

 Council on Licensure,  
Enforcement and Regulation

**CAN I GET A WITNESS?**



2010 Annual Educational Conference - September 23-25

Presenters: **CHRISTOPHER ASHBY**,  
Christopher Ashby, Barrister  
**BONNI ELLIS**  
Steinecke, Maciura LeBlanc  
**BRUCE MATTHEWS**  
Real Estate Council of Ontario

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**FACT WITNESSES v.  
EXPERT WITNESSES**



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**FACT WITNESSES**

- Are normally restricted to testifying about things that they saw, felt, heard or did.
- Narrate what they observed, but are generally precluded from drawing inferences/conclusions based on those observations.
- May, in certain cases, be allowed to draw an inference based on what they perceived (i.e., that a person was intoxicated).

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<h3>EXPERT WITNESSES</h3> <ul style="list-style-type: none"><li>• Can provide opinions on subjects that are likely outside the knowledge or experience of the trier of fact.</li><li>• There is no general principle that a particular type or category of expert evidence will always be admissible or inadmissible.</li><li>• However, trier of fact can consider whether a particular type of expert evidence (e.g., DNA analysis) has been admitted in previous cases.</li></ul>		

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<h3>ADMISSIBILITY OF EXPERT EVIDENCE</h3> <ul style="list-style-type: none"><li>• Admitting expert evidence is an exception to the general rule prohibiting opinion evidence.</li><li>• The party tendering the expert evidence bears the burden of satisfying the admissibility criteria on a balance of probabilities.</li></ul>		

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<ul style="list-style-type: none"><li>• The admissibility criteria are set out in a four part test, which must establish that:<ul style="list-style-type: none"><li>(a) the evidence is relevant;</li><li>(b) the evidence is necessary to assist the trier of fact;</li><li>(c) the evidence is not subject to any exclusionary rule; and</li><li>(d) the expert is properly qualified.</li></ul></li><li>• Whether opinion evidence meets the above criteria is a question of law.</li></ul>		

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**FACT WITNESSES**

  
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**SELECTING THE FACT WITNESS**

The investigator identifies potential fact witnesses.

The witness must have personal knowledge of the alleged facts.

The investigator interviews the witness to find out what (s)he knows and how believable (s)he is.

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**SELECTING THE FACT WITNESS**

The investigator considers whether the witness had:

- opportunity to observe
- powers of observation
- ability to communicate

Based on the investigation, the attorney identifies relevant witnesses.

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### PREPARING THE FACT WITNESS

As a case progresses, it is critical to keep in touch with the witness so that:

- the witness feels supported through the process of depositions, if any, and hearing testimony.
- the witness remembers what (s)he knows, explains and describes it effectively; helps overcome fears and nervousness and explains the process.

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### PREPARING THE FACT WITNESS

- Especially in sexual misconduct cases, most of the effort involves preparing and supporting the witnesses so they are willing and able to testify and establish the facts.
- A key part of preparation is to help the witness get ready for cross-examination.
  - attorney should discuss likely kinds of questions witness will be asked and inquire about anything in background that might be used to try to discredit testimony

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### CREDIBILITY OF FACT WITNESSES

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### DEFINING CREDIBILITY

Credibility is the quality, capability, or power to elicit belief or a capacity for belief. Credibility of testimony refers to the reliability of testimony, based on competence of the witness and likelihood that it is true.

*USLegal.com*

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“The judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness box. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.”

*O'Halloran, J. in R. v. Pressley, 94 C.C.C. 29 (C.A)*

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### DETERMINING CREDIBILITY

Factors to consider:

- (a) the demeanour of the witness,
- (b) the consistency of the witness' testimony with external facts or the reasonableness of the testimony,
- (c) the internal consistency of the testimony, and
- (d) any evidence directly related to credibility under the exceptions to the collateral issue rule.

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“It is a matter in which so many human characteristics, both the strong and weak, must be taken into consideration. The general integrity and intelligence of the witness, his powers to observe, his capacity to remember, and his accuracy in statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere and frank, or whether he is biased, reticent and evasive. All these questions and others may be answered from the observation of the witness’s general conduct and demeanour in determining the question of credibility.”

Estey J. in *R v. White* [1947] SCR268

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**Demeanour:**

- It is an error for a trial judge to base credibility decisions solely on the demeanour of witnesses, especially where there are significant inconsistencies in the evidence.  
*R v Norman, 16 OR (3d) 295*
- Assessments of credibility based on demeanour are particularly unreliable when there are cultural differences.

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**Consistency with other Evidence:**

- Credibility can be assessed based upon how a witness’s testimony corresponds to verifiable facts in evidence or what is probable in the circumstances.
- The British Columbia Court of Appeal held in *Faryna v. Chorney* [1952] 2 D.L.R. 345:

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“The witness must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of a story of a witness in such a case, must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.”

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**Internal Consistency:**

- The testimony of a witness can also be assessed on the basis of its internal consistency.
- Minor inconsistencies may not diminish the credibility of a witness unduly.
- A series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness’s evidence.

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**Exceptions to the Collateral Issue Rule:**

- This rule prohibits a party from calling evidence solely to contradict a witness’s testimony on a collateral fact.
- Facts relating to credibility are deemed to be collateral subject to three exceptions:
  1. Prior convictions
  2. Prior inconsistent statements
  3. Witness bias or interest in the outcome

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- For these three exceptions, the witness must first deny the fact alleged for the other side to lead independent evidence on the inconsistency.

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In addition:

- Evidence may be called as to a witness's general reputation for untruthfulness, but this evidence is rarely tendered and has inherent frailties.

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ADEQUATE REASONS ON CREDIBILITY

- Appellate Courts frequently admonish trial judges and discipline panels for failing to provide adequate reasons for their findings on credibility.
- The Supreme Court of Canada in a recent decision *FH v. McDougall* [2008] 3S.C.R. 41, explained the purpose and meaning of giving adequate reasons.

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- Justice Binnie summarized the duty to give adequate reasons:
  - (a) to justify and explain the result,
  - (b) to tell the losing party why he or she lost,
  - (c) to provide for informed consideration of the grounds of appeal, and
  - (d) to satisfy the public that justice has been done.

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- With adequate reasons, the trial judge will be shown considerable deference in the particular credibility findings that (s)he makes.

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**EXAMPLES**

*College of Chiropractors of Ontario v. Kovacs [2004] O.J. 435.*

The decision of the Discipline Panel, after a 5 day hearing, was set aside and a re-hearing was ordered.

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<p>The Court held:</p> <ul style="list-style-type: none"><li>(a) the Panel's assessment of the complainant's credibility based on inconsistencies was flawed and that there were no material inconsistencies.</li><li>(b) the Panel relied on the use of stereotypes.</li><li>(c) the Panel failed to consider relevant evidence.</li></ul>		

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<p><i>The Law Society of Upper Canada v. Gary Neinstein</i> 2010, O.N.C.A 193</p> <p>The Court of Appeal:</p> <ul style="list-style-type: none"><li>• remitted this complaint back to a different panel for a new hearing.</li><li>• held that the Discipline Panel gave inadequate reasons for its decision.</li></ul>		

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<p>The Court concluded that the panel preferred the complainant's evidence for the following reasons:</p> <ul style="list-style-type: none"><li>(a) she gave her evidence in a forthright manner.</li><li>(b) she withstood cross-examination well.</li><li>(c) there was independent evidence which corroborated her version of relevant events.</li><li>(d) the contradictory evidence "was not material to a finding of whether sexual harassment took place."</li></ul>		

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However...

the Court of Appeal found *there was no explanation for any of these findings!*

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With respect to the member's evidence, the panel stated:

"While the member denied the allegations, taking into account all of the evidence, and the manner of its presentation, the panel prefers the evidence of S.G. over that of the member. The panel does not believe the member's blanket denials."

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<p>Presenters: <b>BONNI ELLIS</b> <b>BRUCE MATTHEWS</b></p>	
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<p>When do you usually need an expert?</p> <ul style="list-style-type: none"> <li>• Where the evidence required to determine whether the allegations are true likely falls outside the expertise of the trier of fact.           <ul style="list-style-type: none"> <li>- Failure to meet/maintain the standards of practice of the profession</li> <li>- Incompetence</li> <li>- Incapacity</li> <li>- To explain evidence or context/circumstances in which an event occurred</li> </ul> </li> </ul>		

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**Aren't tribunal members experts?**

Simply put, no.

- Although tribunal members may use their expertise to ask questions of a witness and assess evidence, they cannot (and MUST NOT) use their own knowledge and experience to form or supplement an expert opinion

*Huerto v. College of Physicians and Surgeons (1994) CanLII 4900 (SK Q.B.)*

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**Why not?**

- Different opinions amongst them
- No opportunity to challenge
- Requisite knowledge and experience?
- Role of public tribunal members

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**The lawyer's caveat**

- Some cases can potentially be proven without expert evidence:
  - Plainly obvious misconduct/incompetence
  - Some cases of incapacity?
  - Where the standards are enshrined in law

\*The caveat to the caveat:  
Is there a reasonable explanation/defence?

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### Some cases

- Nurse found guilty of professional misconduct for abusing patients without expert opinion (*Snider v. Man. Assn of RNs* (1999) CanLII 14104 (MB Q.B.), leave to appeal dismissed)
- Nurse found incompetent in relation to certain procedures without expert evidence (*Ratzlaff v. Sask. Assn. of LPNs* (2000) CanLII 3 (SK Q.B.))
- Real estate agent found guilty of professional misconduct on the basis of by-law setting out standard (*Murphy v. Nova Scotia Real Estate Comm.* (2007) CanLII 318 (NS S.C.), leave to appeal dismissed)

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### The admissibility of expert testimony

- The four/six-part test:
  - relevant
  - necessary
  - not subject to an exclusionary rule
  - from a properly qualified expert
  - reliable
  - probative value vs prejudicial effect

*R v. Mohan* (1994) CanLII 80 (S.C.C.)

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DAVE COVERLY

"WELL, I'VE NEVER CALLED AN EXPERT WITNESS ON EXPERT WITNESSES BEFORE..."

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Concerns regarding experts

- The expert will usurp the role of the trier of fact
- Battles of the experts
- Bias/lack of independence
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"How come when I appeared for you as an expert witness, I was an 'eminent physician'? And now that you're representing a law suit against me, I'm an 'incompetent quack'?"

"Yes?"

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Is the expert properly qualified?

- Specialized knowledge, skill or experience
  - source of knowledge
  - depth of knowledge
- Scope/area of knowledge
  - subject matter of the opinion

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### Source of knowledge

- The admissibility of such [expert] evidence does not depend upon the means by which that skill was acquired. As long as the court is satisfied that the witness is sufficiently experienced in the subject matter at issue, the court will not be concerned with whether his or her skill was derived from specific studies or by practical training, although that may affect the weight to be given to the evidence.*

*R. v. Marquard (1993) CanLII 37 (S.C.C.), quoting Sopinka, Lederman and Bryant, The Law of Evidence in Canada*

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### Depth of knowledge

*The only requirement for the admission of expert opinion is that the expert witness possess special knowledge and experience going beyond that of the trier of fact. Deficiencies in the expertise go to weight, not admissibility.*

*R. v. Marquard (1993) CanLII 37 (S.C.C.)*

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However....

In the course of *Mohan* and other judgments, the court has emphasized that the trial judge should take seriously the role of "gatekeeper". The admissibility of the expert evidence should be scrutinized at the time it is proffered and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility...".

*R. v. J.-L.J.* (2000) CanLII 51 (S.C.C.)

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Scope/area of knowledge

*All the admissibility safeguards to ensure the relevance, necessity and reliability of expert scientific evidence are for naught if experts are allowed to stray beyond their field of expertise and offer, under the guise of expertise, what are, in essence, only lay opinions that have no scientific value.*

*Inquiry into Pediatric Forensic Pathology in Ontario, Volume 3: Policy and Recommendations, the Role of the Court*  
www.goundgeinquiry.ca

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Duty of the expert

- It is imperative that the expert provide fair, objective, neutral and impartial evidence
- The expert's duty is to the tribunal and NOT to the party paying his/her fee
- An expert MUST NOT assume the role of advocate

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### The Goudge Inquiry



Dr. Charles Smith

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### Brenda Waudby

- Accused of killing her two-year-old daughter on the basis of evidence provided by Smith regarding the timing of her injuries.
- Spent two years in pre-trial custody and older daughter apprehended by CAS



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### Louise Reynolds

- Accused of murdering her 7-year-old daughter by stabbing her multiple times with scissors.
- Spent two years in pre-trial custody and was forced to give up another daughter for adoption.



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**William Mullins Johnson**

- Convicted of asphyxiating his 4 year-old niece while sodomizing her.
- Spent 12 years in jail.  
To this day, his brother's family refuses to speak to him.



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**Concerns with Smith's evidence**

- Failed to understand that his role was not to support the Crown
- Failed to prepare adequately for court
- Rather than acknowledging limits of expertise, misled court by overstating his knowledge in a particular area
- Gave inappropriately unscientific evidence (opinion evidence) drawing on his own experience as a parentt

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**Concerns with Smith's evidence (cont.)**

- Failed to provide a balanced view of the evidence and to acknowledge where controversy existed
- Made unprofessional and unwarranted criticisms of other professionals
- Testified on matters outside his area of expertise (e.g., "profiles" of perpetrators)
- Offered opinions based on speculation
- Used unscientific language (e.g., if I were a "betting" man)
- Made false or misleading statements to the court

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<p><i>While Dr. Smith, as the pathologist giving the expert evidence, must bear primary responsibility for these deficiencies, those charged with overseeing his performance cannot escape responsibility. Indeed, neither can other participants in the criminal justice system - Crown, defence and the court. Each had an important role to play in ensuring, so far as possible, that results in the criminal justice system were not affected by flawed expert testimony...</i></p> <p><small>Inquiry into Pediatric Forensic Pathology in Ontario, Volume 2: Systemic Review, Participation in the Justice System, at 179 (<a href="http://www.goundgeinquiry.ca">www.goundgeinquiry.ca</a>)</small></p>		

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<p>Evaluating expert opinions...</p> <ol style="list-style-type: none"><li>1) Whether the opinion is expressed in clear language</li><li>2) Whether the opinion or aspects of it are susceptible to multiple interpretations</li><li>3) Whether the expert's level of confidence or certainty is accurately expressed</li><li>4) Whether the opinion addresses other explanations</li><li>5) Whether the opinion is in an area of controversy in the scientific community</li></ol>		

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<ol style="list-style-type: none"><li>5) Whether all or part of the opinion falls outside the expert's area of expertise</li><li>6) Whether the opinion is based, in whole or in part, on non-scientific information provided to the expert</li><li>7) Whether the opinion relies, in whole or in part, on other expert opinions provided to the expert</li><li>8) Whether the opinion includes the facts and the reasoning process relied on to form the opinion</li></ol>		

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<b>Further efforts?</b>		
<ul style="list-style-type: none"><li>• Rules and Guidelines regarding expert reports and testimony:<ul style="list-style-type: none"><li>- Code of Conduct for experts<ul style="list-style-type: none"><li>• Duty to tribunal</li><li>• Fair, objective, neutral</li><li>• Confined to areas of expertise</li><li>• Disclosure of basis of opinion (consults)</li></ul></li><li>- Certification requirements</li></ul></li></ul>		

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