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Admissibility of Expert Opinion Evidence

Paul T. McGivern

This article represents Mr. McGivern's opinion as of the time it was written. There may have been changes or further developments in the law since that time and this article should not be relied on as legal advice without first consulting a lawyer.

Admissibility of Expert Opinion Evidence

“The truth is rarely pure, and never simple.”

Oscar Wilde (1895)

The Importance of Being Earnest

In modern day litigation, the search for “the truth”, in many cases, has devolved into a battle between experts. In some types of litigation, this is unavoidable. For example, in medical malpractice litigation, an absence of appropriate expert evidence will usually result in a dismissal of the case. This is because the plaintiff must establish that the defendant failed to meet the standard of care of the ordinary competent physician of similar background and training: *Belknap v. Meeks* (1989), 64 D.L.R. 452 at 473 (B.C.C.A.), and *ter Neuzen v. Korn* (1995), 11 B.C.L.R. (3d) 201 (S.C.C.) at 214. Given the special expertise involved in medical matters, establishment of the standard of care, and its breach, are dependant upon appropriate expert medical evidence (see, for example, *Steeves v. Air Canada* [1996] .B.C.J. (Q.L.) No. 2879 (B.C.S.C.):

“Absent any expert evidence that Dr. Boileau should have done something other than what he did, it is not open to the court to infer negligence from the fact that at a later date another physician ... considered a further alternative and identified a possible renal problem.” (at para. 14);

See also the decisions in: *Hampton v. Marshall* [1997] B.C.J. (Q.L.) No. 558 (B.C.S.C.); *Gibson v. Henniger* [1997] B.C.J. (Q.L.) No. 779 (B.C.S.C.); *LeBlanc v. Regan* [1995] B.C.J. (Q.L.) No. 2577 (B.C.S.C.); and *Leith v Stockdill* (1999) BCSC.

In other cases, however, parties attempt to employ experts to promote their case – in other words to assist as advocates. That is inappropriate and rarely of real assistance to the court. In order to address abuse of expert evidence by litigants, the courts and the legislature have developed a number of rules which limit or govern the admissibility of expert evidence. The purpose of this paper is to simply touch or highlight the various criteria/rules which govern the admissibility of expert evidence, and to provide reference to cases which have dealt with some of these matters in order to assist counsel who may have to deal with them in their own cases.

I. The Rule

Rule 40A of the rules of court provide (in part):

Admissibility of written statements of expert opinion

(2) A written statement setting out the opinion of an expert is admissible at trial, without proof of the expert's signature, if a copy of the statement is furnished to every party of record at least 60 days before the statement is tendered in evidence.

Admissibility of oral testimony of expert opinion

(3) An expert may give oral opinion evidence if a written statement of the opinion has been delivered to every party of record at least 60 days before the expert testifies.

Idem

(4) The statement also may be tendered in evidence.

Form of statement

(5) The statement shall set out or be accompanied by a supplementary statement setting out the following:

- (a) the qualifications of the expert;
- (b) the facts and assumptions on which the opinion is based;

(c) the name of the person primarily responsible for the content of the statement.

Proof of qualifications

(6) The assertion of qualifications of an expert is prima facie proof of them.

Admissibility of evidence

(7) If a statement that does not conform to subrule (5) has been delivered

(a) it is inadmissible under subrules (2) and (4), and

(b) the testimony of the witness under subrule (3) is inadmissible

unless the court otherwise orders...

Dispensing with statement

(15) At trial, the court may dispense with the requirement of delivery of a statement.

Idem

(16) Without limiting the generality of subrule (15), the court may dispense with the requirement of delivery of a statement on one or more of the following grounds:

(a) where facts have come to the knowledge of the party tendering the witness after the delivery of the statement of that witness's evidence, that could not, with due diligence, have been learned in time to be reduced to a further statement and delivered within the time required by this rule;

(b) where the non-delivery is unlikely to cause prejudice

(i) by reason of an inability to prepare for cross-examination, or

(ii) by depriving the party against whom the evidence is tendered of a reasonable opportunity to present evidence in response;

(c) where the interests of justice require it.

Time

(17) Before or at trial, the court may extend or abridge the time limits set out in this rule.

II. The Authorities

One starts with the fundamental proposition that evidence which is material and relevant, and which is not excluded by any rule of evidence, is admissible (*Anderson v Maple Ridge* (1992), 71 B.C.L.R. (2d) 68 (B.C.C.A.)). Special rules apply, however, to expert evidence. Experts, generally speaking, are not witnesses to the “facts” of the case. They are there to assist the trier of fact to draw the appropriate inferences from the facts proven by other admissible evidence. Expert evidence is admissible where the issue to be decided is beyond the ken of the judge and/or jury. An expert is a witness who draws on special knowledge not possessed by the trier of fact and offers his\her own inference or opinion in order to assist the trier of fact.

In *R. v. Mohan* [1994] 2 SCR 9 the Supreme Court of Canada fixed the general criteria for the admission of expert evidence. Mohan, a paediatrician, was charged with sexual assault. His lawyer indicated that he intended to call a psychiatrist who would testify that the perpetrator of the alleged offences would be part of a limited and unusual group of individuals and that respondent did not fall within that narrow class because he did not possess the characteristics belonging to that group. The psychiatrist testified in a *voir dire* that the psychological profile of the perpetrator of the first three complaints was likely that of a pedophile, while the profile of the perpetrator of the fourth complaint that of a sexual psychopath. The psychiatrist intended to testify that the respondent did not fit the profiles, but the evidence was ruled inadmissible at the conclusion of the *voir dire*. The Court of Appeal ordered a new trial.

Sopinka, J, in allowing the Crown appeal, set out the criteria for the admissibility of expert evidence in the following terms:

Admission of expert evidence depends on the application of the following criteria:

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

With respect to these criteria, the court established the following:

❖ **Relevance:**

- A question of law to be decided by the trial judge;
- If the prejudicial nature of the evidence outweighs its probative value, it will be excluded (This exclusion criteria is very rarely utilized). In this regard, the court must ask itself:
 - (1) Is the evidence likely to assist the jury in its fact-finding mission, or is it likely to confuse and confound the jury?
 - (2) Is the jury likely to be overwhelmed by the "mystic infallibility" of the evidence, or will the jury be able to keep an open mind and objectively assess the worth of the evidence?

❖ **Necessity**

- The evidence must provide information "which is likely to be outside the experience and knowledge of a judge or jury". The fact that the evidence may be, in the abstract sense, "helpful" to the trier of fact, is not sufficient. The evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature ("[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge".)

❖ **Absence of an Exclusionary Rule**

- Simply put, evidence that otherwise complies with the criteria for the admission of expert evidence as set out above will be excluded if it is otherwise excluded by an established exclusionary rule of evidence (such as evidence relating to the disposition to commit a crime).

❖ **A Properly Qualified Expert**

- In this regard, the court held:
 - The evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes

to testify. The less actual experience the expert has, the less likely it is that the evidence will be admitted.

- Expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert.
- The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

Although *Mohan* was criminal case, it is clear that the criteria set out by the court apply to civil actions also (see, for example, *Porto Seguro Companhia De Seguros Gerais v. Belcan S.A.* [1997] 3 S.C.R. 1278).

A number of subsequent BC cases have attempted to summarize the rules relating to the admissibility of expert opinion evidence also. In *Yewdale v. Insurance Corporation of British Columbia* (1995), 3 B.C.L.R. (3d) 240 (S.C.) Madam Justice Newbury (as she then was) nicely summarized the general rules regarding the admissibility of expert opinion in these terms:

The following are not absolute rules, since their applicability will often depend on the particular nature and accessibility of the issues before the court, the extent to which industry or professional standards and practices can be formulated for the court's assistance, and even the manner in which the relevant questions have been posed for the expert. In general terms, however, I proceed on the basis that:

1. Opinion evidence is admissible only where it would be of assistance to the court in deciding a question requiring long study or experience. Conversely, such evidence is not admissible with respect to matters that lie within the ordinary experience of the trier of fact;
2. If expert opinion is permitted, the expert must stay within his or her stated area of expertise;
3. The expert must not be permitted to displace the role of the trier of fact. Because of this, courts in the past resisted expert testimony going to

the "ultimate issue". That clear rule has long since fallen by the wayside, but it still remains essential for the expert to state the facts he or she has assumed in the course of reaching the opinion, and if possible, to avoid making findings of fact on issues in dispute. Thus if the court does not find such facts or finds different facts, the weight of the expert's opinion can be assessed accordingly;

4. Given the special privilege accorded to experts to testify as to their opinions, they must not become advocates. They must express their opinions as opinions and must leave for the court the required conclusions of law. In theory at least, the court "knows the law" --- in practise it has the responsibility of finding and applying it. Thus the expert should express his or her opinion in an objective and impartial manner, and must not present argument in the guise of expert evidence.

In *Surrey Credit Union v. Willson* (1990) 45 B.C.L.R. (2d) 310 (BCSC) McColl J. summarized the rules relating to the admissibility of expert testimony in these terms:

1. He [the expert] may give evidence of the standards of his profession which relate to the issues in dispute;
2. When he has been provided with facts, assumptions or hypothetical facts, he may offer an opinion as to whether they conform to the standards of which he has given evidence;
3. Where he has given an opinion upon facts made know to him he is bound to disclose those facts and how they came to his attention;
4. Where he has made assumptions he is bound to explain the basis upon which those assumptions have been made;
5. In the event that contrary expert opinions are put to him he may explain why, in his view, his opinion should be accepted over others;
6. He may not make conclusive findings of fact on issues in dispute and may not offer an opinion as to how the law should apply to any of those facts; and
7. He may not give an opinion on the merits of the plaintiff's claim.

The basic rules are well set out in these judgments. It is in the application of these rules to specific circumstances that difficulties often arise. For that reason, I propose to highlight next a number of specific issues and the cases that have considered them.

Specific Issues:

1. The Locality Rule:

An expert's lack of knowledge of the standards practiced in a particular community and the available facilities therein must also be taken into consideration. In *St. Jules v. Chen and Le Hehuquet* (17 October 1989), Nanaimo No SC8412 (B.C.S.C.) Mr. Justice Gow made the following comments about the witness' expertise and familiarity of the communities and facilities available:

Now, there is not the slightest doubt that Doctor Schiff, if I may say so, is a medical man of very considerable academic standing and experience, but he is not and never has been an obstetrician. His specialty is pediatrics. He has never practised as a family physician, nor has he practised as a family practitioner in a rural area.

The two localities I have mentioned; that is Gold River and Campbell River are in a general sense rural communities. They lie far from such metropolitan centres as Vancouver and Edmonton.

...

He has never been to Gold River. He has never been to Campbell River, and knows nothing of the circumstances of these two localities or the types of practices carried on there. He has no personal knowledge of what carried on down there. He has no personal knowledge of what facilities are there. Indeed, under cross-examination by Mr. Thackray, he laid much emphasis on his desire, and it is a very laudable desire, very praiseworthy indeed, to keep on raising standards. He ended up by saying he hope these standards would prevail in this Province too or be achieved in this Province too.

Now, as it is well-known in the law of negligence where professional negligence is called in question, the standard to some extent depends greatly upon the circumstances. What is, shall we say, culpable on the part of an obstetrician practising in downtown Vancouver within walking distance, so to speak, of major hospitals and facilities, not to mention other colleagues, is one thing. That standard in law cannot be transferred and applied without qualification to a family physician in a rural part of Vancouver Island who, for example, is called in to help a woman give birth to a child or children. It is not just a matter of weight and I agree with what Mr. Thackray says on that score.

While these comments are important and potentially fatal to the admissibility of expert evidence, one must be very careful in the attempted application of the rule. Where the standard sought to be applied is global, or where access to other experts is readily available, the locality will not rarely be applied (see, for example, *Norris v. LeBlanc*, [1989] O.J. No. 840, at p. 7, where Walsh J. referred to *McCormick v. Marcotte*, supra, at 346-7:

McCormick upheld a modified 'locality principle.' Though a doctor is measured against the standards expected of those in similar communities, if the doctor has easy access to major medical centres, then it is expected that the doctor will utilize such centres if necessary.

2. *The Specialty Rule*

A variation of the "Locality Rule" is the "Specialty Rule". This "rule" suggests that only an expert of the same qualifications as the defendant can testify regarding the standard of care to be met. This so called "rule" has met with mixed success. There are some cases where objections to the admissibility of an expert's opinion have been successful where the specialties are different (see, for example, *Dobie v Dlin* (2001) 95 B.C.L.R. (3d) 179 (SC)) while other cases have resulted in the court adopting a much less stringent test and allowed the evidence to go in, holding that the difference in specialty goes to weight, not admissibility (see, for example, *Robinson v. The Sisters of St. Joseph of the Diocese of Peterborough* (1999) CanLII 2199 (Ont CA) where the appellant argued that the trial judge should not have allowed the opinion of a specialist to be admitted in order to set the standard to be met by a general practitioner. The court held:

There is no general rule that a specialist cannot offer an opinion as to the applicable standard of care governing medical treatment provided by a general practitioner, or that the specialist cannot offer an opinion as to whether the general practitioner met the applicable standard. The admissibility of the specialist's opinion depends on the subject matter on which that opinion is offered and the specialist's training and experience. Surely, there are treatments and procedures which are common to the practices of general practitioners and specialists alike. We see nothing in the reasons of Anderson J. in *Wilkinson Estate v. Shannon* (1986), 37 C.C.L.T. 181 (Ont. H.C.) which would exclude opinion evidence merely because the expert was a specialist and the opinion addressed the standard applicable to a general practitioner. Indeed, in that case the evidence of the specialist was admitted although Anderson J. gave it little weight.

It would appear that the deciding factor in these cases is whether the proposed expert actually has experience dealing with the issue which is before the court. If, for example, both a GP and a specialist deal with particular medical issues, the fact that the defendant is a GP is a will not exclude the evidence of the specialist, notwithstanding his\her greater training and experience (*Phillips v. Sobkin* 2002 BCSC 860).

3. Evidence Based on Hearsay etc

The fact that an expert's evidence is based on hearsay evidence does not per se make it inadmissible. Nevertheless, there is an "...obligation' of the party tendering evidence of the factual basis for the opinions of experts, to establish, 'through properly admissible evidence, the factual basis on which such opinions are based. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.'" (per Dickson, J in *R. v Abbey* [1982]2 SCR 24). When expert opinion is a combination of admissible and inadmissible evidence, the weight attributable to such testimony is directly related to the amount and quality of admissible evidence upon which the opinion is based (*R. v Lavallee*, 1990] 1 S.C.R. 852, at p. 36). In other words, where the facts upon which the opinion is based are not properly proven by other admissible evidence, the opinion may be initially admissible, but may be accorded no weight whatsoever.

When the court cannot discern to what extent an expert has relied upon matters which will not be in evidence, the report may be ruled inadmissible if the other party could not have anticipated this body of evidence until trial. *Sebastian v. Neufeld* (24 July 1995), New Westminster No. S010228 (B.C.S.C.)

4. Evidence to Establish the Standard of Care

An expert report which "...is [merely] a statement of what the witness would have done had he been in the place of the defendant[s]" is inadmissible (*Kuo v. Lee* [1995] B.C.J. No. 276). To be admissible, it is necessary that the evidence go to establish the conduct of a prudent practitioner in similar circumstances.

5. *Late Objections to Expert Reports*

In *Pushee (Guardian ad litem of) v. Roland*, 2003 BCSC 149 Mr. Justice Burnyeat considered the reasonable notice requirements in Rule 40A. In that case, the plaintiff objected several days before the matter was to be heard by way of Rule 18A to the admissibility of an expert report tendered by the defendant. Rule 40A does not strictly apply to Rule 18A applications; however, Mr. Justice Burnyeat used the principles underlying the notice provisions in Rule 40A as a guide in his reasoning. He held that:

[15] Where a written statement setting out the opinion of an expert is given at least 60 days before the statement is to be tendered in evidence at a summary trial and where the date of the summary trial is known, it is appropriate for a party adverse in interest to make demand that the expert appear at the summary trial for cross-examination or to provide a statement of objection to the admissibility of the evidence within a reasonable time. In that situation, a reasonable time would be at least 30 days prior to the date of the summary trial.

[16] Where a written statement setting out the opinion of an expert is given less than 60 days before the statement is to be tendered in evidence at a summary trial and the date of the summary trial has been set pursuant to Rule 51(A)(6) of the Rules of Court, then it is appropriate for a party adverse in interest to make a demand for the expert to appear at the summary trial for cross-examination or to provide a statement of objection to the admissibility of the evidence forthwith after the date and time of the hearing has been fixed by the Registrar and is known by the party adverse in interest.

6. *The obligation to set out the “facts” upon which the expert’s opinion is based*

There are two points to consider here. First, what must be set out in terms of “facts” or “assumptions” in order for an expert’s opinion to meet the requirements of the rule? The second issue is whether it is appropriate to set out facts which are not core to the opinion.

In *Bolton v Vancouver* (2002) BCSC 537 Henderson, J addressed the requirement under Rule 40A that an expert set out the “facts” upon which an opinion is based. He stated:

When an expert brings his expertise to bear upon a question, he will necessarily be taking into account two separate types of facts. One class of fact which he will

have to consider is the alleged or assumed circumstances of the incident upon which he is to give an opinion. Here, for example, Mr. Lisman expresses an opinion that, had there been a higher barrier in the middle of the Cambie Bridge, this would have prevented Ms. Bolton's car from crossing over the median. In reaching that opinion, he must necessarily assume certain facts to be true. He must assume that Ms. Bolton was travelling on the bridge at a particular time, on a particular day, in a particular direction; that she was travelling at a particular speed; that a force acted upon the rear of her vehicle in such a way as to propel it away from its expected line of travel towards the median; and that it struck the median in a certain way with a certain degree of force. All of those are assumed facts pertaining to the incident itself. That type of fact or assumption must be set out clearly in the report for it to be admissible under Rule 40A.

[4] When bringing his expertise to bear on issues, the expert will also take into account a number of other "facts". There may, for example, be studies, perhaps dozens of them, which bear upon the question about which he is to give an opinion. The existence of these studies is, in one sense, a "fact". The fact that the expert has or has not read a particular study is, in a sense, a "fact". However, these are not the sorts of facts that need to be set out in the report itself. They can be inquired into in cross-examination, but they are not what are aimed at in the requirement in the Rules that the "facts" and assumptions be set out in the body of the report.

The other frequently litigated issue relates to the extent of the obligation for an expert to set out the first category of "facts" identified by Mr. Justice Henderson. In *Croutch v. B.C. Women's Hospital* 2001 BCSC 995 Lowry, J stated:

I consider it preferable that a statement of expert evidence (most often referred to as an expert's report) begin with a clear statement, or perhaps reference to an annexed letter of request, sufficiently specifying the nature of the opinion sought so as to make it immediately evident why the opinion is required and what it is that must be proven with this kind of evidence. The facts upon which the opinion is to be based - and only those facts - should then be set out in as complete and concise a statement as the circumstances will allow.

In the subsequent judgment of *Rowe v. Bobell Express Ltd.*, 2003 BCSC 472 Lowry, J reiterated his comments in *Croutch* and then stated:

The facts, known or assumed, should be immediately apparent. The reader should not have to cull them out of pages recording what was said in the course of interviews or observed during examinations or revealed by tests administered. Descriptions of professional assessments of that kind may be quite useful in a medical-legal report to counsel, but they are generally of little assistance and often serve only to make what should be a concise statement of the opinion of an

expert witness into an unnecessarily long and tedious document to read and understand.

[13] What is necessary for the purposes of the rule is that the facts upon which the opinion is based be clearly set out, not that the evidentiary basis whereby those facts are to be proven be described. It matters not that the witness was told, or observed, or determined some fact. All that should be stated is the fact itself.

The obligation for an expert to avoid advocacy

It has been the law in this jurisdiction for some time that an expert must not assume the role of an advocate. He\she must be an impartial or dispassionate expert who is there to assist the court. A report which crosses that boundary and attempts to advocate the position of the party who retained him will properly be rejected by the court (*Sengbusch v. Priest* (1987), 14 B.C.L.R. (2d) 26; *Emil Anderson Const. Co. v. B.C. Ry. Co.* (1987), 15 B.C.L.R. (2d) 28 (S.C.)). That is not to say, however, that an expert must not advocate his\her position. In *Bolton v Vancouver*, supra, Henderson J adopted this position:

An expert assists the court by bringing to bear his special knowledge on an issue that the court cannot be expected to have knowledge about. In the nature of things, each side will likely have opposing experts. Their views will differ. In attempting to put forward their views as clearly and positively as they can, the experts will, in a sense, argue with each other. Insofar as an expert is arguing for the correctness of his views and the incorrectness of opposing views within the realm of his expertise, then argument is unobjectionable.

[10] What the courts have taken frequent objection to is argument by experts on matters which fall outside the scope of their expertise. These are experts who portray a lack of objectivity by showing an inappropriate eagerness to assist the party who hired them. That sort of argument should be excluded from expert reports wherever it is found. However, where an expert is advancing an argument for the correctness of his own position and for the incorrectness of someone else's, and where that argument falls safely within the realm of the expert's expertise, not only is there no reason to exclude it, but it may be of considerable assistance to the court in resolving the conflict.

7. Reply and Rebuttal Expert Evidence

“...the evidence which a plaintiff adduces after a defendant has put in his case, commonly called reply or rebuttal evidence, is of two sorts. One is evidence going to an issue the burden of proof of which lies upon the defendant. The other is

simply evidence responsive to some point made in the oral evidence of the witnesses called by the defendant. In the former, the plaintiff has no obligation to adduce any evidence on the issue until the defendant's case has gone in when he then has a right to answer if he considers there is anything to answer. If he does address that issue in his own case, he cannot generally address it again, for he would then be splitting his case.”

If the plaintiff does address such an issue and then seeks to adduce further expert evidence at the close of the defence case, the attempt will not succeed because of the appearance of “splitting your case” (*Spoor v Nicholls* (2002) 90 BCLR (3d) 88 (CA); *Spoor v Nicholls* (2002) 90 BCLR (3d) 88 (CA)). In order to be permitted to adduce further expert evidence which falls outside the scope of proper rebuttal evidence, a party must satisfy the strict criteria laid down by the Supreme Court of Canada in *Palmer v The Queen* (1979), 106 D.L.R. (3d) 212 as follows:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen* [[1964] S.C.R. 484].
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

The second sort of reply evidence is described by Madam Justice Saunders in *Kroll v. Eli Lilly Canada Inc.* (1995), 5 B.C.L.R. (3d) 7 (S.C.), referred to as “response evidence”, at 9:

In my view, R. 40A(3) was not intended to prevent the court's receipt of evidence from expert witnesses which is in response to the opinion of experts presented by other parties to the action. While it will often be desirable that notice of such evidence be provided to a party prior to commencement of trial, and this will often be agreed by parties in litigation in which the action is subject to case management, such notice is not required, in my view, by the new Rule. I consider that the law as enunciated in *Pedersen v. Degelder* is still applicable to response to expert reports, and note that this exception to the requirement for advance written notice of the expert's view, limited strictly to true response evidence, does

not permit fresh opinion evidence to masquerade as answer to the other side's reports

In order to qualify as “response evidence”, the evidence must be truly responsive to a matter raised in the expert evidence tendered by the opposing party and of which the first party had no notice (*Kroll v. Eli Lilly Canada Inc.* (supra.); and *Kelly v. Kelly*. (1995), 20 B.C.L.R. (3d) 194 (S.C.)). A party does not have an absolute right to call rebuttal evidence. The court retains a discretion to disallow it in appropriate circumstances (*Stewart v Chen* 2002 BCSC 1478).