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TAB 16

Motor Vehicle Litigation SUMMIT 2018

Five Evidentiary Challenges in Motor Vehicle Accident Trials

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March 27, 2018

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Five Evidentiary Challenges in Motor Vehicle Accident Trials

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Trials offer a myriad of challenges in the effective handling of evidence. This paper provides an overview of five of the most common evidentiary challenges trial lawyers face in motor vehicle accident trials:

1. **How to effectively use documentary evidence and have exhibits entered into evidence;**
2. **How to identify hearsay and the basic framework for having hearsay admitted into evidence;**
3. **How to request and tender effective opinion evidence from experts;**
4. **How to impeach a witness; and**
5. **Understanding the relevance of collateral benefits in your tort trial.**

1. Documentary Evidence and the Use of Exhibits

In the civil trial process, each party has the right to direct how its case is presented to the court. Properly marshalled exhibits can play as vital a role as oral testimony in proving your case and maintaining the attention of the jury. Exhibits are for the trier of fact – to explain, to illustrate and to persuade the judge or jury.

In order to have your exhibit admitted into evidence, you must first lay the foundation for the authenticity and relevance of the document: what is it, where does it come from and why does it matter? Authenticating the exhibit is the most important step in laying the foundation. A witness must testify that the document is genuine and accurate.

You must be careful in selecting which witness you use to lay the foundation for having your document admitted into evidence – firsthand familiarity with the evidence is key. For example, you may want the trier of fact to understand the severity of the collision your client was involved in. Using a photograph depicting the property damage sustained by the vehicle your client was driving at the time of the collision can be one avenue to achieve this aim. The photograph of the wreck is a powerful tool that allows the trier of fact to understand the forces your client was subjected to during the crash.

To have the photograph admitted as an exhibit, you will first have to lay the foundation. Your witness will have to identify the vehicle depicted in the photograph and confirm that

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Special thanks to Roger G. Oatley and Troy H. Lehman for their invaluable input.

the photograph fairly and accurately depicts the property damage sustained as a result of the collision.

With more complex evidence, you may require testimony from more than one witness to authenticate the document. If that is the case, do not request to have it admitted into evidence until the foundation has been properly laid with the necessary witnesses.

Once the foundation has been laid and the evidence has been authenticated, request to have it admitted into evidence and marked as a numbered exhibit. Ensure you have an extra copy of the documentary evidence to provide to the Court. After your evidence is admitted as an exhibit, make sure you reference the exhibit number when you refer to the exhibit (for example, "I'd like to draw your attention to Exhibit 4, the photograph of John's vehicle after the collision").

Should you wish to oppose the introduction of opposing counsel's exhibit, you may cross-examine the witness on the foundation or authenticity before the evidence is admitted as an exhibit.

In an electronic trial where documentary evidence is displayed on a television or computer screen (as opposed to a physical hard copy), the process of laying the foundation is the same, as is the request to have your properly authenticated evidence marked as a numbered exhibit. You must also have a copy of the documents burned to a CD or copied to a USB to provide to the Court. The CD or USB will be provided to the Court along with an electronic table of contents confirming which items are on the CD/USB and their various exhibit numbers. The Court may also require a sworn affidavit accompanying each CD/USB which confirms that the documents on the CD/USB are true copies of the electronic exhibits displayed in the courtroom which were admitted into evidence. You may wish to hand up your affidavit and CD/USB enclosing the previous day's exhibits each day before the trial day commences, rather than undergoing the tedium of preparing an affidavit for each individual exhibit, or saving the task to the end of a multi-week trial.

At trial, you should keep a running list of the exhibits entered into evidence, including the numbers, the description of the exhibit and which witness authenticated them. If you are conducting an electronic trial, this list will be vital in assisting you in completing your daily affidavits.

The use of documents at trial may begin as early as in opening statements. Using demonstrative aids can assist in gripping the attention of the trier of fact from the outset. You are entitled to use in an opening (subject to proper proof) virtually any type of demonstrative evidence that will aid the trier of fact in understanding your client's case.[2]

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[2] JA Olah, *The Art and Science of Advocacy*, looseleaf (Scarborough, Ontario: Carswell, 1990) at 8-20.

In *Smith v Morelly*, Justice CA Gilmour was called upon to rule on the use of demonstrative aides in an opening statement. Justice Gilmour enunciated a four-part test to determine whether demonstrative aids could be used in an opening statement:[3]

1. **Will counsel using, or proposing to use, the demonstrative aid undertake to prove it?**
2. **Is the demonstrative aid relevant?**
3. **Will the demonstrative aid assist the trier of fact in understanding the case?**
4. **Is there anything unusually prejudicial about the demonstrative aid that would require it to be excluded?**

The use of demonstrative aides in opening statements can be agreed upon by counsel in advance, or counsel may make an application to the court if consent cannot be obtained. Demonstrative aides – such as photographs, medico-legal illustrations of the Plaintiff's injuries, treatment schedules or computer animation or modelling of the collision – can provide powerful support for your opening statements and capture the jury's attention from the outset.

Although you should be familiar with the steps in laying the foundation to authenticate a document, in practice, you should seek to have as many exhibits admitted by agreement as possible, in order to save the Court's time. The vast majority of exhibits are usually admitted on agreement.

In an electronic trial, you should exchange a list of proposed exhibits well in advance of trial; doing so will allow you to pre-load the agreed upon, pre-numbered exhibits onto the computer or iPad, making it much smoother to locate and use the exhibits.

In the case of exhibits that are not agreed upon in advance, it is best practice to show the exhibit to opposing counsel before showing it to the witness to have him authenticate the evidence.

The use of exhibits can also create problems with hearsay evidence, even if counsel agrees to admit the exhibit into evidence. If a document is being used to establish the truth of assertions in the document, it is hearsay. To avoid objections related to hearsay, you must establish that the document fits within an exception to the hearsay rule (see the section on "Hearsay", below). Documents may also be admitted if they fall within the exception created for "business records" as defined in section 35 of Ontario's *Evidence Act*, R.S.O. 1990, c. E.23:

> **Where business records admissible**
>
> **(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or**

[3] *Smith v Morelly,* 2011 ONSC 6830 at paragraph 6.

> **event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter…**

Section 35 of the Ontario *Evidence Act* does not make everything in a document admissible simply because the document is one which for some purposes falls within the section. Hospital records in personal injury claims can be rife with hearsay. Given the large volume and diverse nature of hospital records, the entirety of the records may not meet the requirements of s. 35.

Section 35 of the *Evidence Act* does not allow for the admissibility of hospital records to establish the truth of events that precede a patient's admission to hospital.[4] For example, if a hospital record includes the patient's memory that she was unconscious for five minutes after a collision, the reported history of loss of consciousness is untested hearsay and is not saved by the admissibility of business records.

An opinion, diagnosis or impression does not constitute an "act, transaction, occurrence or event" as required by s. 35.[5]

As you can imagine, the use and admissibility of hospital records is an often-contested ground in motor vehicle accident trials. The following cases illustrate the difficulty counsel will face if attempting to rely on an opinion or history in a Plaintiff's hospital file without proving the truth of the content of the document (e.g. having the doctor testify that she did diagnose the Plaintiff with the recorded condition and the history behind the diagnosis).

In *O'Brien v Shantz,* the parties filed records from the Workers' Compensation Board. The Defendant did not make any mention of the records during evidence. In the closing, defence counsel referred to the records in an effort to show that the Plaintiff had told contradictory versions of his medical condition in an effort to get workers' compensation benefits. The trial Judge dismissed the Jury. The Defendant appealed, arguing that the entire Worker's Compensation Board file was admitted as a business record and was therefore admissible or the truth of the contents. The Ontario Court of Appeal disagreed, writing that:[6]

> **Although s. 35(2) of the *Evidence Act* does provide for an exception to the hearsay rule, the entire contents of the hospital records do not constitute evidence of the truth of their contents by the mere fact that they are introduced following the service of a notice under s. 35. Any records**

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[4] *O'Brien v Shantz*, [1998] OJ No 4072 (CA), *Robb v St. Joseph's Health Centre*, [2001] OJ No 4605 (CA), *Adderly v Bremner*, [1968] 1 OR 621 (HCJ), *R v Felderhof*, [2005] OJ No 4151 (CJ) and *Olynyk v Yeo*, [1998] BCJ No 2289 (CA).

[5] *R v Felderhof*, [2005] OJ No 4151 (CJ) at paragraphs 73 – 76; *Adderly v Bremner*, [1968] 1 OR 621 (HCJ) at 3.

[6] *O'Brien v Shantz*, [1998] OJ No 4072 (CA) at paragraphs 5 and 11.

sought to be relied upon for the truth of its contents must fall within the scope of the statutory exception…

First, we reject the appellant's main contention that the entire WCB records could be used for the truth of their contents because the records were filed under s. 35(2) of the Evidence Act. Although each party served notice of his intention to file these records under s. 35(2), certain prerequisites must be shown to exist before a record can properly be admitted as proof of its contents under that provision.

…Therefore, the trial judge was correct in concluding that the records were simply filed without formal proof of their authenticity and were not admissible for the truth of their contents.

In *Adderly v Bremner,* the Plaintiff alleged she had suffered an allergic reaction following an injection. The Plaintiff relied on records from St. Michael's Hospital, where she received treatment. She attempted to introduce all of the records for the truth of their contents. An objection was made to parts of the hospital records which contained statements that amounted to a history of events which preceded the patient's admission to the hospital. An objection was also made on the ground that the hospital records contained statements of opinion, diagnosis or impressions and those portions should therefore be inadmissible. The Court held that s. 35 of the *Evidence Act* applied to the particulars of the admission and succeeding events, but not to a reported chronology of events preceding admission. Furthermore, information obtained from third persons not called as witnesses was inadmissible hearsay evidence.[7]

In *R v Felderhof*, Hryn J. exhaustively reviewed the case law with respect to s. 35 and set out eight requirements for admissibility pursuant to s. 35:[8]

i. **Record made on some regular basis, routinely, systematically;**

ii. **Of an act, transaction, occurrence or event;**

iii. **And not of opinion, diagnosis, impression, history, summary or recommendation;**

iv. **Made in the usual and ordinary course of business;**

v. **If it was in the usual and ordinary course of such business to make such record;**

vi. **Pursuant to a business duty;**

vii. **At the time of such act or within a reasonable time;**

viii. **And where the record contains hearsay, both the maker and informant must be acting in the usual and ordinary course of business.**

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[7] *Adderly v Bremner,* [1968] 1 OR 621 (HCJ) at 2 and 3.
[8] *R v Felderhof*, [2005] OJ No 4151 (OCJ) at paragraph 30.

Properly authenticated and handled exhibits can be important tools for persuading the trier of fact in a motor vehicle accident trial and can be a powerful complement to the evidence adduced in oral testimony.

2. Hearsay Evidence

The basic rule of evidence is that all relevant evidence is admissible, with exceptions such as hearsay. Hearsay is presumptively inadmissible.

There are two essential defining features of hearsay:

(1) An out of court statement that is adduced to prove the truth of its contents and

(2) The absence of a contemporaneous opportunity to cross-examine the declarant.[9]

The rule against hearsay guards against the admission of evidence which cannot be tested by its adversary. The reasons for excluding hearsay are the lack of safeguards (oath and cross-examination) which are necessary when the evidence depends on the credibility of the person asserting it and the potential for falsehoods to go undetected.

One way to identify if an out-of-court statement constitutes hearsay is whether the statement is being tendered for the truth of its contents or the fact that the statement was made. In other words, are you asking the trier of fact to believe the truth of what the declarant is saying, or only that the words were spoken at all?

Another way to identify if a statement is hearsay is to consider the rationale of the rule – guarding against the admission of untested evidence. If the lack of ability to cross-examine the declarant is not a concern, or if there are "no meaningful questions that can be put [to the declarant]", then the statement is not hearsay.[10]

Although presumptively inadmissible, hearsay evidence can be admitted if it falls into one of the common law exceptions to the rule excluding hearsay evidence or if it is admissible under the "principled approach", which considers whether the evidence is necessary and reliable.

In *R v Starr*, the Supreme Court of Canada outlined the following framework when dealing with hearsay exceptions:[11]

> **First, it must be determined whether the statement is hearsay. Second, the trial judge should determine whether the hearsay statement falls within an established exception to the hearsay rule. If it does, the evidence is**

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[9] *R v Khelawon*, [2006] 2 SCR 787 (SCC) at paragraph 35. See also paragraphs 2 and 34.
[10] R Delisle and L Dufraimont, *Canadian Evidence Law in a Nutshell*, 3rd Edition (Scarborough, Ontario: Carswell, 2009) at 91. See also pp. 88-116 for a comprehensive overview of hearsay evidence.
[11] *R v Starr*, 2000 SCC 40, at paragraph 29.

> **admissible. Third, if the evidence does not fall within an established exception, the trial judge should determine whether it would still be admissible under the principled approach. Fourth, the trial judge maintains the limited residual discretion to exclude evidence where the risk of undue prejudice substantially exceeds the evidence's probative value. Finally, once the statements are found admissible, it is for the trier of fact to weigh the evidence and make a determination as to the ultimate reliability of the hearsay evidence at issue.**

In the seminal case, *R v Khelawon*, Charron J. provides an overview on the overarching principles of the admissibility of hearsay evidence. This case is an essential read for any trial lawyer:[12]

> **...[T]wo guiding principles that underlie the traditional common law exceptions: necessity and reliability. This Court first accepted this approach in Khan and later recognized its primacy in *Starr*. The governing framework, based on Starr, was recently summarized in *R v Mapara*, [2005] 1 SCR 358, 2005 SCC 23 (SCC), at para. 15:**
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> **(a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.**
>
> **(b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.**
>
> **(c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.**
>
> **(d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.**

If the hearsay evidence you are trying to adduce does not fall within one of the common law exceptions (for example, a "spontaneous utterance" is admissible hearsay, recognized under the *res gestae* exception), you must persuade the Court (on a balance of probabilities) that the evidence is both necessary and reliable.

In establishing "necessity", the question is whether the evidence is "reasonably necessary". It refers to the necessity of the hearsay evidence to prove a fact in issue.

Necessity has been given a flexible definition. It must be capable of encompassing diverse situations. The Supreme Court of Canada in *R v Smith* stated: "What these situations will have in common is that the relevant direct evidence is not, for a variety of

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[12] *R v Khelawon*, [2006] 2 SCR 787 at paragraph 42.

reasons, available." The Court relied on *Wigmore on Evidence*, 2d ed. (1923) for examples of a non-exhaustive categorization of situations where necessity arises:[13]

> **The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing [by cross-examination]. This is the commoner and more palpable reason...**
>
> **The assertion may be such that we cannot expect, again or at this time, to get evidence of the same value from the same or other sources. ... The necessity is not so great; perhaps hardly a necessity, only an expediency or convenience, can be predicated. But the principle is the same.**

As an example of the second type of necessity in Wigmore's categories, many established hearsay exceptions do not rely on the unavailability of the witness. Admissions, present sense impressions and business records have a very high circumstantial guarantee of reliability, which offsets the fact that only expediency or convenience militate in favour of admitting the evidence. In *Ares v Venner*, [1970] SCR 608, the Supreme Court admitted nurses' records into evidence and made "no reference to the present availability of the nurses as it related to the admissibility of the hearsay evidence."[14]

In *R v Khelawon*, Charron J. observed that "the principle is now well established, that necessity is not to be equated with the unavailability of the witness." An inability to recall events can fulfill the criterion of necessity. In *R v L(C)*, the Court observed, "We are of the view it would be unrealistic to expect hospital personnel to recall the specific event in question, given that they would deal with [similar events] ... on a daily basis and therefore the criterion of necessity is met."[15]

The indicia of necessity ultimately refer to the quality of the evidence and the ability to get it from another source.[16]

The next question after necessity is whether your evidence is reliable.

Reliability does not have to be established with absolute certainty. The reliability component of the principled approach to hearsay exceptions addresses a threshold of reliability, rather than ultimate or certain reliability.[17]

When determining threshold reliability, the trial judge is not to encroach on the trier of fact's domain at the admissibility stage:[18]

> **If the trial is before a judge and jury, it is crucial that questions of ultimate reliability be left for the jury... If the judge sits without a jury, it is equally**

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[13] *R v Smith*, [1992] 2 SCR 915, at paragraph 37.
[14] *R v B(KG)*, [1993] 1 SCR 740 at paragraphs 108-109.
[15] *R v L(C)*, [1999] OJ No 3268 (ONCA) at paragraph 15.
[16] *R v Starr*, [2000] 2 SCR 144.
[17] *R v B(KG)*, [1993] 1 SCR 740 (SCC) at paragraph 85.
[18] *R v Khelawon*, [2006] 2 SCR 787, at paragraph 50.

important that he or she not prejudge the ultimate reliability of the evidence before having heard all of the evidence in the case.

Threshold reliability is concerned with whether or not the circumstances surrounding the statement itself provide circumstantial guarantees of trustworthiness. Absence of a motive to lie, or having safeguards in place such that a lie could be detected, provides circumstantial guarantees of reliability.

In *R v Smith*, Lamer C.J. reiterated that the circumstances surrounding the making of a statement can provide sufficient safeguards for reliability:[19]

> **The criterion of "reliability"—or, in Wigmore's terminology, the circumstantial guarantee of trustworthiness—is a function of the circumstances under which the statement in question was made. If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be "reliable", i.e., a circumstantial guarantee of trustworthiness is established.**

The weight that will be attributed to the hearsay evidence is a matter for the trier of fact to determine at the conclusion of the trial, after considering the statement in the context of the entirety of the evidence.

3. Expert Evidence

Almost every motor vehicle accident trial will include testimony from at least one expert. To effectively marshal opinion evidence from an expert, you must properly prepare your expert witness, in addition to giving careful consideration to the type of expert you intend to call and how you intend to tender your expert.

Requesting an expert opinion effectively begins with the right preparation.[20] Your job in this regard is two-fold:

1) Ensure the expert is prepared to give evidence during chief in a logical, clear and persuasive manner; and
2) Ensure the expert is prepared for cross-examination.

You should ensure that your expert is familiar with the contents of his report and allow adequate time for the expert to review the relevant documents. You should also prepare your expert witness so as to avoid any appearance that he is an advocate when he takes

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[19] *R v Smith*, [1992] 2 SCR 915 at paragraph 34.

[20] For further discussion and study on these topics, the reader is invited to review chapters 24 to 26 of Geoffrey Adair's "On Trial – Advocacy Skills Law and Practice", 2nd ed. LexisNexis Canada Inc. 2004.

the stand. You must ensure that the expert understands his role and duty as an impartial expert who is assisting the Court. It is important to reinforce key strategies such as conceding on issues as necessary and answering questions directly.

Before you can begin your examination-in-chief, you must first tender the expert properly to permit him or her to give opinion evidence.

A Litigation Expert is only entitled to provide opinion evidence in relation to a proceeding if permitted to do so or by order of the trial judge. After the expert is called as a witness, you should indicate to the Court that you intend to adduce opinion evidence from the witness. You should vocalize the particular field in which the witness is an expert in as well as clarify the subject matter of the proposed opinions.

For instance:

> **Mr. Smith is a neurologist with expertise in pediatric neurology and traumatic brain injuries. I intend to adduce opinion evidence from him touching upon the diagnosis, prognosis and treatment recommendations concerning the Plaintiff's traumatic brain injury and its impact on her employability and need for supervisory care.**

This will help save time by allowing opposing counsel to understand the specific areas on which you intend to question the expert. You may also wish to enter the expert's curriculum vitae before questioning your expert on her qualifications. You will then proceed to ask a series of questions regarding the expert's qualifications, training and experience.

After you are finished leading the witness through this subject matter, the trial judge will ask whether opposing counsel would like to cross-examine the expert on qualifications.

Presuming that opposing counsel does not have any issue with the expert's qualifications, you should proceed to request that the witness be tendered as an expert and be allowed to provide opinion evidence. It is important to clarify once again the specific areas on which the expert will be giving evidence.

Specifically identifying the subject matter of the opinion evidence removes any doubt on the admissibility of the opinion evidence on those subject matters. If you conduct a vague or loose qualification process, it could potentially affect the admissibility and weight of certain opinion evidence given during chief.

Therefore, it is good trial practice to qualify and tender an expert in a clear and specific manner so as to promote trial fairness and efficiency.

After tendering your witness, there is no cookie-cutter formula to most effectively present an expert's evidence during your examination-in-chief. It is a matter of style as well as understanding the strengths and weaknesses of the examiner's case.

In certain situations, you may find it more effective to have the expert state her ultimate opinion at the outset of her testimony. For instance, this may be preferable if you anticipate the opinion will be unchallenged or if you know that opposing counsel does not have any conflicting expert opinions on the issue. In other circumstances, you may wish to cover all of the underlying facts before asking for the expert's opinion. For instance, taking the expert through the chronological history of the Plaintiff's complaints may add to the weight and credibility of the impairments that are at issue.

Although the style of the examination will depend on each case, there are a few points that should be addressed during the examination-in-chief at one point or another:

- **The type of expert that she is and how she became involved with the case;**
- **If she is a Litigation Expert, you should clarify and explain the circumstances of the retainer;**
- **When and how she assessed the patient, what materials she received and reviewed and other information or facts relayed to the expert (i.e. through other lay witnesses or treatment providers);**
- **How she was able to reach her opinion or conclusion (i.e. explain any tests or measures so the trier of fact can understand the process).**

Generally speaking, a well-structured examination-in-chief of an expert should:

- **Use simple language;**
- **Highlight the expert's qualifications, experience and training;**
- **Present the expert as an authority who is independent and non-partisan;**
- **Portray the expert as a teacher;**
- **Provide the expert an opportunity to address key differences that may exist between his opinion/report and the opposing expert's;**
- **Provide the expert an opportunity to address points raised by the opposing expert that may not have been covered in his report;**
- **Inoculate against anticipated weaknesses on issues touched by the expert's evidence;**
- **Use the expert's report as an *aide memoire* for the trial judge to follow along;**
- **Use other demonstrative aides such as medical illustrations or reconstructions where appropriate;**
- **Use headings when moving from one topic to another (e.g. "Now I'd like to talk to you about…").**

It is important to remember that there are different types of experts you may wish to call in a motor vehicle accident trial. In addition to Litigation Experts, there are also Participant Experts, Non-Party Experts. The *Rules* do not apply in the same way to each of these types of experts.

The 2010 addition of Rule 4.1.01 and amendment of Rule 53.03 have significantly changed the landscape regarding expert evidence. Rule 4.1.01 sets out the overriding duty of every expert engaged by or on behalf of a party to provide opinion evidence that is fair, objective and non-partisan and within the expert's area of expertise. This duty is owed to the Court and overrides any other duty the expert may owe to the party on whose behalf the expert was engaged. Rule 53.03 sets out what information must be included in an expert report along with a Form 53 that the expert must acknowledge and sign. These rules govern what are now considered "Litigation Experts".

"Participant Experts" are experts whose opinions were formed as a result of their participation or observation of the underlying events and during the ordinary exercise of their skill. For example, a treating physician would be considered a participant expert.

"Non-Party Experts" are experts retained by a party other than a party to the litigation in which the expert evidence is sought to be tendered. They are experts who form opinions based on personal observations or examinations relating to the subject matter of litigation for a purpose other than the litigation. For example, an accident benefits assessor would be considered a non-party expert.

Rule 53.03 has no application to participant experts or non-party experts. Calling a participant expert or a non-party expert to give opinion evidence does not mean that this specific expert has been engaged by or on behalf of the party for the purposes of Rule 53.03. The opinion evidence of participant experts and non-party experts is admissible for its truth without having to comply with the requirements of Rule 53.03.

A Participant Expert is therefore entitled to give opinion evidence with respect to diagnosis, prognosis and treatment so long as these opinions are based on the expert's personal observations or examinations. However, there are inherent limits as to what a participant expert can testify to. For instance, a treating physician would not be permitted to testify about a patient's future employability without a Rule 53.03 compliant report.

You should give careful consideration on the evidence you need from each category of expert and what evidence remains necessary from Rule 53 compliant experts.

The decision to call Participant Experts will depend on each case. More often than not, you will need to rely on the evidence of participant experts to effectively present your case. This decision will have to be made on balancing the value of the participant expert's evidence against the risks of calling such an expert at trial.

Much of the strategic considerations concerning Participant Experts are similar to that of any other witness:

- **How does the Participant Expert present? Do they seem knowledgeable? Are they likeable and easy to understand?**
- **How will they fare under cross-examination? Do they have a tendency to be argumentative, over-agree or evade answers?**

Considerations which tend to be more specific to Participant Experts are:

- **How long have they known or have been treating the Plaintiff;**
- **Will they fill a particular or important time period in the Plaintiff's chronology;**
- **Under what circumstances were they introduced to the Plaintiff;**
- **How familiar they are with the Plaintiff's issues or history;**
- **Will they be testifying strictly from memory or will they need to review documentation;**
- **If they have documentation, what is the substance and extent of their clinical notes and records or other material relating to the Plaintiff and any associated risks of highlighting those materials to the cross-examiner.**

You must be conscious of the potential for an adverse inference to be drawn if you choose not to call a Participant Expert who has exclusive knowledge of your client or who has been long-involved in the Plaintiff's care.

Many of these questions can be answered by sitting down and speaking face-to-face with the witness. It is at that stage that you can begin to grasp which Participant Experts to call and the value their evidence adds to the case. You will also need to make strategic decisions on the order in which you call your witnesses. If you intend to call the Participant Experts before having the Plaintiff testify, you should ensure that you begin and end the presentation of your case with your best witnesses.

Generally speaking, there are benefits to calling Participant Experts as part of the Plaintiff's case. They generally tend to be less risky witnesses under cross-examination, given the scope of their evidence (particularly so if they do not have any notes or records). They are an arm's length source of information who can speak to the significance and chronicity of the Plaintiff's issues. Participant Experts can also help "build" or "set the stage" for the grand presentation of the Plaintiff when he is finally called.

4. Impeachment of a Witness

It has been said that cross-examination is the ultimate means of demonstrating truth and of testing veracity. Your goal as cross-examiner is to gain admissions of fact helpful to your case and to undermine the effect of the witness' evidence. Perhaps the most powerful and dramatic way of doing so is by eroding a witness' credibility through impeachment. This paper discusses impeachment by using prior inconsistent statements and discovery transcripts.

Generally speaking, counsel intending to challenge the credibility of a witness by using independent evidence should be aware of the rule in *Browne v Dunn*[21]. The rule requires the cross-examiner to confront the witness with the evidence while he or she is still in the witness box. The spirit of the rule is to promote fairness to the witness and trier of fact and minimize wasted court time.

You should also familiarize yourself with sections 20 and 21 of the *Ontario Evidence Act* – the authority on the proper procedure for impeaching a witness by introducing a prior inconsistent statement.

The goal of impeachment through prior inconsistent statement is to get the witness to adopt his earlier testimony or to attack his credibility. It is a technique meant to weaken or discredit the witness' evidence (the rationale being that the witness' evidence elicited during the chief is harmful to your case). Once an inconsistency is elicited, you are able to argue during your closing submissions that the witness is unreliable or not to be believed. This effect is amplified if the witness denies making the inconsistent statement and you are required to prove the inconsistency.

Before you proceed to impeach a witness, you must first ensure that there is a true inconsistency between the prior statement and the *viva voce* evidence. Attempting to impeach on a minor or trivial fact may undermine your credibility or even bolster the witness' credibility.

Geoffrey Adair canvasses the proper practice for cross-examining an adversary's witness upon a prior oral or written inconsistent statement as follows:[22]

> 1. **Questions are asked to affirm the witness' current evidence at trial in order to highlight the anticipated contradiction.**
> 2. **The witness is asked if he or she made a certain statement on a previous occasion and an admission or denial of making such a statement is obtained. Sufficient particulars of the statement must be given to allow the witness to remember the occasion and content of the statement.**
> 3. **If the witness admits having made the statement, then it is proven that he or she made such a statement. Appropriate cross-**

[21] *Browne v Dunn*, (1893), 6 R 67 (HL).
[22] "On Trial – Advocacy Skills Law and Practice", 2nd ed. LexisNexis Canada Inc. 2004.

examination highlighting and making effective use of the contradiction should follow.

4. **If the witness denies having made the statement, then such cross-examination deemed appropriate on the denial may take place. This would include showing the witness the statement if it is later intended to prove any statement reduced to writing. Continued denial will result in the cross-examiner having the right to prove the statement.**

This is the method traditionally taught in trial advocacy courses. There are, of course, other methods and approaches to confronting a witness with a prior inconsistent statement.[23] Generally speaking, the questions and cross-examination should be set up so as to underscore the contrast between the witness' current evidence at trial and the prior inconsistent statement.

Prior inconsistent statements that are put to a witness do not need to be entered as evidence or an exhibit. This is a strategically important decision particularly when there are other portions of the statement or document which are harmful. However, circumstances may arise where the trier of fact must compare the full statement with the witness' evidence at trial. Such matters are best left with the trial judge because they are heavily dependent on the facts of each case.

Prior inconsistent statements are generally used for the purpose of impeaching a witness. In certain cases however, it may be in your best interest to seek to admit the prior inconsistent statement for the truth of its contents. The test of necessity and reliability for such statements is outlined in the Supreme Court of Canada decision of *R v B(KG)*.[24]

Before trial begins, it is essential that you review the transcript from the examination for discovery of the opposing witness and know that transcript inside and out. The examinations for discovery are a crucial step in proceedings for litigation counsel. The evidence given at the discovery can shape the theory of liability and lead to key admissions. It can also be a valuable resource for impeachment depending on the witness' evidence at trial.

You should be prepared to use discovery transcripts to impeach a witness. The discovery transcripts should be ordered well in advance of the trial. The transcripts should be signed by the reporter in the event the transcript needs to be formally proved.

If it is a jury trial and examinations for discovery have not been discussed prior to your intention to rely on such evidence, you should ask the trial judge for permission to explain it to the jury. The trial judge may wish for the explanation to come from the Court or allow you to proceed with your explanation. This will help the jury understand the context and significance of an examination for discovery. It can also be an additional opportunity to

[23] For example: The Honourable Todd L. Archibald & Kenneth Jull, "An empirical approach towards a new methodology of impeachment" (Autumn 2011) 30 Advocates' J. No. 2, 3 – 11.
[24] *R v B(KG),* [1993] 1 SCR 740.

connect with and speak directly to the jurors. You should have copies of the relevant portions of the examination for discovery transcript you intend to rely on ready to hand up to the trial judge, opposing counsel and the witness.

The procedure on using discovery transcripts to impeach a witness can be found under Rule 31.11(2) & (3). If discovery evidence will be used to impeach a witness, you must abide by sections 20 and 21 of the *Evidence Act*. In other words, the relevant portions of the discovery transcript must be put to the witness. You must also ensure that the subject and content of the discovery evidence are related to substantive matters within the litigation. Otherwise, the line of cross-examination may not be allowed to proceed.

If you are relying on portions of the discovery transcript – as is most often the case – the opposing party may request that other evidence from the same transcript be introduced to qualify or explain the evidence being used to impeach the witness. There are limitations to this rule. The extent of allowing additional evidence will depend on the context and necessity of the evidence proffered. It will be a matter of discretion for the trial judge.

5. Collateral Benefits – the Relevance of Accident Benefits in a Tort Trial

The impact and relevance of statutory accident benefits available to a Plaintiff becomes increasingly important as a tort claim approaches settlement or trial. The deductibility rules outlined by legislation and case law establish that accident benefits have a direct effect on the quantum of a Plaintiff's recovery of damages.

You must familiarize yourself with section 267.8 of the *Insurance Act,* which outlines the deductibility and future assignment principles governing a Plaintiff's damages award in relation to collateral benefits.

With respect to the deductibility of accident benefits from tort damage awards, Ontario courts traditionally endorsed a strict matching approach,[25] but the legal landscape is changing.[26] Two recent Ontario Court of Appeal decisions – *El-Khodr v Lackie* and *Cobb v Long Estate* – suggest that Courts will no longer apply the traditional strict matching approach. The Ontario Court of Appeal has clarified that courts are only required to match accident benefits which fall into the "silos" stipulated by section 267.8 of the *Insurance Act*.

In other words, income loss awards are to be reduced only by collateral benefits paid regarding income loss, while future care awards are to be reduced only by collateral benefits paid regarding future care expenses. All other expenses would presumably fall under the "other pecuniary losses" category.

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[25] See *Bannon v McNeely* (1998), 38 OR (3d) 659 and *Gilbert v South,* 2015 ONCA 712.
[26] See *El-Khodr v Lackie*, 2017 ONCA 716 and *Cobb v Long Estate*, 2017 ONCA 717.

This shift towards a more relaxed approach means that tort awards and settlements for future care do not have to be broken down into specific categories such as medication, social work, occupational therapy, assistive devices in order for it to be deducted.

These recent Ontario Court of Appeal decisions also suggest that any award for past and future loss of income must be deducted from any past and future income replacement benefits. The Ontario Court of Appeal has clarified that section 267.8(1) of the *Insurance Act* does not distinguish between past and future income loss awards so far as deductibility is concerned.

With respect to the future assignment of medical and rehabilitation accident benefits, the Ontario Court of Appeal has indicated that a strict qualitative and temporal matching requirement should not be applied for the assignment of future benefits.

The deductibility of collateral accident benefits to a tort claim has obvious implications to Rule 49 offers and the awarding of costs at the conclusion of a trial. For a more detailed discussion on this topic as well as others, you are invited to review "The Interplay Between Tort and Accident Benefits" paper presented at the 2017 Oatley McLeish Guide to Motor Vehicle Litigation.

Before you commence a jury trial you should give careful consideration to any limits that should be imposed on opposing counsel with respect to the referencing of collateral benefits. Some counsel will go to great lengths to convince a jury that the accident benefits available to a Plaintiff are adequate to meet the Plaintiff's needs after trial for care. Such an approach is unfair and improper, but some defence counsel take this approach anyway. If you are Plaintiff's counsel you should bring up this issue with the court before the trial starts and in the absence of the jury so that there is a clear understanding of the limits and relevance of this evidence. Most trial judges will agree that such evidence is misleading and irrelevant unless it goes soley to issues such as motivation, mitigation and how care was funded prior to trial.

Conclusion

It has been said that many battles are won or lost before they are ever fought. Motor vehicle accident trials pose unique evidentiary challenges for lawyers. Therefore, it is vitally important for trial lawyers to anticipate and prepare for these challenges in order to place themselves in the best position for a successful outcome.