

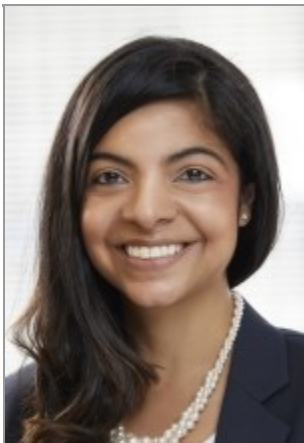
Expert Witness Denied

Laying the groundwork for admission of expert evidence

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(January 6, 2020, 8:21 AM EST) -- A recent decision by Ontario Superior Court Justice Phillip Sutherland, in an ongoing civil trial, emphasized the gatekeeper role of trial judges when considering the admissibility of expert evidence.

Justice Sutherland refused to permit the plaintiff's expert on damages to testify and refused to admit his report, finding that the report served by the plaintiff had not complied with the requirements of Rule 53 and further that the plaintiff had not established the foundational evidence to permit the expert to testify.

In his decision delivered Dec. 2, 2019, in the matter of *Wong v. Li et al.* (CV-11-105816), Justice Sutherland was being asked to permit an expert to testify with respect to monetary damages the plaintiff claimed to have suffered as a result of the alleged fraudulent actions of the defendants. The defendants objected to the introduction of expert evidence arguing that the plaintiff had failed to otherwise introduce into evidence the financial information upon which the expert sought to provide an opinion, and further that the plaintiff had not complied with Rule 53 regarding the form of expert report provided.

In his decision, Justice Sutherland stated that the days when all opinion evidence should simply be introduced and then judged as to weight by the trier of fact were gone. He noted that the Ontario Court of Appeal in *R. v. Abbey* 2017 ONCA 640 and the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Halliburton Co.* 2015 SCC 23 had both emphasized the importance of the threshold requirements for admissibility of expert evidence and more importantly the gatekeeper role of the trial judge to scrutinize the expert evidence and to ensure that it was properly admissible, relevant and reliable.

As part of its gatekeeper role, the Supreme Court of Canada had indicated that the admissibility of expert evidence must be scrutinized at the time it is proffered. The party seeking to introduce expert evidence was required to satisfy the court not only that the evidence is relevant and reliable, but also that the prerequisites for the introduction of expert evidence had been met.

Justice Sutherland further held that fairness required that the defendants receive a detailed report completely in compliance with Rule 53 prior to trial, served in accordance with the Rules. Rule 53 requires any proposed expert to outline in a report the factual assumptions upon which his or her opinion was based, as well as the information and documentation relied upon. He noted that this allowed the defendants to make informed decisions with respect to whether to commission their own expert report.

Justice Sutherland further referred to the decision in *R. v. Abbey* [1982] 2 S.C.R. 24, where the

Supreme Court of Canada held that before any weight can be given to an expert's opinion, the facts upon which the opinion was based must be found to exist.

In *Wong v. Li et al.*, the plaintiff had failed to introduce direct evidence with respect to the plaintiff's financial affairs and accordingly any opinions given by the expert upon the plaintiff's financial matters would be hearsay at best.

The plaintiff had not introduced evidence with respect to the financial statements, tax returns, bank accounts or any other financial evidence to support the expert opinion which was proposed to be offered.

Furthermore, the expert report that had been served by the plaintiff noted simply that he had relied upon "... information provided to me by Mr. Wong", without identifying the nature of the information provided or why the information was of assistance to the expert in formulating his opinion.

The expert in his report had set out what were his "principal assumptions." Justice Sutherland noted that Rule 53 required a description of all the factual assumptions upon which the opinion was based to be set out in detail.

As the plaintiff in *Wong v. Li et al.* had failed to comply with the requirements of Rule 53.03, the expert was not permitted to testify, and his report was not admitted.

This decision should be a wake-up call for all counsel. Expert opinion evidence is frequently key to establishing one's position. If expert evidence is sought to be admitted, proper comprehensive expert reports fully in compliance with Rule 53.03 must be served and further the foundational evidence upon which the expert is being asked to provide an opinion must be properly before the court through direct evidence.

The middle of a civil trial is not the time to realize that this groundwork has not been laid and that accordingly your expert cannot testify.

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