THE LAW OF EVIDENCE IN CANADA

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5. *The Absence of an Exclusionary Rule*

§12.113 Expert evidence is admissible if it meets the requirements for the reception of opinion evidence and is not barred by another exclusionary evidentiary rule.[281] For example, an expert opinion tendered by the Crown to show that the accused has a propensity to commit a common crime is inadmissible since it contravenes the exclusionary character rule.[282]

§12.114 Some of the leading cases in Canadian jurisprudence concerning the relationship between the expert evidence rule and an exclusionary rule arise in the context of proffered evidence of the accused's disposition or absence of disposition to commit a particular offence. The general character rule provides that the accused's character, in the sense of disposition, can only be adduced by evidence of general reputation in the community.[283] The "distinctive group" exception to the character exclusionary rule applies where "it is shown that the crime is such that it could only, or in all probability would only, be committed by a person having identifiable peculiarities that the accused does not possess."[284] The identification of a "distinctive group" is a precondition of admissibility which must be proven on a balance of probabilities.[285]

§12.115 The development of the law in this area illustrates the application of the *Mohan* criteria on a scientific and principled basis.[286] In *R. v. Robertson*,[287] the accused was charged with the violent murder of a nine-year-old girl. The defence sought to introduce psychiatric evidence that a propensity for violence was not part of the accused's mental make-up. Justice Martin ruled that the opinion evidence was inadmissible:

> In my view psychiatric evidence with respect to disposition or its absence is admissible on behalf of the defence, if relevant to an issue in the case, where the disposition in question constitutes *a characteristic feature of an abnormal group* falling within the range of study of the psychiatrist, and from whom the jury can, therefore, receive appreciable assistance with respect to a matter

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281 *R. v. Morin*, [1988] 2 S.C.R. 345, 66 C.R. (3d) 1, at 25-27, [1988] S.C.J. No. 80 (S.C.C.); *R. v. McMillan* (1975), 7 O.R. (2d) 750, [1975] O.J. No. 2247 (Ont. C.A.), affd [1977] 2 S.C.R. 824, [1977] S.C.J. No. 32 (S.C.C.); *R. v. Garfinkle* (1992), 15 C.R. (4th) 254, [1992] Q.J. no 873 (Que. C.A.); *R. v. Mohan*, [1994] 2 S.C.R. 9, 89 C.C.C. (3d) 402, at 423, [1994] S.C.J. No. 36 (S.C.C.); *R. v. A. (G.R.)* (1994), 35 C.R. (4th) 340, [1994] O.J. No. 2930 (Ont. C.A.).

282 *R. v. Morin*, [1988] 2 S.C.R. 345, [1988] S.C.J. No. 80 (S.C.C.); *R. v. Pascoe* (1997), 32 O.R. (3d) 37, 5 C.R. (5th) 341, at 351-54, [1997] O.J. No. 88 (Ont. C.A.). See Chapter 10, Character Evidence, Chapter 11, Similar Fact Evidence.

283 *R. v. Handy*, [2002] 2 S.C.R. 908, [2002] S.C.J. No. 57, at para. 146 (S.C.C.).

284 *R. v. J. (J.-L.)*, [2000] 2 S.C.R. 600, [2000] S.C.J. No. 52, at para. 38 (S.C.C.).

285 *Ibid.*, at para. 40.

286 See Chapter 10, §§ 10.34-10.41.

287 (1975), 21 C.C.C. (2d) 385, [1975] O.J. No. 1658 (Ont. C.A.), leave to appeal refused [1975] 1 S.C.R. xi, 21 C.C.C. (2d) 385*n* (S.C.C.).

> outside the knowledge of persons who have not made a special study of the subject. *A mere disposition for violence, however, is not so uncommon as to constitute a feature characteristic of an abnormal group* falling within the special field of study of the psychiatrist and permitting psychiatric evidence to be given of the absence of such disposition in the accused. [Emphasis added.][288]

The Supreme Court in *R. v. Mohan* raised the threshold for the admission of expert evidence of disposition:

> Before an expert's opinion is admitted as evidence, the trial judge must be satisfied, as a matter of law, that either the perpetrator of the crime or the accused has *distinctive behavioural characteristics* such that a comparison of one with the other will be of material assistance in determining innocence or guilt.[289] [emphasis added]

§12.116 In *R. v. J. (J.-L.)*,[290] the Supreme Court further circumscribed the admission of evidence of the accused's disposition. The Crown alleged that the accused committed acts of anal penetration of young males under five years old. The defence tendered a physician who was qualified in the fields of psychiatry, sexology and physiology. The proffered opinion evidence was that the accused did not have the propensity to commit the crime, a subject matter falling within the scope of expert evidence. The Supreme Court recognized the "distinctive group" exception to the general rule that the character of the accused, in the sense of disposition to commit or not commit the offence, could only be evidenced by general reputation. The "distinctive group" exception allowing the admission of expert evidence of the accused's disposition would only apply if the personality profile of the perpetrator group had identifiable and distinctive psychological elements in order to differentiate them from the general population.[291]

§12.117 In *R. v. Mohan*,[292] Sopinka J. held that the criteria for admissibility of expert evidence of an accused's disposition are satisfied where the scientific community has developed a standard profile of the offender who commits this particular crime.[293] A standard profile may not be necessary, however, if the personality traits are sufficient to identify distinctive personality traits of the perpetrator with workable precision.[294] Since the class of potential perpetrators of the alleged crime in *R. v. J. (J.-L.)* was not sufficiently distinctive, the Court

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[288] *Ibid.*, at 429-30 (C.C.C.).
[289] [1994] 2 S.C.R. 9, at 37, [1994] S.C.J. No. 36 (S.C.C.).
[290] [2000] 2 S.C.R. 600, [2000] S.C.J. No. 52 (S.C.C.).
[291] *Ibid.*, at paras. 38, 40, 44.
[292] [1994] 2 S.C.R. 9, 89 C.C.C. (3d) 402, [1994] S.C.J. No. 36 (S.C.C.).
[293] *Ibid.*, at 423 (C.C.C.).
[294] *R. v. J. (J.-L.)*, [2000] 2 S.C.R. 600, [2000] S.C.J. No. 52, at paras. 41-45 (S.C.C.).

ruled that the proffered expert evidence was inadmissible as it was barred by the character exclusionary rule.[295]

§12.118 The exclusionary rule against oath-helping may preclude the admission of expert opinion evidence. Justice O'Connor in *R. v. Llorenz* held:

> The rule against oath-helping prohibits the admission of evidence adduced solely for the purpose of proving that a witness is truthful. The rule applies to evidence "that would tend to prove the truthfulness of the witness rather than the truth of the witness's statements" .
>
> The line to be drawn when evidence is considered to be oath-helping is not always clear. There is a distinction to be made between (1) evidence about credibility (i.e. in my opinion the witness is truthful), which is inadmissible and (2) evidence about a feature of the witness's behaviour or testimony, which may be admissible even though it will likely have some bearing on the trier of fact's ultimate determination of the question of credibility.[296]

§12.119 It is the responsibility of the trier of fact to decide the truthfulness of a witness and not the experts. The difficulty arises where an expert's opinion contravenes an exclusionary rule like the rule against oath-helping but the proffered opinion is admissible for a different purpose. For example, in a murder prosecution where an accused causes the death of a spouse and claims self-defence, expert opinion evidence which is restricted to a brief description of the nature and root causes of the conditions known as Battered Women's Syndrome and Post-traumatic Stress Disorder may be admissible. However, where the main effect of the opinion evidence is to convey to the jury the expert's belief in the truthfulness of the witness, the trial judge has a residual discretion to exclude the proffered opinion because it may distort the fact-finding process.[297]

§12.120 In *R. v. D. (D.)*,[298] the Crown alleged that the accused sexually assaulted a five-year-old child by requiring the child to touch his penis on numerous occasions. The complainant did not disclose the allegations for two-and-one-half years. At trial, defence counsel cross-examined the complainant on the delayed disclosure of her complaint and suggested that the allegation was fabricated. The Crown tendered a child psychologist who testified that delayed disclosure did not assist in determining whether a complaint was true or fabricated. Justice Major, for the majority, did not rely upon the exclusionary rule against oath-helping but disposed of the appeal on the sole ground that the proffered opinion was not necessary to assist the jury since the information could be conveyed by an instruction to the jury.

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[295] *Ibid.*, at paras. 30-32, 38-45, 49.

[296] *R. v. Llorenz* (2000), 145 C.C.C. (3d) 535, [2000] O.J. No. 1885, at paras. 27-28 (Ont. C.A.); *R. v. Reid* (2003) 65 O.R. (3d) 723, [2003] O.J. No. 2822, at paras. 45-46 (Ont. C.A.).

[297] *R. v. Llorenz, ibid.*, at paras. 28-32; *R. v. Reid, ibid.*, at paras. 45-47.

[298] [2000] 2 S.C.R. 275, [2000] S.C.J. No. 44, at para. 3 (S.C.C.).

§12.121 Chief Justice McLachlin, in her dissenting reasons, acknowledged that the exclusionary rule against oath-helping barred opinion evidence on the actual credibility of a witness. She reasoned, however, that when the proffered opinion does not directly address the issue of the truthfulness of the witness, that is, it does not express an opinion on whether the complainant was truthful, such evidence may be admissible on the subsidiary issue of delayed disclosure even though the sole relevance of the opinion evidence is the credibility of the witness.[299]

§12.122 There is a danger that the trier of fact will use the evidence for the wrong purpose, that is, to determine the complainant's truthfulness in the circumstances of *D. (D)*. In those cases where the expert evidence is relevant for one purpose but not another, the trial judge must evaluate the proffered opinion and apply the prejudice/probative test. If the trial judge rules that the probative value of the evidence exceeds its prejudicial effect, the trial judge must instruct the jury on the permissible and the impermissible uses of the evidence.[300] Proffered expert evidence that satisfies the reformulated *Mohan* criteria and does not contravene other exclusionary rules of evidence is admissible.

6. A Properly Qualified Expert Witness

§12.123 Expert opinion evidence is admissible to assist the fact-finder to appreciate the facts due to their scientific or technical nature or to form a correct judgment on a matter if ordinary persons are unlikely to do so without the assistance of persons with special knowledge. The expert witness provides a ready-made inference for the trier of fact because the judge or jury do not have the knowledge or experience to draw the required inferences from the evidence presented without assistance.

§12.124 The proffered expert witness must possess special skill, knowledge or experience which is likely to be outside the knowledge or experience of the fact-finder.[301] The expert's usefulness in this respect is circumscribed by the limits of her or his skill, knowledge and experience.

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[299] *Ibid.*, at paras. 19-20, 34; see also *R. v. Marquard*, [1993] 4 S.C.R. 223, at 248, [1993] S.C.J. No. 119 (S.C.C.); *R. v. B. (F.F.)*, [1993] 1 S.C.R. 697, [1993] S.C.J. No. 21 (S.C.C.); *R. v. K. (A.)* (1999), 45 O.R. (3d) 641, at 678, [1999] O.J. No. 3280 (Ont. C.A.); *R. v. Llorenz* (2000), 145 C.C.C. (3d) 535, [2000] O.J. No. 1885, at paras. 33, 34 (Ont. C.A.); *R. v. Reid*, [2003] O.J. No. 3255, at paras. 54-55 (Ont. C.A.).

[300] *R. v. B. (F.F.)*, *ibid.*, at para. 44; *R. v. Llorenz*, *ibid.*, at para. 44.

[301] *R. v. Marquard*, [1993] 4 S.C.R. 233, [1993] S.C.J. No. 119 (S.C.C.); *R. v. C. (L.T.)* (1994), 124 Nfld. & P.E.I.R. 199, [1994] N.J. No. 409 (Nfld. C.A.), leave to appeal refused (1995), 140 Nfld. & P.E.I.R. 90*n*, [1995] S.C.C.A. No. 12 (S.C.C.); *Kozak v. Funk* (1995), 136 Sask. R. 12, [1995]

§12.125 In *Rice v. Sockett*,[302] Falconbridge C.J. stated:

> 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.[303]

§12.126 The proponent of the expert evidence must satisfy the trial judge that the proffered expert witness acquired special or peculiar knowledge through study or experience in respect of the subject matter of the opinion.[304] The witness' expertise must be in the particular field in which the witness' opinion is sought[305] and the expert's evidence should be confined to her or his area of expertise[306] to minimize its potential for misuse or confusion.[307] The admissibility of expert evidence does not depend upon the means by which that skill was acquired. As long as the trial judge is satisfied that the witness is sufficiently experienced in the subject matter at issue, the judge will not be concerned with whether the expertise was derived from specific studies or by practical training, although that may affect the weight to be given to the evidence.[308]

S.J. No. 569 (Sask. Q.B.); *R. v. R. (W.D.)* (1994), 95 C.C.C. (3d) 190, [1994] O.J. No. 2934, at para. 4 (Ont. C.A.). See this chapter, § 12.57.

302 (1912), 27 O.L.R. 410, [1912] O.J. No. 49 (Ont. H.C.J.).

303 *Ibid.*, at 413 (O.L.R.) (quoted from *State v. Davis* (1899), 33 S.E. 449, cited in *Words & Phrases Judicially Defined*, Vol. 3, at 2595). To the same effect, see *R. v. Silverlock*, [1894] 2 Q.B. 766, at 771 (C.C.R.); *R. v. Bunniss*, [1965] 3 C.C.C. 236, at 239, [1964] B.C.J. No. 107 (B.C. Co. Ct.).

304 *R. v. Mohan*, [1994] 2 S.C.R. 9, [1994] S.C.J. No. 36, at para. 27 (S.C.C.); *R. v. Bedford* (2000), 184 D.L.R. (4th) 727, [2000] O.J. No. 887, at paras. 33-44 (Ont. C.A.); *R. v. Chalmers*, [2009] O.J. No. 1254, at para. 79 (Ont. C.A.).

305 *R. v. C. (L.T.)* (1994), 124 Nfld. & P.E.I.R. 199, [1994] N.J. No. 409 (Nfld. C.A.), leave to appeal refused (1995), 140 Nfld. & P.E.I.R. 90*n*, [1995] S.C.C.A. No. 12 (S.C.C.); *R. v. Chan* (1993), 145 A.R. 304, [1993] A.J. No. 1005 (Alta. C.A.). See this chapter, §§ 12.62-12.63 concerning scientific body of knowledge requirement.

306 *R. v. K. (A.)* (1999), 45 O.R. (3d) 641, [1999] O.J. No. 3280, at paras. 103-104, 121-138 (Ont. C.A.). See *R. v. Robinson* (2003), 176 C.C.C. (3d) 23, [2003] B.C.J. No. 1380, at paras. 87-93 (B.C.C.A.), where an expert lacked the necessary expertise to give opinion evidence.

307 *R. v. Llorenz* (2000), 145 C.C.C. (3d) 535, [2000] O.J. No. 1885, at paras. 31, 32 (Ont. C.A.).

308 *R. v. Marquard*, [1993] 4 S.C.R. 233, 85 C.C.C. (3d) 193, at 224, [1993] S.C.J. No. 119 (S.C.C.). *R. v. R. (W.D.)* (1994), 95 C.C.C. (3d) 190, [1994] O.J. No. 2934, at para. 4 (Ont. C.A.); *R. v. Wade* (1994), 18 O.R. (3d) 33, [1994] O.J. No. 543 (Ont. C.A.), revd on other grounds [1995] 2 S.C.R. 737, [1995] S.C.J. No. 51 (S.C.C.); *R. v. Wald* (1989), 94 A.R. 125, [1989] A.J. No. 140 (Alta. C.A.); *R. v. M. (B.)* (1998), 42 O.R. (3d) 1, 130 C.C.C. (3d) 353, at 379, [1998] O.J. No. 4359 (Ont. C.A.).

§12.127 In *R. v. McIntosh*,[309] the Ontario Court of Appeal suggested a test to determine whether a proffered opinion was a proper subject matter for expert evidence:

> [T]he subject matter of his or her expertise is a branch of study in [a discipline] concerned with a connected body of demonstrated truths or with observed facts systematically classified under a common hypothesis operating under general laws [governing the area of expertise].[310]

The Court in *McIntosh* held that simply because a person conducts research in a learned science and lectures at universities on a topic of interest to him or her does not qualify him or her as a forensic expert to testify in court.[311] A witness is probably not qualified to give expert evidence on a subject matter if a witness' knowledge or experience of a subject matter is minimal.[312] There are differing judicial views relating to the minimum qualifications for a forensic expert.

§12.128 In *Johnson v. Milton (Town)*,[313] the Ontario Court of Appeal criticized the trial judge for permitting an accident reconstructionist to testify about a broad range of subjects:

> Permitting experts to give evidence on matters that are commonplace or for which they have no special skill, knowledge or training wastes both time and resources and adds stress to an already overburdened justice system. It is also legally incorrect.[314]

§12.129 There is a distinction between a witness who has the knowledge and expertise in a particular subject matter whose evidence also bears upon a related area of expertise of which the witness has a working knowledge[315] and a generalist who is more knowledgeable than an ordinary trier of fact but lacks a sufficient degree of knowledge, skill or experience in the particular subject matter at issue.[316]

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309 (1997), 35 O.R. (3d) 97, [1997] O.J. No. 3172 (Ont. C.A.).

310 *Ibid.*, at 103 (O.R.).

311 *Ibid.*

312 *R. v. K. (A.)* (1999), 45 O.R. (3d) 641, [1999] O.J. No. 3280, at para. 103 (Ont. C.A.).

313 (2008), 91 O.R. (3d) 190, [2008] O.J. No. 2157 (Ont. C.A.).

314 *Ibid.*, at para. 48.

315 See *R. v. Marquard*, [1993] 4 S.C.R. 233, [1993] S.C.J. No. 119 (S.C.C.); *R. v. Fisher* (2003), 179 C.C.C. (3d) 138, [2003] S.J. No. 597 (Sask. C.A.).

316 *Johnson v. Milton (Town)* (2008), 91 O.R. (3d) 190, [2008] O.J. No. 2157 (Ont. C.A.); *R. v. Thomas* (2006), 207 C.C.C. (3d) 86, [2006] O.J. No. 153 (Ont. S.C.J.); compare *R. v. McIntosh* (1997), 35 O.R. (3d) 97, at 103, [1997] O.J. No. 3172 (Ont. C.A.) and *McLean (Litigation Guardian of) v. Seisel* (2004), 182 O.A.C. 122, at 102-113, [2004] O.J. No. 185 (Ont. C.A.).

§12.130 The concern is whether the generalist can give real assistance to the jury. A minimal standard of expertise (more knowledgeable than the trier of fact) may set too low a threshold in some cases. There is a danger that the fact-finder may not appreciate the generalist's lack of expertise or give her or his opinion more weight than it scientifically or technically deserves. In *Mohan*, the Supreme Court rejected the helpfulness standard and substituted the necessity standard for the admissibility of expert evidence because the latter criterion was too low for expert witnesses. The expert witness' qualifications should be evaluated in the context of the necessity and reliability criteria in the sense that the fact-finder needs information that is reliable to assist them. The Supreme Court in *R. v. J. (J.-L.)*[317] cautioned that trial judges should not allow expert evidence too easy an entry:

> [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.[318]

§12.131 The issue whether the proffered expert has the requisite qualifications to testify on a particular subject matter is a question of law.[319] If opposing counsel objects that the proffered witness lacks the requisite expertise or that the subject matter of the opinion is not a proper subject for expert evidence, counsel should do so immediately after the expert has stated his or her qualifications and before the witness testifies on a substantive issue. The trial judge must conduct a *voir dire* to determine the witness' qualifications and the admissibility of the opinion evidence.

§12.132 If no objection is raised before the expert testifies in relation to a substantive issue, then any cross-examination as to the expert's qualifications goes only to the weight, not to the admissibility of the witness' testimony.[320] Once the trial judge rules that a person has the requisite qualifications and expertise to provide opinion evidence in relation to a material issue in dispute, the extent of the expert's accomplishments, experience and recognition by her or his peers, the focus of study within a particular field and the manner of presenting her or his evidence are matters of weight for the trier of fact.[321]

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317 [2000] 2 S.C.R. 600, [2000] S.C.J. No. 52 (S.C.C).

318 *Ibid.*, at 613 (S.C.R.).

319 *R. v. Mohan*, [1994] 2 S.C.R. 9, [1994] S.C.J. No. 36 (S.C.C.).

320 *Preeper v. R.* (1888), 15 S.C.R. 401, at 408, [1888] S.C.J. No. 22 (S.C.C.); *R. v. Marquard*, [1993] 4 S.C.R. 223, 85 C.C.C. (3d) 193, at 224, [1993] S.C.J. No. 119 (S.C.C.).

321 *R. v. Fisher* (2003), 179 C.C.C. (3d) 138, [2003] S.J. No. 597, at para. 19 (Sask. C.A.); *McLean (Litigation Guardian of) v. Seisel* (2004), 182 O.A.C. 122, at 102-113 (Ont. C.A.).

§12.133 Opposing counsel has an obligation to object if the witness testifies beyond her or his purported area of expertise. If opposing counsel objects, the trial judge has a discretion to permit the party producing the witness an opportunity to further qualify the expert. In the absence of an objection, a technical failure to qualify a witness who clearly has the expertise in the subject matter does not mean the witness' evidence should be ignored. Failure by counsel to object to the expert's qualifications at an early stage is only a bar to a subsequent objection where the witness stays within her or his purported area of expertise. This situation should be distinguished from the case where an expert testifies beyond her or his field of expertise. If it is shown that the witness does not have the necessary expertise, it is immaterial that no challenge was made at the time that the witness was qualified and the trial judge should direct the fact-finder to disregard the expert's opinion. In these circumstances, the admission of opinion evidence outside the witness' expertise without a proper direction of a trial judge may constitute appealable error.[322]

§12.134 The expert witness should provide independent assistance to the court and should not assume the role of an advocate. An expert should state the facts or assumptions upon which his or her opinion is based and should not omit to consider material facts which weaken his or her opinion. A government forensic scientist has a duty in criminal investigations to assist in a neutral and impartial manner.[323]

7. Hypothetical Question

§12.135 If the expert lacks personal knowledge of the matters in issue and is called to give an opinion upon certain disputed facts, evidence of which has been or will be led at trial, the opinion may be elicited only through the vehicle of a hypothetical question.[324] Where the opinion sought is predicated upon contested facts, counsel are required to use a hypothetical question as explained by Ritchie J. in *Bleta v. R.*:

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[322] *R. v. Marquard*, [1993] 4 S.C.R. 223, at 243-44, 250, [1993] S.C.J. No. 119 (S.C.C.); *R. v. Millar* (1989), 49 C.C.C. (3d) 193, [1989] O.J. No. 829 (Ont. C.A.).

[323] *The "Ikarian Reefer"*, [1993] 2 L.L.R. 68, at 81-82 (Q.B. (Com. Ct.)), revd [1995] 1 L.L.R. 445, at 496-98 (C.A.); *Cogar Estate v. Central Mountain Air Services Ltd.* (1992), 72 B.C.L.R. (2d) 292, at 308, [1992] B.C.J. No. 1691 (B.C.C.A.); *R. v. Ward*, [1993] 2 All E.R. 577 (C.A.); *R. v. Olscamp* (1994), 95 C.C.C. (3d) 466, [1994] O.J. No. 2926 (Ont. Gen. Div.); *Kozak v. Funk* (1995), 136 Sask. R. 12, [1995] S.J. No. 569 (Sask. Q.B.); *Burroughs v. Bristol City Council*, unreported, 18 January, 1996 (Q.B.); *Baynton v. Rayner*, [1995] O.J. No. 1617 (Ont. Gen. Div.); *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456, [1988] O.J. No. 4050 (Ont. Gen. Div.).

[324] *R. v. Kelly* (1990), 59 C.C.C. (3d) 497, at 504, [1990] O.J. No. 1606 (Ont. C.A.). The formulation and use of the hypothetical question by counsel is discussed by A. Maloney, "Expert Evidence", *Law Society of Upper Canada Special Lectures* (Toronto: DeBoo, 1969), at 96 *et seq.*