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Comparative Study on the Qualifications and Testimonies of Expert Witnesses

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CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW

MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR
SPECIAL TRIBUNAL FOR LEBANON

Issue: Comparative Study on the Qualifications and Testimonies of Expert Witnesses

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**J.D. Candidate, 2014
Fall Semester, 2013**

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Scope

This memorandum discusses how different court systems—specifically, United States federal courts, Canadian courts, United Kingdom courts, and international criminal tribunals—handle the admission of expert witnesses and define the allowable content of expert witness testimony. Specifically, it details the courts’ requirements for admitting experts and how the courts define experts’ expertise. Additionally, this memorandum discusses the content to which an expert can testify and the subject matter limitations relating to the expert testimony. Where possible, the memorandum will focus on cellular or mobile phone communications experts.¹

B. Summary of Conclusions

1. United States federal courts rely on the Federal Rules of Evidence Rule 702 and the principles outlined in *Daubert* to control expert witness testimony.

Evidence Rule 702 sets forth the main test for managing the admission of expert witnesses, requiring an expert witness to have scientific, technical, or other specialized knowledge in order to qualify as an expert. In United States federal courts, an expert witness’s testimony must also have an adequately formed basis upon which it rests. The testimony itself must pass the “relevancy-plus” test which ensures that it is adequately relevant and reliable.

2. Canadian courts utilize the guidance explicated in *Mohan* to manage expert witness testimony.

R v. Mohan sets forth the standards for the admission of expert witness testimony in Canadian courts. An expert witness must first be shown to have expertise on the topic on which

¹ How do different court systems define the requirements for admitting expert witnesses? How do different court systems define the experts’ expertise? About what can the experts testify? How, if at all, do the court systems limit the scope of the experts’ testimony?

he will give his testimony. Canadian courts are deferential in admitting an expert witness on the basis of his expertise. The testimony itself must be relevant and necessary to the proceeding, and no exclusionary rule can apply that would render the expert testimony inadmissible.

3. English courts have developed a test through common law for admitting expert witness testimony.

Through English common law, the English court system has developed requirements for the admission of expert testimony. Expert witnesses must be qualified, with English courts holding that it is the expertise itself that determines qualification, not the study or experience that led to the expertise. That expertise must then be connected to the issue to which the expert witness will testify. The expert testimony must then meet assistance, impartiality, and evidentiary reliability standards to be admitted.

4. International criminal tribunals utilize methods of evaluating and admitting expert witness testimony that is similar to the United States federal court approach and has developed through experience.

International criminal tribunals do not have an explicit rule regarding the admission of expert witness testimony. Rather, the tribunals have developed methods of dealing with such testimony. The tribunals require experts to be qualified based upon the knowledge they possess and the extent to which that knowledge can aid the factfinder. In addition, the expert witness testimony must be relevant, reliable, and have adequate probative value.

II. FACTUAL BACKGROUND

This memo was constructed for the Special Tribunal for Lebanon, a tribunal created primarily to hold accountable those responsible for a 2005 attack that killed 23 people, including former Lebanon Prime Minister Rafiq Hariri.² The memo discusses how multiple court systems

² *About the STL*, SPECIAL TRIBUNAL FOR LEBANON (last visited Oct. 28, 2013), <http://www.stl-tsl.org/en/about-the-stl> [Electronic copy provided in accompanying USB flash drive at Source 42].

throughout the world manage expert witness testimony. It covers how the court systems handle both expert witness qualifications and the guidelines regarding expert witness testimony. Where possible, examples of cases involving cellular communications experts will be mentioned to discuss the particular court's handling of such experts.

III. LEGAL DISCUSSION

A. United States Federal Law: The *Daubert* Standard

Rule 702 of the Federal Rules of Evidence governs the manner in which United States federal courts handle expert testimony. The rule states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.³

Essentially, an expert may testify if the expert has certain reliable, specialized knowledge that can help the finder of fact to determine the outcome of the case.⁴

1. Expert must Possess Scientific, Technical, or Other Specialized Knowledge

The requirements for admitting an expert witness had been the topic of much debate in the federal court system until a 1993 Supreme Court case and its progeny eventually clarified the issue. As stated in Rule 702(a), an expert witness must have "scientific, technical, or other specialized knowledge [that] will help the trier of fact to understand the evidence or to determine

³ FED. R. EVID. 702 [Electronic copy provided in accompanying USB flash drive at Source 4].

⁴ FED. R. EVID. MAN. 702.02 [Electronic copy provided in accompanying USB flash drive at Source 2].

a fact at issue.”⁵ In making such a determination, courts analyze the knowledge upon which the expert’s testimony is based.⁶ The trial judge must act as a “gatekeeper” to ensure that the expert witness’s testimony “rests on a reliable foundation.”⁷

The required qualifications for an expert witness and the source of his knowledge vary depending upon the expert’s field of expertise. Rule 702 itself states that an expert witness qualifies based upon his “knowledge, skill, experience, training, or education”⁸ and makes “no relevant distinction between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge.”⁹ Thus, not only can a highly-educated specialist qualify as an expert witness, one who gained all of his expertise through on-the-job experience or skills training can also qualify.¹⁰ Courts require extensive formalized study in situations where the topic of the expert testimony is so technical and complicated that one could not reasonably acquire such expertise without it.¹¹ Where the expert’s qualifications are not apparent by formal training or education, the expert must explain why his qualifications warrant admission as an expert witness.¹²

⁵ FED. R. EVID. 702(a).

⁶ See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) [Electronic copy provided in accompanying USB flash drive at Source 24].

⁷ See, *id.*

⁸ FED. R. EVID. 702.

⁹ *Kuhmo Tire Co., Ltd., v. Carmichael*, 526 U.S. 137, 147 (1999) [Electronic copy provided in accompanying USB flash drive at Source 28].

¹⁰ See, e.g., *State v. Mack*, 653 N.E.2d 329 (Ohio 1995) (“[T]here is no degree requirement *per se*. Professional experience and training in a particular field may be sufficient to qualify one as an expert.”) [Electronic copy provided in accompanying USB flash drive at Source 30].

¹¹ See, e.g., *Sullivan v. Rowan Cos.*, 952 F.2d 141 (5th Cir. 1992 (affirming the trial court judge’s decision to exclude an expert witness “with extensive practical experience” in metallurgy because he did not have sufficient education in the subject) [Electronic copy provided in accompanying USB flash drive at Source 31].

¹² See FED. R. EVID. 702 advisory committee’s note, 5 (“If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a

If the opposing party wants to challenge the expert witness's admission, it may do so through a voir dire or pre-trial motions.¹³ The trial court judge will rule as to whether the expert witness will be admitted to testify.¹⁴ The opponent has the opportunity to raise the witness's shortcomings during cross-examination which the factfinder must then consider when determining the weight of the witness's testimony.¹⁵ An appellate court may overturn a trial court's decision admitting or excluding expert testimony only for abuse of discretion.¹⁶

2. Testimony must be Reliable, Relevant, and Based on Specialized Knowledge

Expert witnesses are given a great deal of freedom regarding the content of their testimonies.¹⁷ When testifying about background information or knowledge gained through professional training and experience, courts generally permit a great deal of testimony that would otherwise be inadmissible when offered by normal witnesses.¹⁸

But an expert witness is subjected to a higher standard when his testimony relates to the case at hand. In such situations, Rule 703 states that the facts or data that form the bases for the expert's testimony may be those "that the expert has been made aware of or personally

sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'" [Electronic copy provided in accompanying USB flash drive at Source 4].

¹³ DAVID H KAYE, DAVID E. BERNSTEIN, JENNIFER L. MNOOKIN, *THE NEW WIGMORE 44, A TREATISE ON EVIDENCE: EXPERT EVIDENCE* (2004) [Electronic copy provided in accompanying USB flash drive at Source 47].

¹⁴ *Id.*

¹⁵ *See, e.g., Hemmings v. Tidyman's Inc.*, 285 F.3d 1174 (9th Cir. 2002) [Electronic copy provided in accompanying USB flash drive at Source 27].

¹⁶ *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997) [Electronic copy provided in accompanying USB flash drive at Source 26].

¹⁷ *Daubert*, *supra* note 6.

¹⁸ *Id.*

observed,” or of the type that “experts in the particular field would reasonably rely on...in forming an opinion on the subject...”¹⁹ The evidence need not be admissible. Therefore, an expert may form an opinion based on: “(1) firsthand observation ..., (2) hypothetical question or having the expert attend the trial and hear the testimony establishing the facts..., (and) (3) presentation of data to the expert outside of court and other than by his own perception.”²⁰ In order to be considered valid, an expert witness’s testimony must be based upon one of these three sources.

In the trial court judge’s role as a gatekeeper, he must also ensure that an expert’s testimony only includes permissible content. In making such a determination, the trial court judge must subject the content of an expert’s testimony to two-factor test.²¹ The two chief components of this test, as formalized by the *Daubert* court, are reliability and relevancy.²²

First, an expert witness’s testimony must be reliable. Reliability, in this sense, means that the testimony must be “ground[ed] in the methods and procedures of science.”²³ In making such determination, the trial court judge may weigh the following factors:

- (1) whether...(the expert’s) theory or technique can be (and has been) tested;
- (2) whether the technique or theory has been subjected to peer review and publication;
- (3) the known or potential rate of error (of the expert’s theory or technique);

¹⁹ FED. R. EVID. 703 [Electronic copy provided in accompanying USB flash drive at Source 7].

²⁰ Fed. R. Evid. 703 advisory committee notes [Electronic copy provided in accompanying USB flash drive at Source 8].

²¹ *See, Daubert, supra* note 6.

²² *See, id.* (“Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset... whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.”).

²³ *Id.* at 590.

- (4) the existence and maintenance of standards controlling the technique's operation;
(and)
- (5) (the) degree of acceptance (of the expert's theory or technique) within... (the scientific) community.²⁴

The Court stated that the list of factors is non-exclusive and later emphasized that the “the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.”²⁵ The proponent of the expert witness bears the burden of proof to establish the expert's qualifications.²⁶

The factors used in determining the validity of the basis for an expert's opinion apply to the evaluation of both scientific and non-scientific experts in United States federal courts.²⁷ In weighing these factors, the trial court judge is to keep the issue of scientific validity as the cornerstone of his evaluation.²⁸ The judge's focus should be on the expert's theory and techniques, not on the end conclusions.²⁹

The “relevancy” (or “helpfulness”) prong of the test necessitates a sufficient, valid connection to the inquiry at hand as a prerequisite for admission.”³⁰ The trial court judge must evaluate how well the proffered testimony can help the factfinder in resolving some factual dispute in the case at hand.³¹ The connection is evaluated in terms of “fit,” or “upon a specific

²⁴ *Id.* at 593-95.

²⁵ *Kuhmo*, *supra* note 9, at 152.

²⁶ *Daubert*, *supra* note 6, at n.20.

²⁷ *Kuhmo*, *supra* note 9.

²⁸ *Daubert*, *supra* note 6, at 594.

²⁹ *Id.* at 595.

³⁰ *Id.* at 591-92.

³¹ *See, United States v. Downing*, 753 F.2d 1224 (3rd Cir. 1985) [Electronic copy provided in accompanying USB flash drive at Source 33].

proffer showing that scientific research has established that” which is a subject at issue within the case at hand.³² “Fit” need not always be completely clear, and scientific validity is determined based on context and applicability to the issue at hand.³³

The scope of an expert’s testimony is limited by Rule 403, which states that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”³⁴ A trial court judge should disallow expert testimony that is “only marginally-helpful” to the factfinder or that “is based upon premises lacking any significant support and acceptance within the scientific community.”³⁵

Courts in the United States have wrestled with some types of cellular phone evidence. For instance, courts have split on the question of whether witness testimony regarding cellular towers requires a technical background.³⁶ On the other hand, some courts have held that where the proffered expert evidence can be determined by an able lay witness without any technical background, the expert witness testimony is not relevant.³⁷ Also, courts have deemed the use of cellular tower data to track criminals essentially per se reliable since it has proven to be a

³² *Id.* at 1226.

³³ *See Daubert, supra* note 6 (“scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes”). The Daubert court gives an example of a non-obvious fit: an expert’s presentation of a study of the phases of the moon is relevant when presented in a case where an issue to be resolved is the darkness of a particular night.

³⁴ Fed. R. Evid. 403 [Electronic copy provided in accompanying USB flash drive at Source 3].

³⁵ Fed. R. Evid. 703, advisory committee notes.

³⁶ *See United States v. Kale*, 445 Fed. App’x. 482 (3d Cir. 2011) [Electronic copy provided in accompanying USB flash drive at Source 34].

³⁷ *See, United States v. Henderson*, 2011 U.S. Dist. LEXIS 138802, *14 (N.D. Okla. Dec. 1, 2011) [Electronic copy provided in accompanying USB flash drive at Source 33].

successful, time-tested method.³⁸ Indeed, many courts merely defer any questions of the expert witness reliability to cross-examination.³⁹

B. Canadian Law: The *Mohan* Standard

The Supreme Court of Canada outlined the use of experts at trial in *R. v. Mohan*.⁴⁰ In *Mohan*, the Court held that the following elements must be analyzed in making a determination as to whether certain expert evidence is admissible:

- (a) relevance;
- (b) necessity in assisting the trier of fact;
- (c) the absence of any exclusionary rule; and
- (d) a properly qualified expert.⁴¹

This seminal case created a test which Canadian courts now follow when faced with a question regarding expert evidence. The court later clarified that the application of this four-part test is case specific.⁴²

1. Expert must be Properly Qualified

Under Canadian law, the court must find that an expert is “properly qualified” in order for that expert to be admitted.⁴³ The purported expert must be “shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she

³⁸ See *United States v. Allums*, 2009 U.S. Dist. LEXIS 24224, *6 (D. Utah Mar. 24, 2009) [Electronic copy provided in accompanying USB flash drive at Source 30].

³⁹ See, e.g., *id.* at *7.

⁴⁰ *R. v. Mohan*, [1994] 2 S.C.R. 9 (Can.) [Electronic copy provided in accompanying USB flash drive at Source 13].

⁴¹ *Id.* at 20.

⁴² *R. v. D.D.*, [2000] 2 S.C.R. 275, 12 (Can.) [Electronic copy provided in accompanying USB flash drive at Source 10].

⁴³ See *Mohan*, *supra* note 40, at 25.

undertakes to testify.”⁴⁴ Courts generally concentrate their analysis on the first three elements of the test and merely iterate that the expert is indeed an expert when conducting a full analysis of the expert testimony.⁴⁵

2. Testimony must be Relevant, Necessary, and not Exclude

Whether to admit expert testimony is a question of law for the trial judge.⁴⁶ The proponent of the expert testimony has the onus of proving that the expert testimony is admissible.⁴⁷

Expert testimony must be relevant in order to be admissible,⁴⁸ and it is *prima facie* relevant if it is “so related to a fact in issue that it tends to establish it.”⁴⁹ Even if the expert testimony qualifies as *prima facie* relevant, the judge must determine the logical relevance and balance the costs and benefits of admitting the expert testimony as it relates to the testimony’s effect on the trial itself.⁵⁰

Determining logical relevance involves one basic question: “Does the evidence, as a matter of logic or human experience, have some tendency to advance the inquiry?”⁵¹ Only if the

⁴⁴ *Id.* at 25.

⁴⁵ *See, e.g., D.D. supra* note 42 (where the Court’s full analysis of the expert’s qualifications is one sentence, stating that neither the opponent nor the appellate court challenge the expert’s legitimacy).

⁴⁶ Graham D. Glancy and John M. W. Bradford, *The Admissibility of Expert Evidence in Canada*, 35 J. AM. ACAD. PSYCHIATRY L. 350 (2007) [Electronic copy provided in accompanying USB flash drive at Source 43].

⁴⁷ *R. v. Terceira*, [1998] 15 C.R. 359 (Can.) [Electronic copy provided in accompanying USB flash drive at Source 15].

⁴⁸ *Mohan, supra* note 40, at 20.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ David M. Paciocco, *Coping with Expert Evidence about Human Behaviour*, 25 QUEEN’S L.J. 305 (1999) [Electronic copy provided in accompanying USB flash drive at Source 42].

trial judge determines that the expert testimony is logically relevant may such testimony be admitted.

The cost-benefit analysis requires a more extensive examination. The Court in *Mohan* stated that the harm of the expert testimony outweighs its benefits if:

- (1) its probative value is overborne by its prejudicial effect;
- (2) it involves an inordinate amount of time which is not commensurate with its value; or
- (3) it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability.⁵²

Essentially, the expert evidence must be excluded if its effect is somehow adulterating to the point of nullifying its potential benefit. Moreover, the Court in *Mohan* warned of the misuse and potentially distorting effects of expert testimony arising from the court's blind submission to the "mystique of science."⁵³ To thwart that potential problem, the trial court judge should query whether the testimony will aid the jury in factfinding or harm and the jury by confusing complicating matters.⁵⁴

When analyzing the relevance element in criminal cases, there is a bias in favor of the defense. If the costs of the prosecution's expert testimony outweigh the benefits, the trial court judge should exclude the expert testimony.⁵⁵ On the other hand, unless the costs substantially outweigh the benefits of the defense expert's testimony, the trial court judge should deem the

⁵² *Mohan*, *supra* note 40, at 20.

⁵³ *Id.* at 21.

⁵⁴ *R. v. Melaragni*, [1992] 73 C.C.C. 3d 348, 353 (Can.) [Electronic copy provided in accompanying USB flash drive at Source 12].

⁵⁵ *Paciocco*, *supra* note 51, at 330.

relevance element of the *Mohan* test met.⁵⁶ Though deferential to the defense, the court must make a thorough inquiry into the relevance of all expert evidence⁵⁷ and must undergo a case-specific determination without relying solely on judicial precedent.⁵⁸

The second element of the *Mohan* test requires that the expert testimony be “[necessary] in assisting the trier of fact.”⁵⁹ Necessary testimony provides “a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate.”⁶⁰ The expert testimony must be more than just helpful to the factfinder,⁶¹ but need not reach a terribly high threshold in order to meet this element.⁶² Expert testimony must provide information that is likely unfamiliar to or outside of the factfinder’s understanding.⁶³ If the judge and jury can use the proven facts to understand the case and make their own conclusions without the proffered expert testimony, then the expert testimony is not “necessary.”⁶⁴

Practically speaking, courts do not often utilize the “necessity” test to exclude expert witness testimony.⁶⁵ In fact, courts tend to qualify any expert testimony that may be reasonably

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Mohan*, *supra* note 40, at 20.

⁶⁰ *R. v. Abbey*, [1982] 2 S.C.R. 24, 42 (Can.) [Electronic copy provided in accompanying USB flash drive at Source 9].

⁶¹ *Mohan*, *supra* note 40, at 23.

⁶² *Id.*

⁶³ *Abbey*, *supra* note 60, at 42.

⁶⁴ *Dir. of Pub. Prosecutions v. Jordan*, [1977] A.C. 699, 718 (Can.) [Electronic copy provided in accompanying USB flash drive at Source 8].

⁶⁵ *Paciocco*, *supra* note 51, at 324.

conceived as necessary for the factfinder as “necessary.”⁶⁶ However, *Mohan* did hold that the “necessity” test is “applied strictly, on occasion, to exclude expert evidence as to an ultimate issue,” and thus, in certain circumstances, creates a safeguard against admitting expert witness testimony too liberally.⁶⁷

Finally, in order for expert testimony to be admissible, there must be an “absence of any exclusionary rule.”⁶⁸ Frequently used exclusionary rules include:

- (1) the rule against bad character evidence;
- (2) the hearsay foundation rule;
- (3) the *Mohan* rule relating to exculpatory character (to limit witnesses who can comment on certain psychological character evidence); and
- (4) the rule against oath-helping (to bar experts from testifying to whether a witness is telling the truth where the factfinder can make such a determination himself).⁶⁹

Canadian courts have also struggled with questions relating to experts in cellular communications matters. In one case, a witness, an employee in the security department of a wireless company, relied on her seventeen years in the wireless business to testify about the location of a cell phone as it related to the alleged perpetrator of a crime.⁷⁰ The trial court allowed her to testify as an expert because she had dealt with mobile phone location in the past

⁶⁶ *Id.*

⁶⁷ *Mohan*, *supra* note 40, at 24.

⁶⁸ *Mohan*, *supra* note 40, at 20.

⁶⁹ *Paciocco*, *supra* note 51, at 339.

⁷⁰ See *R. v. Spackman*, [2009] CarswellOnt 4265 (Can. Ont. S.C.J.) [Electronic copy provided in accompanying USB flash drive at Source 14].

as it related to emergency situations.⁷¹ She had never received negative feedback about her performance in handling those emergency location cases.⁷² Eventually, the appellate court ruled that the witness did not qualify as an expert in cellular phone towers and locations because of the sum of a number of factors, including: having no formal training as an engineer, gaining knowledge through undocumented experiments, basing her testimony on rough estimates (and not precise data), giving generalized testimony based on conversations with engineers, and basing testimony on data and information that had changed and thus could not be challenged in court.⁷³ The appellate court ended up restricting the expert's testimony to less technical matters, such a raw data collected by her company, which it felt were still probative.⁷⁴

At the other end of the spectrum, a Canadian court deemed a witness an expert in a case involving a cell phone location issue because of his technical knowledge and expertise.⁷⁵ There, the witness was a manager of a wireless engineering department and was highly involved in the implementation of cellular phone service in his province.⁷⁶ The opposing party argued that the expert witness did not have enough "field" experience and had never acted as an expert witness in previous cases.⁷⁷ The court affirmed the trial court's reasoning that it must review the expert witness's qualifications in relation to the testimony that he will provide.⁷⁸ The court then

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *R. v. Korski*, [2009] M.B.C.A. 37 (Can.) [Electronic copy provided in accompanying USB flash drive at Source 11].

⁷⁶ *Id.*

⁷⁷ *See id.*

⁷⁸ *See id.*

concluded that the witness’s credentials and expertise clearly qualified him as an expert in testifying about the technicalities of cell phone location.⁷⁹

C. English Law: The Common Law Standard

English courts adhere to a four-part test in assessing expert witness testimony.⁸⁰ In order to be admissible in an English court, an expert witness’s testimony must satisfy the following four elements:

- (1) assistance,
- (2) relevant expertise,
- (3) impartiality, and
- (4) evidentiary reliability.⁸¹

1. Expert must have Expert Qualifications or Relevant Expertise

A witness must have expert qualifications or relevant expertise in order to testify as an expert.⁸² The rules outlining such requirements developed through common law.⁸³ The current rule, originally formulated in 1894,⁸⁴ states that an expert must have an “opinion of authority of one not so qualified will lack” and that the opinion is of such great quality that it elevates the

⁷⁹ *See id.*

⁸⁰ THE LAW COMMISSION, EXPERT EVIDENCE IN CRIMINAL PROCEEDINGS IN ENGLAND & WALES 13 (2011) [Electronic copy provided in accompanying USB flash drive at Source 45].

⁸¹ *Id.*

⁸² *Id.*

⁸³ Michelle M. Dempsey, *The Use of Expert Witness Testimony in the Prosecution of Domestic Violence*, CROWN PROTECTION SERV. DOMESTIC VIOLENCE EXPERT WITNESS REPORT 16 (Mar. 2004) [Electronic copy provided in accompanying USB flash drive at Source 44].

⁸⁴ *See R. v. Silverlock*, [1894] 2 Q.B. 766 (U.K.) (The discussion of whether the claimed expert is “peritus” involves answering the questions: “Is he skilled? Has he an adequate knowledge?”) [Electronic copy provided in accompanying USB flash drive at Source 17].

witness to the status of peritus.⁸⁵ An expert may acquire his expertise through education, experience, and/or training,⁸⁶ which must then form a connection to that topic about which the expert intends to testify.⁸⁷ Courts have held that it is expertise itself, not the method in which it was acquired, that determines this element of the test.⁸⁸ If the aforementioned conditions are met, the expert witness is qualified.

2. Testimony must be of Assistance, Impartial, and Reliable

The admission of an expert witness is further constrained by the requirements of assistance, impartiality, and evidentiary reliability, which together act to constrain the content of and limits to expert testimony.

Assistance involves aiding the court in making some determination in the matter at hand. In order to meet this element of the test, expert testimony must “furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury.”⁸⁹ However, if the judge or jury can understand the case and reach conclusions without the aid of the expert witness, then the expert does not pass the “assistance” element of the test.⁹⁰ Courts have warned against admitting superfluous expert witnesses and the inherent danger of their

⁸⁵ *R. v. Robb*, [1991] 93 Cr. App. R. 161, 164 (U.K.) [Electronic copy provided in accompanying USB flash drive at Source 16].

⁸⁶ *See id.* at 164.

⁸⁷ *Dempsey*, *supra* note 83, at 16.

⁸⁸ *See, Silverlock*, *supra* note 84.

⁸⁹ *Regina v. Turner*, [1975] Q.B. 834, 841 (U.K.) [Electronic copy provided in accompanying USB flash drive at Source 20].

⁹⁰ *Id.* at 841.

potentially misleading testimonies.⁹¹ So long as the expert witness's testimony is helpful and assists the factfinder understand matters beyond his normal, self-directed comprehension, the testimony passes this element of the test.

The expert witness's testimony must also be impartial.⁹² This requirement entails "provid[ing] independent assistance to the court by way of objective unbiased opinion in relation to matters within [the expert's] expertise."⁹³ The expert witness's duty and obligation to the court is dominant over any duty he may have to either party.⁹⁴ Where an expert witness has an obvious conflict of interest, the court will not admit his testimony.⁹⁵ However, a mere risk that the expert witness could be biased is not grounds for disqualifying him.⁹⁶ Thus, in the absence of a showing that the expert witness is biased, the expert witness passes the "impartial" part of the test.

Finally, the expert witness's testimony must rise to some level of evidentiary reliability in order to be admissible.⁹⁷ However, courts have not conclusively developed a standard test for

⁹¹ *See, id.* at 841 (explaining that judges and juries may take an expert witness's testimony for granted merely out of reverence for the expert's reputation without actually ensuring that the expert witness's testimony truly assists their factfinding mission).

⁹² THE LAW COMMISSION, *EXPERT EVIDENCE IN CRIMINAL PROCEEDINGS IN ENGLAND & WALES* 13 (2011) [Electronic copy provided in accompanying USB flash drive at Source 45].

⁹³ *Toth v. Jarman*, [2006] C.P. Rep. 44, 698 (U.K.) [Electronic copy provided in accompanying USB flash drive at Source 22].

⁹⁴ Criminal Procedure Rules of England, 33.2(2) [Electronic copy provided in accompanying USB flash drive at Source 1].

⁹⁵ *Toth*, *supra* note 93, at 698.

⁹⁶ *Regina v. Stubbs*, [2006] E.W.C.A. Crim 2312 (U.K.) [Electronic copy provided in accompanying USB flash drive at Source 19].

⁹⁷ LAW COMMISSION, *supra* note 92, at 13.

evaluating reliability.⁹⁸ Courts do have a standard procedure for challenges to the reliability of scientific evidence,⁹⁹ where it evaluates “whether there is a sufficiently reliable scientific basis for that evidence to be admitted.”¹⁰⁰ If the scientific evidence passes muster, the evidence is deemed reliable, and any questions or challenges to its validity must be left for trial.¹⁰¹

D. International Tribunals: Standard Similar to the United States and Developed through Precedent

The admission and limits of expert witness testimony in international criminal tribunals is not governed by a clear set of rules or statutes.¹⁰² Rather, the standards and procedures have evolved as the tribunals evolved, and the set of standards that organically emerged are similar to United States’s procedures.¹⁰³

1. Expert Must Possess Specialized Knowledge Specific to the Testimony

An expert must first qualify as an expert before his testimony may be heard in court. Many tribunals conduct an inquiry before the trial to determine the expert witness’s qualifications.¹⁰⁴ A recent decision in the International Criminal Tribunal for Rwanda (“ICTR”) defined an expert as one who “possess[es] some specialised knowledge acquired through education, experience, or training in the field that may assist the fact finders to understand the

⁹⁸ *Regina v. Reed*, [2010] 1 Cr. App. R. 23, 18 (U.K.) [Electronic copy provided in accompanying USB flash drive at Source 18].

⁹⁹ *See, e.g., Regina v. Weller*, [2010] E.W.C.A. Crim. 1085, 7 (U.K.) [Electronic copy provided in accompanying USB flash drive at Source 21].

¹⁰⁰ *Regina, supra* note 98, at 18.

¹⁰¹ *Id.*

¹⁰² KARIM A. A. KHAN, CAROLINE BUISMAN, AND CHRIS GOSNELL, *PRINCIPLES OF EVIDENCE IN INTERNATIONAL CRIMINAL JUSTICE* 600 (2010) [Electronic copy provided in accompanying USB flash drive at Source 47].

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 610.

evidence or to assess a fact in issue.”¹⁰⁵ Formalized education is not a necessary qualification for an expert witness.¹⁰⁶ But expert knowledge cannot only be general knowledge about a topic; the knowledge must be specific to that which the expert witness seeks to testify.¹⁰⁷ Also, the subject matter of the expert’s expertise must match the subject matter of the testimony.¹⁰⁸

2. Testimony must be Relevant, Reliable, and Possess Probative Value

There are three requirements for the content of an expert’s testimony—relevance, probative value, and reliability—and to be admissible, the expert testimony must meet all three requirements.¹⁰⁹

Relevance is not a strict requirement in international criminal tribunals, but it is the court’s major gatekeeping function. The ICTR has stated that “the opinion of an expert need not be essential or strictly necessary, or that any of his knowledge lie beyond the understanding of the triers of fact...[but only] needs to be useful to the finders of fact.”¹¹⁰ The ICTR has also outlined a limit to relevance. In *Prosecutor v. Simba*, an expert witness offered a sweeping retelling of a historical event and only mentioned the subject of the case’s name once, merely in passing.¹¹¹ The court held that the expert’s testimony did not meet the relevancy element

¹⁰⁵ *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-T, Oral Decision on the Qualification of Mr. Edmon Babin as Defense Expert Witness, 13 April 2005, para. 5 [Electronic copy provided in accompanying USB flash drive at Source 37].

¹⁰⁶ *See, e.g., Prosecutor v. Popović*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008 [Electronic copy provided in accompanying USB flash drive at Source 38].

¹⁰⁷ *See, e.g., Prosecutor v. Popović*, Case No. IT-05-88T, Second Decision Regarding the Evidence of General Rupert Smith, 11 October 2007 [Electronic copy provided in accompanying USB flash drive at Source 39].

¹⁰⁸ Khan, *supra* note 102, at 615.

¹⁰⁹ *Id.* at 600.

¹¹⁰ *Nyiramasuhuko*, *supra* note 105, at para. 5.

¹¹¹ *Id.*

because it was too broad in nature.¹¹² Additionally, it stated that it could not ascertain how the expert testimony was relevant and that the proponent of the expert testimony had not given any reason as to why it should be admitted.¹¹³

Furthermore, the Special Court for Sierra Leone (“SCSL”) held that, based upon decisions in the Trial Chambers, expert testimony that goes beyond the focused portion of the case at hand to make conclusions about the ultimate issue in the case is inadmissible.¹¹⁴

However, the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) has also noted that expert witnesses often give lengthy testimonies because they may speak to any matters relevant to the case at hand so long as it is in the purview of their expertise.¹¹⁵ Therefore, though an expert witness may expound upon the case at considerable length, the expert’s testimony must be focused on his area of expertise and must not make conclusions in regards to the case’s ultimate issue.

Probative value and reliability are not subject to such structured analysis as the relevance element but are nonetheless highly important in determining an expert witness’s admissibility. Probative value is inextricably linked with the qualification of an expert witness; a more qualified witness is more likely to offer testimony with a greater probative value. Likewise, a more qualified witness is more likely to testify reliably. Since testing reliability directly is incredible difficult, the court effectively polices the reliability of an expert’s testimony through

¹¹² See *Prosecutor v. Simba*, Case No. ICTR-2001-76-I, Decision on Prosecutor’s Motion for Admission of Testimony of an Expert Witness, 14 July 2004 [Electronic copy provided in accompanying USB flash drive at Source 40].

¹¹³ *Nyiramasuhuko*, *supra* note 105, at para. 5.

¹¹⁴ See *Prosecutor v. Brima et al*, SCSL-2004-16-T, Special Court for Sierra Leone, Judgment, 20 June 2007, para. 151 [Electronic copy provided in accompanying USB flash drive at Source 36].

¹¹⁵ *Co-Prosecutors v. Ieng*, Case File No. 002/19-09-2007/ECCC/TC, Decision on the Assignment of Experts, 5 Jul. 2012, para. 4 [Electronic copy provided in accompanying USB flash drive at Source 35].

the allowance of cross-examination.¹¹⁶ However, courts may still conduct a thorough inquiry into the reliability of an expert witness's testimony. Though courts vary on when such an inquiry takes place,¹¹⁷ many Trial Chambers defer conducting an extensive analysis into probative value and reliability until the latter stages of a trial.¹¹⁸

IV. CONCLUSION

A review of these four court systems reveals a great deal of commonalities in their treatment of expert witness testimony. All four court systems require a solid knowledge and understanding of the expertise to which the expert witness is planning to testify. Though each court system varies slightly in the ways in which they weigh formalized education and knowledge, none of the court systems requires such education. Indeed, the court systems are generally deferential in admitting experts with informally-acquired expertise, so long as the expertise is related to the issue to which the expert witness will testify. The majority of the court systems also commented on the availability of cross-examining the expert witness, an effective method of weeding-out defective expert witness testimony.

Likewise, each court system varies slightly in how it defines the content and scope of the expert witness's testimony, but that slight discrepancy does not change the fact that the court systems handle the content and scope of an expert witness's testimony nearly uniformly. Reliability and relevance are ubiquitous in each court system's discussion of testimonial requirements. The court systems share a strong desire to filter-out unnecessary and misleading expert testimony, both of which could be highly damaging to the fairness of the trial. There is

¹¹⁶ Khan, *supra* note 102, at 601.

¹¹⁷ *Id.* at 610.

¹¹⁸ *Id.*

also a common thread of concentrating on the expert witness's primary function—aiding the factfinder in making sound decisions—and striving to ensure that a qualified expert witness can meet that responsibility. Through an analysis of these court systems, it is apparent that there is a great deal of harmony in the ways in which they manage expert witness testimony.