



**Law Society**  
of Ontario

**Barreau**  
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**TAB 6**

# **The Six-Minute Criminal Court Judge 2020**

Challenging Expert Evidence for Bias

**The Honourable Andras Schreck**  
*Superior Court of Justice*

January 25, 2020



# CHALLENGING EXPERT EVIDENCE FOR BIAS

Justice Andras Schreck  
Ontario Superior Court of Justice  
Toronto

# ANALYTIC FRAMEWORK

*White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23

- Expert evidence is presumptively inadmissible
- Two-step admissibility inquiry:
  - (1) Threshold requirements from *R. v. Mohan*, [1994] 2 S.C.R. 9
    - Relevance, necessity, absence of an exclusionary rule, properly qualified expert
  - (2) Gatekeeping step
    - “whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of expert evidence”: *R. v. Abbey*, 2009 ONCA 624, at para. 76

# DUTY OF IMPARTIALITY

*Ontario Rules of Civil Procedure (White Burgess, at para. 30)*

- 4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,
  - (a) to provide opinion evidence that is fair, objective and non-partisan;
  - (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
  - (c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.
- (2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

# IMPARTIALITY AND ADMISSIBILITY

Impartiality and independence relevant at three stages:

- Threshold requirement – expert must be aware of duty and willing to carry it out. An expert who does not meet this threshold requirement is not “properly qualified”: *White Burgess*, at paras. 10, 53.
- Gatekeeping stage – impartiality and independence should be considered in determining whether the benefits of admission outweigh the risks: *White Langille*, at para. 54
- Weight – trier of fact may consider impartiality and independence even if evidence is admitted.

## IMPARTIALITY AND THE THRESHOLD REQUIREMENT

- Threshold requirement is not onerous and will rarely warrant exclusion: *White Burgess*, at para. 49
- Onus on party tendering the evidence, but once expert attests to impartiality under oath, burden is on party opposing admission to demonstrate realistic concern about impartiality: *White Burgess*, at para. 48
- Examples of situations warranting exclusion at threshold stage include where expert has direct financial interest in outcome of litigation, close familial relationship with a party, or who assumes the role of advocate: *White Burgess*, at para. 49

## IMPARTIALITY AND THE GATEKEEPING FUNCTION

- Independence and impartiality are related to reliability and must be considered in the exercise of the trial judge's gatekeeping function.
- Trend in favour of enhancing the gatekeeping function: *White Burgess*, at para. 20
- The “trust me” approach has been replaced by the “persuade me” standard: Hon. D. Paciocco, “Taking a ‘Goudge’ out of Bluster and Blarney: An ‘Evidence-Based Approach’ to Expert Testimony” (2009), 13 Can Crim. L. Rev. 135, at p. 146
- Expert evidence of questionable reliability has little probative value: *R. v. Abbey*, 2017 ONCA 640, at para. 115

## IMPARTIALITY AND WEIGHT

- Same considerations as with gatekeeping
- Evidence that is sufficiently reliable to get past gatekeeper not necessarily deserving of weight
- Judge alone trial – Consider focusing on weight only



## MEANING OF BIAS

- Bias does not necessarily connote corruption or moral blameworthiness
- “Predisposing influences that can tincture the accuracy of expert testimony”: Hon. D. Paciocco, “Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts” (2009), 24 Queen’s L.J. 565, at p. 572
- Framing the issue in terms of moral judgment may result in a reluctance to malign the expert
- Most bias is not conscious or intentional

## CONFIRMATION BIAS

- “[T]he unconscious tendency of those who desire a particular outcome to search for things that support that outcome and to ignore or reinterpret contradictory information”: Paciocco, “Unplugging Jukebox Testimony”, at p. 577
- Tunnel vision
- “Thinking dirty” (Hon. S. Goudge, *Inquiry Into Pediatric Forensic Pathology in Ontario: Report* (Toronto, Ministry of the Attorney General, 2008), vo. 3, at pp. 374-377)

## ADVERSARIAL BIAS

- Noble cause distortion -- “[T]he distorting effect of believing you are on the side of good”: Paciocco, “Unplugging Jukebox Testimony”, at p. 582
- Dr. Charles Smith believed that part of his job was to address the under-reporting and under-prosecuting of child abuse: *Goudge Report*, vol. I, at p.17
- Experts who have spoken as advocates
- *R. v. Truman*, [2003] O.J. No. 5675 (C.J.), at paras.17-18 – Proposed drug trafficking expert had expressed the view that trafficking sentences were insufficient
- *R. v. McPherson*, 2011 ONSC 7717, at para. 31 – Proposed expert in human trafficking was an advocate for victims of trafficking

# ADVERSARIAL BIAS

- Sources of evidence:
  - Correspondence between opposing counsel and the expert (*R. v. Sappleton*, 2010 ONSC 5704; *R. v. Natsis*, 2014 ONCJ 532, aff'd 2018 ONCA 425)
  - History of Activism (*R. v. K.G.*, 2018 ONCJ 537; *R. v. Heimbecker*, 2019 SKQB 204)
  - Did the expert ignore or downplay information? (*R. v. Giles*, 2016 BCSC 294)
  - Did the expert allow for margin of error? (*R. v. Rasaratnam*, 2019 ONSC 3840)
  - Is language used adversarial or argumentative? (*Commercial Electronics Ltd. v. Savics*, 2011 BCSC 162)
  - Involvement in the investigation (*R. v. Van Bree*, 2011 ONSC 4273)

## ADVERSARIAL BIAS

- Selection bias – “[D]istorting effect that occurs from the practice of having the parties select (or reject) experts based on whether they will support the desired positions”: Paciocco, “Unplugging Jukebox Testimony”, a p. 575
- Why was the expert chosen?
- Does the expert have a history of testifying for one side (*Edmondson v. Payer*, 2012 BCCA 114)?
- Were there other equally or more qualified experts more readily available?

## CONTEXTUAL BIAS

- Impact of contextual information not directly relevant to the expert's task: J.M. Chin, M. Lutsky and I.E. Dror, "The Biases of Experts: An Empirical Analysis of Expert Witness Challenges" (2019), 42 Manitoba L.J. 21, at p. 29
- Was the expert told of evidence implicating the accused (e.g., a confession)?
- Did the expert's report include information not relevant to the opinion?

## PROFESSIONAL BIAS

- Does the expert have an interest in defending his own research?
- *Loblaws Inc. v. United Dominion Industries Ltd.*, 2007 NLTD 45 – Expert relied on a machine he had created
- *Kobilke v. Jeffries*, 2014 ONSC 1786 -- Correctness of expert physician's own diagnosis was at issue
- “Epistemological immodesty” – reluctance to allow for uncertainty: J.M. Chin, B. Grown and D.T. Mellor, “Improving Expert Evidence: The Role of Open Science and Transparency” (2019) 50 Ottawa L. Rev. 365, at pp. 286-387

## CHALLENGES

- “[E]xpert evidence is highly resistant to effective cross-examination by counsel who are not experts in that field”: *R. v. D.D.*, 2000 SCC 43, at para. 54
- Difficult to expose bias of which the expert is unaware because of its unconscious nature
- Tendency for experts to deceive themselves into thinking that they are immune from bias: J.M. Chin *et al*, “Improving Expert Evidence”, at pp. 385-386



## SUMMARY

- Independence is relevant to admissibility of expert evidence at both the threshold and the gatekeeping stages
- Also relevant to weight
- Bias need not be conscious and does not necessarily imply moral turpitude
- Various types of bias, including but not restricted to confirmation, adversarial, contextual and professional
- Bias is difficult to expose