

ANATOMY OF A TRIAL: A DEEPER DIVE INTO JURY TRIALS

INSURANCE LAW

The Admissibility of Expert Accident Reconstruction Evidence

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You have probably read and heard many times in this course that preparation is key. Perhaps nowhere is that piece of advice more valuable than when it comes to arguing a *voir dire* in the middle of a trial. Waiting for the issue to come up during the trial to prepare to argue a motion, should be avoided. When preparing for trial, it is best to have a brief with the basic case law, preferably from the Court of Appeal or higher, on any potential issues that may come up by way of a motion. Below, is a sample of what could be in that brief if you anticipate the other side will object to the admissibility of a demonstrative aid, such as an animation reconstructing an accident. If you have support back in the office or you have time, it is best to prepare a very brief factum for the Court which sets out the law and the evidence supporting marking the demonstrative aid an exhibit.

A. GENERAL TEST FOR ADMISSIBILITY OF EXPERT OPINION EVIDENCE

The Ontario Court of Appeal in *R. v Shafia* 2016 ONCA 812 (leave to appeal dismissed; *Hamed Mohammad Shafia v. Her Majesty the Queen*, 2017 CanLII 20378 (SCC)) summarized the two part test for the admissibility of expert opinion evidence outlined in the leading Supreme Court of Canada decisions, including *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (CanLII), [2015] 2 S.C.R. 182 and *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9.

(1) The party must first establish the threshold requirements of admissibility discussed in *R. v Mohan*:

- (a) relevance;
- (b) necessity in assisting the trier of fact;
- (c) the absence of any exclusionary rule;
- (d) a properly qualified expert.

(2) The trial judge must then balance the potential risks and benefits of admitting the evidence to decide whether the potential benefits justify the risks.

B. ADMISSIBILITY OF EXPERT ACCIDENT RECONSTRUCTION OPINION EVIDENCE (REPORTS AND VIDEO EVIDENCE)

Taylor v. Sawh, 2000 CanLII 5652 (ON CA)

The Ontario Court of Appeal in *Taylor v. Sawh*, 2000 CanLII 5652 (ON CA) provided guidance on the application of the two part test to admit expert accident reconstruction opinion evidence.



Background Facts

The issue at trial was to determine whether the subject accident occurred on the Plaintiff's side of the road, and therefore the Defendant is the liable party, or whether the accident occurred on the Defendant's side of the road and therefore the Plaintiff is the liable party.

The Defendants wanted to admit expert evidence of the Officer/Constable who attended the scene and provided an accident reconstruction report opining that the Plaintiff first hit a snow bank and veered into the Defendant. In other words, they wished to admit his opinion as to the point of impact.

The trial judge applied the test in *R. v Mohan* and held that the Officer could give evidence on his observations at the scene however he could not give his opinion as to the point of impact. The trial judge held properly that the Officer was a qualified expert and no exclusionary rule applied, however he excluded such evidence on the grounds that the evidence was not necessary because there were two other experts who would testify on the point of impact, on the grounds of relevance in that the prejudicial effect outweighs its probative value, and on the grounds that the Officer was not an engineer.

The Defendants appealed.

Law – Ontario Court of Appeal

In short, the Ontario Court of Appeal agreed that the trial judge erred in their application of the test/requirements. The Court of Appeal however dismissed the appeal on the grounds that there was no substantial wrong or miscarriage of justice despite the errors.

The Court of Appeal summarized the guidance in *R. v Mohan* on the criterion of “necessity”:

Necessity refers to information that is likely to be outside the experience and knowledge of the jury. The opinion of a qualified expert does not become unnecessary simply because there may be other, even other more qualified experts, who will be testifying at the trial. The same understanding of necessity applies in both criminal and civil cases.

The Court of Appeal also summarized the guidance in *R. v Mohan* on the criterion of “relevance”, and part two of the test – balance of probative value versus prejudicial effect:

(a) Relevance is a threshold requirement, decided by a Judge as a question of law, where the judge considers whether there is logical relevance of the opinion of the expert to the evidence.

(b) The trial judge then engages in cost benefit analysis of whether the value is worth what it costs (i.e. effect on the trial process). Prejudicial effect outweighs probative



value if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that it affects the trier of fact, particular a jury, for example: dressed up scientific language which the jury does not easily understand through a witness with impressive antecedents, may be accepted by a jury as being virtually infallible and having more weight than it deserves. No such concerns were raised with the Officer's evidence; his opinion was relatively straight forward.

Lastly, the court of appeal held that the fact that Officer was not an engineer is not a basis for excluding his evidence. A person can become an expert motor vehicle accident reconstructionist through either experience in the police force, or obtaining an engineering degree recognized by a college or university.

Holding – Ontario Court of Appeal

As briefly mentioned above, the Court of Appeal dismissed the appeal despite the errors of the trial judge. The court of Appeal held that there was no substantial wrong or miscarriage of justice because of the exclusion of the officer's opinion:

- The Officer provided opinion evidence;
- The Officer described himself as an accident investigator, accident reconstructionist;
- The Officer gave extensive evidence regarding his observations;
- The Jury heard evidence about the point of impact from highly qualified defence expert based on the officer's testimony; and
- The Officer referred to the defence theory as the police theory and actually told the jury that the police report put the impact in the (southbound lane) Defendant's lane.

Greer v. Kurtz, 2008 CanLII 37056 (ON SC); upheld on appeal, 2009 ONCA 865

Greer v. Kurtz is an Ontario Superior Court decision which engaged specifically with the issue of the admissibility of video reconstruction evidence.

Factual Background

Two videos were by the Plaintiff: (1) accident reconstruction video based on various experts' evidence, and (2) video demonstrating that if confronted with an oncoming car, the driver should try and avoid the impact.



Criterion/Safeguards for Admitting Video Reconstruction Evidence

First, the court must be satisfied that the witness is an expert. In this case, a *voir dire* was held and the witness was held out to be an expert in reconstruction of automobile accident scenes.

Before allowing video evidence, the court must be satisfied that the opinion evidence is acceptable (i.e. accurate and authentic). The court noted that the expert evidence must be based on verifiable facts and not conjecture. The court listed the following points that must be proven to admit a computer generated videographic animation:

- (1) From the testimony from the accident reconstruction expert that the data points measured at the accident site were accurately recorded.
- (2) From the testimony of the person who entered those data points into the program that they were entered correctly.
- (3) That the algorithms used in the form and motion software validly apply the law of physics and validly render accurate images of the scenes depicted in the exhibit.
- (4) Competent opinion testimony from the accident reconstruction expert that any additional modifications to the exhibit, made after the computer's first renderings, are valid.
- (5) Testimony that the experts are familiar with the demonstrative exhibit.
- (6) A showing that the exhibit will aid the trier of fact in understanding the expert's testimony."

Lastly, the court must be satisfied that the evidence will be helpful to the court, meaning that the jury cannot easily draw the necessary inferences without the evidence. In other words, such evidence will be allowed if it will assist the trier of fact in arriving a just and proper decision.

Holding

The court did not allow the second video demonstrating that a party should avoid an oncoming car was to be admitted into evidence because it was based on conjecture and was of no assistance to the court.

The court admitted the accident reconstruction video. All six safeguards listed above were met because the video was based photos taken at the time of the accident, studies were done on vehicles of a certain weight and speed, photos demonstrating the position of the vehicles after the impact, the expert evidence of another witness on the speed of the vehicles; and the place of impact and final resting place was accurately reflected in the video.