Focus PERSONAL INJURY

Poor expert report compliance affects admissibility

C. Nicole Mangan

Medical evidence is a key element of personal injury files. Recently the courts in British Columbia have struck a balance between the mandatory language of the current rules governing the admissibility of expert reports, and the overriding discretion of a trial judge to admit expert opinion evidence.

Post *Maras v. Seemore Entertainment Ltd.* [2014] B.C.J. No. 1242, as counsel are working to ensure every expert report complies with the current law, more recent cases continue to remind counsel to ensure all experts are properly instructed and the reports tendered as evidence comply with the necessary legal elements.

In October, *Lawrence v. Parr* [2014] B.C.J. No. 2626 and *Pausch v. Vancouver Coastal Health Authority (c.o.b. UBC Hospital)* [2014] B.C.J. No. 2654, were released in quick succession and addressed very different issues in the area of expert report admissibility. The analysis provided in these two cases provides the plaintiff and defence bars with decisions that address important practice tips, highlighting the need to ensure the facts on which a report is based are identifiable and the requirement to properly object to a report's admissibility is met.

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In *Lawrence*, multiple expert reports were tendered as evidence in a motor vehicle accident action. One report was delivered by the defence within the required deadline for a response report but the plaintiff challenged its admissibility, stating the report failed to include, among other things: a certification that the expert was aware of his duty; a CV; the report instructions; and the assumptions on which the opinion was based. A second issue raised was that the report included fresh opinion which was not proper response evidence. Some of these objections were easily remedied. The key issue for the trial judge became the expert's failure to clearly identify the facts and assumptions relied on, and the failure to clearly identify which documents were relied on in preparation of the report. The expert who prepared the report had not personally examined the plaintiff, which made the ability to assess the basis of the report very important for the trier of fact. At times the report's summaries of comments or opinions of other treatment providers or experts contained errors. Unfortunately, even lengthy cross-examination failed to fully reveal the proper facts and assumptions forming the basis for the opinion. The court concluded the issues with failing to clearly identify all documents relied on, and the facts and assumptions on which the report was based, resulted in both a failure to comply with the mandatory wording in British Columbia's Rules of Court and prejudice the other party. *Lawrence* serves as another reminder to counsel and experts to ensure each fact, assumption and document relied on in preparation of a report is specifically identified.

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Focus PERSONAL INJURY

Shining a light on due diligence requirement

Ontario ruling dismisses plaintiff's motion to add party to an action after the expiry of the limitation period

Matt Lalande

In *Auger (Litigation guardian of) v. Wood* [2014] O.J. No. 4419, Superior Court Justice Louise Gauthier recently determined that a plaintiff in a personal injury case failed to establish that a reasonably diligent party would not or could not have discovered the identity of the defendant that they proposed to add to their action.

In 2008, the plaintiff Auger was struck by the defendant Wood and suffered severe injuries. Wood alleged that he could not see Auger prior to striking her. The investigating officer's notes reported that the area had very poor artificial lighting. The parties exchanged pleadings and Wood subsequently commenced an action against the city of Sudbury alleging the failure of procedural inspection and clearing of the roadway at the scene of the accident. In November 2010, a litigation guardian was appointed for Auger. Discoveries were held in June 2012. Wood's evidence was that the accident happened around a curve that was improperly lit. In particular, the area as he evinced went from brightness to darkness. The city provided an undertaking in October 2012 which referred to Sudbury Hydro overseeing the street lighting system in Sudbury, including the lighting at the scene of the accident. Wood then served a reconstruction report concluding that the artificial lighting conditions in the area may have caused or materially contributed to the accident. In March 2013 the city issued a fourth party claim against Sudbury Hydro claiming contribution and indemnity if there was any breach of agreement in overseeing and maintaining city lighting which may have caused or materially contribution to the accident. The plaintiff's lawyers investigated and requested information from SH, in particular whether or not they subcontracted out responsibilities for the street lighting system. The motion add summary SH as defendant in the main action was commenced in September 2013 and heard in September 2014.

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> "Justice Gauthier's analysis targeted the intertwining issues of discoverability and reasonable diligence...
>
> **Matt Lalande**
> Lamont Law

The plaintiff's position was that she or her litigation guardian were unaware that there was a lighting issue that may have caused or materially contributed to the accident until the discovery evidence was heard in 2012. They argued that despite the officer initially mentioning poor street lighting, the defendant had in fact been charged with a driving offence. Further, it was held

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Gatekeeper: Inadvertence by counsel no excuse

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In *Pausch*, counsel for the defendant argued the Rules of Court governing notice of any objections to an expert report applied only to a report's contents — not the expert's qualifications. The court disagreed and decided that issues with an expert witness' qualifications are to be raised in advance of trial in accordance with Rules of Court. Ultimately the court concluded that "qualification is a prerequisite to admissibility," therefore, admissibility objections must include objections to an expert's qualifications. The court highlighted that inadvertence by counsel is no excuse for failure to comply with mandatory rules, yet, a case where inadvertence exists does not relieve the court of its important gatekeeper function in determining whether the expert presented is appropriately qualified to opine on the issues before the court. Ultimately, the court in *Pausch* permitted the expert evidence submitted on only two of the five questions posed to the expert, due to the court's concerns about the expert's qualifications and who was responsible for providing the opinion contained in the report.

Current case law highlights the need for expert reports to assist the trier of fact. *Lawrence* and *Pausch* remind all counsel to ensure every objection to a report is raised in a timely way and the basis of all reports are clearly identified. While the overall gatekeeper function of the court may result in a report with technical irregularities being admitted, the need to avoid prejudice to other parties and to ensure the court is satisfied it understands the evidence relied on may also serve to make a report inadmissible, which can seriously impact the strength of a party's case.

C. Nicole Mangan is a partner at Richards Buell Sutton in Vancouver who practises in the areas of insurance litigation, real estate disputes and employment law.

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