

# LEXOLOGY®

## Judge's ongoing duty to ensure expert witness objectivity

**Dentons**

**Canada** | July 18 2017

### Introduction

In *Bruff-Murphy v Gunawardena*(1) the Court of Appeal confirmed the ongoing gatekeeper function of trial judges in the context of expert testimony. A trial judge's role does not end after the preliminary threshold stage, but continues throughout the proceeding to protect the justice system's integrity. Inaction on the part of the trial judge can lead to unfairness in the proceeding, requiring a new trial. Trial judges are not powerless once an expert witness has begun testifying – rather, they have an ongoing duty to ensure that there is no acute risk to the trial's fairness.

### Facts

The plaintiff, Liese Bruff-Murphy, was injured in a motor vehicle accident after her car was hit from behind. An action was commenced against the defendant, who admitted liability. The sole issue during the 23-day jury trial was what damages, if any, the plaintiff had suffered.

During the trial the defendant called two expert witnesses, both of whom were medical experts who had been retained to conduct independent medical examinations of the plaintiff. One of these experts was Monte Bail, a psychiatrist. Counsel for the plaintiff objected to the expert's testimony on the basis that:

- his report constituted an attack on the plaintiff's credibility; and

- he was biased against the plaintiff.

Despite these concerns, the trial judge qualified the expert and permitted his testimony. During the trial, it became evident that parts of Bail's testimony were problematic, and that he had taken on the role of advocate for the defence instead of acting as an independent expert witness. No objection was made during the trial and no special instruction was requested regarding Bail's testimony. The trial judge raised no concerns about the expert's testimony with the jury. The jury awarded the plaintiff C\$23,500 in general damages and rejected all other heads of damages.

The plaintiff appealed the jury's award on the basis that her right to a fair trial had been breached by the trial judge's inaction, arguing that a new trial was necessary. One of the issues on appeal was whether the trial judge had erred in:

- qualifying Bail as an expert witness; and
- failing to intervene or take steps to exclude his testimony.

### **Preliminary determination of expert's independence**

The Court of Appeal held that the trial judge had erred in his application of the law at the qualification stage. In coming to this conclusion, the court confirmed the two-step approach set out in *White Burgess Langille Inman v Abbott and Haliburton Co.*(2) First, the trial judge must engage in an analysis of the threshold requirements for admissibility (ie, relevance, necessity in assisting the trier of fact, absence of an exclusionary rule and the need for a properly qualified expert) to determine whether the expert's evidence should be admitted. The question at this stage is whether the expert is able and willing to carry out his or her primary duty to the court.(3) Second, the trial judge must balance the potential risks and benefits of admitting the expert's evidence, which the court referred to as the 'discretionary gatekeeping step'. It is only after this balancing is done that the court can determine whether there is a probability that the expert witness' testimony will impair the fairness of the proceeding. In the Court of Appeal's view, had the trial judge engaged in a proper balancing after the initial qualification of the expert, he would have found that Bail was not independent, but rather was acting as an advocate for the defence.

### **Judge's ongoing gatekeeping role**

The trial judge had also erred by assuming that his gatekeeper role ended after Bail was qualified as an expert. The Court of Appeal confirmed that the trial judge's role does not end after the expert has been qualified to testify and his or her testimony has been provided.

Rather, a trial judge has an ongoing gatekeeping role throughout the trial. If an expert's testimony makes clear that he or she is not independent, the trial judge "must not act as if she were *functus*."<sup>(4)</sup> If any concerns arise during the trial as to the expert witness's non-independence and such issues pose an acute risk to the trial's fairness, the trial judge must immediately take action (regardless of whether a party has objected to the testimony or requested that specific instructions be provided to the jury). The trial judge need not wait for an objection or a request for specific instructions before intervening.

By not intervening in this case, the trial judge had failed to stop the admission of dangerous expert evidence that significantly affected the trial's fairness. The Court of Appeal found that a number of options had been available to the trial judge – for example, he could have advised counsel that he was going to give an instruction to the jury regarding Bail's testimony or asked for submissions from counsel regarding a potential mistrial. The trial judge had not been powerless and, in failing to take steps, the trial's fairness had been affected to such an extent that the Court of Appeal granted the appeal and ordered a new trial.

### **Expert's objectivity: building on *Wright***

Another hallmark of this case is the reaffirmation of the separation that must exist between an expert and an advocate. A similar point was recognised in the Ontario Superior Court of Justice's decision in *Wright v Detour Gold Corporation*.<sup>(5)</sup> In this case, the defendants in a securities class action had hired an expert (Gillin) who, in turn, had hired his own lawyer. Gillin's legal team had helped to locate information and assisted with the drafting of the affidavit setting out his opinion. During his cross-examination, Gillin was asked to produce:

- drafts of the affidavit;
- all correspondence between him and the law firm that he had retained;
- specific cover letters sent to him by his law firm; and
- the invoice that he had ultimately sent to the defendants' lawyers, Davies Philips and Vineberg LLP, outlining his fee for preparing his opinion.

The expert refused to provide this evidence. The plaintiff subsequently brought a motion to compel Gillin to provide answers to questions which he had refused to answer.

On the return of the refusals motion, the court reasoned that the witness' decision to hire a law firm to help him to prepare the opinion should be "encouraged not discouraged."<sup>(6)</sup> Taking this step enhances the independence and impartiality of an expert and ensures that the witness is not pressured by the litigant's lawyers to be a partisan witness. The court held that Gillin had made the right decision by refusing to produce the documents, not because his communications with his law firm were privileged – he is an expert not a litigant – but because they might have contained information concerning the defendants that was covered by litigation privilege.

## **Comment**

Together, these cases highlight the increasing importance of ensuring that an expert is regarded by the public as independent. To protect the integrity of the trial process, both the trial judge and the expert have a role in ensuring that the expert's testimony is impartial.

Gone are the days where an expert witness acts as a hired gun, engaged by a party to advocate for its position. The role of the expert has expanded considerably over the past 20 years. Experts are now encouraged to hire their own lawyers – not only to ensure that they remain independent, but to emphasise to the public that they are so. Trial judges are empowered to take action to protect the trial from any harmful testimony that may arise if it is clear that an expert, despite being qualified as such, is ultimately not independent. As was highlighted in *White Burgess*, it is an expert's duty to provide "fair, objective, non-partisan assistance".<sup>(7)</sup> An expert's loyalty is to the court not to the party paying their account. The Court of Appeal's decision in *Bruff-Murphy* to expand the role of trial judges to ensure expert witnesses act appropriately and objectively is the next natural step in the evolution of the relationship between experts and the courts.

Finally, the court's decision to order a new trial is significant given the post-*Hryniak*<sup>(8)</sup> era that courts find themselves in. By making such a decision, the Court of Appeal emphasised the importance of ensuring that trials remain objective and fair despite the recent call for faster trials and lower costs. The concept of fairness is a hallmark of Canada's judicial system and is necessary to maintain public confidence in the system. As was evidenced in this case, in the battle between efficiency and integrity, the latter must always prevail.

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