# Discrete Issues Involving Expert Reports in BC

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Introduction:

The commission, provision, disclosure, and proper use of expert opinion is a broad and often vigorously litigated topic. These days, there are seemingly endless experts to choose from, the costs of which seems to be ever increasing. The proliferation of expert reports and the increased reliance of the courts on expert guidance has brought to the fore previously discrete issues for debate among counsel. There are several often contested peripheral issues that consistently arise throughout the life of an expert report, which may appear to have little to do with the contents of the report itself. This paper sets out some of the underlying and less discussed factors affecting the foundation and negotiation of expert opinion and, against that backdrop, takes a look at a few of these increasingly relevant peripheral issues.

Executive Summary

Here are a few key takeaways:

1. All written communications to/from an expert – especially prior to retention of counsel – may be producible if that expert's report is served. It may be wise to restrict key strategy discussions with an expert to telephone calls.
2. Plaintiff firms may have grounds to refuse having their plaintiff attend with both a defence physiatrist and orthopaedic surgeon (as an example), pursuant to Rule 7-6. Courts are more reluctant to order a second examination where experts may be viewed as practicing in the same field; of course, if there are separate injuries each requiring different expertise, then this becomes less relevant.
3. Defence firms have a reasonable basis to refuse to pay lost wages (incurred while attending a defence medical assessment) in the form of conduct money prior to the medical assessment.
4. If a dispute arises regarding the location of the expert's assessment of the plaintiff, the court can be expected to order the assessment take place in reasonable proximity to the Registry of record.

Disclosure/Privilege

Where expert evidence is served on another party, the BCSC Civil Rules require that an expert's file materials must also be produced, upon request from opposing counsel.[1] The question then, is what properly forms part of the producible expert file and what does not? The short answer is that most communications to/from an expert, as well as the expert's draft reports will be producible upon service of the expert report. The following cases provide some commentary:

In *Flinn v. McFarland* a 2002 decision out of the Supreme Court of Nova Scotia the plaintiff's lawyer, upon receiving a draft report, returned it to the engineer with his comments. In response to those comments, the engineer prepared a revised report that the plaintiff sought to rely upon. The plaintiff's lawyer refused to disclose the preliminary report or the lawyer's comments, claiming that they were privileged on the grounds that his comments to the engineer involved discussions of "tactics and strategy". The defendants applied for an order to compel disclosure of the written comments.

In the result, the Court ordered the disclosure of the lawyer's comments stating: "Whatever information and materials were provided to the expert must be disclosed". The Court explained that the defendants were entitled to determine whether the plaintiff's lawyer had influenced the engineer's final opinion.

Further, in *Vancouver Community College v. Phillips, Barratt*, [1987] B.C.J. No. 3149 as interpreted in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, [2007] B.C.J. No. 1403, at para. 7 the court held that once an expert has become a witness he or she offers her professional opinion to assist the court and must no longer be in the camp of a partisan. He or she should have nothing to hide and should be willing to have her opinion tested by offering up documents relevant to the preparation and formulation of her opinions, as well as to her consistency, reliability, qualification and other matters touching on her credibility.

However, in some cases correspondence between the retaining party and their expert (absent the retainer letter) will fall under litigation privilege even after service of the report. In order to compel production of such communication, the plaintiff will usually be required to establish a foundation for the production of any correspondence (relevance, fairness, for example) between

[1] *British Columbia Supreme Court Civil Rules* Rule 11-6(8)

counsel and the experts, on the grounds that, barring a showing to the contrary, such communications were subject to litigation privilege.[2]

Physical Examinations of a Plaintiff

In many cases, a plaintiff will attend several medical assessments by consent, but it is worth noting that the BCSC Civil Rules provide an avenue for a plaintiff to refuse more than one attendance at an expert assessment. Simply put, a defendant can send a plaintiff for one expert assessment as of right, but, in some cases, may face opposition from opposing counsel (or the courts) to sending the plaintiff for subsequent assessments. This is based on the language of the BC Civil Rules (Rule 7-6). Where a plaintiff attends a medical assessment by consent at the defence's request, many firms in British Columbia will make it known that the plaintiff's attendance is to be considered an "ordered" attendance pursuant to Rule 7-6. This raises a potential issue when the defence wishes to have the plaintiff attend for a second (or more) expert assessment. If subsequent medical examinations are opposed, the defendant may be required to seek a court order to compel attendance.

Such cases are specific to each plaintiff and turn on which injuries (mental and physical) are "in issue". The case law indicates that the courts will generally be liberal in ordering additional medical examinations, but will carefully scrutinize both the necessity and relevance of the subsequent medical opinion. In some cases it may even be advisable to have the proposed additional defence expert swear an affidavit in support of the relevance of their opinion; for example, if the defendant has already obtained a report from a physiatrist and wishes to have the plaintiff's anxiety assessed by a psychologist, it might be wise to have the psychologist explain why they are best suited to prepare such an opinion, as opposed to the physiatrist. This may also have other implications as identified in the case studies found in the final section of this paper.

In sum, the general principles are as follows:

- *Jones (Litigation Guardian of) v. Donaghey*, 2011 BCCA 6 (CanLII) – Whether a proposition of fact is "in issue" for purposes of this rule must be determined from examination of the pleadings. This, in turn, references material facts rather than

[2] *Bodum USA, Inc. v. Meyer Housewares Canada Inc.,* [2012] F.C.J. No. 1576, 2012 FC 1450

relevant facts. A material fact refers to the ultimate issue, or facts put in issue by the pleadings. The test under Rule 7-6(1) is not whether a fact is relevant, but whether it is in issue in the litigation as revealed in the pleadings. The mental condition of a party is in issue only if raised in the pleadings.

- *Kim v. Lin*, 2010 BCSC 1386 (CanLII) – Courts routinely consider proportionality, by considering the severity of the plaintiff's injuries and the potential magnitude of the plaintiff's claim, in addressing the appropriateness of further independent medical examinations. Where multiple injuries are claimed that require separate experts to address the claims, proportionality supports the appropriateness of multiple IMEs.
- *Hamilton v. Pavlova,* 2015 BCSC 493 – A second exam will not be allowed for the purpose of attempting to bolster an earlier opinion of another expert. That is, there must be some question or matter that could not have been dealt with at the earlier examination.
- *Luining v. Luining*, 2015 BCSC 2304 (CanLII) – Defendants are not required to show exceptional circumstances where the application for subsequent examination is not by an expert in the same field or a multidisciplinary assessment.
- *Garford v. Findlow*, 2014 BCSC 2404 (CanLII) – The defendants are not required to show any exceptional circumstances as this is not an application for a subsequent examination by an expert in the same field or a multidisciplinary assessment.

Expenses:

Another discrete issue that often arises in the context of obtaining expert opinion, is whether a plaintiff is entitled to lost wages for attending an expert examination as part of the conduct money payable by the defendant. Defendants may want to refute paying lost wages as part of conduct money, because such sums could be significant, if, for example, numerous experts are required and/or the plaintiff is a high income earner.

The BC Civil Rules authorize the court to make an order respecting “any expenses connected with the examination,” but the definition of “expenses” in this context has been subject to some debate. For example, in *Wall v. Simonson*, [1990] B.C.J. No. 2364 (S.C.-M.), the court held that wages lost as a result of attendance at an examination “are a loss of income but not an expense in the ordinary sense of the word, being ‘a spending of money’, *Concise Oxford Dictionary*, 6th Edition, p. 365”.

In *Kelly v. Dillon*, [1999] B.C.J. No. 468 (S.C.-M.), affd [1999] B.C.J. No. 752, 30 C.P.C. (4th) 64 (S.C.), the master considered himself bound by *Wall v. Simonson*, *supra*, and declined to make an order that the plaintiff recover as expenses the four hours of lost work time required to attend an examination. In the result, the plaintiff was entitled to recover these costs as a “wage loss” at the conclusion of the matter, but not as an “expense” (conduct money) at the outset.

Examination Location

Sometimes a particular expert will be sought in an action and the location of this expert will be different than the person to be examined. This raises an issue as to whether the person to be examined has an obligation to travel, or whether they have a right to be examined in their particular location. In many cases this can be negotiated between the parties. If an agreement cannot be reached, then a court is most likely to order the medical assessment take place in reasonable proximity to the place of trial (*Dakin v. Roth,* 2013 BCSC 1018).

**Two Interesting Case Studies on Expert Opinion**

What expert bills do defendants have to pay?

*Perron v Catalano,* 2016 BCSC

This decision involves an assessment of the plaintiff's costs in a personal injury action which settled 10 days before trial. The issues of the assessment were both the tariff items and disbursements included in the bill of costs.

The underlying tort claim involved a 36 year old plaintiff, employed as a security supervisor at a casino, who was involved in a motor vehicle accident in June of 2011. The 2011 accident resulted in soft tissue injuries to the plaintiff's neck and back as well as psychological complaints including anxiety, depression, disrupted sleep, emotional upset, as well as memory and concentration difficulties. Claims for lost income and income earning capacity were also included. This plaintiff had previously been involved in a serious motor vehicle accident in 1991 resulting in injuries requiring surgical intervention as well as a further motor vehicle accident in 2001 causing a flare-up of back pain and a further flare-up of back pain in 2008. The plaintiff's injuries were treated by a chiropractor, a physiotherapist, and a GP.

One of the arguments advanced in this assessment hearing was that the plaintiff retained too many experts and obtained too many expert reports; specifically, that many of the expert reports contained unnecessary duplication.

Rule 14-1(5) of the *BCSC Civil Rules,* provides:

> (5) when assessing costs under subrule (2) or (3) of this rule, a registrar must
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> (a) determine which disbursements have been necessarily or properly incurred in the conduct of the proceeding, and
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> (b) allow a reasonable amount for those disbursements.

Additionally, the court examined the following legal principles regarding the consideration of whether the charges for the expert report disbursements were allowable:

- the consideration of whether a disbursement was necessarily or properly incurred is case-and circumstance-specific and must take into account proportionality under Rule 1-3;[3]
- the time for assessing whether a disbursement was necessarily or properly incurred is when the disbursement was incurred not with the benefit of hindsight;[4]
- a necessary disbursement is one which is essential to conduct litigation; a proper one is one which is not necessary but is reasonably incurred for the purposes of the proceeding;[5]
- the role of an assessing officer is not to second guess a competent counsel doing a competent job solely because other counsel might have handled the matter differently;[6]
- the onus of proof rests on the party submitting the bill to establish affirmatively the necessity or reasonableness of the charges he claims as disbursements;[7]
- the solicitor responsible for the preparation of the case should give evidence, which may be by affidavit, verifying that the work was necessary for the full and proper presentation of the case and that the fees charged for the work were reasonable in the circumstances;[8]
- if the expert's bill contains less than a reasonably detailed outline of the work he performed and the hours he devoted to his retainer, an affidavit sworn by the expert may be required;[9] and
- the affidavit of verification does not bind the assessment officer but he should consider it carefully and weigh it against the other evidence.[10]

In the result, the court accepted that some of the expert opinions “could have been more focused”, additional evidence as to the details of charges was required, and some duplication in opinion existed and as such held:

- A claim was made for a report from Dr. Etheridge for $3,000. Allowed at $1,800.

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[3] *Fairchild v. British Columbia (Vancouver Coastal Health Authority)*, 2012 BCSC 1207.
[4] *Van Dael v. Van Dael*, 56 B.C.L.R. 176 (SC) rev’d 56 B.C.L.R. 178 at para. 4 (CA).
[5] *McKenzie v. Darke*, 2003 BCSC 138, para. 17-18.
[6] *Ibid* at para 21.
[7] *Hall v. Strocel* (1983), 34 C.P.C. 170 (B.C.S.C.).
[8] *Berite v. Schuette* (1980), 17 C.P.C. 259 (B.C.S.C.).
[9] *Ibid.*
[10] Bell v. Fantini; Fasciana v. C.N.R. (1981), 32 B.C.L.R. 322 (B.C.S.C.)

- A claim was made for a report from Dr. McCann for $3,692. Allowed in full.
- Reports from Dr. Sahjpaul, a neurosurgeon, were claimed at $7,000. Allowed at $5,300.
- Accounts from Dr. Tater reduced by about 50%.
- A claim was made for $4,080 for a report from Neil Trainor. Allowed at $2,400.
- MRI of $1,316 disallowed.
- Economist report reduced from $1,625 to $725.
- Knight Easton account refused.

What expert to select?

*Flores v Burrows,* 2018 BCSC

The plaintiff sought damages for injuries sustained in a motor vehicle accident which occurred on June 15, 2013. The plaintiff sustained soft tissue injury to his back, neck and hip as a result of the accident which persisted, along with headaches, throughout the fall of 2014. The plaintiff undertook massage and physiotherapy to treat his injuries.

A number of experts were employed to opine on the plaintiff's injuries in this case, on either side. With regards to the physical soft tissue injuries, the plaintiff retained Dr. Waseem, a physiatrist whose practice included the assessment and treatment of patients with neurological and musculoskeletal injuries and chronic pain. The defendant retained Dr. Marks, an orthopaedic surgeon, who had been the medical director of the Raptors basketball team, and testified that he has considerable experience diagnosing, assessing and treating musculoskeletal injuries including "all manner of sprains and tears".

Dr. Waseem, who examined the plaintiff on April 5, 2017, opined that the accident caused chronic left hip pain, chronic left hip snapping pain syndrome, chronic myofascial pain syndrome of the cervical and thoracic spines, and cervicogenic headaches which he considered "chronic, unremitting and permanent". In contrast, Dr. Marks, who examined the plaintiff on December 14, 2016, opined that the accident caused "cervical strain and lumbar strain" and that the plaintiff's prognosis for recovery was "excellent". Dr. Marks also concluded that "no disability [had] been

identified in this plaintiff with regards to activities of daily living, self-care, home maintenance or his vocation".

When determining which opinion to prefer, the court considered the comments expressed in *Khudabux v. McClary*, 2016 BCSC 1886, at paras. 90-93:

> [90] … I digress with a general observation with respect to expert medical evidence in soft tissue injury cases.
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> [91] The expert medical evidence presented at this trial brought into focus a difficulty that not infrequently arises when a defendant pursues the strategy of tendering the opinion of an orthopaedic surgeon to rebut allegations of soft tissue injury. Of course, there may be situations in which such a specialist feels able to offer opinion evidence that sheds light on the nature and scope of such complaints. But it is also the case that a clash between experts pitting an orthopaedic surgeon against a physiatrist, specializing in rehabilitation medicine – or even, as in the present case, against a family physician – can possibly leave counsel in the position of the hoodlum in the film The Untouchables, at the point when he realizes too late that he has brought a knife to a gunfight.
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> [92] There is a tendency common to many orthopaedic surgeons who provide expert opinion reports in soft tissue injury cases before this court to express their opinions without qualification – specifically, without acknowledging the extent to which their opinions are shaped by or restricted to the narrow field of their own expertise. In the result, many such reports come before this court that, in substance, say "I have examined this patient, and nothing is wrong with them," when what is really meant is, "I have examined this patient, and I am unable to diagnose any orthopaedic injury". Expert witnesses who provide opinions in such stark terms without explicitly stating the limitations of their opinion may, if their opinions contrast with complaints of pain and suffering that are found to be genuine, and are at odds with contrary opinion evidence from another medical expert, risk creating confusion. They may also leave themselves vulnerable to a finding of bias if the unstated limitations of their opinions are not drawn out at trial.
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> [93] These risks should be avoided through counsel having, in the first instance, selected an expert witness qualified to give opinion evidence in a field relevant to the

> issues at stake. Counsel should be familiar with the commonly understood scope of expertise held by specialists in that field, and should endeavour to determine whether the expert they have retained shares that understanding. Once the expert's report has been prepared, counsel should always explore with their expert witness the extent to which their opinion has been shaped, in terms of what is said and what is not said, by any limitations in the witness' expertise. Lastly, counsel should ensure that any limitations or qualifications in the expert's opinion are frankly acknowledged in the substance of the report.

In the result, while the court accepted both doctors as "experts", the opinion of Dr. Waseem was preferred as the issues in question fell more squarely within his expertise and as such Dr. Waseem was "more qualified to give these opinions than was Dr. Marks".