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ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
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GIUSEPPE TAVERNESE AND JULIA TAVERNESE	)	Bernie Romano, for the Plaintiffs
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
ECONOMICAL MUTUAL INSURANCE	)	David Zarek, for the Defendant
	)	
Respondent	)	
	)	
	)	**HEARD:** May 26, 2009

RULING ON EXPERT ENGINEERING EVIDENCE

LAUWERS J.

[1] The plaintiffs allege that their home was burgled and are seeking to recover from the defendant under a policy of insurance. Most of the valuables taken were alleged to have been stored in a locked wall safe. The safe was found with the door removed.

[2] The defendant proffers the evidence of two mechanical engineers who have analyzed the safe. For reasons that she explores at length in her report, Michelle R. Bradley, P.Eng., includes that: "Based on my examination of the Gardall safe, it is my opinion that the damage sustained to the door and body of this safe was inflicted with the door in the "open" position."

[3] Mark Fabbroni P.Eng., concluded that: "The damage sustained to the Safe was insufficient to defeat the door locking mechanism. In order to remove the door and access the safe contents, the safe must have been unlocked. Further, much of the damage to the safe was sustained with the door in an open position. Thus, the damage to the safe is inconsistent with forced entry." In reaching this conclusion, Mr. Fabbroni conducted an "experiment" with a more recent model of the safe in question. His report notes that although there are differences between the models, they are not material: "For the purposes of the testing conducted the safe in the

exemplar would produce identical results. In fact, an assessment of the differences between the two suggested should have been easier to reach the exemplar."

[4] The evidence of the plaintiffs is that the safe was locked when they left it and that only they knew the combination. If the safe door was open when it was removed from the safe, then the logical inference is that the safe was left open or that the burglar or burglars had the combination. Both scenarios could lead the jury to the further logical inference that the plaintiffs were complicit in the burglary. This expert evidence is therefore significant.

[5] Mr. Romano challenged the evidence of each of these engineers. He argued that neither of these engineers by education or experience is qualified to provide expert evidence in this case and challenged the necessity and neutrality of their evidence. At the conclusion of the *voir dire* and argument, I ruled that both witnesses were qualified as experts in the field of mechanical engineering and able to give opinion evidence in respect of the ways and means by which the door was removed from the safe. These are the reasons for my ruling.

[6] In making his argument, Mr. Romano relied on a number of authorities. He cited Sopinka et al, The Law of Evidence in Canada (2nd Edition – 1999) at page 623:

> The expert's usefulness in this respect is circumscribed by the limits of his or her own knowledge. Before a court will receive the testimony on matters of substances, it must be demonstrated that the witness possesses special knowledge and experience going beyond a trier or fact. The test of expertise so far as the law of evidence is concerned is skill in the field in which the witness's opinion is sought.

[7] Mr. Romano emphasized the gatekeeper role of the trial judge, relying especially on the language of T. Ducharme J. in *Dulong v. Merrill Lynch Canada Inc.* (2006), 80 O.R. (3d) 378 at paragraph 9:

> There is no question that, in civil cases at least, the path of least resistance in matters such as these seems to be to admit the [page384] evidence and then compensate for any of its weaknesses by attaching less weight to the opinion. But such an approach is an abdication of the proper function of a trial judge and was explicitly rejected by Binnie J. in R. v. J. (J.-L.), [2000] 2 S.C.R. 600, [2000] S.C.J. No. 52, at p. 613 S.C.R.:
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> > [t]he Court has emphasized that the trial judge should take seriously the role of "gatekeeper". The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility. Of course, this gatekeeper function directly collides with the general requirement that the parties to an action must be afforded the opportunity to lead the most complete evidentiary record consistent with the rules of evidence. This fundamental tension can only be resolved by the careful and consistent application of the rules of evidence.

[8] There is a renewed emphasis on the gatekeeper role of all judges, most recently reinforced by Justice Stephen Goudge in the *Report of the Inquiry into Pediatric Forensic Pathology in Ontario* (2009). At volume three of the report, Goudge J.A. notes at page 477:

> The trier of fact must determine the ultimate reliability of any admitted evidence, including expert evidence. The question is whether the law of evidence requires the court, as gatekeeper, to insure that evidence proffered as scientific opinion meets a minimum threshold of reliability sufficient to warrant consideration by the trier of fact. In my view, the answer to that question is clearly in the affirmative.

[9] Recommendation 131 of the Report, at page 496, provides:

> In determining the threshold reliability of expert scientific evidence, the trial judge should assess the reliability of the proposed witness, the field of science, and the opinion offered in the particular case. In doing so, the trial judge should have regard to the tools and questions that are most germane to the task in the particular case.

[10] Goudge J.A. discussed the two methods currently in use by trial courts in determining the admissibility of expert evidence, at page 497:

> One method is for counsel to provide a summary of the proposed evidence as the basis for the judge's decision. That summary might consist of a "will-say" statement, the expert's report, and/or the testimony given at the preliminary hearing. Jurisprudence has encouraged the adoption of this approach where additional oral evidence is not necessary to resolve the admissibility issues. The second method involves the hearing of evidence, including that of the proposed expert witness, before a decision is made whether to admit the evidence. If the debate is confined to the particular witness's qualifications or expertise to give evidence, that *voir dire* often takes place in the presences of the jury, where the *voir dire* is more extensive, and the expert's ultimate opinion will be referred to, the jury will generally be excluded.

[11] Mr. Zarek proposed that the first method be used to assess the evidence of these witnesses. Mr. Romano objected that there ought to be cross-examination. I issued the following ruling:

> Mr. Romano has advised that he means to challenge the qualifications of the proposed expert proffered by Mr. Zarek. I have read the reports of the proposed experts and their CV's. I have also read the case brief provided by Mr. Zarek.
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> The issue of how to deal with such an objection is delicate. Yesterday I said that a *voir dire* in the absence of the jury would take place. I believe that the challenge goes beyond qualifications and will involve the experts' opinions. The Goudge inquiry in Volume 3 at page 497 recommended that "Where the *voir dire* is more extensive and the expert's ultimate opinion will be referred to, the jury will generally be excluded." I am taking that advice.

[12] As a result, the examinations and cross-examinations of the experts took place in the absence of the jury.

[13] The four part test for determining the admissibility of expert evidence is set out in the decision of the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 S.C.R 9 as relevance, necessity in assisting the trier of fact, the absence of any exclusionary rule, and a properly qualified expert.

[14] Mr. Romano conceded that the evidence of the proposed experts was relevant. He seemed to concede that the evidence was necessary in the sense contemplated in the cases but, in oral argument, seemed to resile from his position. He conceded that there was no applicable exclusionary rule and instead focused on qualifications. He also launched a collateral attack on Mr. Fabbroni's neutrality. These issues will be addressed in turn.

Necessity

[15] The concept of necessity has a special meaning. As noted by T.L. Archibald and Heather L. Davies in "Law, Science and Advocacy: Moving Towards A Better Understanding Of Expert Scientific Evidence In The Courtroom", in *Annual Review of Civil Litigation*, 2006 (Toronto: Thomson Carswell, 2007) at pages 12 and 13:

> *Mohan, supra*, explains the necessary component as "necessary in the sense that it would provide information which is outside the experience and knowledge of a judge or jury". But to be necessary, expert evidence must be more than simply "helpful". It must provide the trier of fact with the ability to draw inferences that *could not* be made without the expert's assistance."

[16] The authors also cited the Court of Appeal's decision in *R. v. K. (A.)* (1999), 45 O.R. (3d) 641, which "highlighted a number of questions that judges should consider when assessing the necessity of proposed expert evidence:

(a) whether the expert opinion will enable the trier of fact to appreciate the technicalities of a matter at issue;
(b) whether the evidence will provide information that is likely to be outside the experience of the trier of fact;
(c) if the trier of fact is unlikely to form a correct judgment of the assistance of the expert evidence?"

[17] The Court of Appeal in *R. v. K. (A.)* also required the trial judge to consider whether the need for the evidence was sufficient to overcome its potential prejudicial affect.

[18] In my opinion the expert evidence in this case meets the test of necessity. Neither I as a trial judge nor the jury as the triers of fact have the technical knowledge to interpret the damage to the safe that would allow us, as lay people, to draw reasonable conclusions about how the door came to be removed from the safe. While the anticipated expert evidence supports the theory of the defendant, it is not prejudicial in a way that could not be overcome by contrary evidence provided by the plaintiffs. The decision whether to lead such evidence is, of course, in the hands of the plaintiffs.

Qualifications

[19] Archibald and Davies, *supra*, deal with the question of a properly qualified expert in general terms:

> The proposed evidence must come from a properly qualified expert. The expert must have "specialized knowledge" that goes beyond the trier of facts knowledge. The "specialized knowledge" does not, however, have to come from formal academic training....
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> More recently, *B.M.* (1998), 42 O.R. (3d) 1 (C.A.) at 18 confirmed the conclusion that the lack of practical experience or formal training/writing is not an automatic bar to admissibility in all cases. Any such weakness may go to weight. In most cases, however, formal academic training is at the core of the proposed expert's qualifications.
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> Although a formal academic training or practical experience is not a pre-requisite, there must be evidence of a "specialize knowledge". (page 18)

[20] Mr. Romano relies heavily on *Dulong v. Merrill Lynch Canada Inc.*, *supra*, where T. Ducharme J. stated at paragraphs 20 and 21:

> How the witness acquired that "special" or "peculiar" knowledge is not the central issue at this point. Rather the issue is whether the witness does, in fact, have the "special" or "peculiar" knowledge. Thus one can acquire the necessary knowledge through formal education, private study, work experience or other personal involvement with the subject matter. In some cases, the expertise will require formal study, for example, evidence of medical experts. Other areas of expertise can be developed in less formal ways. Thus, in Rice v. Sockett, [1912] O.J. No. 49, 27 O.L.R. 410 (C.A.), Falconbridge C.J. stated at p. 413 O.L.R.:
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> > The derivation of the term "expert" implies that he is one who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation. Hence, one who is an old hunter, and has thus had much experience in the use of firearms, may be as well qualified to testify as to the appearance which a gun recently fired would present as a highly-educated and skilled gunsmith.
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> When assessing the qualifications of a proposed expert, trial judges regularly consider factors such as the proposed witness's professional qualifications, her actual experience, her participation or membership in professional associations, the nature and extent of her publications, her involvement in teaching, her involvement in courses or conferences in the field and her efforts to keep current with the literature in the field and whether or not the witness has previously been qualified to testify as an expert in the area.

[21] T. Ducharme J. ultimately ruled against the proffered expert witness, a lawyer, on the basis that his resume "discloses no experience working for any brokerage firm in any capacity", "no expertise in the details of day-to-day retail brokerage compliance, accounts provision, counter operations, account trading or other procedures." He was therefore not qualified: "While Mr. Malcomson undoubtedly has expertise with respect to various aspect of the securities industry, he does not have the requisite "special" or "peculiar" knowledge about the retail brokerage industry to qualify him for the purpose for which he was tendered." (paragraph 26)

[22] T. Ducharme J. further noted that in respect of the matters for which the expert evidence was proffered, "this court does not require expert evidence to assist it with above matters. Opinion evidence is not required to determine what discussions took place between Mr. Miller and Mr. Dulong etc." (paragraph 29). He added: "Finally both the tenor and substance of the report are objectionable as it consists of Mr. Malcomson arguing the facts and generally advocating his client's position with respect to them throughout – similar to what one would expect from counsel's closing argument" (paragraph 30). In effect, the decision is a good example of the court's reluctance to accept expert evidence on the "ultimate question" particularly where the trial judge, in that case sitting alone, had no need of expert evidence. It is therefore distinguishable form this case.

[23] Mr. Romano interpreted the reference to "special" or "peculiar" knowledge as requiring more than mere knowledge or experience in mechanical engineering. He made much of the fact that Ms. Bradley had only worked on one other safe, and that it was a fire-rated floor safe and not a wall safe. Mr. Fabbroni had not encountered a safe in his forensic engineering practice. Neither of the witnesses had taken courses relating to safes, assuming that there are such things, and neither had attempted to contact individuals who might have more specialized knowledge in relation to safes, including the police and safe manufacturers.

[24] In my opinion such a narrow definition of expertise is not required by the *Mohan* rules in order for an expert to be qualified to give evidence that meets the test of necessity, noted above. Mechanical engineering is about the properties of various materials and the application of forces and loads to them. It studies the failure of various types of materials and structures under stress. A mechanical engineer qualified by a professional designation and forensic experience is capable of giving evidence on the issues in this case after study of the safe, as was undertaken by both experts. Both experts testified that the safe in question was a simple mechanical structure and special technical expertise was not required for them to determine the way in which the door was removed from the safe.

Neutrality

[25] During the cross-examinations it became clear that there had been some collaboration between Ms. Bradley and Mr. Fabbroni. Mr. Romano argued that this tainted Mr. Fabbroni and that he thereby lost his neutrality, which is essential in an expert witness, citing the decision of E.M. MacDonald J. in *Alfano v. Piersanti*, [2009] O.J. No. 1224 at paragraphs 6 and 7:

> I accept this as a correct statement of the role of an expert. The court expects objectivity on the part of the expert. In other words, he or she cannot "buy into" the theory of one side of the case to the exclusion of the other side. To do so, poses the danger that could taint the court's understanding of the issues that must be decided with impartiality and fairness to both sides. The fundamental principle in cases involving qualifications of experts is that the expert, although retained by the clients, assists the court. If it becomes apparent that an expert has adhered to and promoted the theory of the case being advocated by either Plaintiffs or Defendants, he or she becomes less reliable and is not an expert in the way that the role has been defined in the recent and well known jurisprudence.
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> Before I leave the topic of the proper role of an expert, I refer to Farley J's decision in *Bank of Montreal v. Citak,* 104 A.C.W.S. (3d) 100. At paragraph [5] in his reasons for judgment, he said the following:
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> > Experts must be neutral and objective, to the extent that they are not, they are not properly qualified to give expert opinions (citations deleted). To the extent that Mr. Hill has merely used the views of Mr. Citak as to the state of affairs and based his opinion on these views, Mr. Hill is building on a foundation of sand, not rock.

[26] In his evidence, Mr. Fabbroni stated that before meeting Ms. Bradley he came to his own conclusion that the door was open before it was removed from the safe. When he met her in June or July, the purpose for their meeting was to discuss ways in which the conclusions they had reached could be tested. Ms. Bradley was present later when Mr. Fabbroni carried out the tests or experiments on an exemplar safe. It is not clear to me that communication between experts necessarily carries with it a taint of bias.

[27] In my opinion the complaints about neutrality in this case should be best dealt with in cross-examination with the result going to weight. It would take a palpably partisan approach on the part of a purported expert witness to result in outright disqualification, and that was not present here.

[28] I qualified the expert witnesses for the reasons set out above.

Justice P. Lauwers

Released: June 2, 2009