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Partisans at the Gate: Expert Evidence and the Ongoing Duties of the Trial Judge



Marco P. Falco

Partner, Litigation & Written
Advocacy

PHONE

416 777 5421

EMAIL

mfalco@torkinmanes.com

Marco is a partner in the Litigation Department at Torkin Manes. He provides written advocacy for a wide range of civil disputes, including commercial litigation and administrative law. He specializes in applications for judicial review and civil appeals.

Once a judge has allowed expert evidence to be admitted at trial, is the Court's "gatekeeper function" at an end? A recent decision of the Ontario Court of Appeal, *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502, establishes that where an expert's testimony leads to questions about her impartiality at trial, the trial judge has a positive and ongoing duty to exclude the evidence or give a warning to the jury, even after the evidence has been admitted.

Facts and the Trial Ruling

Bruff-Murphy involved a claim by the plaintiff who was involved in a motor vehicle accident. The defendants admitted liability and the jury trial concerned damages. At issue was the extent of the plaintiff's injuries, including the psychological effects of the accident, including anxiety and depression.

The defence called two medical expert witnesses. One of them was a psychiatrist. The psychiatrist's report highlighted a number of inconsistencies between the information the plaintiff provided to him in her interview and what he

later found in her medical records. The psychiatrist never put these inconsistencies to the plaintiff. After examining the plaintiff, he spent ten to twelve hours reviewing the plaintiff's medical records, looking for discrepancies between what the plaintiff told him and what was in the medical records.

Ultimately, at the *voir dire*, the trial judge ruled that the psychiatrist could not testify on certain sections of his report. Among other conditions, the trial judge ruled that the psychiatrist could not give evidence about the plaintiff's credibility.

At trial, the psychiatrist testified that the plaintiff had not developed any psychiatric disorders as a result of the accident. The psychiatrist was the last witness to testify at trial.

During the charge to the jury, the trial judge did not instruct the jury regarding the duty of expert witnesses, nor did he raise any concerns regarding the psychiatrist's testimony or his independence.

When the jury retired, defence counsel brought a "threshold motion",

arguing that the plaintiff did not suffer a permanent serious impairment as defined under the *Insurance Act* (the “Threshold Motion”). At the end of the Threshold Motion, the jury returned with its verdict and calculated the plaintiff’s damages at \$23,500. The jury rejected all other heads of damages.

The trial judge released his decision on the Threshold Motion one month later and held that the plaintiff’s claim for general damages met the threshold set out in the *Insurance Act*.

In reaching this conclusion, the trial judge made a number of observations about the psychiatrist’s testimony at trial. The trial judge was critical of the psychiatrist’s evidence, holding that, amongst other things:

- the psychiatrist’s evidence in chief described how observations in the plaintiff’s medical records contradicted what the plaintiff said in her interview;
- the only “semi-psychiatric” aspect of the expert’s report was one-half of a page in a twenty page report;
- to be fair and objective, the psychiatrist ought to have asked the plaintiff to explain the inconsistencies between her interview with him and her medical records;
- the psychiatrist testified that he discarded any notes he made during his interview with the plaintiff;
- the psychiatrist “was making up evidence as he testified to support

his conclusions”; and

- the majority of the psychiatrist’s testimony and report were not of a psychiatric nature, but were presented “under the guise of expert medical testimony”.

The trial judge concluded in the Threshold Motion that the psychiatrist was not a credible witness and did not honour his undertaking to be fair, objective and non-partisan under Rule 4.1.01 of the *Rules of Civil Procedure*. The psychiatrist crossed the line from neutral expert to partisan advocate.

The plaintiff appealed the jury verdict. The plaintiff alleged, among other arguments, that trial fairness had been compromised and that the psychiatrist’s testimony ought to have been excluded.

The Court of Appeal agreed with the plaintiff and ordered a new trial.

The Ongoing “Gatekeeper Function” of the Trial Judge

The Court of Appeal began its analysis by citing the two-part test established by the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 for the admissibility of expert evidence:

- i. First, the Court must consider the four traditional “threshold requirements” for admissibility as established in *R. v. Mohan*, [1994] 2 S.C.R. 9, namely relevance, necessity in assisting the trier of fact, absence of an exclusionary rule, and the need for the expert to be properly qualified;
- ii. Second, the Court must exercise

its “discretionary gatekeeping role”, whereby the Court engages in a costs-benefit analysis to determine if the expert evidence should be admitted because its probative value outweighs its prejudicial effect.

In this case, the Court of Appeal held that the trial judge failed to engage in the second step of the *White Burgess* test. That is, the “trial judge did not reference this second component of his discretionary gatekeeper role”. To the contrary, he appears to have believed that he was “obliged to qualify [the psychiatrist] once he concluded that the witness met the initial *Mohan* threshold”.

The Court noted that it was “evident from a review of [the psychiatrist’s] report that there was a high probability that he would prove to be a troublesome expert witness, one who was intent on advocating for the defence and unwilling to properly fulfill his duties to the court”.

The trial judge then permitted the psychiatrist to testify, although he later determined that the psychiatrist “crossed the line of acceptable expert evidence”.

In the circumstances, the Court of Appeal held that the trial judge was under a positive and ongoing duty to exercise its gatekeeper function. This gatekeeper role did not end once the psychiatrist was qualified as an expert:

Where, as here, the expert’s eventual testimony removes any doubt her independence, the trial judge must not act as if she

were functus. The trial judge must continue to exercise her gatekeeper function. After all, the concerns about the impact of a non-independent expert witness on the jury have not been eliminated. To the contrary, they have come to fruition...

...

...the costs-benefit analysis under the second component of the framework for admitting expert evidence is a specific application of the court's general residual discretion to exclude evidence whose prejudicial effect is greater than its probative value. **This general residual discretion is always available to the court, not just when determining whether to admit an item of evidence, but after the admission stage if the evidence's prejudicial effect is only revealed in the course of its presentation to the trier of fact.**

In view of the "miscarriage of justice" that took place at trial, the Court reluctantly ordered a new trial.

Conclusion

Bruff-Murphy makes it clear that a trial judge's gatekeeper function regarding expert evidence does not end at the

time of the evidence's admissibility. On the contrary, the Court's duty is positive and ongoing.

Where an expert's testimony violates her duties of impartiality, the evidence ought to be excluded or the jury must be warned. The reasoning in *Bruff-Murphy* is consistent with Ontario Courts' increasing impatience with experts acting as "hired guns". Where the expert gives testimony that crosses the line into advocacy, the evidence is tainted. The Court then has an obligation to eliminate trial unfairness by excluding evidence, or, at the very least, providing the jury with a warning.