EVIDENCE AND PROOF

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A. INTRODUCTION

At the outset it is probably worth stating that facts, not law, determine law suits. The skilful marshalling of facts is the art of advocacy! Lloyd Paul Stryker, in his book "The Art of Advocacy" at page 11, puts the matter as follows:

> The really difficult problem in the preparation of the case is to learn what the facts are, and no matter how long or conscientiously you work, you will never know them all. The law seldom decides the issue, the facts do; and as contrasted with the ascertainment of the facts, the law is relatively easy to discover. There are 100 good researchers of the law to one who has the genius, I may say a nose, for the discovery of the true facts.
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> Some young lawyers have a tendency not only to minimize the study of the facts but to treat them as of inferior importance to what they are pleased to call the "law". . . . But the experienced advocate has learned that the facts are the foundation, the only sure foundation of his case and he has found out too, how complicated and how difficult it is to dig them out.
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> 'More and more', Judge Cardozo once observed, 'we lawyers are awaking to a perception of the truth that what divides and distracts us from the solution of a legal problem is not so much uncertainty about the law as uncertainty about the facts - the facts which generate the law. Let the facts be known as they are, and the law will sprout from the seed and turn its branches toward the light'.

The role of the lawyer is to present the facts once gathered to a court in a manner that satisfies the legal standards of proof. Proof in a civil case can be achieved through the presentation of:

(1) oral testimony;

(2) documents; and

(3) by admissions.

What proof is required in a civil case will be determined from the pleadings that have been exchanged between the parties. As a general rule, the burden of proof will be on the person making the allegation. As lawyers, it is your duty to offer proof that is

(1) relevant;

(2) credible; and

(3) persuasive.

1. Relevancy

Proof that is offered to a trier of fact should be confined to those facts that will assist you in proving your case or in disproving the other party's case. You can ask yourself the question: If the other party admits the proof that I am offering to the court, would it assist in proving my case? If not, the facts are probably irrelevant.

2. Credibility

As you are aware, credibility is for the trier of fact to determine whether that be a trial judge or a jury. It is the role of lawyers to provide as much proof as is available to establish the credibility of the facts being asserted. As stated by Francis Wellman, in his classic work "The Art of Cross-Examination", 4th edition at p. 157:

> No one can frequent our courts of justice for any length of time without finding himself aghast at the daily spectacle presented by seemingly honest and intelligent men and women who array themselves upon opposite sides of a case and testify under oath to what appear to be absolutely contradictory statements of fact.

The foregoing quote appears in the chapter of Mr. Wellman's work entitled "Cross-Examination to the 'Fallacies of Testimony' ". The inherent weakness of testimonial proof has been commented on at length in court decisions over the years. For a resume of literature emphasizing the inherent weaknesses of testimonial proof, refer to Schiff "Evidence in the Litigation Process", 2nd edition, at p. 142-144.

Therefore, while oral testimony is invariably required in most civil trials, it is incumbent to support that oral testimony wherever possible with independent evidence, which may include additional oral testimony or documentary evidence or real evidence (i.e., the broken object, etc.). Documentary evidence can be the deciding factor in determining credibility issues between witnesses offering oral testimony, and furthermore, documentary evidence once introduced as an exhibit becomes a lasting document available to the trier of fact at the time of making the decision when the impact of oral testimony might not be clear, or overlooked.

As to the importance of documents, I would refer to a lecture by John Sopinka (as he then was) at the Anniversary Advocacy Symposium held in Toronto on the 29th of January, 1982, where he stated in the introduction to his lecture on "The Preparation and Proof of Documents" as follows:

> Documents constitute a major part of the evidence in a substantial percentage of civil cases and in many criminal cases. The inability to cope with the large volume of documents disqualifies many counsel in large civil cases. Many counsel are frightened away by the mystique that appears to surround documentary proof while others revel in a case which abounds in paper. I consider that documents are welcome Beacons in the uncharted waters of oral evidence. Documents are often prepared when there is no motive to misrepresent and may very well constitute the only reliable evidence in a case . . .
>
> [Emphasis added]

3. Persuasive

The art of advocacy is having another adopt your view as his or her own. The art of advocacy is, therefore, the art of persuasion. In a trial setting your object is to be persuasive through the manner in which you present your evidence at trial. This means:

(a) presenting evidence in an organized, logical manner in order that the jury or judge can appreciate the significance of the evidence at the time it is being presented; and

(b) presenting evidence in a manner that is as interesting as possible.

The first point requires that you plan the order in which you intend to present your evidence at trial; the second point requires that you maximize the use of illustrative and demonstrative evidence. It appears to be generally agreed among senior trial advocates that the most effective way to be persuasive in the presentation of a case is to maximize the use of this type of evidence in conjunction with oral testimony.

4. Illustrative Evidence

The following comments were made by Mr. Justice Haines, a very experienced trial judge in the Ontario High Court in the case of *Majcenic* v. *Natale* (1968), 66 D.L.R. (2d) 50 at pp. 56-57*:*

> As this case proceeded the medical evidence became so complex that I was quite satisfied the jury had only the vaguest impression of the injury to the plaintiff's foot and were probably quite confused. . . .

> At the commencement of the trial counsel provided me with copies of their medical reports which are now exs. 2 to 9 inclusive which I read carefully. As the case proceeded I had before me my atlas of anatomy. As the doctors spoke of the various parts of the foot and the effect of the injury on the patient their evidence became more meaningful and took on a definitive character that could not be gotten without an atlas of anatomy or model of the relevant bones. On the second day of the trial it became apparent that I was trying one case and the jury another. From the bewildered expressions on the faces of some of the jurymen I was of the definite view they were either confused or had lost interest.
>
> It is my considered view that if we are going to try these personal injury cases with a jury of laymen every proper aid to communication must be used to communicate to the jury the exact nature of that part of the anatomy involved, its use and injury. No lecturer to students would think of lecturing in anatomy without adequate anatomical charts and models. It seems to me that in genuine cases where such aids to communication are required they should be used in a modern trial.…

By resorting to models and charts to illustrate the oral testimony being presented by a witness one may greatly assist the understanding of the trier of fact of the testimony being presented. It should be stated that illustrative evidence is not in itself probative. In other words, it is not real evidence or original evidence. It simply illustrates testimony which is probative and usually consists of a model or a chart or a diagram, etc. It greatly assists in establishing the credibility of a witness, and the persuasiveness of his or her testimony.

5. Demonstrative Evidence

Martin H. Wunder, Q.C., in presenting a lecture to the 150th Anniversary Symposium on Advocacy in 1982 on the topic “Sources and Uses of Demonstrative Evidence”, stated as follows:

> What the trier of fact can literally see with his own eyes, whether he be judge or juror, he will accept, embrace and even defend with alacrity and enthusiasm with little help from counsel. . . . What we lack and, indeed, cannot convey verbally, can often be compensated for by the use of thoughtful and relevant visual aids.

Photographic reproduction is the most common form of demonstrative evidence, simply because photographs are far more portable than the object being photographed in most cases. Unlike illustrative evidence, demonstrative evidence is real evidence (and is, in fact, often referred to by that name). It portrays the reality of what the situation was or is.

In the personal injury case of *Hansen* v. *Saskatchewan Power Corporation* (1961-62), 36 W.W.R. (N.S.) 640 (Sask. C.A.), the trial judge had allowed a plaintiff to expose his thighs and feet to the jury which had been massively scarred as a result of burns received from an electrically charged guy wire owned by Saskatchewan Power Corporation. Woods J.A. at pp. 642-643 stated as follows in upholding the trial judge in this instance:

> Anything that might cause a jury to decide an issue on any basis other than the evidence before it must be carefully scrutinized. Wounds, and other external evidences of injury, may be used to inflame emotion and excite pity and thus cause a jury to allow sentimental considerations to replace a judicial approach to the evidence. That the admission of evidence that may be so used is to be carefully watched goes without saying.…
>
> In the present case the question of negligence was not in issue. The jury's task was to assess the extent of the damages. They were, after the judge's permission had been obtained, shown the well-healed scars of several wounds upon which a successful graft had been performed. By this means they were given a clear indication of the extent of the disfigurement of the plaintiff and thus they obtained a clear picture of the present circumstance of the plaintiff's wounds. Evidence of the plaintiff and of the medical witnesses would be more meaningful to the jury as a result.…
>
> But the viewing of the scars was a simple and effective way of explaining to the jury a pertinent part of the condition of the plaintiff and his condition was certainly pertinent to the task before the jury. Any severely injured person may well be the proper subject of pity, and it is important that such feelings for the plaintiff be not allowed to sway a jury to attach blame to an innocent party. But where liability is already established, and the question is that of damages alone, the fact that the plaintiff is a subject of pity is attributable to the fault of the defendant and much of the force of any objection that might exist to this type of evidence disappears.…

Note: The implication in Mr. Justice Woods' foregoing comments was that if liability was an issue, his decision might have been otherwise. Nevertheless, Mr. Justice Woods did affirm the principle that it is in the trial judge's discretion to determine if the probative value of viewing healed wounds would be exceeded by the prejudice to the defendant of a jury viewing them. The issue is would it inflame emotion and excite pity amongst the jury for the plaintiff out of proportion to the probative value of the evidence. Of course, such considerations would not arise in a trial before a judge alone, which is the manner in which most personal injury cases are tried.

In the case of *Draper* v. *Jacklyn* (1970), 9 D.L.R. (3d) 264 (S.C.C.), a personal injury action tried with a jury where both liability and damages were disputed, the plaintiff had suffered facial lacerations and fractures to his jaw and cheekbone. "Kirschner" wires were inserted in the jaw as part of surgical treatment and the wires protruded through the plaintiff's left cheek during four

weeks of healing. At trial, while examining the surgeon who had repaired the injury, the plaintiff's counsel tendered in evidence two photographs of the plaintiff's face taken during this four week period. The trial judge had admitted the photographs, but this ruling was reversed on appeal. On further appeal to the Supreme Court of Canada, Mr. Justice Ritchie stated as follows at pp. 265-266:

> … In my view there is a clear distinction between the display of such injured parts of the body for the sole purpose of having them seen by the jury and the introduction of photographs taken during the course of the medical treatment for the injuries sustained. The photographs in the present case serve to illustrate the nature of the treatment to which the appellant was subjected and in this sense they form a part of the narrative of his illness and recovery and are both relevant and admissible.
>
> There are cases where photographs which are relevant may, nevertheless, be excluded from the evidence in the discretion of the trial Judge on the ground that they are inflammatory, but no basis has been established in the present case for holding that the learned trial Judge erred in failing to exclude the photographs on that ground.

It will be noted that the foregoing cases dealt with demonstrative evidence intended to show the present state of the plaintiff's wounds and disfigurement or to explain the amount of scarring and/or pain and discomfort experienced by the plaintiff in the healing process.

Where demonstrative or illustrative evidence is not relevant to an issue before the court, i.e., damages for pain and suffering, then the court will not likely admit such an exhibit into evidence. *Shipman* v. *Antoniadis* (1975), 58 D.L.R. (3d) 321 (Ont. C.A.) was a case before a jury, where the issue was damages for personal injury suffered by an infant plaintiff. As part of a medical doctor's evidence he produced a vividly coloured chart drawn to depict the human trunk laid open to disclose the internal organs. It appeared that the chart was used for the purposes of teaching medical students, and the various colours were not an exact reproduction of natural colours but were used to distinguish organs or systems sought to be depicted. The surgeon utilized this chart for the purposes of indicating the location of the liver, spleen and gall bladder, and to illustrate the operative techniques the surgeon had employed in his surgical repair of the internal injuries suffered by the plaintiff. The Court of Appeal reversed the trial judge on the exercise of his discretion, and Kelly J.A. stated as follows at p. 322:

> But a detailed description of the operative repair techniques employed by the surgeon is not related to the existence of continuing or permanent impairment and diagrammatic material, however useful to one who would be interested in assessing the operative technique, was not significantly useful to an appreciation of the continuing or permanent impairment resulting from the removal of Barbara's spleen, gall bladder and one-half of her liver. To countenance the description of the operation performed by the surgeon and the use of the exhibit to illustrate that part of the surgeon's testimony would be but one step removed from permitting to be shown before the jury coloured moving pictures taken in the operating theatre during the course of the operation.

II. PROOF OF DOCUMENTS

A. ORGANIZATION OF DOCUMENTS FOR USE IN COURT

In any case where there are documents to be introduced in evidence, sufficient copies of all such documents should be prepared in order to make available to the trial judge, the jury (if there is one) and to each of the opposing parties, a copy of the document, in addition to the document that you will seek to introduce as an exhibit. This avoids the confusion that arises when one copy only of a document is made available and valuable court time is taken up with each party attempting to ascertain what the contents of the document are. It will also prove more effective if the trial judge and jury have access to a copy which can be followed while the witness is giving testimony with respect to the document.

In a case that involves numerous documents, the parties should give consideration to preparing a comprehensive brief of documents that will include documents that both sides have disclosed in their Statement as to Documents and will hope to introduce at the trial. A copy of the comprehensive brief of documents can then be made available to each party and to the trial judge. The brief of documents should be properly indexed. The documents contained in the brief will not be exhibits at that point in time, but as each document becomes an exhibit at the trial, it can be referred to by the indexed reference in the brief and the trial judge and each party is then in a position to attach the appropriate exhibit number to each document as it becomes an exhibit.

A variation on the foregoing suggestion is that the parties may agree in whole or in part that the documents contained in the comprehensive brief are authentic, in the sense that they are prepared by the person they purport to be prepared by, and they were received by the person they purport to be addressed to within a reasonable time following the date appearing on the document. If this can be agreed to the comprehensive brief of documents can be introduced as one exhibit at the opening of the trial, and greatly facilitate the handling of documents thereafter. By agreeing to authentication in the foregoing manner you are not thereby admitting the veracity, weight or effect of the documents. That will be determined by the trier of fact taking into account all of the evidence received at the trial. For an example of an agreement arrived at between counsel in a law suit involving six different parties, refer to Appendix A.

B. THE MEANING OF PROOF WITH RESPECT TO DOCUMENTS

Proof of a document has three possible meanings, and proof for one purpose does not necessarily satisfy the other two purposes.

1. Execution

This form of proof is necessary to establish that a party prepared the document or signed the same or had the same prepared and signed under their direction, but does not necessarily make the contents of the document proof of the facts stated therein, unless the assertions therein can be construed as admissions.

2. Genuineness

It has become increasingly common to resort to the use of photocopies of documents for submission to the court as an exhibit, but you should be aware that the Best Evidence Rule is still in existence and requires the original to be produced if available in the absence of agreement to the contrary. If the original document can no longer be made available for production and it is necessary to resort to a carbon copy, etc. you will still have to satisfy the necessary evidentiary rules to introduce the copy in place of the original document.

Proof of Execution and Proof of Genuineness are necessary to meet the requirements of authenticity.

3. Proof of Contents

If the document contains admissions by the author of the document, proof of execution can satisfy the necessary proof of contents. However, documents will often contain hearsay which is reported by the author, and the introduction of the document as an exhibit because it meets the requirements of authenticity, does not thereby make the contents of the documents which are hearsay proof of the facts contained in the hearsay.

An example of documents that often will contain hearsay are reports prepared by expert witnesses, including medical doctors, engineering consultants, automobile accident reconstruction experts, etc. The basis of the report may often depend on facts that are referred to, which the expert witness does not have personal knowledge of, but which the person assumes for the purposes of offering an opinion. The medical doctor may have requested psychological testing of the patient, the results of which psychological testing the doctor includes in a medical report, but in circumstances where the doctor in question had no part in conducting the psychological testing nor was he or she present during the same. In these circumstances, you should be entitled to insist that the person conducting the psychological testing be required to testify and be subject to cross-examination in order to test the "underpinning" of the doctor's opinion based on the psychological testing.

4. Documents Introduced for Identification

It will often transpire that due to the sequence of witnesses or the availability of witnesses, you will wish a witness to refer to a document which has not yet been authenticated. In these circumstances it is proper to refer the witness to the document, extract whatever evidence is relevant with respect to the document and at the conclusion of the evidence, tender the same to the court as a document for identification. A subsequent witness can then authenticate the document at which time it can become a full exhibit.

C. METHODS OF PROOF OF DOCUMENTS

1. By Agreement Between Opposing Counsel

A considerable amount of time is taken up on Examinations for Discovery putting individual documents to the opposing party's witness in order to obtain the appropriate admissions with respect to the document for the purposes of trial. Admission of documents can often be agreed to in advance by counsel, the agreement signed and, thereafter, the agreement can be introduced as one exhibit on the Examination for Discovery. This procedure saves valuable time and the added expense of a lengthier transcript consisting of page after page of putting documents to the witness.

2. By Obtaining Admissions as to Documents on Examination for Discovery

Another part of this paper will deal with the production of documents from all sources and the desirability of having as many documents as possible that are relevant to the proceedings available at the time you commence the Examination for Discovery. For this reason you should always insist that the other side has made full disclosure of its documents prior to commencing your Examination for Discovery. On the Examination for Discovery you will wish to obtain as many admissions as possible with respect to the documents you will seek to introduce at trial in order to avoid the necessity of calling evidence at the trial for that purpose, thereby taking up unnecessary trial time.

In the absence of agreement between the parties to introduce documents by consent at the opening of trial (which should be the exception rather than the rule), you will then be in a position to read in questions and answers from the opposing party's Examination for Discovery at the commencement of your case and have the documents made full exhibits prior to calling oral evidence.

3. By Notice to Admit Documents Pursuant to Rule 242

> **242(1)** Either party may by notice in writing at any time not later than 10 days before the day fixed for trial, call upon any other party to admit any document, saving all just exceptions, and if the other party desires to challenge the authenticity of the document, he shall within six days after service of such notice, give notice that he does not admit the document and requires it to be proved at the trial. Am. Gaz. May 15/87.
>
> (2) If such other party refuses or neglects to give notice of non-admission within the time prescribed in the last preceding paragraph, he shall be deemed to have admitted the document unless the court or a judge otherwise orders.
>
> (3) Where a party gives notice of non-admission within the time prescribed by subrule (1) and the document is proved at the trial, the costs of proving the document shall be paid by the party who has challenged the document. R. 242 Amend Gaz. Dec. 13, 2002.

It will transpire that the opposing party will not be prepared to admit all of the documents in an Examination for Discovery, for hopefully good reasons. However, as the trial date approaches, opposing counsel should again be requested to admit at least the authenticity of those documents that are not otherwise admitted and, particularly, any documents that will require the presence of an independent witness to authenticate. Failing agreement, a Notice to Admit Documents pursuant to the Rule referred to above may be resorted to (see Appendix B). As you will observe from Rule 242(3), if the party fails to admit the document and the same is subsequently proved at trial, the cost of proving the document will be paid for by the party who refused to admit the same whatever the outcome of the trial proceedings might be.

4. At a Pre-Trial Conference

> 191(8) A pre-trial conference shall be for the purpose of attempting to settle the proceeding, and if that is not possible, to consider:
>
> (a) the identification and simplification of the issues;
> (b) the necessity or desirability of amendments to the pleadings;
> (c) the possibility of obtaining admissions that will facilitate the trial;
> (d) whether all necessary steps have been taken in preparation for trial;
> (e) the possibility of settlement of specific issues;
> (f) the quantum of damages;
> (g) any other matters that may aid in the disposition of the proceedings;
> (h) the actual trial time required; and
> (i) the date for trial.

It has always been desirable to discuss the admission of documents that have not been previously admitted with opposing counsel prior to trial, and the provisions of Rule 191(8)(c) quoted above now provides a formalized basis to do so.

5. Proof of Documents at Trial

There are a number of ways that a document can be proven at trial apart from admissions, and they include the following:

(a) by calling the writer;

(b) by calling a witness who saw the documents signed or written;

(c) by calling a witness who has acquired knowledge of the author's writing:
  (i) because he or she is a handwriting expert and has compared the writing with sufficient specimens to offer an opinion on authorship; or
  (ii) by a non-expert who is acquainted with the person's handwriting (Section 47 of the *Saskatchewan Evidence Act*, R.S.S. 1978, c. S-16); or

(d) by utilizing the provisions of the *Evidence Act* or other statutory provisions providing for proof by certified copies of any number of "public" documents. When relying on these provisions you must be careful to ascertain if the statute provides for proof of contents of the documents, or simply provides for their authenticity, leaving the contents to be proven in the normal manner. Usually when it is intended that the statute provide for proof of contents, it uses words equivalent to the words contained in section 11 of the *Saskatchewan Evidence Act*, *supra* which reads as follows:

> **11** Copies of official and other notices, advertisements and documents printed in *The Canada Gazette* or in *The Saskatchewan Gazette*, or in the official gazette of any other province or territory of Canada shall be *prima facie* evidence of the originals and of the contents thereof
>
> [Emphasis added]

Vide also sections 28 to 30 of the *Saskatchewan Evidence Act* relating to banking records, micro film and mercantile documents.

6. Proof of Execution by Circumstantial Evidence

If a letter is received by a party which is in reply to a letter earlier forwarded, then even though the letter of reply is denied by the other party and is not in the handwriting of the party denying the same, such letter of reply may well be put to the jury or judge acting without a jury to determine the authenticity of the document. See: *Stevenson* v. *Dandy*, [1920] 2 W.W.R. 643 (Alta. S.C.).

7. Proof of Business Records

Section 31 of the *Saskatchewan Evidence Act* states as follows:

> 31(1) In this section:
> (a) "business" includes every kind of business, profession, occupation, calling, operation, activity or government activity, whether carried on for profit or otherwise;
> (b) **"court"** means the court, judge, arbitrator or person before whom a legal proceeding is held or taken;
> (c) **"legal proceeding"** means any civil proceeding or inquiry, including an arbitration, in which evidence is or may be given;
> (d) **"record"** includes any information that is recorded or stored by means of any device, including a computer.
>
> (2) Any writing or record made of any act, transaction, occurrence, or event is admissible in any legal proceeding as evidence of the act, transaction, occurrence or event if:
> (a) it is made in the usual and ordinary course of any business; and
> (b) it was in the usual and ordinary course of such business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter.
>
> (3) The circumstances of the making of a writing or record mentioned in subsection (2), including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility.
>
> (4) Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged.

The following observations are made with respect to the foregoing section:

(a) The section refers only to the record of any "act, transaction, occurrence or event". Matters of opinion would not appear to be admissible under this section.

The Supreme Court of Canada decision of *Ares* v. *Venner,* [1970] S.C.R. 608; 73 W.W.R. 347 which dealt with the admissibility of hospital records which often include matters of opinion by recording nurses, doctors, etc., is a decision at common law, and

not dependant on any statutory provision. The better view is that this common law exception is now available beyond hospital records. The criteria established in *Ares* v. *Venner, supra,* is set out by Hall J. at p. 362 wherein he stated as follows:

> Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record, should be received in evidence as *prima facie* proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so….

(b) The writing or record must have been made in the usual and ordinary course of business.

(c) It must be in the usual and ordinary course of business that such writing or record is made at the time or within a reasonable time thereafter. An example of where the criteria referred to in (b), *supra* was met but the criteria in this subsection was not met, is the case of *Palmer* v. *Hoffman* (1943), 318 U.S. 109.

> A deceased train engineer made a report in writing to an employer which was done in the course of his employment as an engineer, and to that extent it was made in the usual and ordinary course of business. However, the record was not one that was part of the systematic record keeping of the employer, but was rather a one time report, and it was held that it was not usual and ordinary in the business to make such a record. It was therefore not admissible under the equivalent section.

Note: The *Canada Evidence Act*, R.S.C. 1985, c. E-l0, does not specify this requirement. Under the *Canada Evidence Act* the only major condition of admissibility is that the document be made in the usual and ordinary course of business.

(d) Section 3l(2)(b) requires the record be created "at the time of the act, transaction, occurrence or event or within a reasonable time thereafter". In *Setak Computer Services Corporation Ltd.* v. *Burroughs Business Machines Ltd. et al.,* (1977), 76 D.L.R. (3d) 641 (Ont. H.C.) Griffiths J. noted at p. 651:

> …Where there is evidence of some delay in the transcribing, then in each case, it would seem to me, the Court must decide, as a matter of fact, whether the time span between the transaction and the recording thereof was so great as to suggest the danger of inaccuracy by lapse of memory.

(e) With respect to computer records, you will note that section 31(1)(d) which defines "records" includes any information that is recorded or stored by means of any device, including a computer. It has been held in two Court of Appeal decisions from Ontario and Alberta that a computer printout is a record whether or not the original information remains stored in the memory of the computer:

R. v. *Bell and Bruce* (1982), 65 C.C.C. (2d) 377 (Ont. C.A.)
R. v. *Cordell* (1982), 39 A.R. 281 (Alta. C.A.)

In *R* v. *Hall*, [1998] B.C.J. No. 2515 the defendants were charged with the theft of telecommunications services after having set up 'ghost' cellular telephone accounts using the names of government employees and giving false addresses. The Crown wished to introduce the phone company's billing records, in the form of printouts that had been downloaded from the company's computer. The records were created in a completely mechanical matter, with no human involvement in their creation. The computers were programmed to generate records from electronic signals emanating from telephone calls. The defendants opposed admission of the records because they were generated in the course of an investigation and because they were not originals but copies. The British Columbia Supreme Court ruled that the billings were admissible. In dealing with the issue of whether the records were originals or copies, Mr. Justice Owen-Flood concluded that the distinction was a "meaningless one" in the context of the case. In so finding, he commented at paragraph 52 of his decision that:

> For this Court to hold in the context of this application that the printouts were not admissible would be to ignore the realities of the computer age, wherein technological change has rendered the former distinctions between originals and copies a moot distraction in many areas.

Justice Owen-Flood relied upon various authorities, including *R.* v. *Vanlerberghe* (1976), 6 C.R. (3d) 222 (B.C.C.A.) and *R. v. Bicknell* (1988), 41 C.C.C. (3d) 545 (B.C.C.A.) and the *Bell and Bruce* case mentioned above.

For a complete review of the law on business and financial records, refer to the Practice Note by Audrey Brent, B.A., LL.B., LL.M in (1984-85) *Saskatchewan Law Review*, p. 103. See also Sopinka J., S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) pp. 187-214.

8. Electronic Records

Sections 29.1 to 29.6 were added to the *Saskatchewan Evidence Act* in 2000, and deal solely with Electronic Documents. These provisions read as follows:

> 29.1 (1) In this section and sections 29.2 to 29.6:
> (a) "data" means representations, in any form, of information or concepts;
> (b) "electronic record" means data that:
> (i) is recorded or stored on any medium in or by a computer or other similar device; and

(ii) can be read or perceived by a person or a computer or other similar device;
and includes a display, printout or other output of that data, other than a printout mentioned in subsection 29.3(2)

(c) "electronic records system" includes a computer system or other similar device by or in which an electronic record is recorded or stored and includes any procedures related to the recording or storing of an electronic record.

(2) This section and sections 29.2 to 29.6 do not modify any common law or statutory rule relating to the admissibility of records, except the rules relating to authentication and best evidence.

(3) A court may consider evidence admitted pursuant to sections 29.2 to 29.6 in applying any common law or statutory rule relating to the admissibility of records.

Authentication of electronic record
29.2 A person seeking to enter an electronic record must prove its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be.

Application of the best evidence rule
9.3(1) Subject to subsection (2), where the best evidence rule applies to an electronic record, the rule is satisfied on proof of the integrity of the electronic records system in or by which the electronic record was recorded or stored.

(2) An electronic record in the form of a printout that has been manifestly or consistently acted on, relied on or used is the record for the purposes of the best evidence rule.

Proving the integrity of an electronic records system
29.4 In the absence of evidence to the contrary, the integrity of the electronic records system in or by which an electronic record Is recorded or stored is proven for the purposes of subsection 29.3(1):

(a) by evidence that supports a finding that at all material times the computer system or other similar device was operating properly, or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic record and there are no reasonable grounds to doubt the integrity of the electronic records system;

(b) if it is established that the electronic record was recorded or stored in the usual and ordinary course of business by a party to the proceedings who is adverse in interest to the party seeking to introduce the record.

(c) if it is established that the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control oft he party seeking to introduce the record.

Standards
29.5 For the purpose of determining under any rule of law whether an electronic record is admissible, evidence may be presented respecting any standard, procedure, usage or practice on how electronic records are to be recorded or stored, having regard to the type of business or endeavour that used, recorded or stored the electronic record, and the nature and purpose of the electronic record.

These provisions were clearly intended to address the proliferation of electronic records in both personal and business contexts. Because the amendments to the statute are still rather recent, there were no reported cases which interpreted the provisions at the time this paper was revised.

It seems, however, that the provisions may work to forestall disputes about whether electronic records once printed out onto paper, constitute originals or copies. In drafting the provisions, legislators seem to have acknowledged the potential grey areas that arose in the *Bell and Bruce, Cordell* and *Hall* cases above.

D. PROOF OF PHOTOGRAPHS, DRAWINGS AND DIAGRAMS

1. Photographs

The admissibility of photographs is dependent on the following three criteria:

(a) their accuracy in truly representing the facts;

(b) their fairness and absence of any intention to mislead; and

(c) their verification on oath by a person capable of doing so.

Vide: *R.* v. *Creemer and Cormier*, [1968] 1 C.C.C. l4 at p.22 (N.S.S.C.).

We have dealt with certain aspects of accuracy in truly representing the facts and the requirement that the photographs not be misleading or unfair to one of the parties in the preceding material. On this latter point, if the prejudicial effect on the jury will exceed the probative value of the photograph, there is a risk the same will not be ruled admissible. However, the fact that the photographs are in colour, as opposed to black and white, is not grounds for rejecting the coloured photographs as long as they are otherwise accurate and relevant.

Vide: *R.* v. *Green* (1973), 9 C.C.C. (2d) 289 (N.S.S.C.).

With respect to the necessity for verification on oath "by a person capable to do so", it is not necessary that the photographer be called in order for the photograph to be verified. The leading case in this respect is *R.* v. *Bannister* (1936), 66 C.C.C. 38 (N.B.S.C.). In this case the charred remains of a human body had been photographed and the doctor who had conducted the post mortem examination of the remains swore that the photographs were a true depiction of the remains. At p. 41, Baxter C.J. stated as follows:

> We think that the photographs were properly admitted in evidence. Dr. Paul Melanson, who made a *post mortem* examination of the remains of Phillip Lake, swore that exs. nos. 24 and 25 were true photographs of those remains, and his testimony is supported by that of Dr. A.R. Landry. When these gentlemen recognize the photographs as being accurate portrayals of the condition of the charred remains, it seems immaterial to inquire as to the person who had taken them or when they were taken or as to those engaged in their development.

While the foregoing is a criminal case, the same rule would apply in civil cases.

It will depend on the purpose for which the photographs are being introduced and whether or not the accuracy of the photographs is being challenged on a technical basis whether it is necessary in any one instance to call the photographer. Where it is alleged the photographs (or video tape) are the product of artistic or creative camera techniques that distort or misrepresent matters, it will be necessary to call the photographer.

Vide: Quintal v. *Datta,* [1988] 6 W.W.R. 481 at p. 497 (Sask. C.A.).

Where the photographer is called, it is not necessary to qualify the photographer as an expert, as they are not giving opinion evidence. Nevertheless, it is common to review the photographer's qualifications, the type of camera used, the type of film used, the lighting that prevailed, the type of camera settings used, the type of lenses used, etc., with the end result being that the photographer will have to persuade the court that the photograph or video tape does accurately represent what was being photographed and does not misrepresent or distort the subject matter.

In order to expedite the evidence offered through photographs, and for the assistance of the court, it is important that each photograph introduced be properly labelled. Preferably the photographs should be assembled in book form, each photograph should be numbered and thereafter a written legend prepared indicating what each numbered photograph represents (see Appendix C). The information that should be available with respect to each photograph is location of scene; the compass direction depicted in the scene, if relevant, and the time and date the photo was taken.

A party seeking to introduce photographs at trial has the obligation of preparing a sufficient number of copies of the photographs so that copies are available for the opposing counsel, the trial judge, and a copy for every two jurors. Only in this way can the evidence offered through the photographs be appreciated by all relevant persons.

2. Video Tape

In *Simpson Timber Co. (Sask.) Ltd.* v. *Bonville,* [1986] 5 W.W.R. 180 at p. 187 Walker J. noted:

> In broad, the admissibility of videotape film is governed by the same rules which apply to the admission of photographs and motion pictures. Whenever a videotape film is offered as proving or assisting in proving a thing to be as therein represented, then it is offered testimonially, and it must be associated with a testifier. The videotape film can be received only as a non-verbal expression of the testimony of a witness competent to speak to the facts represented. It is immaterial who had prepared the videotape film, provided it is represented to the court by a competent and qualified witness as a representation of his or her knowledge. It is indifferent by whom it is made, providing it represents to the eye what the witness declares was the real appearance of things at the time he or she saw it and he or she states that it accurately depicts what it purports to show.

There is one exception to the foregoing and that is the images obtained from a static surveillance camera, known as the silent witness. *Vide: R.* v. *Taylor* (1984), 4 C.R.D. 425. A witness can authenticate a video tape, which is used primarily for identification purposes, by testifying as to the operation of the equipment used to record it.

In serious personal injury cases, it is not uncommon at this time to have presented to the court a "day in the life of" video tape of the plaintiff to show the difficulties that person encounters in every day living. To the extent the tape being offered is an edited version of a number of tapes, it will be necessary to make available to the opposing side all of the raw tape utilized in the course of preparing the edited version. With respect to the admissibility of video tape, the Saskatchewan Court of Appeal noted in *Quintal* v. *Datta, supra* at p. 497:

> …Generally speaking, in order to be admissible in evidence they must be accepted by the trial court as (1) being material and relevant to the issues in litigation, as well as probative in value, and (2) tending to aid, rather than confuse or mislead or prejudice, the jury: see *Draper* v. *Jacklyn,* [1970] S.C.R. 92 at 96-97, 9 D.L.R. (3d) 264 [Ont.]. In personal injury litigation photographs are often used to show the nature and appearance of the injuries at the time each photograph was made. This technique demonstrates visually the severity of the injury or disability and may assist the trier of fact in its task.
>
> We all agree that the court should always be alert to the possibility that the use of videotape, or any other medium including photographs, to present evidence might have a *misleading* and prejudicial impact on the jury. However, in this case the impugned evidence passed the threshold test of authentication and accordingly we exclude consideration of "staged" reenactments and misleading camera techniques.

3. Drawings and Plans

If you are introducing a drawing or plan as evidence in a trial, there are two types that may be considered:

(a) the scale plan; or
(b) the measured plan or drawing.

(a) Scale Drawing or Plan

A scale drawing or diagram is accurate as to measurement and distances in every respect, except it is miniaturized to reflect so many feet or yards per inch or centimetre. It is important the diagram indicate the scale that has been used, (e.g., one inch equals fifty feet) in order that the judge or jury can thereafter use a ruler to determine various measurements indicated on the diagram. A compass direction should also be indicated on the diagram. See the example in Appendix D.

(b) A Measured Diagram

All relevant measurements appear on the measured diagram. This is done whenever it is necessary to represent the object in three dimensions. Appendix E has a sample of a measured diagram of a swimming pool and diving board.

We often see diagrams which indicate the specific measurements of interest to the party introducing the diagram only. However, invariably if measurements are relevant, opposing counsel will have numerous questions to pose in cross examination on measurements that are of interest to his or her client. If the witness is not able to answer such questions in cross examination the witness can be made to appear biased, and a suggestion of unfairness will surround the evidence presented by that witness. For this reason when utilizing a measured diagram include all possible relevant measurements and not simply those which are of immediate interest to your client.

As in the case with photographs, it will be necessary to call the person who prepared the diagram to verify the same and advise the source of the information contained on the diagram if the person did not obtain the same personally. If the information has not been personally obtained, it will be necessary to call the people who provided the information in the first instance to avoid breach of the hearsay rule.

With respect to measurements it is important that you instruct the persons who are performing the measurements that the same person should always be on the "live" end of the tape and recording the measurements. You do not wish a situation where one person has done half the measurements and the other person has done the other half.

Finally, the size of the diagram or drawing should be a consideration at the time you are requisitioning the same. In a jury trial, or where a number of witnesses will be referring to the diagram, the larger the drawing or diagram the better. This allows an opportunity for everyone in the courtroom to pay attention to the one diagram while a witness is referring to the same for the purposes of giving oral testimony. The availability of an easel and a pointer for the use of the person referring to the same shows organization, assists the witnesses in presenting their evidence and assists the court or jury to understand and follow the evidence.

Today, a most effective way to present charts and diagrams is by overhead projector. Using this equipment makes it very easy for everyone to see the item and, with electronic pointers, the witness need not ever leave the witness stand.

E. EXHIBITS

For any document, photograph, article, etc. to be evidence in a trial it must be first entered as an exhibit. If it is not an exhibit it is not evidence for trial purposes.

1. Handling an Exhibit

The method of handling an exhibit is as follows:

(a) You show the document or article you are seeking to introduce to opposing counsel. If there is an objection at this point in time it will likely be with respect to relevance or possibly disclosure.

(b) In the absence of objection from opposing counsel or after a favourable ruling you will next show the item to the witness.

(c) You will then proceed to have the witness authenticate the item. As we discussed earlier with respect to documents, the object of authentication is to establish the genuineness of the item (i.e., the signature, who prepared it, who found it, does it truly represent what you saw, etc.).

(d) After asking authentication questions you will ask that the item be made an exhibit. The judge will ask opposing counsel if there is any objection. If there is, the objection will likely relate to whether or not the item has in fact been authenticated.

(e) After a favourable ruling on authentication you then ask the judge to make the item an exhibit in the trial. The judge will give the item an exhibit number which will use an initial and a sequential numbering system for each of the parties in the trial (i.e., exhibits P-l, D-l, T (third party)-l, etc.).

(g) Once the item is an exhibit you will then publish the exhibit to the judge and, if there is a jury, to the jury. This means having sufficient copies available to distribute when the item is a document as opposed to taking court time to pass the document around to all relevant parties. As noted earlier, not having sufficient copies available is the least effective way to present your case.

(h) After publication you will then proceed to question the witness with respect to the particular exhibit.

2. Exhibits Marked for Identification

It will often transpire that you will have to call a witness out of order to accommodate the witness' availability. This can result in producing a witness you wish to give evidence with respect to an item (e.g., fingerprints or a document) before the item has been authenticated.

In this situation you will go through the procedure outlined above, and if the item is ruled relevant and otherwise admissible but for authentication, the item will be given an exhibit number for Identification Only. The item is not at this point an exhibit.

You will then question the witness on the evidence you wish to elicit with respect to the item. If subsequently you fail to authenticate the item, any evidence given with respect to it will not be admissible in the trial. If you do subsequently authenticate the item, you will then ask that the item become a full exhibit at that point in time. One of the items you will wish to have in your trial checklist is a note that before the close of your case you have ensured all exhibits for identification have been made full exhibits.

F. CONTINUITY

When it is necessary or it has transpired that an item pass through the hands of a number of individuals, such as occurs when items are sent away for analysis, in the absence of continuity being admitted, it is often necessary to call each person to establish that the item has not been altered and is in the same condition as when it passed through that person's possession. Police officers and criminal lawyers are familiar with the necessity of establishing the chain of continuity and I mention it simply to alert you that the same rules apply in a civil case.

F. OBJECTIONS TO EVIDENCE

The time to make an objection with respect to any form of evidence whether testimonial or real is at the earliest opportunity. The trial judge will exercise some independent discretion in this area, particularly when it is a jury trial, but the primary responsibility to raise objections is on counsel. With the disclosure that is now available in civil cases counsel should anticipate objections to evidence whether made with respect to the opposing parties evidence or objections that may be forthcoming from such party with respect to your evidence, and counsel should come to trial with appropriate authorities to support or defend anticipated objections.

III. PROOF BY WAY OF WITNESSES

A. ROLE OF THE WITNESS

While everyone is likely aware of the dictionary definition of the word "witness", its origins in the English language are important in identifying the function of a witness to our legal system. In the text *Witnesses* by Carswell, 1991, the learned author, Allan Mewett, states at page 2-1:

> The word 'witness' is derived from the Old English 'witan' (cognate with the Latin '*videre*') meaning 'to have knowledge of', 'to know as a fact' or 'to perceive', and the suffix '-ness' to denote the person possessing that knowledge. A witness, generally, is called to testify as to his or her knowledge of the facts that are in issue -- a knowledge acquired through his or her observation of events, by seeing them or hearing them himself. The witness's testimonial capacity comes from this observation, from his or her memory of it and from the ability to communicate what he or she observed to the court. The sum total of all of the evidence constitutes the data from which the trier of fact will draw an inference as to what actually occurred. It is not, therefore, the function of the witness to express his or her opinion as to inference that should be drawn from those facts for to do so would be to exceed the role of merely presenting those facts for the use of the court or tribunal. The evidence of such witnesses is given in the form of replies to questions of fact.

Accordingly, it is important to recall when preparing your witnesses for trial that the witness is to provide facts for the court rather than opinions. Otherwise, opposing counsel or the judge may intervene and restrict the witness's testimony. The line, however, is not a hard and fast one and there are some instances where facts cannot be conveyed, except in the form of conclusions drawn from the facts observed (for example, a witness might testify that the defendant 'went through a red light'). Often matters of fact are combined to an opinion and are accepted by the court unless objection is taken, in which case the facts giving rise to the opinion can be broken down into their constituent elements. See *Graatt* v. *R.* (1983), 2 C.C.C. (3d) 365.

Of course, the role of the expert witness is totally different from that of the lay witness. The expert witness is called to give opinions based upon facts that either have been or will be proven at trial.

The evidence of the expert's opinion is submitted to assist the court or the jury in reaching a decision based upon the factual evidence presented. More will be said about the role of the expert witness later in this paper.

B. CALLING OF WITNESSES

The decision of which witnesses to call and how many and what questions to put to such witnesses is the function of the parties to the litigation, or more appropriately, counsel acting on their behalf. The trial judge has no power to order that a witness be called. Lord Denning in the case of *Jones* v. *National Coal Board* (1957), 2 Q.B. 55 stated at page 64:

> Let the advocates one after the other put the weights into the scales . . . but the judge at the end decides which way the balance tilts, be it ever so slightly. So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might shed some light on the facts. He must rest content with the witnesses called by the parties. . . .

If the trial judge does descend into the arena, a Court of Appeal may order a new trial. In the case of *Phillips* v. *Ford Motor Co. of Canada Ltd.* (1971), 18 D.L.R. (3d) 641, the headnote reads:

> Under the adversary system it is assumed that the litigants, assisted by counsel, will fully and diligently present all the material facts which have evidentiary value in support of their respective positions and that these disputed facts will receive from the trial Judge a dispassionate and impartial consideration in order to arrive at the truth of the matters in controversy. The trial is not intended to be a scientific exploration with the presiding Judge assuming the role of a research director. The trial Judge commits a fundamental error when he intervenes constantly in an attempt to direct an inquiry instead of a trial, puts forward theories of his own, orders scientific tests to determine their validity and questions witnesses in a manner that goes beyond what is necessary to clarify obscurities in technical evidence and becomes an attempt to provide scientific support for theories conceived by the Court.

A trial judge may, however, intervene to clear up ambiguities, to ensure an orderly presentation of testimony or resolve doubt as to meanings or credibility. Even then, there are limits to the trial judge's intervention. In the case of *Shoppers Mortgage & Loan Corp.* v. *Health First Wellington Square Ltd.* (1995), 38 C.P.C. (3d) 8 at page 16, the court referred to the case of *R.* v. *Brouillard*, [1985] 1 S.C.R. 39, where Lamer J., for the court, stated that the maxim justice must be seen to have been done applies to both civil and criminal cases, and quoted the following passage from that court in *R.* v. *Torbiak* (1974), 26 C.R.N.S. 108 (Ont. C.A.):

> The proper conduct of a trial judge is circumscribed by two considerations. On the one hand his position is one of great power and prestige which gives his every word an especial significance. The position of established neutrality requires that the trial judge should confine himself as much as possible to his own responsibilities and leave to counsel and members of the jury their respective functions. On the other hand his responsibility for the conduct of the trial may well require him to ask questions which ought to be asked and have not been asked on account of the failure of counsel, and so compel him to interject himself into the examination of witnesses to a degree which he might not otherwise choose.

While it is entirely within the discretion of the parties or their counsel who they call as witnesses, failure to call someone whose evidence is critical to a matter might result in the court drawing an adverse inference from the failure to call such evidence. See *Murray* v. *City of Saskatoon* (1952), 2 D.L.R. 499 (Sask. Q.B.).

However, it is not the rule that a party must call all the witnesses, no matter how numerous, who knew anything about the case. If there is a reasonable explanation for not calling evidence or a witness, it should be provided to the court so that an adverse inference will not be drawn. See *Sunnyside Nursing Home* v. *Builders Contract Management Ltd.* (1985), 40 Sask. R. 1 at page 10 and *Schmerman* v. *Schmerman* (1994), 161 A.R. 21.

C. OBLIGATION TO CROSS EXAMINE

Although there may be a rule in England that failure to cross examine a witness on a matter affecting the credibility of the testimony would prevent calling subsequent evidence to challenge such credibility, there is no such rule in Canada. However, since the trier of fact might take the failure to cross examine into account in deciding the weight to be given to the evidence subsequently tendered, it is, I believe, good practice to raise the theory in cross examination, as well as subsequently tendering evidence. See *Hurd* v. *Hewitt* (1994), 120 D.L.R. (4th) 105 (Ont.C.A.) where Carthy J.A. stated at page 117:

> My analysis of these authorities leads to the conclusion that there are no absolute rules in Canada as to the questioning of witnesses at hearings or trials adjudicating between parties. The argument that a party puts after failing to ask obvious questions of a witness may be so severely impaired as to be characterized as incredible. Yet the evidence of a witness may be so obviously flawed that a party's best interest lies in leaving that evidence to stand naked. In either event, the tribunal must assess the evidence and adjudicate upon the rights of the parties as those rights appear from that evidence, and not the evidence minus that which appears unfair to third parties.

In the case of *Budnark* v. *Sun Life Assurance Co. of Canada* (1996), 7 W.W.R. 670 (B.C.C.A.), the defendant introduced medical records as part of its case, without first cross examining the plaintiff on the issue. The Court of Appeal held that this was permissible since the plaintiff could always have been permitted to explain these records on re-examination.

D. FORMS OF TESTIMONY

As with documentary evidence, there are two pre-requisites for allowing witness's testimony:

(1) the evidence must be relevant; and
(2) the evidence must not be excluded by any of the issues regarding admissibility.

Therefore, testimony of witnesses should be put in the form of questions so that objections can be taken before the evidence is in. It is, therefore, quite improper to ask a witness "tell us what you know about the case". The purpose of an examination-in-chief is to bring forth the evidence favourable to your client and to present it in its most favourable light. The purpose of cross examination is to minimize the weight of the witness's evidence, to elicit evidence favourable to the party doing the examination, to discredit a witness or a combination of all three. However, the two basic requirements of relevancy and admissibility apply, even in cross examination, although more leeway is given if you can show the judge that credibility is the issue which you are pursuing.

An issue sometimes arises where there are co-plaintiffs or co-defendants as to the ability to cross examine a co-plaintiff or a co-defendant. The issue normally involves the right to ask leading questions in cross examination. Generally speaking, the courts have limited the cross examination of a co-plaintiff and have not allowed leading questions on the basis that the joining of co-plaintiffs in an action is voluntary in nature and the witness for one of the parties can hardly be said to be opposed in interest to the other. However, generally, co-defendants are not joined voluntarily and, accordingly, may not have identical or corresponding interests with each other. Therefore, co-defendants have been said to have a right to cross examine the other defendant's witnesses and to ask leading questions. See *Murdock* v. *Taylor* (1965), A.C. 574 (H.L.). A trial judge, however, has discretion not to allow cross examination of co-defendants unless their interests are adverse and then to require the co-defendant to cross examine prior to the plaintiff cross-examining. See *Trizec Equities Ltd.* v. *Ellis-Don Management Services Ltd.* (1996), 45 C.P.C. (3d) 275 (Alta. Q.B.).

After cross examination, the party calling the witness has the right to re-examine, but is limited to matters arising out of the cross-examination.

There is also in some cases a limited right to call evidence in rebuttal. However, the plaintiff is not allowed to split its case and the plaintiff is only allowed to call evidence that could not have been anticipated to have been an issue prior to the defendant presenting its case. See *Sood* v. *College of Physicians and Surgeons (Saskatchewan)*, [1996] 2 W.W.R. 668 (Sask.Q.B.) where the learned Chamber Judge stated at page 674:

> In my view the College did not split its case by introducing rebuttal evidence as this testimony was called solely to counter the testimony that Mrs. Sood had been present during the examinations. A party splits its case when that party fails to call evidence which is clearly relevant to the proof of the allegations and then seeks to call evidence in rebuttal to support or buttress its case. As stated by Robichaud J. in *B.F. Goodrich Canada Ltd.* at p. 34:
>
> > '. . . it is not competent for the plaintiff to rely upon a purely prima facie case in the first instance, and then to support it by further evidence in reply.'

The trial judge has the discretion to allow rebuttal evidence to allow "for the discovery of the whole truth of the matter in issue and in an effort to ensure the proper administration of justice". See *B.F. Goodrich Canada Ltd.* v. *Mann's Garage Ltd.* (1959), 21 D.L.R. (2d) 33 (N.B.Q.B.).

E. COMPETENCE AND COMPELLABILITY

1. Competence

In order to be considered competent to testify, a witness must have some relevant and admissible evidence to offer and is not barred from testifying because of some mental defect or other legal disability. All adults are presumed to have sufficient mental capacity to testify and the onus is on the party seeking to have the witness disqualified, to satisfy the trial judge that the witness lacks the mental capacity. See s. 16(5) of the *Canada Evidence Act* R.S.C. 1985, c. C-5, am. R.S.C. (3rd Supp.), c. 18:

> 16(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

The issue is not whether a witness is mentally ill, but rather because of a mental disorder, the witness lacks mental capacity because he or she is unable to perceive the event in question or remember it or is unable to communicate to the court intellectually.

An issue which arises periodically is whether counsel for a party is competent to testify. While counsel may have relevant evidence to give, the courts have generally indicated that unless counsel is prepared to withdraw such that new counsel can lead the questioning, that the court will not allow such a practice. The *Code of Professional Conduct*, Chapter IX, Commentary 5, states as follows:

> The Lawyer as Witness
>
> 5. The lawyer who appears as an advocate should not submit the lawyer's own affidavit to or testify before a tribunal save as permitted by local rule or practise, or as to purely formal or uncontroverted matters. This also applies to the lawyer's partners and associates; . . . . The lawyer who is a necessary witness should testify and entrust the conduct of the case to someone else. Similarly, the lawyer who was a witness in the proceedings should not appear as advocate in any appeal from the decision in those proceedings.

See *Bilson* v. *University of Saskatchewan* (1984), 4 W.W.R. 238 (Sask.C.A.) and *Owen* v. *Whitebear Lake Development Corp.*, [1997], 157 Sask.R. 1.

2. Compellability

While competence deals with whether a witness may testify, compellability deals with the question of whether he or she must testify. Generally speaking, individuals can be compelled to testify in civil cases by serving them with a subpoena issued by the court. However, there are certain instances when a subpoena may be set aside. These are:

(a) Sovereign and Parliamentary Immunity

In British constitutional theory, the Queen is not a compellable witness since there is no process pursuant to which her attendance can be enforced. However, the principal does not apply to members of the Government. See *Phillips* v. *Eyre*, [1909] 1 K.B. 258. However, the mere fact that the Government officials are subpoenable does not mean that they can be compelled to give

testimony that is otherwise exempt on the basis of crown immunity or privilege. In the case of *Mulroney* v. *Coates* (1986), 54 O.R. (2d) 353 (Ont. H.C.) in quashing the summons given to three crown witnesses, the trial judge stated at page 366:

> As it has been made to appear to me that all of the lines of inquiry sought to be pursued on the examinations for discovery of these proposed deponents will inevitably trespass upon ground covered by the suggested prerogative or immunity, I see no useful purpose in ordering their attendance upon examinations at which it is clear that that position will, in my view meritoriously, be asserted.

(b) Judicial Immunity

Judges are not compellable as part of the principal of judicial independence. In the case of *MacKeigan* v. *Hickman* (1988), 43 C.C.C. (3d) 287, the court refused to compel Court of Appeal judges to testify at a Royal Commission and stated at page 336:

> A judge must not testify before a commission or court on matters which came before the judge in his or her judicial capacity, even if the judge would like to respond to one or more of the questions which have been publicly raised. . . . [Judicial immunity] . . . . is not for a judge personally, it is for the benefit of the public 'to protect the judicial system against interference or influence which might pervert the course of justice'.

In a recent Saskatchewan decision, *Condessa Z Holdings Ltd.* v. *Brown's Plymouth Chrysler Ltd.* (1993), 109 Sask.R. 170, (1994) 104 D.L.R. (4th) 96, the Saskatchewan Court of Appeal held that a pre-trial judge was not compellable to testify as to the terms of settlement arrived at during a pre-trial conference. Vancise J.A. stated at page 127:

> Unlike privileged communications, judicial immunity from testifying as to matters concerning the exercise of a judge's judicial authority accrues to the judge *qua* judge and may not be waived by the parties. The pre-trial judge is not compellable in these circumstances to testify about matters relating to the settlement or terms of the purported settlement arrived at in the context of the pre-trial conference.

(c) The Parties Themselves

The parties in a civil suit are both competent and compellable witnesses for the opposing side. See the *Saskatchewan Evidence Act* R.S.S. 1978 Cap. S-16, s. 35(1). Section 35(2) of the *Act*, however, states:

> Notwithstanding subsection 1, no person is compellable in a prosecution against himself under any act to give evidence against himself.

However, there are certain instances in which Section 35(2) would not apply, such as before disciplinary governing bodies. See *James and The Law Society of British Columbia* (1982), 143 D.L.R. (3d) 379 and *Belhumeur* v. *Discipline Committee of the Quebec Bar Association* (1988), 35 C.R. (3d) 279 (Que.S.C.) where the court stated:

> "The practise of a profession is a privilege. The law grants to certain groups a monopoly to carry on certain well-defined activities and imposes upon the members of those groups an obligation to prevent abuse and to ensure that the monopoly will be exercised for the public good. It is normal that those who enjoy these privileges should be subjected to a more rigorous discipline than that which applies to ordinary citizens. This discipline is peculiar to them and is not part of the penal law."

F. PREPARATION OF WITNESSES

While lawyers practice in an adversarial system, they are officers of the court and there are, obviously, limits to the manner in which a witness can be prepared for court. In the text *Witnesses* by Mewett, the learned author refers to the case of *The State of North Carolina* v. *McCormick* (1979), 259 S.E. 880 where the court quite succinctly stated the lawyers' role in preparing a witness at page 882:

> It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer . . . and is to be commended because it promotes a more efficient administration of justice and saves court time.
>
> Even though a witness has been prepared in this manner, his testimony at trial is still *his* voluntary testimony. Nothing improper has occurred so long as the attorney is preparing the witness to give *the witness'* testimony at trial and not the testimony that the attorney has placed in the witness' mouth and not false or perjured testimony.
>
> When a witness' testimony appears to be have been memorized or rehearsed or it appears that the witness has testified using the attorney's words rather than his own or has been improperly coached, then these are matters to be explored on cross-examination, and the weight to be given to the witness' testimony is for the jury.

It should also be remembered that there are ethical rules which refer to how you should conduct preparation and interviews. Chapter IX, Commentary 6 of the *Code of Professional Conduct* adopted by the Benchers of The Law Society of Saskatchewan, states:

> Interviewing Witnesses
>
> 6. The lawyer may properly seek information from any potential witness (whether under subpoena or not) but should disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way. The lawyer shall not approach or deal with an opposite party who is professionally represented save through or with the consent of that party's lawyer.

It is also proper to advise and coach a witness what to expect to be asked in cross examination, but it is improper to instruct a witness what to say in response to such cross examination. It is presumable in coaching a witness to suggest approaches to responses, but not exact words which the witness is to memorize.

The *Code of Professional Conduct* also provides specific guidelines in respect to communications with witnesses during a trial. Chapter IX, Commentary 16, provides as follows:

> Communicating with Witnesses
>
> 16. The lawyer should observe the following guidelines respecting communication with witnesses giving evidence:
>
> (a) During the examination-in-chief it is not improper for the examining lawyer to discuss with the witness any matter that has not been covered in the examination up to that point;
> (b) During examination-in-chief by another lawyer of a witness who is unsympathetic to the lawyer's cause the lawyer not conducting the examination-in-chief may properly discuss the evidence with the witness;
> (c) Between completion of examination-in-chief and commencement of cross-examination of the lawyer's own witness there ought to be no discussion of the evidence given in chief or relating to any matter introduced or touched upon during the examination-in-chief;
> (d) During cross-examination by an opposing lawyer the lawyer ought not to have any conversation with the witness respecting the witness' evidence or relative to any issue in the proceeding;
> (e) Between completion of cross-examination and commencement of re-examination the lawyer who is going to re-examine the witness ought not to have any discussion respecting evidence that will be dealt with on re-examination;
> (f) During cross-examination by the lawyer of a witness unsympathetic to the cross-examiner's cause the lawyer may properly discuss the witness' evidence with the witness;
> (g) During cross-examination by the lawyer of a witness who is sympathetic to the lawyer's cause any conversations ought to be restricted in the same way as communications during examination-in-chief of one's own witness;
> (h) During re-examination of a witness called by an opposing lawyer if the witness is sympathetic to the lawyer's cause there ought to be no communication relating to the evidence to be given by that witness during re-examination. The lawyer may, however, properly discuss the evidence with a witness who is adverse in interest;
> (i) When an examination for discovery of a party is in progress there ought to be no communication between the party under oath and his or her lawyer without the consent of the examining lawyer. Such consent is required only during the actual examination and not during any adjournment in the examination.

G. EXPERT WITNESS

In the text *The Law of Evidence in Canada*, Sopinka, Lederman and Bryant, the learned authors state at page 536:

> An expert is usually called for two reasons. The expert provides to the court basic information necessary for its understanding of the scientific or technical issues involved in the case. In addition, because the court is incapable of drawing the necessary inferences on its own from the technical facts presented, an expert is allowed to state his or her opinion and conclusions.

However, expert witness is permitted to testify only where the subject matter of their testimony is such that the judge or jury, as inexperienced people in such matters, are likely incapable of forming a correct judgment without it. Thus, if the judge or jury can easily draw the necessary inferences without it, expert opinion evidence is not admissible. See *Kozak* v. *Funk* (1995), 136 Sask.R. 12 (Sask. Q.B.).

In order to be admissible, expert evidence must be:

(1) relevant;
(2) not inadmissible on policy grounds;
(3) necessary in assisting the trier of fact;
(4) not inadmissible by any exclusionary rules; and
(5) presented by a properly qualified witness.

See *R* v. *Mohan* (1994), 2 S.C.R. 9 at page 20. For a thorough analysis of the above criteria see *Kozak* v. *Funk* (1995), 136 Sask.R. 12 (Sask. Q.B.).

In many circumstances, expert opinion evidence is said to be rejected on the grounds that the evidence tendered constituted an opinion upon the very point the judge or jury had to decide -- the ultimate issue. An examination of the cases, however, indicates that the judge or jury would have had no difficulty in arriving at the proper conclusion without the tendered opinion and that is likely the reason for its rejection. See *Lambert* v. *College of Physicians and Surgeons (Saskatchewan)* (1992), 101 Sask.R. 81 at 88.

Expert opinions, even though admissible, are not binding on the court and can be given whatever weight the trier of facts deems proper since they have the ultimate responsibility for the correct decision. Furthermore, the testimony of experts must be weighted in the same manner as any other witness. See *Southern Canadian Power Company* v. *R*, [1936] S.C.R. 4, Rev'd [1937] 3 All E.R. 923; *Shawinigan Engineering Company* v. *Naud* (1929), S.C.R. 341; and *Kangas* v. *Parker* (1978), 5 W.W.R. 667 (Sask.C.A.).

Where there are conflicting expert opinions, the court will assess which theory is most consistent with the evidence and most probable. See *Sunnyside Nursing Home* v. *Builders Contract Management* (1985), 40 Sask.R. 10 at 16.

The *Saskatchewan Evidence Act* R.S.S. 1978, Cap. S-16, limits the number of experts which may be called by a party without leave of the trial judge. Section 48 of the *Act* provides as follows:

> Where, on the trial of any action, matter or proceeding to which the provisions of this Act extend, it is intended by any of the parties thereto to examine as witnesses, professional or other experts, entitled according to the law or practise to give opinion evidence, not more than five of such witnesses may be called upon by either side without the leave of the Court or Judge presiding, such leave to be applied for before the examination of any of the experts who may be examined without such leave.

This section does not apply to ordinary professional witnesses who give an opinion based upon personal observation of a person or someone who has personally observed the action and forms an opinion based upon this personal observations, even though they might otherwise be considered "experts" in their professional capacities. See *Robbins* v. *National Trust Co.* (1925), 57 O.R. 45, Aff'd (1927) A.C. 515.

Rule 284(D) of the Rules of Court provides as follows:

> Expert Witnesses
>
> 284(D)(1) A party who intends to call an expert witness at trial shall, not less than 10 days before the date fixed for a pre-trial conference, serve on every other party to the action a report setting out the name, address and qualifications of the expert, the substance of the proposed testimony and a copy of any written report intended to be used in evidence.
> (2) No expert witness may testify, except with leave of the trial judge, unless Subrule (1) or Subrule (3), as the case may be, has been complied with.

> (3) A party who has been served with a report as provided in Subrule (1), and who intends to call an expert witness at trial in rebuttal, shall, within 15 days of the assignment of a trial date, serve on every other party to the action a report setting out the name, address and qualifications of the rebuttal expert, the substance of the proposed testimony and a copy of any written report intended to be used in evidence.

Attached hereto as Appendix F is a Notice of Intention to Call Expert Witness from a medical malpractice case.

The Rules providing for disclosure of experts' reports before the pre-trial conference are intended to ensure that there are no surprises at the pre-trial conference or the trial and resulting prejudice to the litigants. It is, therefore, required that the report set out the "substance" of the expert's intended evidence. Where the Notice referred only to conclusions, a successful application was brought by opposing counsel for the documents, calculations and data upon which the conclusions were based and adjournment of the trial to allow for assessment of the materials was granted. See *Transmetro Properties Ltd.* v. *Lochyer Bros. Ltd.* (1985), 4 C.P.C. (2d) 273 (Ont.H.C.).

As well, in circumstances where the notice failed to adequately identify the facts upon which the opinion was based, disclosure of such facts was ordered in the case of *Commonwealth Construction Co.* v. *Syncrude Canada Ltd.* (1985), 40 Alta. L.R. (2d) 89 (Q.B.).

A similar English rule has been interpreted as requiring that the report include both the expert's opinion and the factual premise upon which it is based. See *Ollett* v. *Bristol Aerojet Ltd.* (1973), 3 All E.R. 544 (Q.B.).

It has also been held that the rule concerning disclosure of expert evidence may apply even when the expert witness is one of the parties to the action if it is intended to so qualify him as an expert in the area. See *Shell Pensions Trust Ltd.* v. *Pell Frischman & Partners* (1986), 1 All E.R. 911.

If the substance of the proposed testimony is not adequately set out in the Notice, the trial judge may refuse to allow the expert witness to testify. See *Reedy* v. *Bramalae Limited* (1989), 73 Sask.R. 22.

Where, however, there is a question as to whether there has been sufficient compliance with Rule 284(D), a court may give leave under Rule 284(D)(2). See *Bassett* v. *College of Physicians and Surgeons* (1987), 63 Sask.R. 45 Aff'd (1988) 70 Sask.R. 283.

1. Qualifying the Expert Witness

The accepted practice in Saskatchewan is to call your expert witness to the stand and elicit from them their qualifications and experience. The trial judge is then asked to allow the witness to give opinion evidence in a designated area of expertise. Following the initial questions, opposing counsel is allowed an opportunity to cross examine the proposed expert on their qualifications and experience. Once this has been completed, argument may be held as to whether the proposed expert has the qualifications and experience or to narrow the focus of the opinion evidence to be given. As long as the trial judge is satisfied the witness is sufficiently experienced in the subject matter at issue, it does not matter whether their skill was obtained from studies or experience. See *Datta* v. *Quintal* (1988), 6 W.W.R. 481 (Sask.C.A.).

An expert witness must, however, restrict their evidence to matters which are clearly within their expertise and if the expert can not be shown to be qualified within the area where their opinion is sought, they will not be allowed to testify. See *Rieger* v. *Burgess* (1988), 66 Sask.R. 1 at 31 (S.C.A.).

In qualifying the expert witness, you should not simply ask the witness for a recitation of their qualifications. It gives greater impact and saves time if you know the qualifications in advance and ask them about each qualification individually rather than forcing them to volunteer such information. Opposing counsel may concede that the expert is qualified to be deemed an expert witness and state for the record that you need not elicit their qualifications. Unless, however, counsel is prepared to acknowledge that the proposed expert's opinions are to be accepted as fact, you should proceed with eliciting the qualifications so that the trier of fact is aware of them since such qualifications will, no doubt, affect the proposed witness' credibility with the trier of fact.

The expert's credentials can be challenged on three principal grounds. Firstly, that the expert is not sufficiently educated or experienced in the relevant field. Secondly, that the expert's field of expertise is not relevant to the matter in issue. Thirdly, that the witness' area of expertise is controversial, untested or unproven. See *The Litigator's Guide to Expert Witnesses*, by Freiman and Berenblut, 1997, page 12.

Unless you are relatively confident that you can prevent the expert from being qualified by the trial judge, it may be best to leave challenging questions to cross-examination where they are likely to have a larger impact upon the jury.

2. Examination-in-Chief

It is important that your expert's testimony be presented in a fashion in which the trier of fact can understand it. To this end, it is helpful to have your witness refer to exhibits or charts which the judge or jury can observe and relate the witness's testimony to. It is also effective if you prepare your audience for the witness. For example, if you are dealing with a medical expert, you give the judge and/or jury a short anatomy lesson before having the expert witness give their opinion. This should be done not by simply asking the doctor to tell the jury what they need to know about the case, but to go through the medical terms the doctor will be using in their opinion and perhaps identify the specific areas of the body they refer to by use of medical charts. See "Translating the Medical Dialect", *Examination of Medical Experts* by Matthew Bender, 1968, p. 91.

In the December, 1993, *Trial* magazine, Steven Lubet identified eight techniques for a direct examination of experts. These are as follows:

(1) Avoid narratives by the expert. Every question refocuses the listeners attention.
(2) Use examples and analogies.
(3) Use internal summaries.
(4) Use the concept of consensus. This will show that the witness' opinion is the main stream view.
(5) Use leading questions when called for, but only on non-contentious issues.
(6) Encourage powerful language.
(7) Use numbered lists and have the expert give evidence in point form.
(8) Do not exaggerate the witness' expertise.

An expert witness is not confined to and does not normally testify as to their personal observations. They are normally called to state inferences to or draw conclusions from facts adduced into evidence by others. There must, however, be a factual foundation upon which evidence has already been or will be given. Furthermore, if the expert lacks personal knowledge of the matters in issue and is asked to give an opinion on certain disputed facts, the opinion may be elicited only through the vehicle of a hypothetical question. See *Bleta* v. *R.* (1964), S.C.R. 561 and *R.* v. *Kelly* (1990), 41 O.A.C. 32.

If the judge or jury ultimately rejects the hypothesis as not being accurate, the expert's opinion must be rejected as well. See *R.* v. *Fisher* (1961), O.W.N. 94.

It is extremely important when using an expert to put the hypothetical factual situation to the expert in a clear, uncontradictory fashion, only including facts which you are sure can be proven. In many cases, the hypothetical question may, in effect, be a summation of your case, outlining and emphasizing the factual basis upon which the claim or defense is built. Having said this, however, it is important that the hypothetical question not be too long or complex as to confuse the judge or jury.

An expert witness may be allowed to testify and base their opinion on hearsay, especially, in the case of psychiatrists. However, the party tendering the opinion evidence has a duty to establish through admissible evidence the factual basis for the opinion or such opinion may be rejected or its weight severely limited. See *R.* v. *Abbey* (1982), 138 D.L.R. (3d) 202 at 217 (S.C.C.); *R.* v. *Lavallee*, [1990] 1 S.C.R. 852 and *Rieger* v. *Burgess* (1988), 66 Sask.R. 1 at 32 (S.C.A.).

3. Cross Examination of the Expert Witness

The first rule of successful cross examination of an expert is 'be prepared'. You must cross-examine with a carefully developed plan or objective in mind. To simply go on a fishing expedition in questioning the expert will likely result in a reaffirmation of the expert's opinion in the mind of the judge or jury.

The second most important rule is not to cross examine the expert in an area in which you are unfamiliar. Don't challenge the expert in their own court. This means that unless you are certain that an opinion is scientifically incorrect, you should attack the basis of the opinion, not the opinion itself, bearing in mind that if the factual basis of the opinion can be shown to be false, the opinion itself is valueless. It is often useful to have your own expert witness on the point in issue sit through the examination-in-chief of your opponent's expert since your expert can then brief you on areas which might be relevant on cross examination.

In his treatise "Expert Evidence" published by the Law Society of Upper Canada, Special Lecture Series, 1969 at page 27, Arthur Maloney, Q.C., listed three techniques for successful cross-examination of experts at page 78. They are as follows:

1. Putting questions to the expert which place a different interpretation of the facts upon which the expert has based his opinion, and eliciting, if possible, answers which show that the different interpretation of the facts - an interpretation which is favourable to the cross-examiner's case - is reasonable.
2. Challenging the expert witness' opinion by confronting him with authoritative works, or even his own writings, which cast doubt on the correctness of his opinion.
3. Establishing that the expert witness formed his opinion without taking into consideration facts which have either been established, or which the cross-examiner hopes to establish, and which modify, or should modify, the expert's opinion.

As further stated by Mr. Maloney, it is not a wise tactic to attack an expert's qualifications unless you have specific reasons for doubting them. If you do intend to attack the qualifications, do so at the beginning of your cross examination so that the judge or jury won't be left with the impression you are simply attacking his qualifications because you couldn't shake the opinion.

Practical rules you might also consider are:

(1) Never ask the witness to restate opinions they have already given on direct since this will simply reinforce the opinion in the mind of the jury.
(2) Avoid open-ended questions which allow the expert to go into long narratives which tend to reinforce their opinions in the minds of the jury.
(3) Build your line of questioning to a logical conclusion which compels the expert to agree on each step or the expert will suffer a loss of credibility.
(4) Do not ask questions without a clear understanding of what the answer should be, based upon prior testimony, writings or evidence.

(5) Attack the witness' vulnerabilities, such as:
   a. false or overstated credentials;
   b. evidence of bias;
   c. incomplete investigation;
   d. absence of factual premises for expressed opinions;
   e. false factual premises for the opinions;
   f. absence of conclusive opinions;
   g. false opinions;
   h. superior qualifications of other experts; and
   i. agreement on key facts or comments that support your client's case.

In preparing the materials on witnesses and expert evidence, I relied upon the following resource materials:

Expert Evidence by Arthur Maloney, Q.C., Law Society of Upper Canada, Special Lectures, 1969, at page 77.

Examining the Medical Expert, Lectures and Demonstrations by Albert Sugarman - Institute of Continuing Legal Education, Hutchins Hall.

Examination of Medical Experts, 1968, Matthew Bender.

Using Experts in Civil Cases by Melvin Craft, 1977, Practising Law Institute.

The Law of Evidence in Canada, Sopinka, Lederman and Bryant, Butterworths, 1992.

The Expert, Matthews, Pink, Tupper and Wells, Carswell, 1995.

The Litigator's Guide to Expert Witnesses, Freiman and Berenblut, Canada Law Book, 1997.

Witnesses, Alan Mewett, Q.C., Carswell, 1991.

I would also like to acknowledge Collin Hirschfeld in researching the case authorities referred to herein.

APPENDICES

Q.B. No. 433 of 1980

IN THE COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
JUDICIAL CENTRE OF SASKATOON

BETWEEN:

SUNNYSIDE NURSING HOME,

PLAINTIFF

AND:

BUILDERS CONTRACT MANAGEMENT LTD. and
SABRICE LTD., MID-CANADA CONSULTANTS LTD.,
ILLMAYER SIVAM CONSULTANTS LTD., SI SIVAM and
GENERAL SECURITY INSURANCE COMPANY OF CANADA,

DEFENDANTS

AGREEMENT

The parties agree that the documents introduced into evidence in Exhibits P-1 to P-* and P-* to P-* , each inclusive, are admissible, are full exhibits and are proven:

1. As to authenticity and, where it shows, as to authorship; and
2. In the case of correspondence, as to sending by the author and receipt by the addressee within reasonable times after the date of any such document;

but, their being admissible, full exhibits and proven does not make them binding on any party with respect to veracity, weight or effect which shall depend on the evidence received. Those documents which are admissions against the interest of the party making them are subject to the usual rules of evidence relating to admissions against interest.

Subject to the foregoing, the parties further agree that:

3. A party may object to any of the documents in the exhibits mentioned, and if there are sufficient grounds for the objection, it will not be evidence against that party;
4. A party may prove any document in evidence in the ordinary way, whether it is or is not one of the documents in said exhibits; and

5. Exhibits P (drawings), Exhibit P (Saskatoon Building By-law) and Exhibit P (the National Building Codes and supplements and the Canadian Standards Association Codes) be admitted as exhibits and are fully proven.

Except as varied by this or a subsequent Agreement between the parties, the rules of evidence apply for this trial.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 7th day of March, 1984.

ROBERTSON, MUZYKA, BELL, ROBERTSON & NIEMAN

Per:_____
Solicitors for Sunnyside Nursing Home

BALFOUR, MOSS, MILLIKEN, LASCHUK, KYLE & VANCISE

Per:_____
Solicitors for Builders Contract Management Ltd., Sabrice Ltd., and General Insurance Company of Canada

MacPHERSON , LESLIE & TYERMAN

Per:_____
Solicitors for Mid-Canada Consultants Ltd.

PRIEL, STEVENSON, HOOD, & THORNTON

Per:_____
Solicitors for Illmayer Sivam Consultants Ltd. and Si Sivam

McKERCHER McKERCHER, STACK, KORCHIN & LAING

Per:_____
Solicitors for Saskatoon Redi-Mix, Third Party

LAMARSH & COMPANY

Per:_____
Solicitors for Rhodes Vaughan, Third Party

NOTICE TO ADMIT DOCUMENTS

TAKE NOTICE that the plaintiff *(or* defendant) in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant *(or* plaintiff), his solicitor or agent, at _____ on _____, between the hours of _____ and the defendant *(or* plaintiff) is hereby required, within six days of the service hereof, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and that such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause.

AND FURTHER TAKE NOTICE that if you do not within the aforementioned six days give notice that you do not admit the said documents (or any of them) and that you require the same to be proved at the trial you shall be deemed to have admitted the said document *(or* documents) unless the court or a judge shall otherwise order.

DATED at _____ Saskatchewan, this_____ day of_____ ,2____.

_____
(Signed)
G.H, solicitor *(or* agent) for plaintiff *(or* defendant).

To E.F., solicitor *(or* agent) for defendant *(or* plaintiff).

(Here describe thc documents, the manner of doing which may be as follows.)

ORIGINALS

Description of Documents	Dates
Deed of convenant between A.B. and C.D. first part and E.F. second part	January 1, 2____

COPIES

Description of Documents	Dates
Letter – plaintiff to defendant	February 1, 2____
Sent by post	February 2, _____

Original or Duplicate served, sent, or delivered, when, how, and by whom.

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This report provides photographs of the swimming pool and surrounding area at the home of _____.

LIST OF PHOTOGRAPHS

Photo 1	View looking S.E. from the house adjacent to the pool area, with the pool area doors shown.
Photo 2	View looking S. from the same position as in Photo 1, showing the pool through the windows.
Photo 3	View looking approximately N.N.W. from the same room as in Photos 1 and 2, showing the serving hatch.
Photo 4	View looking approximately W. in the house adjacent to the pool. The chair in the foreground is also seen in Photo 2, while the chesterfield and wooden chairbacks on the right may be seen in Photo 3, extreme left.
Photo 5	View looking N. from the same room adjacent to the pool. The stairway is approached through this door.
Photo 6	View of the pool looking S.S.W.
Photo 7	View of the pool looking S.S.E.
Photo 8	View of the pool with cover in place, looking S.
Photo 9	View of the pool looking S. Note the reflection of the roof windows in the water.
Photo 10	View of the pool looking N. The access doors to the house are in the far right background.
Photo 11	Diving board with man standing on end of same.
Photo 12	General view of diving board.
Photo 13	Diving board in partially depressed position.
Photo 14	Diving board unloaded.
Photo 15	Diving board projecting over the pool.
Photo 16	Coil spring and torsional pivot for the diving board.

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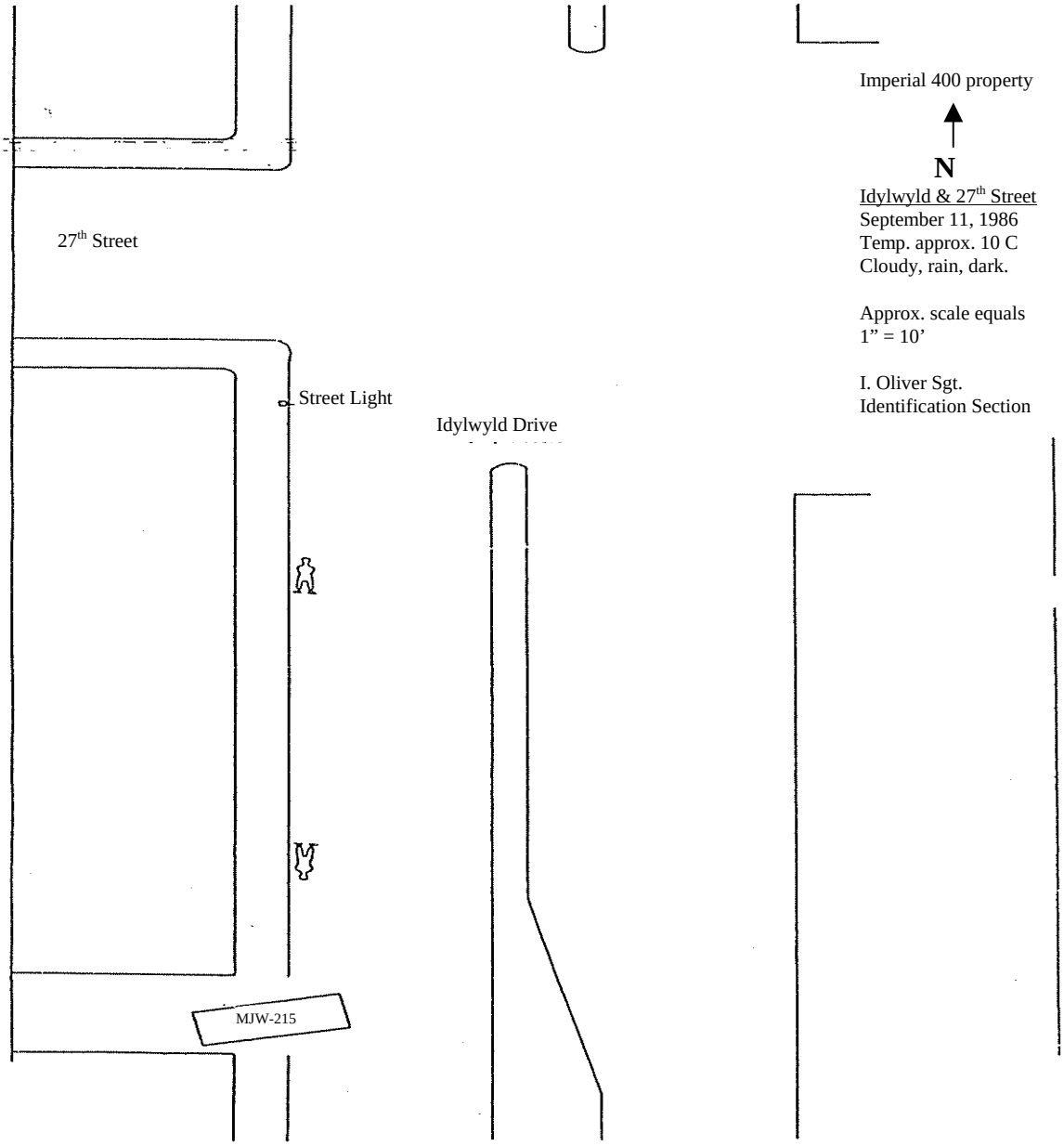
Scale diagram of a car/pedestrian fatal accident, in which two pedestrians were killed



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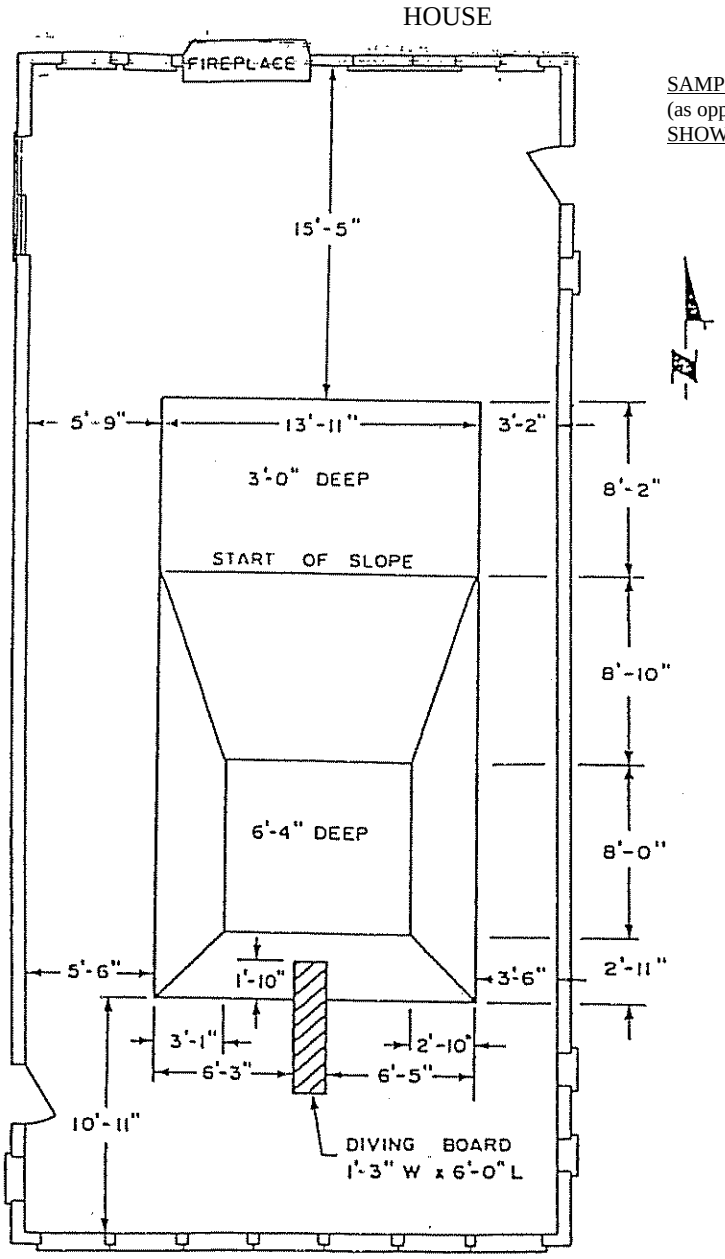
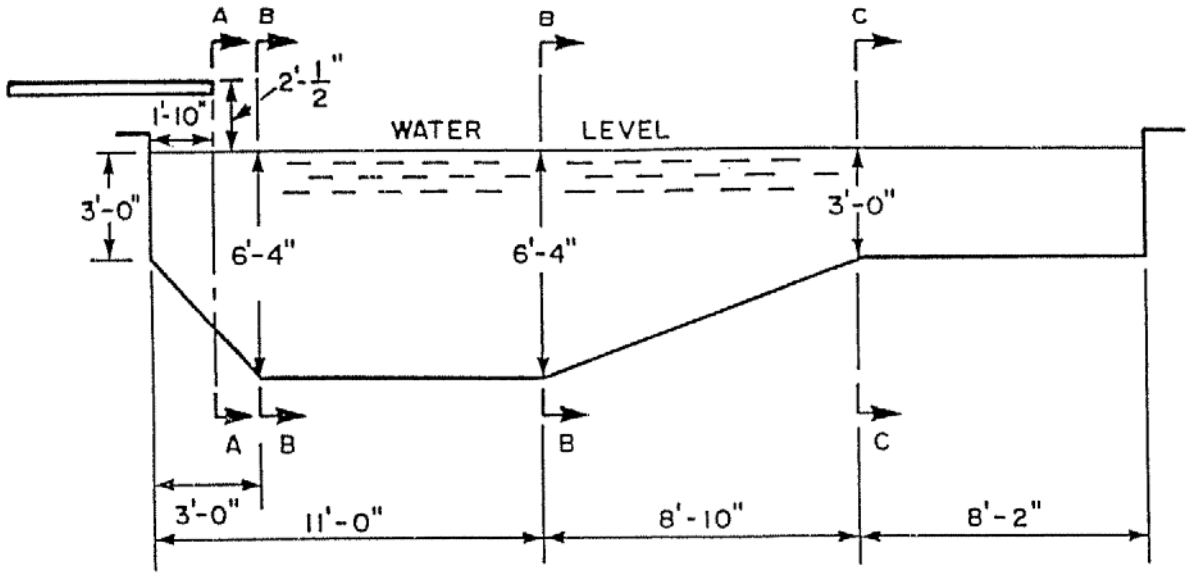
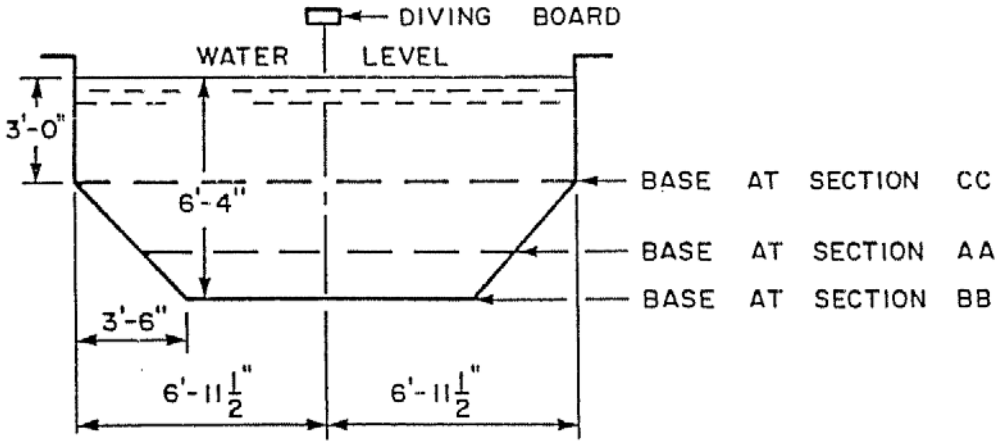
A diagram of measurements of a swimming pool showing the plan view, longitudinal section, and cross section, as well as the diving board from which a person dove, struck the bottom of the pool, and was rendered a paraplegic.



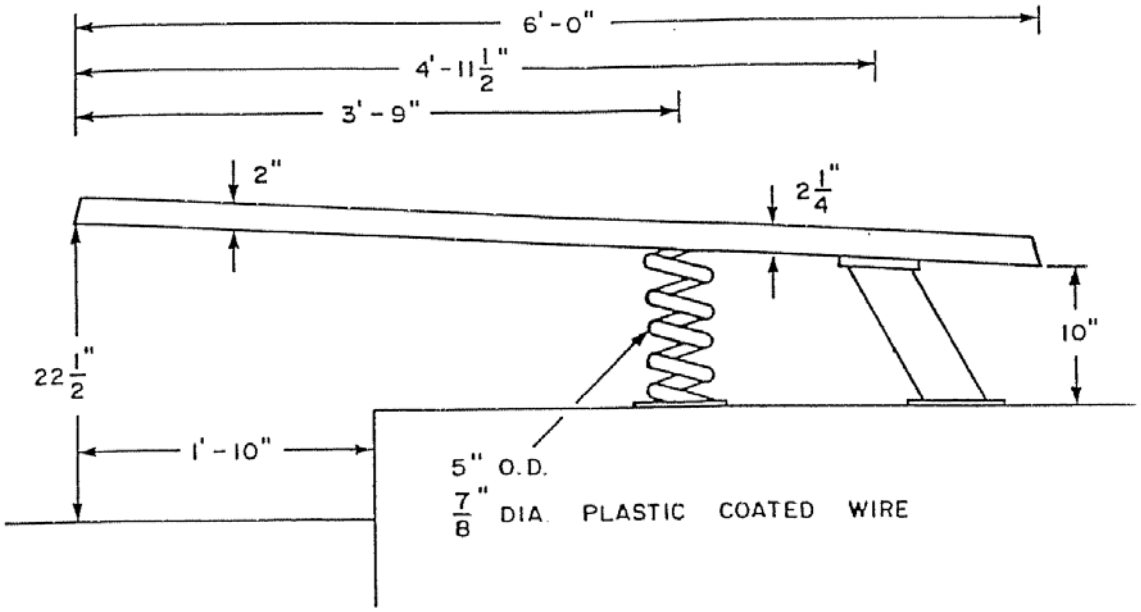
SHEET 1 - PLAN VIEW



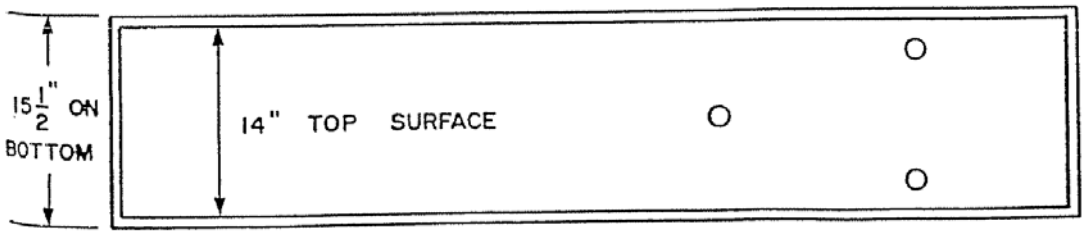
LONGITUDINAL SECTION



CROSS SECTION



NO LOAD POSITION



SHEET 3 - SPRINGBOARD DETAILS

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Q.B. NO. 157 OF A.D. 1986

IN THE COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE OF ESTEVAN

BETWEEN:

I.M. UNHAPPY,

PLAINTIFF

- and -

N.O.T. RESPONSIBLE,

DEFENDANT

NOTICE OF EXPERT WITNESS
IN ACCORDANCE WITH RULE 284(D)

In accordance with Rule 284(D) of the Rules of the Court of Queen's Bench, the Defendant, Dr. N.O.T. Responsible, gives notice of his intention to call the following expert witnesses at the trial of this action.

1. Dr. I.M.N. Expert
Head of the Division of Surgery
in the Department of Surgery
Royal University Hospital and
University of Saskatchewan
Saskatoon, Saskatchewan
S7N 0X0

The qualifications of Dr. Expert are attached hereto as Appendix "A".

The substance of Dr. Expert's proposed testimony is as follows:

(a) Dr. Expert will comment upon the anatomy of an inguinal hernia, its normal progression and recognized treatment. He will confirm that the surgery performed by Dr. Responsible upon the Plaintiff was appropriate in the circumstances and met the standard of care expected of a general surgeon operating in Saskatchewan in 1985.

(b) Dr. Expert will also describe the risks of such surgery and the standard disclosure to the patient when obtaining a consent to surgery. Dr. Expert will confirm that standard disclosure provides for discussion of the possibility of numbness in the area of the surgery following the operation as a result of damage to the nerves in the area, but that such numbness will usually be minor and not disabling. He will confirm that based upon the standard disclosure as described above, he has not had any patients refuse to proceed with the surgery as a result of such disclosure once the risks have been discussed with them.

(c) Dr. Expert will also confirm that ileoinguinal nerve injury is a common complication of inguinal herniography, but injury to the ileoinguinal nerve is usually of little or no consequence since the result is simply a loss of sensation in the area of the surgery.

(d) Finally, Dr. Expert will confirm that in his opinion it is not reasonable to expect that any nerve injury to the ileoinguinal nerve would result in pain or disability to the Plaintiff's leg or back.

Attached hereto as Appendix "B" is a true copy of a report by Dr. Expert dated April 23, 1987.

2. Dr. I. Know
Surgeon
1126 - 15th Avenue
Regina, Saskatchewan
S4P 0Y5

Dr. Know is a general surgeon and attached hereto as Appendix "C" is a list of his qualifications.

The substance of Dr. Know's evidence is as follows:

(a) Dr. Know will testify that he performed exploratory surgery upon the Plaintiff, Mrs. Unhappy, in October of 1985 in response to symptoms of pain in her right groin. It was his opinion at the time that the Plaintiff gave an appropriate response to examination in respect to the areas of her pain.

(b) Dr. Know will testify that at the time of the exploratory surgery in October of 1985, he found that there were suture granulomas in the groin, which he thought might be causing her pain, which were removed. Following surgery the Plaintiff indicated she initially had some improvement in her pain, but that her pain later returned.

(c) Dr. Know will also testify that as part of his exploratory surgery, he sectioned the right ileoinguinal nerve which he found to be intact prior to the surgery and will state as to what the effect of such sectioning has upon a patient.

(d) Dr. Know will confirm that Mrs. Unhappy healed satisfactorily following such surgery although she continued to complain of pain in the right groin. It was Dr. Know's opinion that there was no evidence to indicate that there had been nerve damage and that he believed her symptoms to be very much subjective.

(e) Dr. Know will testify as to the standard of care expected of a surgeon in Saskatchewan in 1985 in respect to the repair of an inguinal hernia and will testify that the surgery performed by the Defendant Responsible upon the Plaintiff was medically indicated and was in keeping with that standard. He will further testify that suture granulomas, and post-operative pain are a recognized complication of the inguinal hernia surgery which can occur without the breach of the standard of care on the part of the surgeon.

(f) Finally, Dr. Know will testify that in 1985 it was standard practise for the surgeon to discuss with a prospective patient the risk of damage to nerves surrounding the surgical site prior to doing a hernia operation, but that in his experience the disclosure of such a risk has not prevented any of his patients from consenting to such surgery.

Attached hereto as Appendix "D" is a true copy of a medical report prepared by Dr. Know dated March 24, 1986 and opinion dated February 9, 1988 which the Defendant intends to refer to and introduce into evidence.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 15th day of November, A.D. 1991.

MCKERCHER MCKERCHER & WHITMORE

Per: "NGG"
Solicitors for the Defendant,
Dr. N.O.T. Responsible

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