

PEER REVIEW

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Providing commentary and information on issues affecting professional regulation and practice in British Columbia

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EXPERT TESTIMONY AND PROFESSIONAL REGULATION

Expert Testimony

Many professionals find themselves in the position of being called to testify to provide expert evidence in civil or criminal proceedings. Many do so having received little or no formal training in how to conduct themselves when presented to the court as an expert. Unless the lawyer who calls them to testify properly briefs such witnesses, the experience of tendering expert testimony and being cross-examined upon it can be a daunting one. If the expert fails to meet his or her professional obligations during the course of presenting his or her expert testimony, as in the case that is featured in this issue of *Peer Review*, it can result in disciplinary proceedings being brought before the professional's regulatory body.

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A recent decision of the General Medical Council of the United Kingdom has made the news. A pathologist had testified in several "child crib deaths". His testimony had a significant bearing upon findings of guilt.

Based in large part upon the evidence of Dr. A. Williams, a pathologist, Mrs. Sally Clark, a solicitor, was convicted of murdering her two baby sons in 1999. Mrs. Clark was freed on appeal in 2003.

Dr. Williams had been called to give expert forensic evidence for the Crown at the murder trial of Mrs. Clark. Based on the nature of his conduct in relation to his expert testimony, disciplinary proceedings were brought before the General Medical Council.

At his professional discipline hearing (Decision of the Fitness to Practise Panel of General Medical Council dated 3 June 2005 regarding Dr. Alan Roy Williams) it was submitted that the postmortems he had conducted were of a standard which impaired the reliable evaluation of evidence of the cause of death. Moreover, Dr. Williams was found to have omitted mention of findings that detracted from his opinion evidence.

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Specifics of errors that were found by the General Medical Council included:

- failure to make a diagrammatic record of findings
- lack of competence to conduct laboratory dissection necessary for the nature of the case at hand
- insufficient scientific evidence to reach the conclusions he did regarding the cause of death
- failure to mention the significance of reported findings

- failure to discuss other possible causes of death
- failure to disclose all the evidence regarding the microbiological and biochemical findings

The Panel of the General Medical Council sat for six weeks hearing evidence and submissions. Upon review of the evidence, the Panel found that Dr. Williams failed to exercise reasonable care and skill in interpreting and reporting the postmortem findings.

The Panel found that Dr. Williams' postmortem considerations and treatments “impaired the reliable evaluation of the cause of death” and therefore affected the trial proceedings. Dr. Williams did not discuss other possible causes of death, as a consequence no further investigations were undertaken.

With regard to Dr. Williams’ reports, the Panel found that he had failed to use his best endeavours because his reports ...“were not compiled on the basis of comprehensive and contemporaneous notes”. (at page 13)

The Panel found, at page 25, paragraph 14:

...you had the responsibility as an experienced forensic pathologist to consider whether test results might need to be openly discussed, before being discounted, in order to prevent any risk of a miscarriage of justice.

And at page 26, paragraph 16:

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...Your responsibility as a pathologist with an overview of the whole case was to state and progressively review the facts or assumptions on which your opinions were based. You should not have omitted mention of findings which might have detracted from your considered opinion, for which, by the time of the trial, there was diminishing evidence.

When speaking of Dr. Williams' role as an expert witness in the trial, the Panel found that he had failed to discharge his duty as an expert witness and that part of that duty was to share the facts and significance of relevant reports commissioned by him.

...You, a general pathologist, knowingly accepted the highest level of forensic paediatric responsibility...you put yourself in the position where you might have a pivotal role in a criminal trial.

...High standards were neither an option nor an "ivory tower" mirage, but your obligation: a fair trial hinged on your evidence. As Dr. Anscombe said in evidence to the Panel, "for a forensic pathologist in a murder case simply being honest is not sufficient..." (at page 27, paragraph 18)

At page 33, paragraph 35 the Panel went on to say:

The message which the Panel sends to the public and to the profession is this: where justice depends on a doctor, neither

competence nor care can be compromised.

The Panel found Dr. Williams' errors and omissions to have "seriously undermined confidence in the role of a doctor as an expert witness."

Dr. Williams was found guilty of serious professional misconduct and banned from forensic pathology for three years.

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Commentary

This decision of the General Medical Council of the U.K. is instructive for the various principles concerning the role of an expert that it underlines. Moreover, it implicitly underscores the fact that a professional when giving evidence as an expert is acting in the course of his profession and therefore is subject to the jurisdiction of his regulatory body.

Guiding legal principles

For those professionals concerned to know about the legal principles that govern their expert testimony these can be found in the relevant caselaw. One case, notable for the clarity of the exposition of these principles, is *National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd.* (“*The Ikarian Reefer*”), [1993] 2 Lloyd’s Law Reports 68 (Q.B. (Com. Ct.))

In the case referred to, the Honourable Mr. Justice Cresswell, for the Queen’s Bench Division (Commercial Court), in outlining the duties and responsibilities of an expert witness, in civil cases, set out the following:

- Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

- An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise.
- An expert witness should never assume the role of an advocate.
- An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion
- An expert witness should make it clear when a particular question or issue falls outside his expertise.
- If an expert’s opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one
- In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report
- If, after exchange of reports, an expert witness changes his view on a material matter, having read the other side’s expert’s report or for any other

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reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.

- Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

By ordinary post []
to:

Signed: _____

On behalf of: _____

The Ikarian Reefer case is referred to in a decision of the Federal Court of Canada in which Harrington, J. says that the principles concerning the role of an expert that are set out in the *Ikarian Reefer* are based on well established authority "which has survived its transatlantic voyage unscathed". *Merck & Co. v. Apotex Inc.*, (2004) 32 C.P.R. (4th) 203.

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IN THIS ISSUE THE CASES THAT ARE FROM THE U.K THEY HAVE BEEN SELECTED BECAUSE OF THE ISSUES THAT THEY ILLUSTRATE. THEIR APPLICATION IN CANADA IS SUBJECT TO CANADIAN LAW.