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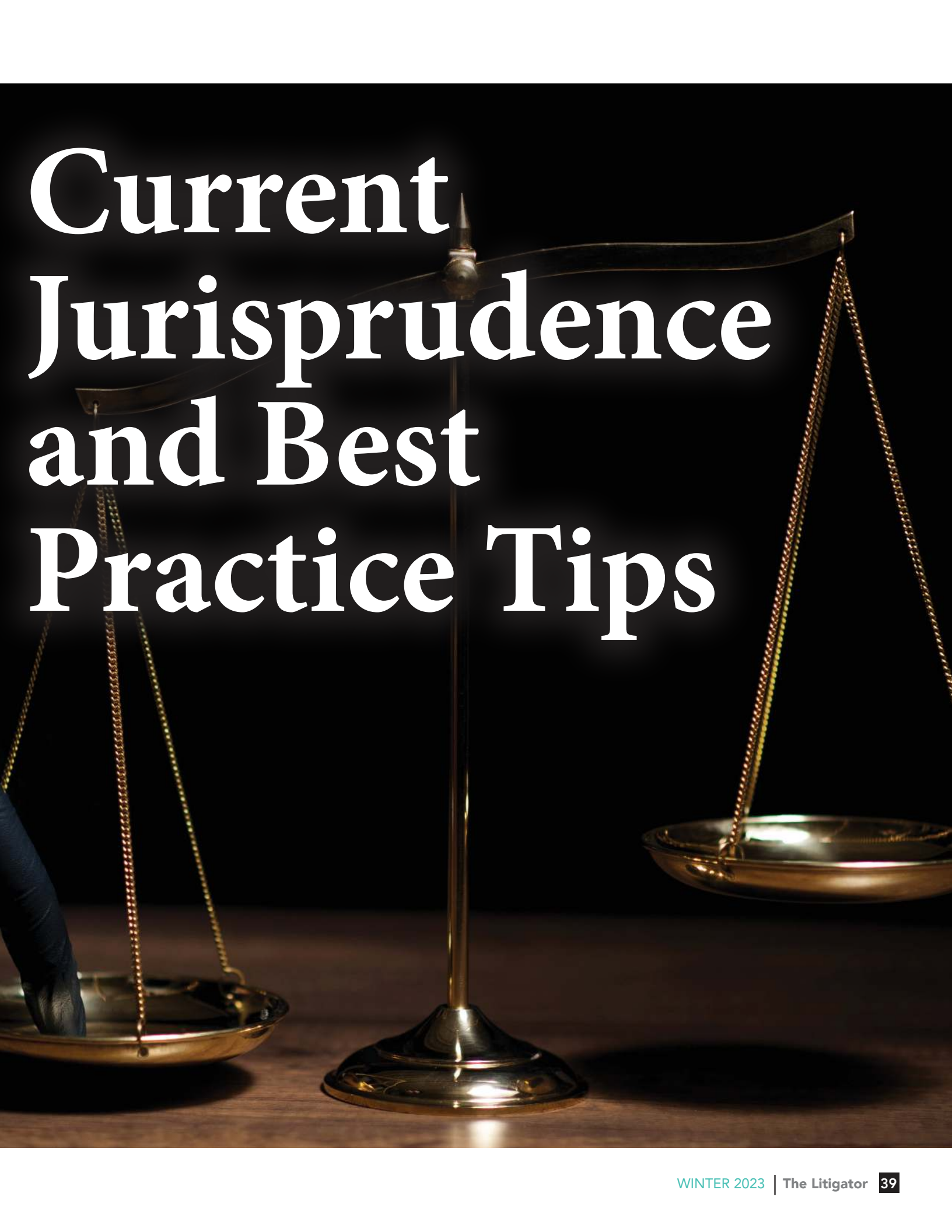
BY JEREMY SYRTASH

THE BIAS EXPERT:

THE LAST THING ANY COUNSEL WANTS IS FOR THEIR OWN EXPERT TO BE EXCLUDED FROM GIVING VIVA VOCE EVIDENCE AT TRIAL, OR AT THE VERY LEAST, HAVE THE CREDIBILITY OF THEIR OWN EXPERT IMPERILED DURING CROSS EXAMINATION.



Current Jurisprudence and Best Practice Tips



Introduction

One of the most significant yet sometimes overlooked issues facing trial counsel is how to proceed with a biased expert. Whether that expert has been retained for your client, or is on for the opposing party, counsel must be extremely strategic in how they proceed. The last thing any counsel wants is for their own expert to be excluded from giving *viva voce* evidence at trial, or at the very least, have the credibility of their own expert imperiled during cross examination. On the other hand, if an opposing party's expert is biased, then what can be done to expose the bias and protect your client's interests? A proper understanding of the current jurisprudence and practice tips about biased experts will assist counsel in prosecuting their cases more efficiently.

This article will set out the jurisprudence on the dangers of a biased expert and provide some guidance on best practice tips.

The Law

Expert evidence carries with it the risk that a jury will inappropriately defer to the expert's opinion rather than carefully evaluate it.¹ There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive credentials, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.² Accordingly, expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance.³ A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion

evidence and should not be permitted to do so.

The test for admissibility of expert evidence consists of two steps.⁴ First, the proponent of expert evidence must support that four conditions are met in order to establish its admissibility: relevance; necessity in assisting the trier of fact; absence of an exclusionary rule (e.g. hearsay); and a properly qualified expert. This includes the requirement that the expert be willing and able to fulfill the expert's duty to court and provide evidence that is impartial, independent and unbiased.⁵ The second stage of the inquiry requires the trial judge, in a gatekeeper role, to determine that the benefits of admitting the evidence outweigh its potential risks, considering such factors as legal relevance, necessity, reliability and absence of bias.⁶ An expert's independence and impartiality should also be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence.⁷

One of the most informative appellate authorities on the role of a trial judge when faced with a biased expert is the 2017 Court of Appeal Decision in *Bruff-Murphy v. Gunawardena*.⁸ There, the plaintiff claimed to have suffered soft tissue damage, anxiety and depression when her vehicle was rear-ended by the defendant's motor vehicle. A psychiatrist was retained by the defendants to perform an independent medical examination of the plaintiff and prepare a report. Despite having serious reservations about the defendants' psychiatrist's methodology and independence, the trial judge qualified him as an expert. However, when the psychiatrist testified, it became apparent that he had crossed

the line and became a partisan advocate for the defendant. The psychiatrist's report and his testimony attacked the plaintiff's credibility. More specifically, the expert had examined the plaintiff before reviewing her medical records, and had then gone through the medical records looking for discrepancies between what she told him and what was in the records. Those discrepancies formed the largest portion of his report. Despite this, the trial judge did nothing to exclude the defendant psychiatrist's opinion evidence or alert the jury to the problems with his testimony.

In overturning the jury verdict and ordering a new trial, the Ontario Court of Appeal in *Bruff-Murphy* found that the trial judge failed to properly discharge his gatekeeper duty by not excluding, in whole or in part, the biased expert's evidence. Most significantly, the Court also made clear that a trial judge's role as gatekeeper is not exhausted once a particular expert has been qualified to testify on the basis of their qualifications and the contents of their report:

*"...the trial judge must not act as if she were functus. The trial judge must continue to exercise her gatekeeper function. After all, the concerns about the impact of a non-independent expert witness on the jury have not been eliminated. To the contrary, they have come to fruition. At that stage, when the trial judge recognizes the acute risk to trial fairness, she must take action."*⁹ [Emphasis Added]

The Court in *Bruff-Murphy* also gave specific instructions on what a trial judge should do when faced with a biased expert:

“Given this ongoing gatekeeper discretion, the question remains of what, as a practical matter, the trial judge could or should have done in this case. **His first option would have been to advise counsel that he was going to give either a mid-trial or final instruction that Dr. Bail’s testimony would be excluded in whole or in part from the evidence.** Had he taken that route, he would have received submissions from counsel in the absence of the jury and proceeded as he saw fit. **Alternately, he could have asked for submissions from counsel on a mistrial, again in the absence of the jury, and ruled accordingly.** In the event that he had to interrupt Dr. Bail’s testimony mid-trial, he would have had to consider carefully how best to minimize the potential prejudicial effect of the

interruption from the respondent’s perspective.

The point is that the trial judge was not powerless and should have taken action. The dangers of admitting expert evidence suggest a need for a trial judge to exercise prudence in excluding the testimony of an expert who lacks impartiality before those dangers manifest”.¹⁰

...

...This court has a responsibility to protect the integrity of the justice system. This is not a “no harm, no foul” situation. No doubt, another trial will be costly and time consuming, but it is necessary because the defence proffered the evidence of a wholly unsuitable expert witness.¹¹ [Emphasis Added]

A more recent appellate authority on the role of a trial judge when faced with a biased expert is the 2021 Ontario Court of Appeal decision in *Parliament v. Conley*.¹² In that medical malpractice case, it was alleged that the defendant physicians failed to diagnose the minor plaintiff’s hydrocephalus in a timely matter, thereby causing permanent brain damage and cerebral palsy. At issue in the case was whether or not one of the defendant physician’s told the minor plaintiff’s mother to take the child to the hospital and whether she had followed their advice. During cross-examination by plaintiffs’ counsel, it became apparent that the defendants’ sole standard of care expert proceeded on the assumption that the minor plaintiff’s mother was untruthful and he did not even consider her evidence that she was never told to take the



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minor plaintiff to the hospital. Despite this, the trial judge failed to caution the jury about the expert's impugned evidence both mid-trial and during the jury charge. The action was ultimately dismissed by the jury.

The plaintiffs appealed and sought new trial on basis that the defendant physicians' sole expert on standard of care gave evidence going beyond the scope of his expertise, failed to demonstrate impartiality, and usurped the proper role of jury in opining on core credibility and factual questions. In overturning the jury's verdict and ordering a new trial, the Ontario Court of Appeal in *Parliament* found that the trial judge erred in failing to advise

the jury that it could not consider the defendant physicians expert evidence on the respective credibility and reliability of the parties:

"It is not possible to assess with any certainty the impact of Dr. Bruce's evidence. That, however, misses the point, which is whether there has been a miscarriage of justice in this case. Given the centrality of credibility in this case, and the absence of any caution about Dr. Bruce's evidence (apart from summarizing the appellants' cross-examination of Dr. Bruce), there is a very real possibility that Dr. Bruce's evidence on credibility and

reliability played a significant role in the jury's decision to find that the standard of care was met by both doctors during the October and November visits.

As Hourigan J.A. wrote in *Bruff-Murphy* at para. 72, "[t]his court has a responsibility to protect the integrity of the justice system. This is not a 'no harm, no foul' situation." The sole witness for the respondents on the issue of standard of care exceeded the admissible scope of his evidence and opined on the credibility of the witnesses, which was highly prejudicial to the appellants. The impugned evidence tainted the jury's verdict and the verdict must be set aside."¹³ [Emphasis Added]

The Court of Appeal in *Parliament* also emphasized that a trial judge has the responsibility to act when faced with a biased expert, even when there have been no objections made by opposing counsel:

"The failure to so instruct the jury was a serious error on the part of the trial judge, despite the fact that the appellants' counsel did not ask for either a mid-trial or a closing instruction. In this case, the trial judge should have delivered a prompt and clear mid-trial instruction during Dr. Bruce's testimony and reiterated this instruction in the final charge. I recognize that both steps might not be necessary in all cases, but it was necessary in this case, given the highly prejudicial nature of the impugned aspects of Dr. Bruce's evidence to the appellants' case and the fact that the jury heard a

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great deal of additional evidence on subjects other than the standard of care after he testified.”¹⁴ [Emphasis Added]

Important Lessons from *Bruff-Murphy* and *Parliament*

These aforementioned appellate authorities make clear not only the consequences of a biased expert at trial, but also provide guidance on the tools a trial judge has when faced with one. However, what can counsel do to ensure that what happened in *Bruff-Murphy* and *Parliament* doesn't happen to their own expert? The simplest answer to this question is as follows: **under no circumstances should one's own expert opine on the credibility of any of the parties.** As counsel, it is your responsibility to ensure that the expert's report does not prefer, or accept as true, one side's evidence over the other. If faced with a “*he said, she said*” situation that impacts an expert's opinion, that expert must acknowledge in the report that there are discrepancies in the evidence and he is not the trier of fact.

A good example is when there is a disagreement on the issue of informed consent. A physician has a duty to explain the risks, benefits and alternatives to a patient before proceeding with a medical procedure.¹⁵ This should also be documented in the medical records. However, a situation may arise where, in the absence of any documentation in the medical records, the physician claims informed consent was obtained but the plaintiff claims otherwise. What is an expert opining on the standard of care supposed to do in this situation?

In my view, the expert should state in his report that although there are discrepancies in the evidence, if the

Court ultimately determines that no conversation of informed consent took place, then defendant physicians' action fell below the standard of care. This way, the expert proffers his opinion without making a determination of credibility, which is left to the trier of fact. This is of course just an example as each case is fact specific.

On the other hand, what does counsel do when faced with a biased defence expert? In my view, if the bias is patently obvious from the expert's report, a concern should be raised to the trial judge at the qualification stage. Submissions can then be made that the expert is biased, and is therefore not a properly qualified expert to give evidence.¹⁶ The trial judge, as gatekeeper, has the ability to exclude the expert's evidence right at the outset. If the expert's bias only becomes apparent during his evidence in chief, counsel should not only attempt to expose the bias during cross examination but should also ask the trial judge to issue a mid-trial caution about the bias to the jury. The same concerns should also be raised on the record when making submissions to the trial judge before the jury charge is given. Even if it is a judge-alone trial, concerns about the expert's impartiality should be put on the record throughout the trial. Regardless of what the trial judge rules, putting these concerns on the record may allow for future appellate review of the case, as was the case in *Bruff-Murphy* and *Parliament*.

Conclusion

As demonstrated in *Bruff-Murphy* and *Parliament*, the finding of one party's expert to be biased by the Court can be fatal to a case. As such, counsel must proceed cautiously and provide clear

instructions to their expert when they are writing their reports. An expert must never opine on the credibility of the parties, nor make any findings of fact. When there are discrepancies in the evidence, one's expert must be able to opine on the case without crossing the line into advocacy. Additionally, when faced with an opposing party's biased witness, counsel must remain on their feet at the outset of trial and do everything to expose the bias. Furthermore, putting concerns on the record during trial will also assist in either striking the evidence of the biased expert, in whole or in part, or at the very least, allow a potential avenue for appeal in the future.



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NOTES

¹ *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, at para. 17

² *Ibid*

³ *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, at para. 2

⁴ *R. v. Abbey*, 2017 ONCA 640 at para 48.

⁵ *Ibid*

⁶ *R. v. Abbey*, 2017 ONCA 640 at para 48.

⁷ *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, at para. 2

⁸ *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502.

⁹ *Ibid* at para 63

¹⁰ *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502 at pars 67-68

¹¹ *Ibid* at para 72

¹² *Parliament v. Conley*, 2021 ONCA 261

¹³ *Ibid* at paras 68-70

¹⁴ *Parliament* at para 58.

¹⁵ *Legal Liability of Doctors and Hospitals in Canada*, Picard & Robertson, 4th ED (Toronto: Carswell, 2007) at pgs. 150-151

¹⁶ *R. v. Abbey*, 2017 ONCA 640 at para 48.