Developed by Barbara Legate, Legate & Associates.
Distributed by TARAN VIRTUAL ASSOCIATES INC., Toll free: 1-877-262-7762
Updated as of May, 2015

Court File No.:

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Plaintiff

- and -

Defendant

PLAINTIFF'S STATEMENT OF LAW

ADMISSIBILITY AND QUALIFICATION OF EXPERT EVIDENCE

PART I - OVERVIEW:

1. Expert or opinion evidence is *prima facie* inadmissible unless it meets four specified criteria known as the Mohan criteria. It must be relevant, necessary to assist the trier of fact, not be subject to any exclusionary rule and be delivered by a properly qualified expert.

2. Applying those criteria, the Ontario Court of Appeal in *R. v. Abbey* set out a two-stage process for determining whether and to what extent an expert's testimony is admissible:

> Stage One:
>
> Pre-conditions to admissibility of the evidence must be established; if they are not, the proposed expert may not testify. Those are:

© 2015, Barbara Legate, Legate & Associates and Taran Virtual Associates Inc.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, except that the purchaser of this publication (who for the purposes of copyright only, shall be deemed to be the individual(s) named on the invoice and/or the CD(s)) shall be entitled to copy, modify and use this publication solely for his or her own legal practice. This publication is designed to provide accurate and authoritative information for use as a precedent by lawyers. This publication is not intended to render legal advice. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

1. The proposed opinion must relate to a subject matter that is properly the subject of expert opinion evidence;

2. The evidence is logically relevant;

3. The expert is qualified in that subject matter; and

4. There is no exclusionary rule respecting the testimony.

Stage Two:

Determine if the proffered evidence is sufficiently beneficial to the trial process to warrant its admission. This requires a cost-benefit analysis that is the trial judge's gatekeeper role. The components are:

1. Legal relevance, i.e. is it sufficiently probative to justify its admission;

2. Reliability of subject matter, methodology used to arrive at the opinion, the expert's expertise, and impartiality and objectivity;

3. Assessment of whether it is worthy of being heard by the jury, (not whether it should be acted upon);

4. Assessment of its cost in terms of
   a) Time, prejudice and potential for confusion;
   b) Necessity to a proper adjudication.

3. The Court clarified in *R. v. Abbey* that the nature and scope of the opinion should be determined by the Court prior to the expert testifying.

4. Under the *Rules of Civil Procedure*, a party who has retained a litigation expert and who intends to call that expert to testify at trial must serve a report at least 90 days before pre-trial. A responding report must be served 60 days before pre-trial. A supplementary report must be served 30 days before trial. The report must be signed and set out the expert's qualifications and the substance of his or

her proposed testimony. An acknowledgement of the expert's duty to the Court must be signed and served with the report.

5. A participant expert, who has not been engaged by or on behalf of a party may give opinion evidence without complying with Rule 53.03 provided the opinion evidence to be given is based on their observation of or participation in the events at issue and the opinion was formed in the ordinary exercise of his or her skill.

6. Similarly, Rule 53.03 does not apply to the opinion evidence of a non-party expert where the non-party expert has formed a relevant opinion based on personal observations or examination relating to the subject matter of the litigation.

7. Under the *Evidence Act*, a report prepared by a health practitioner is admissible with leave of the Court after 10 days of notice has been given.

8. The time for service of an expert's report may be extended or abridged. Relevant evidence should not be excluded on technical grounds unless it would cause prejudice or undue delay.

9. A defendant will not be permitted to call experts where proper notice had not been given to the plaintiff, and the experts' reports had not been put to the plaintiffs' witnesses.

** END OF SAMPLE **

The remainder of this statement of law contains written submission on this issue and is written like the law portion of a factum.