request, provide the following at least 14 days before trial:

- Any written statement or statements of fact on which the expert's opinion is based.
- Records of any independent observations made by the expert in relation to the report.
- Any data compiled by the expert in relation to the report.
- The results of any test conducted by or for the expert, or of any inspection conducted by the expert, if relied upon in forming his or her opinion.
- The contents of the expert's file relating to the preparation of the opinion.

The rules provide that experts

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Learning at your convenience

Access to clinical information is often best used when the physician is at the point of care. But what about the kind of learning that requires quiet contemplation?

Continuing medical education at the point of convenience, when the learner has the time to focus and concentrate, is clearly ideal. This can be achieved by listening to audio files on portable CD or MP3 players, or even on smartphones. Audio-Digest Foundation, an affiliate of the California Medical Association, has been offering recordings of lectures of CME meetings from across the USA for more than 50 years. The lectures cover a wide range of specialties including anesthesiology, emergency medicine, family practice, gastroenterology, general surgery, internal medicine, obstetrics and gynecology, ophthalmology, orthopaedics, otolaryngology, pediatrics, and psychiatry. The

College Library subscribes to these lectures in CD format and makes them available for loan. Furthermore, since 2006, the files have been available in MP3 format. Through the Library's account at Audio-Digest, College members may download hundreds of files and listen to them on their computers or mobile devices for free. Instructions for access are on the library's web site at the Audiovisual & PDA page, www.cpsbc.ca/library/pda-video-audio. A limited number of these files have been made publically available by Audio-Digest on the iTunes web site, but access using the College's web site offers a much larger selection by virtue of the Library's subscription.

—Karen MacDonell

—Robert Melrose

—Judy Neill

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injected with a saline solution so that the surgeon can see where micro holes exist and close them with a small stapling device. This prevents the graft from leaking. Unfortunately, I had understood *Bitte Ziehen* (please pull). Like a good surgical clerk I followed instructions and started tugging on the vein that the technician had so carefully removed.

"What are you doing?" the surgeon screamed. "This is cardiac surgery!" I was not sure what was happening as I had done everything that was asked of me. I stopped pulling the blood vessel. Thankfully it was not harmed in the ordeal and the patient successfully received a new graft. Surprisingly, though, the telephone in my pocket did not ring on Friday. **BBM**

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References

1. Ipsos Reid. Paws and claws: A syndicated study on canadian pet ownership 2001. www.ctv.ca/generic/WebSpecials/pdf/Paws_and_Claws.pdf (accessed 14 December 2009).
2. Barker SB, Wolen AR. The benefits of human-companion animal interaction: A review. *Veterinary Med Educ* 2008; 35:487-495.
3. Rabinowitz PM, Gordon Z, Odofin L. Pet-related infections. *Am Fam Phys* 2007;76:1314-1322.
4. Hemsworth S, Pizer B. Pet ownership in immunocompromised children—a review of the literature and survey of existing guidelines. *Eur J Oncol Nurs* 2006;10:117-127.

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must be promptly notified of a trial date and whether they may be required to attend at trial for cross-examination. Objections to any expert opinion must be raised no less than 21 days before trial or they will not be permitted at trial.

An expert is not permitted to give evidence at trial unless a report has been prepared and served in accordance with the rules. If a party wishes to cross-examine an expert, they must give notice to the party tendering the report within 21 days after the report is served. If an expert has been requested for cross-examination, the report will not be admitted unless the expert is present at trial. If an expert is not called for the purpose of cross-examination, the scope of the evidence he or she can give is limited to clarifying terminology in the report or otherwise making the report more understandable.

In anticipation of the new rules coming into force, medical experts will likely soon be asked to change the format of the reports to reflect the new rules, particularly for any matter which has a trial date after 1 July 2010.

Medical experts will continue to play an important role in personal injury litigation in the province. The new rules should serve to clarify the role of experts in civil litigation and provide greater certainty for both parties and the experts who are retained.

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If you have any suggestions for future articles, please contact DrLaura.Jensen@icbc.com.