

MEDICAL EXPERTS

In this paper I will cover the following:

1. What is an expert?
2. How to instruct your expert to ensure that the opinion is admissible;
3. Building and maintaining your relationship with the expert; and
4. The minefield of Hearsay and the implications for the admissibility of medical records and opinions.

This paper has been written with a focus on practitioner's involved in personal injury practice and on the type of issues that personal injury lawyers will encounter in their practice. Retaining and instructing medical experts is a central part of our work as personal injury lawyers and it is therefore vital that any lawyer practicing in this field have a clear understanding of the principles governing admissibility of expert testimony.

1. WHAT IS AN EXPERT?

The first question on admissibility of expert testimony is whether it is in fact opinion evidence from an expert. Opinion evidence is an exception to the general rule that witnesses are only able to testify as to facts within their knowledge, experience and observations. Expert opinion evidence is admissible in those cases where it is necessary to provide a "ready made inference which the judge or jury, due to the nature of the facts, are unable to formulate."

In cases where the facts are technical or scientific and beyond the ability of the court to make a finding of fact without assistance, the courts have recognized an exception to the general rule and admitted opinions that are "admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury".

Opinion evidence is not admissible unless it satisfies the four pre conditions outlined by Sopinka J. in *R. V. Mohan* [1994] 89 C.C.C. (3d) 402. The four criteria are:

1. Relevance – the opinion must relate to a matter at issue in the proceedings. Relevant opinion evidence may still be rejected if it is of such little probative value that it is not justified in terms of time and impact on the trial process;

2. Necessity in assisting the trier of fact – the opinion must touch on a matter at issue that is outside the ordinary experience and knowledge of a judge or a jury. The role of the expert is to provide the necessary evidence and understanding on matters outside of common knowledge or understanding for which the trier of fact can make findings and conclusions on matters in issue.
3. The absence of any exclusionary rule;
4. Properly qualified expert – your expert has to be in a position to comment based on his or her having acquired specialized or peculiar knowledge through study or experience in respect to the matters to which they are providing an opinion.

Expert evidence is opinion evidence on matters that are outside the ordinary experience and knowledge of the trier of fact. The purpose of expert opinion evidence is to enable the trier of fact to understand evidence regarding an issue that without the assistance of the expert they would otherwise be unable to understand. The role of the expert witness was described by Finch J. (as he then was) in *Vancouver Community College v. Phillips, Barratt*, [1987] B.C.J. No. 3149. The description that Finch J. provided has in many ways been incorporated into the new Rules. Finch J. described the role of an expert witness in the following terms:

He offers his professional opinion for the assistance of the court in its search for the truth. The witness is no longer in the camp of a partisan. He testifies in an objective way to assist the court in understanding scientific, technical, or complex matters within the scope of his professional expertise. He is presented to the court as truthful, reliable, knowledgeable and qualified.

The Supreme Court of Canada has also provided guidance on what expert evidence is. In *R. v. Abbey*, Justice Dickson wrote:

With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate.

An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary.

As a starting point any time that you consider hiring an expert to provide an opinion in your personal injury case you need to determine whether you need an expert to

provide the conclusion from the facts and if yes the type of expert who has the qualifications to provide that opinion. To be qualified as an expert does not simply mean education but rather as noted in *Mohan*, the expertise may be obtained through experience.

An expert's role is to assist the court in drawing conclusions from facts through their expertise. The expert's role is not to act as an advocate. In *Sengbusch v. Priest* (1987), 14 B.C.L.R. (2d) 26 (S.C.), McEachern C.J.S.C., as he then was, delineated the limitation of admissibility of expert reports that provide argument in the guise of opinion. Chief Justice McEachern said, at p. 40:

In my view it is appropriate for the Court to enforce reasonable limits upon the admissibility of opinion evidence. Too often, as in this case, persons with special training or experience are retained to construct scenarios or advance arguments in the form of an opinion when, with proper assistance from counsel, the Court is able to analyze the evidence and reach a proper conclusion on commonplace problems...

It is unnecessary....for counsel to adduce arguments in guise of evidence.

In the recent case of *Warkentin v. Riggs* 2010 B.C.S.C. 1706 Madam Justice Gropper considered the admissibility of the opinion of an expert. The report was objected to on the basis that the expert was not impartial; the opinion was presented in an argumentative way, emphasizing matters which benefit the plaintiff's position and ignoring those which do not support the plaintiff's position; the expert purported to quote from the medical literature but does not present it in an objective way; and he ignores the medical literature which does not support the plaintiff's position. Madame Justice Gropper found the report to be inadmissible concluding that the doctor was not a neutral and impartial expert providing assistance to the court, but rather an advocate on behalf of the plaintiff. She found the report to be argument, not opinion. She found that the discussion of the medical principles and their application to the plaintiff's case to be biased, argumentative and contrary to the requirements for the admissibility of an expert report. This case underscores the importance of ensuring that your expert is providing his opinion "for the assistance of the court" and the devastating consequences for a party if the expert is not providing the opinion in an unbiased manner.

There are many potential objections to opinion evidence. Being aware of the objections can assist you in ensuring that your opinion evidence will be admissible. It is also important to critically view any opinion evidence that is served on you to ensure that all appropriate objections to admissibility are made. The primary objections to opinion evidence are as follows:

- (1) The report contains opinion evidence outside of the expertise or qualifications of the witness;

- (2) The report is essentially argument rather than opinion and not within the confines of the territory in respect of which an expert is entitled to opine;
- (3) The report contains conclusions of fact upon evidence in respect of which it is the function of the trial judge alone to determine;
- (4) The reports contains irrelevant and superfluous information, or is simply of no assistance to the trial judge;
- (5) The report contains passages which in fact are neither comments nor opinions on the areas for which the expert is tendered as an expert.

The provisions of the new rules relevant to retaining experts, provision of reports and objections to reports are found at Rule 11. In particular, be aware of the following provisions of Rule 11:

Rule 11-1(2) Unless the court otherwise orders, if a case planning conference has been held in an action, expert opinion evidence must not be tendered to the court at trial unless provided for in the case plan order applicable to the action.

Rule 11-2 (1) In giving an opinion to the court, an expert appointed under this Part by one or more parties or by the court has a duty to assist the court and is not to be an advocate for any party.

Rule 11-6 (3) Unless the court otherwise orders, the expert's report must be served on every party of record at least 84 days before the scheduled trial date along with written notice that the report is being served under this rule.

Rule 11-6(4) Unless otherwise ordered a responding report must be served at least 42 days prior to the scheduled trial date along with notice that the report is being served under this rule.

Rules 11-6 (5, 6 and 7) If after an expert's report is served the opinion changes in a material way and the party intends to still rely on the expert's report at trial despite the change the party must promptly serve a supplementary report setting out the change in the expert's opinion and the reason for it.

Rule 11-6(9) The party who has served the report of an expert must promptly advise the expert of the scheduled trial date and that the expert may be required to attend at trial for cross examination either after the appointment of the expert or promptly after the trial date has been obtained.

Rule 11-6(10) On the earlier of the trial management conference or 21 days prior to the scheduled trial date you must provide notice of objection to admissibility of expert's evidence.

Rule 11-7(2) Unless the court otherwise orders you must within 21 days of service of the report demand under Rule 11-7(3) that the expert attend at trial for cross examination.

Rule 11-6(8) at least 14 days before the scheduled trial date the expert must produce the documents underlying his report

Checklist for service of opinion

- Opinion is obtained. Advise expert of trial date and that they may be required to attend as soon as trial date is arranged
- Serve opinion within 84 days of trial
- Serve responding opinion within 42 days of trial
- Within 21 days of receiving report, advise if you require other parties expert to attend at trial for cross examination
- Within 14 days of trial the expert must disclose the documents underlying his opinion.

Under the new Rules, there are three different kinds of experts:

1. Own appointed expert (Rule 11-4)
2. Joint appointed experts (Rule 11-3)
3. Court appointed experts (Rule 11-5)

2. INSTRUCTING YOUR EXPERT

When instructing your expert it is necessary to keep in mind both the law relating to the admissibility of opinion evidence and the Rules of Court and in particular Rule 11 and the formal requirements for admissibility of the opinion. Instructions to your expert will often begin with a letter of instruction from you. In the letter of instruction in a general sense you need to:

1. Provide the expert with the facts and assumptions that he is to rely on in reaching his conclusions;
2. The framework for the written report to ensure that it is compliant with the Rules;
3. The matters on which you want the expert to provide an opinion on;
4. Details regarding the trial date and location if known.

The specific requirements for expert's reports are found in Rule 11-6. That rule provides that the report must contain the following:

- signature of the expert
- certification required under Rule 11-2(2)
- the expert's name, address and area of expertise

- the expert's qualifications and employment and educational 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 the issues in the proceeding to which the opinion relates;
- the expert's opinion respecting those issues
- the expert's reasons for his or her opinion including:
 - o a description of the factual assumptions on which the opinion is based
 - o a description of any research conducted by the expert that led him or her to form the opinion, and
 - o a list of every document, if any, relied on by the expert in forming the opinion.

When instructing your expert it is important that you provide them with the information to ensure that their report is compliant with the rules. You should develop a standard instructing letter in which the format of the report is provided to the expert. My instruction letter details the requirements of the rules and provides direction to the expert in relation to each section of his report.

Your instructions to the expert do not end with your initial letter of instruction. Once you receive the report from the expert it is imperative that you check the report to ensure that it is compliant with the requirements of the Rules as well as with the law relating to the admissibility of opinion evidence.

3. BUILDING AND MAINTAINING YOUR RELATIONSHIP WITH THE EXPERT

An expert can fulfill two different roles for a personal injury lawyer:

1. Act as consultant in terms of preparing the evidence for trial and understanding the opinion of the opposing expert;
2. Provide an opinion with respect to the nature and extent of injury of the Plaintiff

It is vital to keep these two roles of the expert separate due to the operation of Rule 11-6(8) which provides that the expert must disclose his file prior to the trial. This rule relates only to the expert's function in providing an opinion in the case, and not to the work that the expert does in helping you to understand and prepare the case. The expert should maintain two separate files due to this.

If you want to build and maintain a good relationship with experts you will follow these eight rules:

1. Communicate early – don't retain your experts last minute and don't provide them with unrealistic deadlines for production of their opinions;
2. Communicate effectively and clearly – ensure that your instructions and all information that you give to the expert are clear and understandable;

3. Communicate often – make sure that you are keeping your expert informed by letting them know any changes to trial dates or of any new issues or information that arise;
4. Communicate fully – make sure that your expert has all the information available to them that may effect their opinion;
5. Communicate respectfully – your expert is a professional and deserves your respect;
6. Prepare your expert well – make them look good;
7. Make their job easy – make it clear to your expert what opinion they require and what facts they can base their opinion on;
8. Pay them promptly.

As a starting point, remember that the courtroom is your office, not your expert's. The expert is relying on you to provide them with the information that they need to ensure that they survive the litigation experience unscathed. There is nothing worse to your expert than being embarrassed in the court room. Litigation is anxiety provoking for many experts, particularly those that are treating practitioners rather than independent medical assessors, and paving the way for them to have a good experience in the court room or within the litigation experience will do wonders for you and your relationship with them. Remember always that you have a number of years in this profession and you cannot in any circumstance afford to compromise the relationships that come your way, either with other lawyers or the experts that you retain.

Scheduling your expert for trial

- don't send them a subpoena
- do accommodate their schedule
- do schedule them at a time when they won't have to wait to testify if possible
- give them lots of advance warning and make sure that you have a system in place to let them know that they are not required for trial in the event of a settlement

Always take the time to meet with your expert to prepare them for trial. Set aside sufficient time to make the expert comfortable with the trial experience and to ensure that you have a full understanding of the opinion that the expert will provide. Identify the likely areas of cross examination and ensure that the expert has available to him all of the information that may effect his opinion. Make the expert aware of the opposing side's opinions and the basis for them. Advise the expert of any problem areas that you anticipate in the evidence. Share with the expert what evidence you intend to elicit in direct examination and take the time to ensure that you understand how the experts training and qualifications makes them able to provide the opinion that you have elicited. Ensure that you are able to clearly describe the area of expertise that you will seek to have the expert qualified in. Find out how much trial experience your expert has and gauge your preparation of them

accordingly. If you prepare your expert well for trial you will have gone a long ways to building and maintaining your relationship with them.

Checklist for Ensuring your Expert is ready for trial

- Review their file and all underlying documents
- Review with the expert the area of expertise that they will be qualified in
- Make sure the expert knows the time and place of trial
- Review the opinion with the expert as well as the underlying facts. If any of the facts are contentious let the expert know this and why.
- Share the opposing sides opinions with your expert
- Identify potential areas of cross examination and review them with your expert
- If there are facts or documents that have come to light since your expert provided their opinion, let your expert know about them.

4. THE MINE FIELD OF HEARSAY AND THE IMPLICATIONS FOR THE ADMISSABILITY OF MEDICAL RECORDS AND OPINIONS

The rules against hearsay make the presentation of opinions and medical records difficult and complicated. A variety of issues have recently been considered by our courts including the admissibility of clinical records and the admissibility of opinions that are based on evidence that is not before the court. The starting point for understanding the issues is an understanding of the rationale behind the hearsay rule. This was clearly and succinctly stated by Dickson J. in *R. v. Abbey* [1982] S.C.J. No. 59 as follows:

The main concern of the hearsay rule is the veracity of the statements made. The principal justification for the exclusion of hearsay evidence is the abhorrence of the common law to proof which is unsworn and has not been subjected to the trial by fire of cross-examination. Testimony under oath, and cross-examination, have been considered to be the best assurances of the truth of the statements of facts presented. Not all statements by a witness of that which he heard someone else say are, however, necessarily hearsay. A felicitous formulation of the distinction between hearsay and non-hearsay evidence is found in the Privy Council decision in *Subramaniam v. Public Prosecutor*, [1956] 1 W.L.R. 965 at p. 970:

Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

What is sometimes loosely and erroneously referred to as hearsay evidence may in fact be “original evidence” as Cross terms it:

When a witness is asked to narrate another’s statement for some purpose other than that of inducing the court to accept it as true, his evidence is said to be “original”. Original evidence may therefore be defined as evidence of the fact that a statement was made, tendered without reference to the truth of anything alleged in the statement.

So given the hearsay rule, are clinical records admissible at trial and for what purpose? Our Court of Appeal has admonished counsel to not simply prepare books of documents containing all the treating records of the medical practitioners of a Plaintiff and have them marked as an exhibit (*Samuel v. Chrysler* 2007 BCCA 431). Typically the clinical records of medical practitioners follow a standard format in which the subjective complaints are first recorded, then the objective findings of the practitioner, the assessment or diagnosis and finally the recommended treatment. The subjective component of the records which contain the complaints that were made by the patient are clearly hearsay and would not be admissible for their truth unless they satisfied an exception to the hearsay rule. One exception that may be applicable is that of contemporaneous bodily state. This exception to the hearsay rule was considered in *Samuel*. At paragraph 25 Kirkpatrick J.A. quotes from Sopinka on evidence as follows:

The only precondition to their admissibility is that the statements be made contemporaneously with the physical sensation. If the declaration amounts to a narrative of the declarant’s past symptoms it will not be admissible under this exception...The circumstances of each case must be examined and if the statement is made at a time too remote from the actual experience of the bodily feeling so as to rob it of any contemporaneity and to amount only to an account of the past state of the declarant’s health, it would be inadmissible.

As can be seen from this quotation, the exception is limited and will not result in admissibility of the bulk of the subjective complaints contained in clinical records for their truth. The Court of Appeal in *Samuel* described the application of the exception at paragraph 36 as follows:

With respect, I consider that the analysis adopted in *Seaman* is correct. As the authorities I have reviewed make clear, the ambit of the hearsay exception of statements of contemporaneous bodily sensation is circumscribed. The hallmark of such statements is their spontaneity. The common law exception for such statements rests on the circumstantial guarantee of reliability that may be presumed from the spontaneous utterance as to the declarant’s bodily sensation. However, the presumptive admissibility of such statements requires that the party offering the evidence establish that the statement was, in fact, spontaneous. Further, the statement’s presumptive admissibility does not render it admissible

if, in the circumstances surrounding the declaration, the utterance is found to be unreliable.

The analysis by Mr. Justice Metzger in *Seaman v. Crook* 2003 BCSC 464 was as follows:

[14] The cases *Ares v. Venner*, *supra*; *Sandu and Brink, Olynyk v. Yeo*, *supra*; *Butler v. Latter*, [1994] B.C.J. No. 2358 (B.C.S.C.), *McTavish v. MacGillivray*, *supra*; *Coulter and Ball et al.*, 2002 BCSC 1740; and s. 42(2) which provides:

In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if..

when taken together, stand for the following:

- (1) That the observations by the doctors are facts and admissible as such without further proof thereof;
- (2) That the treatments prescribed by the doctors are facts and admissible as such without further proof thereof;
- (3) That the statements made by the patient are admissible for the fact that they were made but not for their truth;
- (4) That the diagnoses made by the doctor are admissible for the fact that they were made but not for their truth;
- (5) That the diagnoses made by a person to whom the doctor had referred the patient are admissible for the fact that they were made but not for their truth;
- (6) That any statement by the patient or any third party that is not within the observation of the doctor or person who has a duty to record such observations in the ordinary course of business is not admissible for any purpose and will be ignored by the trier of fact. It is not necessary to expunge the statements from the clinical records as this is a judge alone trial.

[15] Therefore any, and I emphasize the word “any”, opinions contained in the clinical records are not admissible for their truth. The opinions are admissible only for the fact that they were made at the time.

[16] Without having met the requirements of Rule 40A, the oral testimony of the doctor interpreting his clinical records does not change the nature of the evidence contained in those clinical records. The clinical records remain

evidence of the fact that he made those notes, made that diagnosis, and prescribed a certain treatment.

In *Cunningham v. Slubowski*, 2003 BCSC 1854, Madame Justice Mackenzie (now A.C.J.) described the proper use of clinical records and the admissibility of clinical records at paragraphs 13 - 16:

Even had the plaintiff complied with s. 42 of the *Evidence Act* to make the clinical records admissible as business records, the consulting letters to Dr. Abelman of the three specialists to whom he referred the plaintiff amount to expert opinions which are inadmissible because of failure to comply with Rule 40A: *F. (K.E.) v. Daoust* (1995), 3 B.C.L.R. (3d) 128 (C.A.); *McTavish v. MacGillivray*, [1997] B.C.J. No. 1719. The proper use of the clinical records is thus very limited in this case: they can be used by the defendants on cross-examination of the plaintiff, by Dr. Abelman himself as notes to refresh his memory while giving evidence at trial, or in cross-examination of Dr. Abelman on his expert report with respect to the foundation for his opinion. The latter use would include reference to the plaintiff's statements and the opinion of other specialists, but not for proof of the content of those statement and opinions.

The defendants may cross-examine the plaintiff on his prior statements recorded by Dr. Abelman in the clinical records. If the plaintiff admits that he made a particular statement to Dr. Abelman, and it is inconsistent with his testimony at trial, the statement can generally be used only to assess the plaintiff's credibility. The statement is not admissible for its truth unless it constitutes an admission against the plaintiff's interests. If it is an admission against interest, it is admissible for the truth of its content, depending on the jury's assessment of it.

Also, if the plaintiff admits he made the prior statement to Dr. Abelman and he adopts it in his testimony, that prior statement becomes admissible for the truth of its content, depending on the jury's assessment of it.

Of course, if the plaintiff denies having made the prior statement, a pre-requisite to any of the above results is proof that he in fact made the statement to Dr. Abelman. This can be established through the testimony of Dr. Abelman who apparently recorded the statement when the plaintiff made it.

Note that the omission of statements can not constitute an admission against interest. (*Bancroft-Wilson v. Murphy* 2009 BCCA 195).

In an earlier decision of Mr. Justice Burnyeat (*McTavish v. MacGillivray*, [1997] B.C.J. No. 1719) the issue of admissibility of letters from consulting physicians contained in the clinical records of a general practitioner were considered. In ruling that the letters of the referral physician could not be admitted as part of the clinical records of the family doctor, Burnyeat J. summarized the scope of admissibility of clinical

records as business records pursuant to S. 42 of the Evidence Act as follows at paragraph 10:

1. The notes taken must be made contemporaneously.
2. The notes must be made by someone having a personal knowledge of the matters being recorded.
3. The notes must be made by someone who has a duty himself or herself to record the notes or to communicate the notes to someone else to record as part of the usual and ordinary course of their business.
4. The matters which are being recorded must be of the kind that would ordinarily be recorded in the usual and ordinary course of that business.
5. A statement in the records of the fact that a certain diagnosis was made will be admissible.
6. Recorded observations, diagnosis and opinions will be admissible providing they are recorded in accordance with points 1 through 4.
7. The fact that the referring doctor relied upon another doctor's opinion to assist in coming to his or her own diagnosis and opinion is only evidence of that fact so that the other opinion does not become evidence unless it is otherwise admissible. Accordingly, it is only evidence of the fact that the referring doctor wished or required that opinion to be received before forming his or her own opinion.
8. Statements made by parties or by experts which are recorded in the usual and ordinary course of business but which lie outside the exception to the hearsay rule are hearsay and will not be admitted into evidence unless they can be brought within s. 14 of the Evidence Act which allows for the admissibility of such statements if it can be shown that they are proof of a prior inconsistent statement.

More recently in the decision of *Scott v. Erickson* 2009 BCSC 1298, Mr. Justice Smith described the use of clinical records and provided a useful summary of the distinction between use and the weight at paragraphs 52 and 53 as follows:

The Court of Appeal has provided recent reminders that statements recorded in clinical records are hearsay and admissible only under limited conditions and for limited purposes. Such statements may be admissible for the truth of their contents if they can be brought within the common law exception to the hearsay rule for statements of contemporaneous bodily condition, but it is essential that the statements be shown to be contemporaneous and spontaneous: *Samuel v. Chrysler Canada Ltd.*, 2007 BCCA 431. They may also be admissible as admissions against interest, subject always to questions of weight, and may be used to refresh the memory of the doctors who testify: *Bancroft-Wilson v. Murphy*, 2009 BCCA 195, at paras. 9 to 11.

In considering what weight, if any, to give such statements, it must be remembered that they can rarely be relied upon as complete, verbatim records of what the plaintiff has said. More often, they are a summary or paraphrase of

what the plaintiff said and may be meaningful only in the context of other facts that may or may not be in evidence. They should certainly not be used by the court to infer the existence of a medical or psychological condition that no medical professional has diagnosed, either at the time or in retrospect.

A further common issue in the presentation of opinion evidence is when the opinion is based in part on evidence that either is not admissible or is not in evidence at the trial. A typical example of this is the opinions of consulting physicians or imaging results. Our Court of Appeal in *Mazur v. Lucas* 2010 BCCA 473 recently provided a very helpful analysis of this issue. In writing for a unanimous court, Garson J.A. at paragraph 40 summarized the law regarding the admissibility of expert reports containing hearsay evidence as follows:

- An expert witness may rely on a variety of sources and resources in opining on the question posed to him. These may include his own intellectual resources, observations or tests, as well as his review of other experts' observations and opinions, research and treatises, information from others – this list is not exhaustive. (See Bryant, *The Law of Evidence in Canada*, at 834-835)
- An expert may rely on hearsay. One common example in a personal injury context would be the observations of a radiologist contained in an x-ray report. Another physician may consider it unnecessary to view the actual x-ray himself, preferring to rely on the radiologist's report.
- The weight the trier of fact ultimately places on the opinion of the expert may depend on the degree to which the underlying assumptions have been proven by other admissible evidence. Where the hearsay evidence (such as the opinion of other physicians) is an accepted means of decision making within that expert's expertise, the hearsay may have greater reliability.
- The correct judicial response to the question of the admissibility of hearsay evidence in an expert opinion is not to withdraw the evidence from the trier of fact unless, of course, there are some other factors at play such that it will be prejudicial to one party, but rather to address the weight of the opinion and the reliability of the hearsay in an appropriate self-instruction or instruction to a jury.

All of the above demonstrates the necessity of being aware of the rule against hearsay evidence in the presentation of medical evidence. Hearsay evidence may be present in clinical records in the form of the subjective complaints, in the file of the expert in the form of letters from other consulting physicians or x-ray and lab results and may form part of the basis for the opinion of an expert. Knowing what to do with that potential hearsay evidence is a vital component of the litigator's tool box.

The following cases, many of which were referred to above, provide a solid basis for understanding the issues regarding admissibility of clinical records and opinions that may be based in part on evidence that is not otherwise before the court:

Ares v. Venner [1970] S.C.R. 608

R. v. Abbey [1982] S.C.J. No. 59

R. v. Lavallee [1990] 1 S.C.R. 852

R. v. S.A.B. 2003 SCC 60

Seaman v. Crook 2003 BCSC 464

Cunningham v. Slubowski 2003 BCSC 1854

White v. Stonestreet 2005 BCSC 1751

Owimar v. Greater Vancouver Transportation Authority 2007 BCCA 630

Duley v. Friesen 2007 BCSC 1723

R. v. Ziegler 2007 BCPC 446

Scott v. Erickson 2009 BCSC 1298

Bancroft-Wilson v. Murphy 2009 BCCA 195

Smith v. Wirachowsky 2009 BCSC 1434

Mazur v. Lucas 2010 BCCA 473

EXPERT EVIDENCE IN THE SUPREME COURT OF BRITISH COLUMBIA
THE PROVISIONS OF RULE 11

Applicability of Rule 11

11-1(1)	Rule 11 does not apply <ul style="list-style-type: none"> - to summary trials - when the expert's conduct is at issue
11-1(2)	No expert opinion may be tendered unless provided for in a case planning order

Expert's Duty

11-2(1)	The expert's duty is to assist the court
11-2(2)	Experts must in any report that they prepare certify that they: (a) are aware of the duty to assist the court; (b) have made the report in conformity with that duty; and (c) will testify in conformity with that duty

Jointly Appointed Experts

11-3(1)	If two or more parties wish or are ordered to jointly appoint an expert, the following issues must be settled before the appointment: (a) expert's identity (b) issues to be addressed (c) agreed facts or assumptions (d) assumptions of fact that a party wants the expert to consider (e) questions for the expert (f) timing (g) responsibility for fees and expenses
11-3(2)	If the parties agree on the issues in 11-3(1) the parties and expert must agree in writing
11-3(3)	If the parties do not agree on the elements in 11-3(1) any party can apply to settle the terms of the expert's appointment by an application under Part 8 at a case planning conference or applying to amend the case planning order
11-3(4)	An application under 11-3(3) must (a) identify the matters in dispute (b) if they do not agree on an expert, propose the names of one or more alternates who i. are qualified ii. have been made aware of Part 11 (c) state any connection between the expert and any party
11-3(5)	On an application under 11-3(4) the court may (a) settle the terms of the appointment; (b) appoint an expert whether or not he or she was on the 11-3(4)(b) list (c) make or amend a case plan order
11-3(6)	The parties and the expert must all agree in writing to the terms agreed or ordered, and the expert must signify that he or she is aware of Part 11 and consents to the appointment. A copy of the agreement must be served on all parties of record
11-3(7)	Nobody but the joint expert can testify as to an agreed issue without leave of the court
11-3(8)	An application for leave to tender a report from an additional expert under 11-3(7) must be served within 21 days of the receipt of the joint expert's report
11-3(9)	The court may grant leave under 11-3(8) if it is satisfied that the evidence of the additional expert is necessary to ensure a fair trial
11-3(10)	Any party of record, including the appointing parties can cross examine a joint expert
11-3(11)	Parties who are not adverse in interest may appoint a common expert

Own Experts

11-4(1)	Parties to an action can appoint their own experts
---------	--

Court's Own Expert

11-5(1)	The court may appoint its own expert on its own initiative at any stage of the action if it considers that such an expert can help resolve an issue
11-5(2)	The court may <ol style="list-style-type: none"> (a) ask for nominees from the parties who are qualified and are aware of Part 11 (b) enquire as to any connection between a nominated expert and a party (c) receive materials and make enquiries in order to select an expert
11-5(3)	The court is not limited to the parties nominees
11-5(4)	The expert must consent to the appointment
11-5(5)	The court may appoint an expert even if he or she has already given a report on an issue in the action
11-5(6)	Each party of record may cross examine the court's own expert
11-5(7)	After consultation with the parties, the court must <ol style="list-style-type: none"> (a) settle the questions to be addressed by the expert; (b) give the expert appropriate directions; (c) direct the parties to facilitate the expert's ability to provide his or her opinion
11-5(8)	The court may make additional orders with respect to the examination of the physical or mental condition of a party or the inspection of property
11-5(9)	The remuneration of the expert must be fixed by the court and consented to by the expert, it must include a fee for the report and supplementary reports and for each day of required attendance in court
11-5(10)	The court may order the expert's remuneration to be paid at the time ordered and/or security for his or her remuneration
11-5(11)	The court appointed expert must <ol style="list-style-type: none"> (a) prepare a report in compliance with Rule 11-6 and send it to both the registry and the parties of record in compliance with the ordered deadline, and (b) if his or her opinion changes in a material way after it is delivered, prepare a supplementary report in compliance with 11-6 and deliver it
11-5(12)	Reports and supplementary reports under Rule 11-5 must be tendered as evidence at trial

Expert Reports

11-6(1)	An expert's report tendered as evidence must be signed and include the Rule 11-2(2) certification and the following: <ol style="list-style-type: none"> (a) his or her name, address, and area of expertise;
---------	---

	<ul style="list-style-type: none"> (b) qualifications, employment and education in his or her area of expertise; (c) instructions given (d) nature of the opinion and each issue in the proceeding to which the opinion relates; (e) opinion on each issue, if a range of opinions is given, a summary of the range and the reasons for the expert's opinion within that range; (f) the reasons for the opinion including: <ul style="list-style-type: none"> i. factual assumptions; ii. any research leading to the opinion; and iii. a list of every document relied on.
11-6(2)	The assertion of the expert's qualifications is evidence of them
11-6(3)	<p>Except for a court appointed expert, the expert's report must be served on each party to the action at least 84 days before the scheduled trial date along with notice that the report is being served under this subrule</p> <ul style="list-style-type: none"> (a) by a party tendering a report from an additional expert; (b) by each party who intends to tender a jointly appointed expert report
11-6(4)	A party who intends to tender a report responding to one served must do so at least 42 days before the scheduled trial date along with notice that the report is being served under this subrule
11-6(5)	<p>If after the report of a jointly appointed expert is tendered there is a material change in the expert's opinion</p> <ul style="list-style-type: none"> (a) the expert must prepare a supplementary report as soon as practicable and ensure that it is provided to <ul style="list-style-type: none"> - a party who, with leave of the court, intends to tender at trial a report in addition to that of the joint expert - each of the parties who intend to tender the report at trial (b) the party must promptly serve it on every other party of record.
11-6(6)	<p>If after the report of an additional expert or a responding report is served and the party intends to tender the report at trial, there is a material change in the expert's opinion</p> <ul style="list-style-type: none"> (a) the expert must prepare a supplementary report as soon as practicable and provide it to the party; and (b) the party must promptly serve it on every other party of record.
11-6(7)	<p>A supplementary report prepared by a court's own expert, a jointly appointed expert, or a responding report must</p> <ul style="list-style-type: none"> (a) be identified as a supplemental report (b) be signed by the expert (c) include the 11-2 certification (d) explain the change and the reasons for it
11-6(8)	<p>If a report is provided to a party from an additional expert or an own expert the receiving party musts</p> <ul style="list-style-type: none"> (a) promptly after being asked serve whichever of the following documents relating the report have been requested: <ul style="list-style-type: none"> i. written statements of the facts upon which the report was based, ii. a record of any independent observations by the expert,

	<ul style="list-style-type: none"> iii. any data compiled, and iv. the results of any test or inspection that the expert has relied on. <p>(b) if asked by a party of record, make available his or her file for review and copying</p> <ul style="list-style-type: none"> i. if less than 14 days before the trial date as soon as possible; ii. otherwise 14 days before the scheduled trial date
11-6(9)	As soon as the scheduled trial date is set, the person required to serve the report under Rule 11-6 must notify the expert that he or she may be called for cross examination
11-6(10)	A party who objects to the admissibility of an expert report must serve notice of that objection on the earlier of the trial management conference or 21 days before the scheduled trial date
11-6(11)	If a reasonable notice of objection to the admissibility of the report could have been given but was not, the objection will not be permitted at the trial

Expert Opinion Evidence at trial

11-7(1)	<p>Other than the court's own expert, opinion evidence must not be tendered at trial unless</p> <ul style="list-style-type: none"> (a) the opinion evidence has been included in a report prepared and served in accordance with Rule 11-6 (b) supplementary reports prepared by the court's own expert, joint experts, own experts, additional experts or responding experts have been prepared and served under Rule 11-6
11-7(2)	<p>The following apply to a report or supplementary report of an expert</p> <ul style="list-style-type: none"> (a) if within 21 days of having been served with a report or a supplementary report, a party of record demands the attendance of the expert at trial, the report must not be tendered at trial unless the appointing party calls the expert to be cross examined; (b) If no demand is made for the attendance for cross examination of an expert within 21 days <ul style="list-style-type: none"> i. the expert need not attend at court, and ii. the report, if admissible, may be tendered and accepted as evidence
11-7(3)	<p>A party of record may, within 21 days, demand that an expert who report has been served in compliance with 11-6 attend at trial for cross examination as follows:</p> <ul style="list-style-type: none"> (a) If the expert was appointed jointly or by the court as its own expert any party of record may demand the attendance for cross examination (b) If the expert was appointed by a party or as an additional expert, any party of record who is adverse in interest to the party who appointed the expert may demand the attendance of the expert at trial for cross examination

11-7(4)	If the court is of the opinion that a cross examination by demand was not of assistance, the party who made the demand may be ordered to pay the other party or the expert an amount that the court considers appropriate
11-7(5)	<p>A party who appoints an additional expert or its own expert</p> <p>(a) may not call an expert to give oral evidence unless</p> <ul style="list-style-type: none"> i. the expert's attendance has been demanded for cross examination, or ii. the party believes that direct examination is necessary to <ul style="list-style-type: none"> - clarify terminology or - make the report more understandable <p>(b) may not cross examine the expert</p>
11-7(6)	<p>The court may allow an expert to provide evidence even if one or more aspects of Part 11 have not be complied with if</p> <p>(a) one or more of the parties have learned facts that could not reasonably have been included in a report or a supplementary report within the Rule 11 time limitations;</p> <p>(b) non compliance is unlikely to cause prejudice</p> <ul style="list-style-type: none"> i. by reason of an inability to prepare for cross examination, or ii. by depriving the party against whom the evidence is tendered of a reasonable amount of time to respond <p>(c) the interests of justice require it</p>