

Evidence: Beaver 2006
Opinion Evidence - The Fundamentals

General Exclusionary Rule: operates to exclude opinions; in general, the law is interested in knowing what direct witnesses heard and saw of the facts in issue, not their opinion on what happened, or their characterization of what happened.

Exceptions for lay persons' opinion: examples are measurements (estimates); sobriety; speed; handwriting (see s.8 CEA); identity; testamentary capacity; state of mind; where opinion is a "compendium" of factual observation ie. "intoxicated".

Expert evidence: Needs to be necessary and reliable.

Necessity: needs to assist the trier of fact where the expertise lays outside of their general common experience - everything from mechanics of a combustion engine, to psychiatry, to accounting, to computer science.

If the matter is one within the general common experience of trier of fact - e.g. credibility - the opinion is inadmissible as per this rule. Whether the evidence is necessary is a issue of law for the trier of law.

Reliability: both the *area of expertise/study* and the *proposed witness* must be reliable.

Therefore, the science/area of expertise/study has to be well-known or otherwise proven to be a generally accepted area of study or discipline; and

the subject-matter of the opinion has to be generally accepted within the community of that area of study.

Regarding the witness, an expert is one who is shown to have acquired special or peculiar knowledge through study or experience on the types of matters he proposes to testify about. His or her qualifications in that area of study must be either proved in the *voir dire* or admitted by your opponent. The witness is examined in chief and cross-examined on the *voir dire*. Argument is made, and the trier of law rules on whether the opinion is admissible, and whether the witness is qualified as an expert - his area of expertise is stated for the record by the trier of law. The opinion can then be offered to the trier of fact. Questioning can be based on the record the witness has heard, or alternatively, on the basis of hypothetical questions based on the evidence before the Court. Note that if the questions of the examiner misstate the evidence heard, the opponent should object and his objection should be sustained. Note that if the witness strays outside of his expertise, the opponent should object.

The following is then left to the trier of fact: (a) whether the basis for the opinion is made out in the record (a foundation for the opinion that they accept must be found); and (b) even if the foundation is made out, they must decide whether to accept none, a part, or all of the opinion, and decide what it means to them in the overall scheme of the case.

Mohan speaks of four criteria for the admissibility of expert evidence:

- (a) relevance - but this is always a requirement;
- (b) necessity in assisting the trier of fact;
- (c) absence of any exclusionary rule - again, always a requirement of admissibility; and
- (d) a properly qualified expert.

Relevant expert evidence is excluded if its prejudicial value exceeds its probative value. The trier of law looks at things such as judicial economy (will the evidence take an inordinate time to hear?); does it have the potential to be misused by the trier of fact, or overwhelm the trier of fact in this case?; does the evidence have the effect of usurping the role of the trier of fact providing a ready made opinion of the very issues they have to decide? (e.g. "In my opinion, this child was sexually assaulted.") The closer the opinion comes to the ultimate issue for determination, the more likely it is to be excluded.

Additional comments:

Nurses, doctors, evidence of their observations (non-expert), then expert evidence of cause of injury, nature of treatment required, likelihood of recovery.

Qualifying your expert: remember that experts can come from all walks of life, university degrees may be important to some areas of expertise, but not others. For example, a physicist will likely need a University degree, whereas an expert in home renovation may not. The latter's expertise comes from his experience. Your police officer "expert" in drug dealing and jargon probably got his or her experience "on the street."

Your expert need not be "the expert" on the subject, nor even the best student in his class. If he or she has an expertise that the trier of fact does not share, his or her evidence is likely admissible. The fact that he is not "the expert" goes to weight.

To establish qualifications, the following is suggested:

- years of study in the proposed area of expertise, including level of study - University? College? apprenticeship? Bring a c.v. for ease of reference, make it an exhibit on the *voir dire*
- practical, hands-on experience in the area - ie. for a mechanic, how many vehicles has he worked on? For a nuclear physicist, how many years working on a reactor?
- whether your proposed expert teaches in the area
- whether your proposed expert attends lectures, conferences or "refreshers" on the subject
- whether your proposed expert publishes in the area - ie. in trade related magazines, anything peer review related
- whether your proposed expert keeps up to date with developments in his chosen field (ie. reading trade magazines, attending conferences)
- whether your proposed expert has been qualified as an expert in court previously (provide list)

Cross-examining the expert witness or challenging his evidence:

there are several ways to combat the expert evidence

- (a) attacking the basis of the opinion - ie. determine from the witness the facts upon which his or her opinion is based, get confirmation from the witness that if one or more is absent, then the opinion fails; point out underlying facts not made out or attack those facts on cross of other witnesses or calling your own;
- (b) attacking the expertise of the witness: your pitch can be twofold, you can attack the admissibility of the area of expertise, or you can attack this witness as not being an "expert", if determined to be an expert, you can still attack his credentials in front of the trier of fact (e.g. the expert who is "bottom of his class" or universally ridiculed by those in his profession, even his record of discipline within the profession), this will then go to the "weight" of his opinion;
- (c) calling your own expert witness, note you are limited to 5 each (s. 7 CEA).

Other tips on cross-examination of an expert witness:

The law allows us to cross-examine on the basis of the texts and materials of the expert's community / discipline / profession. If the witness acknowledges the authoritative nature of the text, but disagrees with its content or application to the case at bar, it is nevertheless admissible and can be considered by the trier of fact. If the text or passage is not recognized or accepted by the witness, you are limited to calling your own evidence thereof (ie. Your own expert.)