



TREES & THE LAW

BY JULIAN DUNSTER

The role of the expert witness

In most cases that go before the courts there are the two parties, the Plaintiff claiming the other party has done something wrong, and the Defendant claiming that there was no wrong doing.

Often both sides will use expert witnesses to support their claims. Having been an expert witness, and having seen other expert witnesses in court, I can assure you that the role of the expert witness is widely misunderstood by those using them, and sometimes even by the expert as well.

There are two main roles for an expert. One is as an advocate, using their specialised knowledge to advocate for and on behalf of their client. That means that the expert takes the side of the client and works to support their arguments, their claims and their evidence.

A second and entirely different role is as an expert witness. In this case the expert cannot be an advocate for the client. Rather, they review the facts of the matter impartially, and offer their opinion to the court, regardless of what the client wants it to be.

There have been incidences where expert witnesses crossed the line and became advocates, and several Canadian jurisdictions have now amended court rules to make the distinction clearer. In essence, the expert witness, although paid by one of the parties, is retained to provide an opinion for the court, not the client.

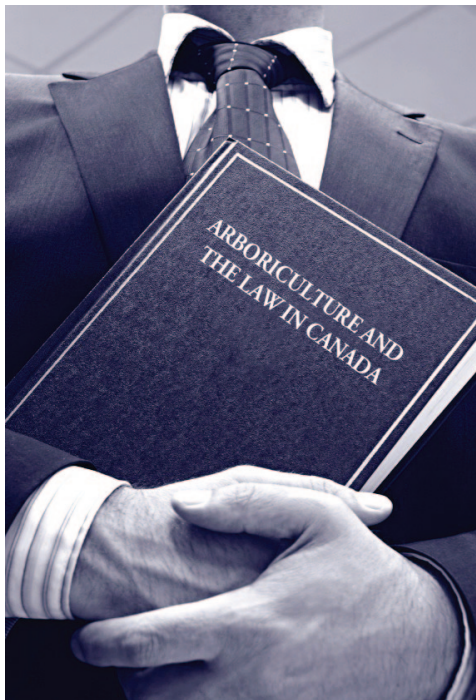
This is an important aspect, not to be lightly ignored. For example, expert witnesses in British Columbia must now abide by Rule 11 of the Rules of Court (Supreme Court Civil Rules B.C. Regulation 168/2009). That requires a statement to be written into all reports before the Supreme Court as follows:

As an expert witness, I:

- am aware of my duty under section 11 - 2 (1) of the Rules of Court, namely that I have a duty to assist the court and am not to be an advocate for any party;
- have made my report in conformity with that duty; and
- will, if called on to give oral or written testimony, give that testimony in conformity with that duty.

The report must include the following components:

- the expert's name, address and area of expertise;
- the expert's qualifications and employment and educational experience in his or her area of expertise;
- the instructions provided to the expert in relation to the proceeding;
- the nature of the opinion being sought and the issues in the proceeding to which the opinion relates;
- the expert's opinion respecting those issues;
- the expert's reasons for his or her opinion, including
- a description of the factual assumptions



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on which the opinion is based,
(ii) a description of any research conducted by the expert that led him or her to form the opinion, and
(iii) a list of every document, if any, relied on by the expert in forming the opinion.

Similarly, in Ontario (Rules of Civil Procedure, RRO 1990, Reg 194) the duty of the expert is defined as:

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,

- to provide opinion evidence that is fair, objective and non-partisan;
- to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
- to provide such additional assistance as the court may reasonably require to determine a matter in issue.

It is not unusual for an expert to be retained in tree related issues with the client expecting that their expert will be an advocate for them. This is especially true in cases where the expert is preparing an appraisal of dollar values caused by damage such as trespass and tree removal or pruning. Most plaintiffs are aggrieved by these incidents and seek compensation.

The expert's challenge is to review the available evidence and facts provided to them, and use those to derive a reasonable appraisal number. It is not the expert's job to seek the highest possible settlement or to derive a high dollar value as a starting point for negotiations. To do that would be to assume an advocacy role.

Similarly, in injury cases the expert deals with the facts. It is not the expert's

job to make the facts look worse, or skew interpretation of the evidence to make the other parties involved look incompetent. Nor is it the expert's job to ignore some evidence that may be prejudicial to their client's case.

The expert's role is to assist the court by providing an opinion about the facts and what they signify. The facts may be given to them, or be derived by listening to other testimony of relevance, or be described in a hypothetical example. It is not the expert's role to determine what is or is not a fact.

The expert's opinion is sought as a means of assisting the 'trier of fact,' that is the judge and or jury, in understanding complex technical issues that they may not understand or even know much about. It is not meant to surpass the role of the judge or jury nor is it the role of the expert to state their opinion about the 'ultimate issue,' that is, if the court claim is or is not valid. If the opinion attempts to answer the ultimate issue the expert may find their opinion rejected. If the court finds evidence of bias or advocacy for one side, the court may choose to accept all, part or none of the opinions offered.

The case of *United City Properties Ltd. v. Tong* (2010 BCSC 111) is a useful overview of these issues and outcomes. Some key points from various citations in the judgment are:

- the expert's evidence must be independent in form and content and uninfluenced by connections with any of the parties.
- ideally, the expert should have no actual or apparent interest in the outcome
- expert evidence must be relevant, necessary for the trier of fact, and the expert must be properly qualified.
- if bias is established the weight afforded the expert opinion may be diminished.

In this case the judge noted, in reference to one of the experts "... I found the plaintiff's expert, Mr. [X], more interested in advocating for the plaintiff than giving the Court an objective assessment...."

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I attach very little weight to his expert evidence."

For those wanting to take on the expert witness role, there are many useful books and resources. A few basic principles always apply.

- You cannot be an advocate for the client.
- You must work within the scope of your expertise.
- You must work with the available facts and you must base your opinion on those and those alone.
- Do not try to make the facts fit the evidence you or your client wish to have.
- Know your role and its limitations.

Failure to observe these procedures may lead to an outcome where all or part of your opinion is dismissed in court, which is usually undesirable for your client and your reputation.

*Dr. Julian Dunster has served as an expert witness in Canada and Hong Kong. He is not a lawyer and the above should not be construed as legal advice. If you have an issue requiring legal advice please consult a lawyer. Additional case law can be found in the book **Arboriculture and the Law in Canada**. Copies are available from Julian Dunster. www.dunster.ca*

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