TRIAL PREP AND TRIALS -

A FINGERTIP REFERENCE (2021)

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Intended Purpose

This work is intended to serve as a reference, both in the lead-up to trial, and at trial itself. Ideally, it will help the reader to identify issues and to prepare for an upcoming trial. At trial, it is intended to be a fingertip reference, with sections corresponding to the various parts of a trial. It is hoped that it may allow the reader to quickly identify common issues, authority, transgressions of opposing counsel and the appropriate mode (and timing) of objections. It is written in contemplation of a jury trial, on behalf of the plaintiff, but should be helpful in certain bench trials as well.

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1. PREPARING FOR THE USE OF DOCUMENTS/EXHIBITS AT TRIAL

A. The Best, Most Efficient Way

The simplest way to deal with documents at trial is for counsel to agree to a joint electronic document brief, well in advance (along with the format, i.e. one large pdf with all exhibits or separate pdfs). Ideally, this joint document brief would contain all documents to be relied upon by the various parties, but in any event, should contain those documents which will ultimately be deemed admissible under the applicable *Evidence Act,* common law and/or the *Rules of Civil Procedure*. Ultimately, everyone loses where formal proof is demanded for admissible documents, i.e. medical and business records, contracts, letters, photographs etc., as it simply increases the time and expense of trial preparation and trial. Depending upon opposing counsel, this option is not always feasible.

Assuming the parties are agreeable to a joint brief, one side should begin by listing all documents which it intends to include. The other party may then indicate any documents to which it objects, and any additional documents it wishes to add. The first party can then review the additional documents and determine whether it objects to the inclusion of any. The parties can then determine how the documents objected to will be handled (i.e. included in separate briefs, in the joint brief but with objections noted in the Index etc.).

Where a party admits the authenticity of a document in Ontario, they are (only) deemed to admit:

a) A document that is said to be an original was printed, written, signed or executed as it purports to have been;

b) A document that is said to be a copy is a true copy of the original [thereby incorporating (a), above, into this sub clause]; and

c) Where the document is a copy of a letter, telegram or telecommunication, the original was sent as it purports to have been sent and received by the person to whom it is addressed.

The admission of authenticity obviates the need to prove the document through witnesses, and the admission applies to subparagraphs a, b and c as they pertain to the specific document. *Marcos Limited Building Consultants v. Lad*, 2016 ONSC 7071 (CanLII) at para. 42, *citing Rule* 51.01, *Ontario Rules of Civil Procedure.*

However, a deemed admission as to authenticity does not equate to an admission as to the truth of the contents. *Children's Aid Society of Algoma v. O.M.*, 2001 CanLII 37715 at para. 33. The document must still be demonstrated to be 'admissible' into evidence. *Girao v. Cunningham*, 2020 ONCA 260 at para.

25. As such, the onus remains on the party offering a document (for the proof of its contents, i.e. hearsay) to establish the criteria of **necessity** and **reliability** on the balance of probabilities, *Ault v. Canada (Attorney General)*, 2007 CanLII 55359 (ON SC) at par. 17. Within that context, necessity is largely synonymous with relevance, while reliability often equates to a recognized exception to the hearsay rule.

B. Another Method to Admit Documents

In some cases, opposing counsel is unwilling to discuss or agree to a joint document brief. In those instances, it may still be possible to have a document admitted by serving a 'Notice to Admit[1]' and/or 'Request to Admit' under *Rule* 51 upon the opposing party.[2] For documents not covered by the applicable *Evidence Act*, the Requests to Admit should cover both authenticity and 'proof of the contents' for each document sought to be admitted (i.e. a recognized exception to the hearsay rule). Further, admissions from discovery as to documents can be relied upon.[3] It may be best to canvass on the record at discovery with opposing counsel how they want to handle the admissibility of

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[1] Notices under the *Ontario Evidence Act* on their own, are often of limited effect, as a party must still often lead evidence as to the purpose for which the document was created, and a court may object where voluminous. *See i.e. Blake v. Dominion of Canada General Insurance Company*, 2015 ONCA 165 (CanLII) and Lynn Marchildon, Exception to the rule against hearsay: Business records under the Ontario Evidence Act, 2016 36th *Annual Civil Litigation Conference* 24A, 2016 CanLIIDocs 4402.

[2] *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at page 289.

[3] *Id.*

documents at trial, if for no other reason that to have same on the record for later cost submissions.

Though not particularly practical (or helpful), the Court of Appeal has laid out a process to be followed in an effort to submit a joint document brief, which takes the 2 chief questions (authenticity and admissibility) and morphs them into six or so.[4] Where opposing counsel is being uncooperative, my practice is to seek admissions (via a Request to Admit) as to authenticity and admissibility, and to invite counsel to address any of the other factors laid out in those cases for each exhibit where they see issues. Absent written agreement, plan to call witnesses to prove each document, as set forth below.

C. The Inefficient, Hard and Time Consuming Way to Admit Documents at Trial

Where there is no agreement as to admissibility (and no admissions), counsel must be prepared to formally prove the admissibility of each and every exhibit. At common law, this typically required counsel to present a witness to:

i) Identify the thing (e.g. it is a bloody knife, letter etc.);

ii) Authenticate the thing by proving it is what counsel alleges (e.g. the witness saw the knife sticking out of the victim's back); and

[4] *Girao v. Cunningham*, 2020 ONCA 260 (CanLii) at paras. 33-35 and *Bruno v. DaCosta*, 2020 ONCA 602 (CanLii) at paras. 53-66.

iii) Show that it is relevant to an issue at trial (i.e. did the accused stab the victim).

In practice, this requires counsel to identify every document (or thing) they intend to admit at trial, and to determine what witnesses are required to admit every such document or thing, along with what formal proof is required for each document. Different types of documents and exhibits must be proven in different ways and by different methods (i.e. through the use of different 'magic words' or customary questions). For common types of documents, I typically refer to the *Fundamentals of Trial Techniques*, Second Canadian Edition, Mauet, Thomas A. et al, Little Brown & Company (Canada) 1995. Likewise, *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at page 291 has a useful chart as to how various documents are verified, along with the applicable statutory provision allowing same. *Ontario Courtroom Procedure*, 3d Ed., at page 301, also sets forth the various steps for counsel to introduce an exhibit into evidence. Finally, if in doubt, an evidence treatise such as *The Law of Evidence in Canada,* Fourth Edition, Sopinka, Lederman & Bryant, LexisNexis Canada 2014 should be consulted.

D. Overcoming Hearsay Objections

Where a party seeks to admit a document for the truth of its contents (i.e. the information contained therein helps to prove a claim or defence, such as the cost to repair the damage was $782.00) the document is hearsay evidence, and generally admissible only where an exception to the hearsay rule applies.[5] Recognized exceptions have been well itemized in the US Federal Rules of Evidence (and it may save time to consult that first before attempting to locate equivalent Canadian authority). Common exceptions include:

- Medical, business and public records;
- Admissions by a party/statements by party opponent;
- Declarations against interest/former testimony;
- Excited utterances/present sense impression;
- Residual (catch-all) where sufficiently 'necessary' and 'reliable.'

Conversely, it may be possible to admit documents for non-hearsay purposes, in the event they contain or constitute:

- Warnings;
- Threats;
- Misrepresentations;
- Operative legal language or "verbal acts" (i.e. contracts);

[5] *Ault v. Canada (Attorney General)*, 2007 CanLII 55359 (ON SC), par. 17.

- To explain subsequent behaviour, e.g. "I got a call that Bubba needed help, and so I went."

See Hearsay and Exceptions to Hearsay Rule, Chapter 9 in Niman ed., Evidence in Family Law (Canada Law Book, 2010).

E. The Use of Contested Documents/Exhibits During Opening

Where a party is seeking to use demonstrative aids or other (presumptive) evidence during an opening statement, permission should be sought beforehand via motion[6] (to ensure such evidence is admissible), in the absences of the jury. Where admissibility is genuinely at issue, admissibility may be established via a voir dire held before the opening address.[7]

F. A Theoretical Way To Attempt to Admit Documents Before Trial

Where a case is to be tried by jury, Justice Ferguson suggests that it is advisable to request permission to use demonstrative aids via a pre-trial motion or from the pre-trial judge. However, regardless of any pre-trial ruling, the trial judge has final say over the admissibility of all evidence (at trial).[8]

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[6] *Chilton v. Bell Estate*, 1998 CarswellOnt 4843 (O.C.J. (Gen. Div.)) at para. 11, *see also* Motion section below.

[7] *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at page 1080.

[8] *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at page 1079.

By analogy, a party could likewise seek a pre-trial ruling admitting other (presumptive) exhibits into evidence at an upcoming jury trial (subject again to the trial judge having the final say). However, judges are likely to be resistant to this method, (as it is not the historical method), and a party advancing such motion would need to show the court real benefits from embracing such practice, such as reducing the number of witnesses necessary at trial or the time of trial etc. To avoid cost consequences, parties attempting to pioneer this method are advised to tack same onto a more conventional (and likely successful) motion.

G. Keeping Track of Exhibits at Trial

In modern Zoom trials, (and in the absence of a joint document brief) I have numbered all of my intended exhibits beforehand (and provided them to opposing), and try to mark them for identification as early in the proceeding as possible, so that the exhibits take the same number as I have them labelled on my computer. As the majority of my exhibits will be in pdf format (if not all in one big pdf with Tabs, think attachments to a motion record), I generally have them saved on my computer in a file folder in the following type format:

1 – Police Report.pdf

2 – Pictures of Scene.pdf

3 – Ambulance call report

Previously, in paper based proceedings, I would create (and update) an exhibit list, as items are entered into evidence, using breaks to cross-check my list with that maintained by the clerk. I typically employed the following format:

Plaintiff's Exhibits	**Description**	**Defendant's Exhibits**	**Description**
PL 1	Police Report	D1	Plaintiff's Pub Receipt
PL 2	Pictures of Scene		
PL 3	Ambulance call report		

2. DETERMINING ADMISSIBILITY OF DOCUMENTS/ EXHIBITS (VOIR DIRE)

Objections to admissibility should be raised at the earliest opportunity. *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at pages 766. Where a ruling on admissibility is dependent upon underlying facts (i.e. was the confession voluntary), the Judge excuses the jury, and holds a trial within a trial, known as a 'voir dire' to determine admissibility. *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at pages 770. A 'voir dire' is commenced at the request of counsel or on the Court's initiative, though the judge has the discretion to determine whether a voir dire is necessary. *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at pages 770-71.

3. THE USE OF DISCOVERY TRANSCRIPTS AND ANSWERS TO UNDERTAKINGS

A. Preliminary Preparation

In *The Use of Discovery Transcripts at Trial*, OTLA 2012 New Lawyers Division Conference | September 28, 2012, L. Craig Brown suggests preparing a transcript brief (or by analogy, an electronic file folder) for use at trial containing:

a. Each discovery transcript;
b. All exhibits from discovery[9];
c. A summary of each transcript;
d. A list of undertakings and the answers to those undertakings; and
e. Transcripts from related proceedings, if any.

Rule 34.18 provides that a party who intends to refer to evidence given at examination must have a copy of the transcript available for filing with the Court. In his article, Mr. Brown reminds that this means the Court copy, signed by the reporter, although with electronic trials, this is likely no longer much of an issue.

B. Use of Admissions

Rule 31.11(1) permits a party to read into evidence, as part of their own case, any part of the evidence given at the examination for discovery of the adverse party, where such evidence proves facts at issue.[10]

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[9] Olah, J., *The Art and Science of Advocacy*, Volume 1 (Toronto: Carswell, 1990) at 7-12.

[10] *The Use of Discovery Transcripts at Trial*, OTLA 2012 New Lawyers Division Conference, | September 28, 2012, L. Craig Brown

C. Use to Contradict/Impeach

Where discovery evidence is intended primarily to impeach or contradict the witness, (prior inconsistent statements) the rules in *Brown v. Dunn*, (1893), 6 R. 87 (H.L. (Eng.)), along with sections 20 and/or 21 of the *Ontario Evidence Act* apply. Very generally, this requires the witness' attention to first be brought to the inconsistent statement and that the witness be afforded an opportunity to adopt or explain same. When that does not occur, counsel for the witness may request other closely connected portions of the discovery transcript be read in.

D. Potential Consequences for Improper Impeachment

Where a party runs afoul of the rule in *Brown v. Dunn* and/or the *Ontario Evidence Act*, such conduct is objectionable, and subject to sanction at the discretion of the Court, which can include permitting the recall of a witness, the striking of the jury in a civil trial or the granting of an adverse inference against the weight of the evidence. *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at pag. 875.

E. Qualifying Answers

Rule 31.11(3) permits the adverse party to ***request*** other parts of the transcript be read in to qualify or explain the part introduced, only where the answer read in is not clear and complete[11]. Such request should be made

[11] *Andersen v. St. Jude Medical, Inc*., 2010 ONSC 1824 (CanLII) at para. 15.

contemporaneously with any read in (though likely outside the presence of the jury).

F. Rebuttal

Rule 31.11(4) permits the party to introduce other admissible evidence to rebut evidence they read in as part of their own case, i.e. a party may read in any part of the adverse party's examination, and then rebut same with any other admissible evidence, including by cross examining the witness to impeach the witness on that answer. *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham*, 2000 CanLII 16946 (ON CA) at paras. 101-105.

G. Use as Demonstrative Evidence

In his paper, *The Use of Discovery Transcripts at Trial*, L. Craig Brown suggests that discovery questions and answers be assembled in electronic format, and that same be projected onto a screen so that the judge and jury may follow along while the answers are read in. Mr. Brown then posits that a paper/electronic copy of such document be tendered to the court to be made an exhibit, so that same is available to the jury during deliberations.

Like with the use of any demonstrative evidence, Mr. Brown notes that the prudent course is to provide a copy of such proposed document to opposing counsel beforehand so that any issues governing admissibility may be resolved. Of course, Mr. Brown notes this provides opposing counsel with additional time

to locate qualifying answers within the transcript, so a cost benefit analysis should be undertaken beforehand.

Though not specifically provided for in the *Rules*, the projection and entering into evidence of transcript testimony in this manner is most akin to the use of demonstrative evidence, such that the same test should apply. Where I do this, I prepare a Word document (that I submit in pdf format) as follows, with citations to pages and lines, in the order I want to present it (note how the 2nd speaker simply has to read the bold portions):

CASE CAPTION

PROPOSED READ INS OF THE EXAMINATION OF WITNESS, OF SEPTEMBER 13, 2016 PER RULES 31.11(1)

PG. 6

5 COMMISSIONER OF OATHS: Do you solemnly swear that the evidence that you shall give in this examination is the truth, the whole truth and nothing but the truth so help you God?

9 THE DEPONENT: **I do.**

PG 30

9 Okay. And your current age?

10 A. **July 11, 1950 -- 71 years old.**

PG 8

1 And where were you on December 2nd at 3 p.m.?

2 A. **I was standing on the corner of Main and Queen**

4. THE DIGITAL TRIAL IS COMING, OBAGI, J. ET AL.

For a guide to conducting in person digital jury trials, please refer to Obagi, J. & Aldersley, A., The Digital Trial is Coming, presented by Joseph Obagi at the 2016 Oatley McLeish Guide to Motor Vehicle Litigation conference, (LSUC).

5. TRIAL BINDER

In advance of trial, I assemble a case specific 'trial binder' (now an electronic file folder) that contains virtually everything I will need through the trial, numbered sequentially, from any preliminary motions to opening statements to proposed direct and cross examinations to closing. Where other arrangements haven't been made, I'll also have an exhibits folder, which contains all numbered exhibits.

I will also have a hardcopy of a sheet I label 'Trial Overview' which acts as an index for both the binder and a quick reference at the trial itself. I have included such a sample below. Post Covid, this is done digitally, but the format remains the same. As you will see, it, like my trial binder, is sequential.

Trial Overview

1. Preliminary Matters:

- Motion to call more than 3 expert witnesses
- Motion to excuse the late filing of expert reports
- Motion to limit experts to the contents of their reports
- Motion to exclude witnesses;
- Motion to permit counsel to record the proceedings to supplement note taking
- Motion to permit juror note taking
- Motion to use aids (and presumptive exhibits) in opening;
- Motion to mention law in opening
- Motion for leave to mention quantum in opening and to raise general and special damages
- Motion for the Court to provide a very limited charge after closing and to take a hands off approach to the evidence
- Motion for additional discoveries (non-parties)
- Motion for production from non parties

- Motion for a further and better affidavit of documents

2. Plaintiff's Opening

3. Plaintiff's Case in Chief
   i) Witness 1 questions
   Exhibits 1, 2, 3
   (with copies for opposing counsel and the Court)
   ….
   ii) Last Witness Questions
   Exhibits 4 & 5

4. Move to Enter All Exhibits into Evidence (catch all)

5. Defendant's Opening

6. Defendant's Case in Chief
   i) Witness 1 cross-examination questions
   …
   i) Last witness cross-examination questions

7. Pre-Charge Conference & Jury Charge

8. Defendant's Closing (No right of reply without leave (exceptional))

9. Plaintiff's Closing

6. WHAT TO BRING TO TRIAL

Given the stress and demands leading up to trial, I have developed a list of additional things that I try to bring with me (or ensure I have access to), especially if I'm doing an in person trial out of town. My list includes:

i) My Trial Binder;

ii) the full client file, even those portions I'm not planning to use;

iii) *Rules of Civil Procedure;*

iv) *Ontario Evidence Act;*

v) *The Law of Evidence in Canada,* Fourth Edition, Sopinka, Lederman & Bryant, LexisNexis Canada 2014;

vi) *Ontario Courtroom Procedure,* 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012;

vii) Ipad with Noteability Application or other recording device;

viii) Laptop, projector, printer, extension cord, power bar and keyboard;

ix) 3 hole punch and stapler, if paper exhibits;

x) Pads, pens & highlighters;

xi) My Robes;

xii) Any other clothes/personal items required.

7. MOTIONS THAT MAY BE BROUGHT AT TRIAL

A. Routine Motions

Exclude Witnesses	Rule 52.06(1), but experts are often exempted from this rule, so they may attend and respond to the testimony provided. *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at page 347.
Exclude Evidence (where previously withheld)	Rules 31.07(2) precludes a party for leading oral evidence where a party fails to answer a question at discovery, while Rule 30.08(1) precludes a party from relying upon a document it failed to produce, except with leave.
Limit Experts to the Contents of their Reports	Rule 53.03(3) precludes an expert from testifying with regard to an issue, unless that issue is set forth in his report (or leave of the Judge obtained). Cases supporting this proposition include *Ault v. Canada (Attorney General)*, 2007 CanLII 55358 (ON SC) and *Hoang v. Vicentini*, 2012 ONSC 1358 (CanLII) at para. 10. *But see Lee v. Toronto District School Board, et al.*, 2012 ONSC 3266 (CanLII) 'a medical expert may explain and amplify what was latent in his report (without opening up a new field), especially where the other party is not taken by surprise or prejudiced.
Leave to **call more than 3 expert witnesses** at trial	See *Andreason v. The Corporation of the City of Thunder Bay*, 2014 ONSC 709 (CanLII) at para. 20 and s. 12 of the *Ontario Evidence Act*. Leave will almost invariably be given where the experts are in different specialties. *Canadian Civil Procedure Law Second Edition*, Abrams, Linda S. et al., (Markham: LexisNexis, 2008) at p. 1254.
To **excuse** late service (or abridge the time for service) of **Expert Reports**	Relevant evidence should not be excluded on technical grounds such as lack of timely delivery of a report, unless the court is satisfied that the prejudice to justice involved in receiving the evidence exceeds the prejudice to justice involved in excluding it. *See Rule* 53.08(1) and *Moving Store Franchise Systems Inc. v. Norseman Plastics Ltd.*, 2004 CanLII 19021 (ON SC) at para. 10. Late service can be addressed by an adjournment. *Talluto v Marcus*, 2016 ONSC 3340 (CanLII). *But see Siuda v. Cunaj*, 2014 ONSC 2069 (CanLII) where an adjournment was held to be prejudicial.
To Permit Counsel To **Record the Proceedings** to Supplement Note Taking	The *Courts of Justice Act*, section 136(2)(b) permits a party, with leave of the Judge, to record a proceeding for the sole purpose of supplementing or replacing handwritten notes. *Savo et al. v. Penfold et al.*, Newmarket Court File No.: CV-13-113743-00, Justice Casullo, March 26, 2021

Request a simple, concise **closing charge**	There is no rule that in a civil jury trial the judge is required to review the facts in a jury charge. *Berthiaume-Palmer v. Borgundvaag*, 2010 ONCA 470 (CanLII) at para. 11. In many cases where credibility is at issue, a lengthy charge is likely to be harmful, so it may be beneficial to request the Judge take a hands off approach to the evidence. Id. at para. 18.
Juror Note Taking	Jurors are generally allowed to take notes, should they choose to do so. *R. v. Lucas*, 2009 CanLII 69335 (ON SC) at para. 10.

B. Motions Dealing With Opening Statements

Mention Law In Opening	With leave, counsel may mention law in their opening, (though such leave will rarely be given). *Walsh v. Kapusin*, 2009 CanLII 9456 (ON SC) at paras. 6, 8.
Using **Demonstrative Aids** (and **other exhibits, summaries, charts and Powerpoint**) in Opening	Use of aids will be permitted in opening where: 1) counsel undertakes to prove such aid; 2) the aid is relevant to the case; 3) the aid is likely to assist the trier of fact in understanding the case; and 4) there is nothing unusually prejudicial about the aid that would require it be excluded. *Smith v. Morelly*, 2011 ONSC 6830 (CanLII) at para. 6. See also *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at pages 592, 1081 and 1057. Permission has been granted to use **chronological summaries** or **charts**, *R. v. Bengert* (No. 5), [1980] B.C.J. No. 721 and to otherwise show the jury (presumptive) **exhibits or aids** (where same have been disclosed to the other party and permission of the trial judge has been obtained), *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at page 593, and make use of **Powerpoint** presentations. *Schram v. Osten*, 2004 BCSC 1789 (CanLII) at para. 3. Counsel will be granted considerable latitude to use non-contentious demonstrative aids in the course of an opening address. *On Trial*, Adair, Geoffrey D. E., (Markham: LexisNexis, 2004) at p. 38.
To Raise **General and Special Damages** (**Quantum)** in Opening	Leave must be obtained to mention the quantum of general damages sought in opening. *Roy v. Watson*, [1993] O.J. No. 4335, *Ivanovski v. Gobin*, [2003] O.J. No. 2053 at para. 2, and *Courts of Justice Act*, R.S.O. 1990, C. 43, s. 118. While there does not appear to be a specific prohibition on mentioning the quantum of special damages such as economic loss or future care, the safest course of action is

	to likewise raise the issue with the Judge beforehand. *Avoiding A Mistrial in Opening and Closing Statements, Dr. McCartney (or How I Learned to Stop Arguing and Keep My Jury,* Fireman, James K.

C. Exclusions & Presumptions

Exclude or strike **expert evidence**	The proponent of expert evidence must satisfy the Court that the evidence meets the four *R. v. Mohan*, 1994 CanLII 80 (SCC) factors (**relevance, necessity, absence of an exclusionary rule and a properly qualified expert**). Additionally, the **probative value must outweigh the prejudicial effect**. *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 SCR 182 at para. 19. *See Bruff-Murphy v. Gunawardena*, 2017 ONCA 502 for a case where an **expert should have been excluded** as an advocate, **unwilling** to **fulfil** his **duties** to be **independent, fair, objective and non-partisan**. In the case of an opinion based on novel or contested science, the proponent must establish the reliability of the underlying science for that purpose. *White Burgess Langille Inmat* at 23. Where it can be shown that an expert lacks independence and impartiality, such evidence may not be admissible (though in the majority of cases, this appears to go solely to weight, *but see Bruff-Murphy above*). *Id.* at 45. To exclude such testimony, in whole or in part, the moving party must show, on the balance of probabilities, that there is a realistic chance that the expert will not be independent and/or impartial. *Id.* at 47-48. The Supreme Court further stated that was only likely to happen in rare cases, such as where an expert assumes the role of an advocate. *Id.* at 49. Out of jurisdiction experts may also be excluded if lacking experience and/or impartiality. *McKitty v. Hayani*, 2017 ONSC 6321.
To **exclude** answers and **evidence** that a **party failed to disclose** through discovery	Where a party has failed to comply with the requirements for the affidavit of documents (Rule 30.08), has previously claimed privilege over the item (Rule 30.09), refused to answer a question at discovery (Rule 31.07(2)(1)), incorrectly stated an answer at discovery (Rule 31.09), or failed to disclose an expert opinion in accord with *Rule* 53.03, ***Rule* 53.08** provides that such evidence is admissible only with leave, though granting leave is mandatory unless prejudice to a party cannot be overcome by adjournment or costs. *Sevidal v. Chopra*, [1987] O.J. No. 732, cited in *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at page 492.

To exclude evidence as **unfairly prejudicial** or for **failing the cost/benefit analysis**	Otherwise relevant evidence may be excluded if its probative value is outweighed by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9. at pages 20-21.
For an evidentiary presumption based on **spoliation** of evidence	Where a party has intentionally lost or destroyed relevant evidence, the destruction occurred after litigation commenced or was pending, and it is reasonable to conclude that the evidence was destroyed to influence the outcome of the litigation, an adverse inference may be warranted. *Gutbir v. University Health Network*, 2010 ONSC 6752 (CanLII). Note that the mere unintentional loss or destruction of evidence is insufficient. *Id.*

D. Striking the Jury

Striking the Jury	May be appropriate in personal injury actions where the evidence is anticipated to be complex, such as in cases involving pre-existing medical conditions and competing expert evidence. *Placzek v. Green*, 2012 ONCA 45 (CanLII) at paras. 6-13. *See also Rule* 47.02(1) and The Courts of Justice Act section 108(2), which lists a number of actions where jury trials are inappropriate. The test is whether justice will better be served by the retention or discharge of the jury. *Ontario Courtroom Procedure,* 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at page 448. This can be true where a jury trial would cause undue delay due to Covid. *Sauve v. Steele*, 2021 ONSC 1557 (CanLii).

E. Miscellaneous

Adjournment	*Rule 52.02*, factors listed in *Arconti v. Smith*, 2020 ONSC 5036 (CanLII). For resulting cost consequences, see *Pryce v. Pryce*, 2019 ONSC 3441 at paras. 9-11.

Amend the Pleadings	*Rule* 26 provides that the Court **shall** grant leave to amend, on such terms as are just, unless prejudice would result that could not be compensated by costs or an adjournment. *See* *Tate v. Bishop*, 2015 ONSC 742 for a case permitting plaintiff to amend at trial, *Rabb Construction Ltd. v. MacEwen Petroleum Inc.*, 2018 ONCA 170 re 'reading generally in favour of amendment' and *Godoy v. 475920 Ontario Ltd.*, 2007 CanLII 38394 for a case permitting defendant to amend and assert a limitations defence at trial, resulting in the action being dismissed.
Appeals	Procedural rulings at trial, other than motions by non-parties to quash a subpoena, cannot be appealed except by appealing the final judgment. *Button v. Jones*, [2004] O.J. No. 4456, *cited in Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at page 494.
Bifurcation of Trial	*Rule* 6.1.01 provides for the bifurcation of liability and damages, on consent. Otherwise, the Court has jurisdiction to Order bifurcation in non-jury cases, *Soulliere (Litigation Guardian of) v. Robitaile Estate*, 2013 ONSC 5073, but not in an action with an extant jury notice. *Kovach (Litigation Guardian of) v. Kovach*, 2010 ONCA 126.
Change of Venue	Provided the venue chosen by the plaintiff has a rational connection to the cause of action or the parties, the defendant has the burden of showing an alternate venue to be 'substantially better.' *Skidmore v. Carelton University*, 2009 CanLII 22575 at para. 11. *See also Rule* 46.01.
Disqualify the Judge	Where it is alleged that the decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable apprehension of bias …. actual bias need not be established. *R. v. S. (R.D.)*., [1997] S.C.J. No. 84 at para. 109, cited in *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at page 428.
Issue Estoppel and Res Judicata	Where a party seeks to revisit an issue upon which the Court has previously ruled (generally between the same parties) a motion may be brought on these grounds to preclude the introduction of such evidence.
Mistrial	May be declared where there is a real danger of prejudice to the accused or of a miscarriage of justice, and arises most often when counsel employs inflammatory language, refers to inadmissible evidence or invites the jury to ignore the law. *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at page 470 and 487-88.

Non-Suit/Directed Verdict	The test for a non-suit or directed verdict in the civil context is, "whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient [evidence] to support the issue." *Fiddler v. Chiavetti*, 2010 ONCA 210 citing *Prudential Securities Credit Corp., LLC v. Cobrand Foods Ltd.*, [2007] O.J. No. 2297 (C.A.), at paras. 35-36, quoting *Parfitt v. Lawless* (1872), 41 L.J.P. and M. 68 at 71-72. A non-suit will not be entertained unless the defendant elects to call no evidence. *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at page 490.
Re-Opening the Case	The test to re-open the case differs depending upon at what stage of proceedings it is raised. If raised earlier, Rules 52.10 and 53.01(3) may apply. If later, the moving party must show that the evidence would probably have changed the result, and that the evidence could not with reasonable diligence have been obtained before trial. *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.J. No. 61, cited in Ontario Courtroom Procedure, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at page 1102.
Sanctions for failure to Comply with an Interlocutory Order (**Strike the Defence**)	Where a party is in breach of an interlocutory Order, pursuant to *Rule* 60.12, the court may stay or dismiss that party's proceedings, strike their defence or make such other Order as is just. Generally, the court will not hear a litigant who has willfully breached a court order until the breach has been cured. *Dickie v. Dickie*, [2006] O.J. No. 95 at para. 84, affirmed [2007] 1 S.C.R. 346, *see also Moran v. Cunningham*, 2009 CanLII 34992 at paras. 68-73. Section 106 of the *Courts of Justice Act*.
Sealing Court Records	The Court set out factors to be considered in sealing court records in K.B. *v. Toronto District School Board*, 2006 CanLII 14411 (ON SCDC). As same goes against the open courts principle, the moving party has a heavy burden, and it may be more feasible for parties to request to seal a portion of the file containing sensitive information rather than the entire file. *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at page 456.

Withdrawal of Counsel	Rules 2 and 4 of the *Rules of Professional Conduct* govern withdrawal, which shall be granted where there is a conflict of interest, the client persists in instructing counsel to do something inconsistent with counsel's duty to court, or there has been a serious loss of confidence, including a client's refusal to accept advice on a significant point of law. *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at page 143. However, counsel are generally not permitted to withdraw at the commencement of a civil trial on the basis of lack of a financial retainer, and if withdrawal is awarded, costs may be ordered, *Id.* at 490, including possibly against counsel themselves pursuant to Rule 57.07. Withdrawal may be refused where contingency counsel attempts to withdraw on the eve of trial where the client has refused to follow settlement recommendations. *Cegnic v. Castro*, 2020 ONSC 986 (CanLii).

8. OPENING STATEMENTS AND OBJECTIONS THERETO

"The object of an opening is to give the court a general notion of what will be given in evidence. . . . In his opening, counsel states what he submits are the issues and the questions between the parties which have to be determined, what are the facts of the case, the substance of the evidence he has to adduce and its effect on proving his case, and **he will refer to the relevant correspondence between the parties and other documents** (emphasis by the writer). He will remark upon any point of law involved in the case, but the opening is not the occasion for detailed argument on legal questions or an extensive examination of the authorities. In opening, counsel may (also) refer to those facts of which the court takes judicial notice." *Brochu v. Pond*, 2002 CanLII 20883 (ON CA) at para. 12. Further, counsel may describe his adversaries' position as a means of describing the issues to the jury.[12] However, counsel may not assert his personal opinion on the facts or the law, or mention facts which require proof but which it is not intended to prove, or which are irrelevant to the issue to be tried.[13] *Brochu*, supra.

As an advocate, an opening should present the evidence in the most persuasive light possible[14]. According to the late Justice Sopinka, "The evidence

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12 Oatley, Roger A., Addressing the Jury, 2d ed. (Aurora: Canada Law Book, 2006) at 68.

13 Halsbury's Laws of England, 4th ed. (London: Butterworths, 1982), vol. 37 at para. 513, quoted in John Sopinka, Donald B. Houston and Melanie Sopinka, The Trial of an Action, 2nd ed. (Toronto and Vancouver, Butterworths, 1998) at p. 74.

14 Fireman, James K., *Avoiding A Mistrial in Opening and Closing Statements, Dr. McCartney (or How I Learned to Stop Arguing and Keep My Jury)*, page 3.

should be marshalled in such a way that the conclusion to be drawn is obvious so that to state the issue is to answer it." Sopinka, "The Trial of an Action", Butterworths, 1981, p, 59, *cited in* *Trypis v. Lavigne*, 2009 CanLII 25321 (ON SC) at para. 17.

In presenting opening statements, Roger Oatley recommends the following three rules:

1. Let the facts speak for themselves;

2. Do not express personal opinions about the facts or the issues in the case; and

3. Do not tell the jury what conclusions to draw on any issue.[15]

While you may comment on law to frame legal issues for the jury, caution in this regard is warranted[16]. Moreover, intricate and lengthy discussions of law should be avoided,[17] while reading case law to the jury is likely to be prohibited. Accordingly, Michael J. Slater, Q.C. will often frame legal issues in the following non-objectionable, non-controversial manner:

- A driver of a vehicle must pay attention to where he is driving. If he drives across a solid double line and someone is hurt then the driver is responsible for the harm he causes.

- A City or Township must take reasonable care when repairing its roadways. If the Township does not take reasonable care and

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15 Oatley, Roger A., *Addressing the Jury*, 2d ed. (Aurora: Canada Law Book, 2006) at 111.

16 Lubet, *Modern Trial Advocacy*, *supra* note 35 at p. 361, a brief explanation of the legal significance of evidence will usually be allowed.

17 *Avoiding a Mistrial in Opening and Closing Statements*, The Litigator, April 2009, Fireman, James K, page 17. *citing* Donald S. Ferguson, Ontario Courtroom Procedure, (Markham: LexisNexis Canada Inc., 2007) at 579.

someone is hurt then the Township is responsible for the harm it causes.

Conversely, should you want to mention the law in opening, the safest course is likely to seek leave of Court beforehand, as alluded to in *Burke v. Behan*, 2004 CanLII 49203 (ON SC) at para. 11.

Though there are a number of approaches to opening statements, the advocate should first concern him/herself with crafting a simple, coherent story (often referred to as the 'theory of the case') that can be followed by an average, unconcerned person with relative ease (and for which he has witnesses to attest to every point). Again, I like the approach to opening statements laid out by Michael J. Slater, Q.C., which is briefly as follows:

A. Rule and consequences

B. The story of what defendant did

   i) Focus on the defendant
   ii) Set the scene

C. Blame (who are we suing and why?)

   i) What was the negligent act or choice to omit?
   ii) What is wrong with the negligent act? How does it foreseeably cause harm?
   iii) What should the defendant have done instead?

D. Undermine the case of the defence (or defences)

E. Damages (your client's losses and harms)

F. Money[18] (what do you want)?

A. Copy to Court

It is often good advocacy to provide the Judge with a full outline of an opening statement in non-jury trials, though it is impermissible to provide a copy to the jury.[19] While it would likely be possible to provide a copy to the Judge in the jury trial, same may not be advantageous, as the Judge (and likely opposing counsel) would have a written record of any transgressions.

For a much more thorough analysis of opening statements, *see*

1) Delaney, T, Lindsay Kenney LLP, Opening Statements. https://lklaw.scdn2.secure.raxcdn.com/drive/uploads/2012/07/OpeningStatementsTimDelaneyRvsd-V0687969.pdf

2) Fireman, James K., Avoiding A Mistrial in Opening and Closing Statements, Dr. McCartney (or How I Learned to Stop *Arguing* and Keep My Jury).

3) Slater, Michael J., Slater Vecchio LLP, Jury Openings: Persuading Without Advocating. http://www.slatervecchio.com/wp-content/uploads/2014/10/Jury-Openings-Persuading-without-Advocating-endnotes-FINAL.pdf

4) Dooley, Daniel et al., Opening Statements: Doing it Right, Civil Litigation Skills Certificate Program: Trial from A to Z. http://www.dooleylucenti.ca/opening-statements-doing-it-right/

5) Fundamentals of Trial Techniques, Second Canadian Edition, Mauet, Thomas A. et al, Little Brown & Company (Canada) 1995.

6) The Honourable Mr. Justice Dan Ferguson, "The Law Relating to Jury Addresses," 16 Advocates' Society Journal No. 2 (July 1997), pp. 19-23.

7) Ontario Courtroom Procedure, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012.

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[18] But *see* Motions that May be Brought At Trial – Routine Motions regarding mentioning the quantum in an opening statement.

[19] Ontario Courtroom Procedure, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at 592.

8) Oatley, Roger A., Addressing the Jury, 2d ed. (Aurora: Canada Law Book, 2006).

B. Objecting to Opening Statements

Where opposing counsel makes inappropriate statements during opening, (or utilizes an inappropriate, sarcastic, derisive or condescending tone) you should promptly (after counsel has finished in almost all cases), and out of the presence of the jury, raise an objection and move for either a corrective instruction, to strike the jury, or if sufficiently serious, a mistrial. The Judge may then sustain or deny the objection. If the Judge grants a mistrial, the offending lawyer may be personally responsible for costs thrown away pursuant to *Rule* 57.07. [20] However, the jury will only be discharged where the improper statements are "sufficiently serious to undermine the fairness of the trial" and they cannot be remedied by a corrective statement to the jury.[21]

According to the authors of *Ontario Courtroom Procedure*, it is not appropriate to interrupt opposing counsel's opening address to disrupt its effect, to disagree with the accuracy of statements of fact, with the interpretation of those facts, with the tone or with what is raised as an issue of law. The safest route is likely to canvass with the Judge prior to the start of trial as to their

[20] *See* *Hall v. Schmidt*, 2001 CanLII 28008 (ON SC) and *Burke v. Behan*, 2004 CanLII 49203 (ON SC).

[21] *Trypis v. Lavigne*, 2009 CanLII 25321 (ON SC) at paras. 9-15.

preference should objections arise during opening. Note that a Court may consider objections to the opening address when brought for the first time later at trial, s*ee e.g.* *Trypis v. Lavigne*, 2009 CanLII 25321 (ON SC), and in extreme cases, for the first time on appeal. *Giang v. Clayton, Liang and Zheng*, 2005 BCCA 54 (CanLii) at para. 53.

C. Objections to Opening Statements - Quick Reference Chart

While a comprehensive list of do's and don'ts on opening statements may be found as an appendix to *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012, the below chart is intended as a quick reference aid for use during (but generally raised after) your opponent's opening.

Objections to Opening Statements - Quick Reference Chart	
Appeals to Sympathy (i.e. 'don't walk away from the plaintiff, put yourself in the shoes of the plaintiff/defendant)	Commenting on **Credibility** or parties, counsel or experts (invades the providence of the finder of fact, and at this stage, offers personal opinions, and where applicable, impugns the character of an Officer of the Court). Where credibility is a central issue, it is permissible to so inform the trier of fact, without presenting argument.
Inflammatory (i.e. appealing to emotions, in assessing regular damages, 'send a message with your verdict', calls to be punitive)	**Incorrect in Law** (defendant has brought us into this Courtroom, defendant is not taking responsibility for their actions, accepting their share of the responsibility)
Unfairly prejudicial, (i.e. tending to arose hostility or appeal to juror's emotions, 'the plaintiff is a drug dealer')	**Argumentative (Rhetoric) –** making legal argument, (i.e. Joe drove negligently, instead of Joe drove 60kph in a 30kph zone, **or** you would have anticipated that the plaintiff would see more doctors, be referred to specialists, still be treating, **or** after X, you would think it would be pretty clear… , **or** comment on how the evidence should be weighed, **or** urge the jury to draw conclusions or inferences **or** explain the importance of certain evidence etc.)
Counsel offering **personal opinion** (i.e. I think, I believe, I'm proud of my client)	**Relevance** (i.e. defendant's ability to pay)
Fraternizing with the Jury – referring to himself and the jury as 'we'	Otherwise **Improper –** using or referring to demonstrative evidence without clearing same with the Court beforehand, **or** suggesting a range for quantum of general damages without clearing same with the Court beforehand, **or** describing the evidence of witnesses you do not intend to call and which the opposing party may not call **or** referring to insurance or lack of insurance, **or** explaining the importance of certain evidence **or** commenting on how evidence should be weighed, **or** urging the jury to draw inference from facts or to reach certain conclusions **or** referring to the quantum of damages from the SOC
Tone – counsel's remarks are condescending, sarcastic, overly loud, constitute argument, are inflammatory, derisive, unfairly prejudicial, go to credibility	

9. EXPERT WITNESSES AND REPORTS

A. Qualifying an Expert

The issue of whether a witness is qualified to give an expert opinion is whether the witnesses posses special knowledge or experience going beyond the trier of fact, on the balance of probabilities. *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at page 961, *citing* *R. v. Marquard*, [1993] S.C.J. No. 119 and *R. v. Terceira*, 1998 CAnLII 2174 (ON CA).

The traditional steps to qualifying a witness at trial are:

i) the witness is called to the stand;

ii) counsel informs the judge as to the areas in which they propose to qualify the witness as an expert, and such areas should be described with precision;

iii) counsel examines the witness on their qualifications, typically by way of leading questions (it is sometimes necessary to ask for permission to lead the witness through their qualifications);

iv) opposing counsel is afforded an opportunity to cross-examine the witness on his/her qualifications;

v) both counsel are invited to make submissions;

vi) the judge announces whether the judge accepts the qualifications of the witness on the specific subjects proposed and if it has been raised, on the admissibility of the opinion.

Ontario Courtroom Procedure, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at page 961.

B. Is the Expert Opinion Admissible?

Once an expert has been qualified, the issue of whether an expert opinion is admissible is governed by the test set forth in *R. v. Mohan*, 1994 CanLII 80 (SCC), namely:

i) Is the opinion logically relevant in that the opinion, alone or in conjunction with other evidence, tends to prove or disprove a fact which is in dispute? Does it pass the cost-benefit analysis (Is the time it will take if the issue is explored worth the cost in terms of the significance of this issue at trial?)

a. Does its probative value exceed any prejudicial effect? For example, is it misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability? Are there concerns with independence and/or impartiality?

ii) Is the opinion necessary in order for the trier of fact to make a correct judgment in the absence of special knowledge?

iii) Is there an exclusionary rule which prohibits the opinion?

iv) Is the witness a properly qualified expert?

Admissibility is determined on a case by case basis. *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at page 960 *citing* *R. v. D.* (D)., 2000 SCC 43 (CanLII). Where a question is present as to whether the opinion is based on acceptable science, a voir dire should be held. As noted above, that question (including whether a novel scientific theory may be presented) is decided on the balance of probabilities. *Id. citing* *R. v. McIntosh*, 1997 CanLII 3862 (ON CA).

C. Use of the Expert Report

Expert reports are not generally entered into evidence, though it is customary that copies are provided to the Judge for his/her review.[22] Pursuant to section 52 of the *Ontario Evidence Act*, a plaintiff may enter an expert medical report into evidence in place of calling the expert, (as it was not the intent of section 52 to allow for the admission of a medical report into evidence when the expert was also going to be called in person[23]), though the Court retains

[22] *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at page 955.

[23] *Id*, *citing* *Ferraro v. Lee*, [1974] O.J. No. 1808.

discretion to allow for both where there is no prejudice.[24] However, the party must produce the expert for cross examination if demanded.[25] Regardless, marking expert reports as numbered or as lettered exhibits for identification is the preferred practice.[26] Note that where an expert report is entered into evidence, counsel can read the report or portions thereof into the record.

D. Participant Experts – Exception to Rule 53

Generally speaking, "participant experts," or those experts who formed opinions based on their observation of or participation in the events at issue, where such opinions were formed as part of the ordinary exercise of his or her skill, knowledge, training and experience (while observing or participating in events) are not required to comply with *Rule* 53. *Westerhof v. Gee Estate*, 2015 ONCA 206 (CanLII) at paras. 60, 70, 82. Such opinions are admitted for the truth of their contents,[27] provided the evidence is otherwise admissible, as set forth in subparagraph B above.

Conversely, questions to "participant experts" that lack any factual and temporal connection to what the expert observed and/or did (and hence go beyond the scope of the participant expert's participation in the events at issue) have been held to be improper, in the absence of compliance with *Rule* 53. *XPG,*

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24 *Id.*
25 *Id, citing Children's Aid Society of Algoma v. A.(B.)*, [2001] O.J. No. 2745 (S.C.J.).
26 *1162740 Ontario Limited v. Pinque*, 2017 ONCA 52 (CanLII) at para. 35.
27 *Westerhof v. Gee Estate*, 2015 ONCA 206 (CanLII) at para. 60.

A Partnership v Royal Bank of Canada, 2016 ONSC 3508 (CanLII) at paras. 50-53.

E. Cross-Examining Experts Based on Prior Testimony

Case law has established that it is improper to cross-examine an expert witness on adverse credibility determinations made in prior cases, absent a finding of 'discreditable conduct'. *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502 (CanLII) at para. 31. This is somewhat akin to the rules governing impermissible bad character evidence, but is problematic in that it allows rogues to continue to sell their 'expert' opinions, which must be dealt with each time as a matter of first impression.

F. Objections to Expert Testimony – Quick Reference Chart

Relevance – does not tend to prove or disprove a fact in issue and/or does not pass the **cost-benefit** analysis	**Unfairly Prejudicial –** its probative value does not exceed any prejudicial effect
Unnecessary – the opinion is not necessary to allow the trial of fact to make a correct judgment in the absence of special knowledge	**Subject to an exclusionary Rule –** is the opinion subject to any exclusionary rule?
Unqualified – the expert lacks the requisite special skills, training and/or experience in the area in which they are sought to be qualified	**Foundation/Reliability –** the expert has not established the underlying basis for the 'novel science' advanced
Non-Compliance with Rule 53 – the proffered opinion does not comply with Rule 53 in one or more way, i.e. late service of the expert report, otherwise incomplete, offering opinions not contained within report etc.	**Improper Opinion Evidence by Participant Expert –** opinion evidence that does not arise from or that goes beyond the participant experts' observations or participation (and is hence non-compliant with Rule 53)
Lack of Objectivity/Independence/ Impartiality and/or Reasonable Apprehension of Bias	

10. REPLY

As a general rule, reply evidence is permitted to respond to a matter raised for the first time after the party has completed its evidence. At hearings and trials however, reply is restricted to addressing new matters that could not reasonably have been anticipated by the plaintiff, applicant or moving party or where the reply evidence is in response to issues enlarged by the opponent in a manner that could not have reasonably been foreseen. *Marmer Penner Inc. v. Purcaru*, 2021 ONSC 3785 (CanLII) at para. 15., *Johnson v. North American Palladium Ltd.*, 2018 ONSC 4496 (CanLII) at para. 13. Additionally, the trial judge retains discretion to admit reply evidence concerning a matter that was only of marginal importance during the prosecution's case in chief, but that took on added significance as a result of the defence evidence. *R. v. Alton*, 2015 ONSC 2166 (CanLII) at para. 10.

Conversely, a party will not be permitted to 'bolster' its case, with additional confirming evidence (to what was presented in chief) or to raise new issues, both of which offend the 'rule against case-splitting.' *Lockridge v. Director, Ministry of the Environment*, 2013 ONSC 6935 (CanLII) at para. 14. The rationale is that the defendant or respondent is entitled to know and to respond to the case being made against him or her, and, therefore, the plaintiff or applicant should not split his or her case and take the opponent by surprise and

without an opportunity to respond. *Johnson v. North American Palladium Ltd.*, 2018 ONSC 4496 (CanLII) at para. 13.

The test concerning reply evidence is laid out in *Lockridge*, which, paraphrased for clarity, essentially provides:

i) **Responsive**: Is the reply evidence responsive to those matters raised by the defence, or does it raise new issues? or

ii) **Unanticipated Need**: Does the reply evidence respond to an unanticipated need that could not have been anticipated when presenting the case in chief? or

iii) **New Evidence**: Is the reply evidence newly discovered? And

iv) **Case Splitting**: Does the reply evidence offend the rule against case splitting, in that it simply confirms evidence presented during the plaintiff's case in chief?

Lockridge v. Director, Ministry of the Environment, 2013 ONSC 6935 (CanLII) at para. 14

When adhering to the above-stated principles, reply "will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other," and in certain cases, sur-reply or terms may be appropriate. *Lockridge v. Director, Ministry of the Environment*, 2013 ONSC 6935 (CanLII) at para. 15

and *Johnson v. North American Palladium Ltd*., 2018 ONSC 4496 (CanLII) at para. 53.

11. COMMON TRIAL OBJECTIONS

A. Objections To Questions

Calls for **Irrelevant** Answer	Calls for a **hearsay** answer
Leading	Calls for a **narrative** answer
Calls for an **opinion** (improper opinion evidence from a lay witness) or **speculation**	Calls for (witness to draw) **Conclusion** based on facts, rather than testifying as to facts)
Argumentative	**Assumes facts not in evidence**
Compound Question	**Confusing/ambiguous/misleading/vague/ Unintelligible, overly broad**
Improper (i.e. questions regarding pleadings or damages claimed in the SOC)	**Improper re-examination or rebuttal**
Improper characterization	**Mis-states evidence, misquotes the witness, inconsistent**
Calls for a **Privileged Communication**	**Repetitive** (already asked and answered)
Violates the Best Evidence Rule	**Improper impeachment** (in breach of *Brown v. Dunn, Ontario Evid. Act. S. 20/21 etc.).*
Badgering, harassing or oppressive to the witness	

B. Objections To Answers

Hearsay	**Irrelevant**
Violates Parol Evidence Rule	**Immaterial**
Opinion	**Conclusion**
Narrative	**Unresponsive/volunteered**
Privileged	**Improper Characterization**

C. Exhibits

No Foundation	**Hearsay**
No Authentication	**Irrelevant**
Prejudice outweighs probative value	**Contains inadmissible matter**

The contents of this chart largely taken from the list found in the Fundamentals of Trial Techniques, Second Canadian Edition, Mauet, Thomas A. et al, Little Brown & Company (Canada) 1995, pg. 316.

12. CLOSING STATEMENTS

The purpose of a closing statement is to persuade the trier of fact by presenting your case "clearly and in a way that is of help to the court in the performance of its duty to decide the issues before it.[28]" "Counsel are required to advance their client's cause fearlessly and with vigor, so long as this is done in accordance with the rules of court and professional conduct and in conformity with counsel's obligations as an advocate and officer of the court[29]."

Considerable latitude is afforded to counsel as to the permissible scope of a closing jury address. As such, "counsel has the right to make an impassioned address on behalf of his or her client and, in some cases, the duty to so do, so long as it "does not offend in other respects", and "courts do and must give considerable latitude, even to extravagant declamation[30]". As such, comments such as the following have been deemed permissible in closing:

> "You and you alone have the power to give Debbie, Fred and Ashley Fiddler the treatment and access to treatment that you determine they require. You and you alone have the power to decide what wage loss Debbie Fiddler, Amanda"s mother has suffered. … Finally, you and you alone will determine an amount in dollars for the loss Debbie, Fred and Ashley have suffered."

Fiddler v. Chiavetti, 2010 ONCA 210 at para 30.

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28 Linda S. Abrams and Kevin P. McGuinness, *Canadian Civil Procedure Law* (Markham: LexisNexis, 2008) at 932.

29 *Landolfi v. Fargione*, 2006 CanLII 9692 (ON CA), at para. 77.

30 *Id*, at para. 76.

However, the expression by counsel of personal beliefs or feelings is improper, as are personal attacks on opposing counsel.[31] The mention of other cases (and likely statutes) not contained in the closing charge is also verboten (and should be objected to). Olah, J., *The Art and Science of Advocacy*, Volume 1 (Toronto: Carswell, 1990) at 18-24. Where counsel crosses the line, the trial judge may take corrective action, as set forth below in: OBJECTIONS TO CLOSING STATEMENTS – QUICK REFERENCE CHART.

In general, closing arguments should:

i) have a logical structure;

ii) argue your theory of the case;

iii) argue the facts;

iv) use exhibits;

vi) anticipate and utilize the Judge's expected instructions;

vii) use themes, analogies and stories;

viii) argue strengths and volunteer weaknesses;

ix) use rhetorical questions to force your opponent to argue his weaknesses;

In personal injury actions, counsel may specifically:

[31] *Id* at paras. 78, 88.

i) tell the jury what specific answers they should give to questions (including the appropriate relief to award);

ii) make submissions on the amount of damages to be assessed in a personal injury action (see e.g. *Courts of Justice Act*, R.S.O. 1990 c. C.43, s 118), without mentioning the upper limit where the case does not involve a catastrophic injury[32];

iii) use chronological summaries or charts, with permission from the trial judge[33];

Ontario Courtroom Procedure, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at pages 1505-06.

A. Order of Closing Statements

The Order of presentation of closing arguments in jury trials is set forth by *Rule* 52.07, which provides that where the defendant has called evidence, the defence closes first (but after plaintiff's reply evidence, if any), followed by the plaintiff. No further right of reply is provided. *Rule* 52.07(4). In non-jury trials, the plaintiff generally argues first, with a right of reply. *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at pages 1117. Like with opening statements, it may be permissible to give the Judge

[32] *Howes v. Crosby*, [1984] O.J. No. 3127, *Baurose v. Hart*, [1990] O.J. No. 3121
[33] *R. v. Bengert (No. 5)*, 1980 CanLII 321 (BC CA).

written submissions in the context of a non-jury trial, but this should be canvassed with the Judge beforehand. *Id.* at 1123-24.

B. Don't Interrupt Closing Statements

Custom states that a party's closing argument should not be interrupted with objections, and where same occurs, a rebuke from the trial Judge is warranted.[34] Instead, objections should be raised afterwards outside the presence of the jury. *Id*.

As to how to construct a closing statement, see:

1) Oatley, Roger A., *Addressing the Jury*, 2d ed. (Aurora: Canada Law Book, 2006).

2) Mauet, Thomas A. et al, *Fundamentals of Trial Techniques*, Second Canadian Edition, Little Brown & Company (Canada) 1995.

3) Fireman, James K., *Avoiding A Mistrial in Opening and Closing Statements, Dr. McCartney (or How I Learned to Stop Arguing and Keep My Jury).*

4) The Honourable Mr. Justice Dan Ferguson, "The Law Relating to Jury Addresses," 16 Advocates' Society Journal No. 2 (July 1997), pp. 19-23.

5) Ontario Courtroom Procedure, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012.

[34] *Ontario Courtroom Procedure*, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at pages 1124-1125, *citing* R. v. Snow, 2004 CanLII 34547 (ON CA) at paras. 26, 28.

C. Objections to Closing Statements

Where counsel attempts to steer the jury away from deciding the case on the evidence, subject to the *Rules*, such conduct is objectionable. Objectionable comments in closing have been held to include:

Comments which encourage assessment based on irrelevant considerations, *Brochu v. Pond*, 2002 CanLII 20883 (ON CA), or which are calculated to inflame the emotions of the jury to the prejudice of the other party. *de Araujo v. Read*, [2004] B.C.J. No. 963.

Comments that are misleading to the jury, i.e. that they may ignore rulings of the Judge. *R. v. Latimer*, [2001] S.C.J. No. 1.

Misstating evidence or stating facts not put in evidence. *R. v. Pisani*, [1970] S.C.J. No. 99.

Inviting the jury to base its verdict on the wealth or status of the defendant. *Sornberger v. C.P.R.*, [1897] O.J. No. 30, *Selick v. New York Life Insurance*, [1920] O.J. No. 634.

Appealing to the jurors on the ground that they are taxpayers. *Cousineau v. Vancouver (City)*, [1926] B.C.J. No. 30.

Personal attacks on opposing counsel, or putting counsel's credibility in issue, (i.e. telling the jury that counsel has kept the promises made to them during opening). *de Araujo v. Read*, [2004] B.C.J. No. 963.

Attacking the defendant for not testifying (criminal) and/or making unwarranted personal attacks upon the professional integrity of opposing witnesses so as to put them on trial. *de* *Araujo v. Read*, [2004] B.C.J. No. 963.

D. Arbitrary Rules Governing Damages (in closing)

Counsel may not:

Suggest an inappropriate range of damages. *Caron v. Chodan Estate*, [1992] O.J. 2106.

Mention the upper limit on non-pecuniary damages set by the Supreme Court in a case which does not involve catastrophic injuries. *Howes v. Crosby*, [1984] O.J. No. 3127.

Mention awards from other cases. *Allan v. Bushnell T.V. Co. Ltd.*, 1969 CanLII 503 (ON CA).

Make submissions on the amount of non-pecuniary damages in a non-personal injury case. *Gray v. Alanco Developments Ltd.*, 1967 CanLII 221 (ON CA).

Mention the quantum of damages sought in the Statement of Claim. *Barkhouse v. Vanderploet* (1976), 16 N.S.R. (2d) 445 (C.A.) at paras. 45-6, *Gray v. Alanco Developments Ltd.*, 1967 CanLII 221 (ON CA), *Gray v. Alanco Developments Ltd.*, [1965] 2 o.r. 144 (H.C.), *cited in* Olah, J., *The Art and Science of Advocacy*, Volume 1 (Toronto: Carswell, 1990) at 8-9,

see also *Brochu v. Pond*, 2002 CanLII 20883 at para. 32 (reference to a pleading in closing is inadvisable).

E. Objections to Closing Statements – Quick Reference Chart

Appeals to Sympathy *(i.e. 'don't walk away from the plaintiff, put yourself in the shoes of the plaintiff/defendant)*	**Irrelevant** *(i.e. defendant's ability to pay)*
Inflammatory (i.e. appeals to passion or comments that tend to arose the hostility or prejudice of the jury)	**Incorrect in Law/Misleading the Jury** (i.e. telling the jury they may disregard the Judge's instructions, otherwise misstating the law)
Unfairly prejudicial, *(i.e. tending to arose hostility or appeal to juror's emotions, 'the plaintiff is a drug dealer')*	**Misstates the Evidence** or **states facts not in evidence**
Counsel offering **personal opinion** *(i.e. I think, I believe, I'm proud of my client)*	**Improper attack on character of counsel** (or potentially an expert)
Fraternizing with the Jury – *referring to himself and the jury as 'we'*	*Otherwise* ***Improper –*** *using or referring to charts or summaries without clearing same with the Court beforehand,* ***or*** *referring to insurance or lack of insurance* ***or*** *referring to the Statement of Claim or the damages claimed therein,* or *case law* not contained in the closing charge.

Where such objection is **sustained**, the judge may:

i) immediately give a direction to the jury;

ii) wait and give direction to the jury in the charge;

iii) give direction to the jury and repeat it in the charge;

iv) declare a mistrial;

v) permit a reply address (only in the clearest cases of unfairness);

Ontario Courtroom Procedure, 3d Ed., Sanderson Mary A. et al., LexisNexis Canada, 2012 at pgs. 1126 & 1119.

13. CLOSING CHARGE

A. No Requirement To Review The Facts Of The Case

Ordinarily in a closing charge, a trial judge should provide the jury with an outline of the evidence with a view to assisting it on the factual issues to be determined. *Berthiaume-Palmer v. Borgundvaag*, 2010 ONCA 470 (CanLII) at para. 11. However, "**there is no rule that in a civil jury trial the judge is required to review the facts in a jury charge**. Nor is there any authority for the proposition that the failure of the trial judge to review the facts necessarily requires an appellate court to order a new trial." *Id.* at para. 14, *cited in* *Vanderbeke v. O'Connor*, 2013 ONCA 665 (CanLII) at para. 25. In determining whether the charge was adequate, an appellate court will further consider the comments of counsel during their closing arguments. *Berthiaume-Palmer* at para. 15. Charges have been held sufficient where they review the law, the applicable standard of care and the issues. *Vanderbeke* at para. 26. As such, provided counsel is thorough, there is no need for the Judge to repeat what has just been said (by counsel).

Accordingly, "[t]he standard to be met by trial judges in their charges to the jury in a civil action for damages for personal injuries does not require that the evidence of each witness on particular issues be described in detail. A trial judge discharges his or her function adequately if the positions of the parties concerning the testimony at trial are outlined, if attention is drawn "to the issues

of fact as they arise from the evidence . . . [and] to the evidence bearing upon those issues", and if those issues are related to the relevant legal principles." *Brochu v. Pond*, 2002 CanLII 20883 at para. 67. Where the trial judge makes comments during the trial that shows his disbelief or hostility to a witness, or if it appears that the trial judge has established a view that the party's case is weak, then this breaches a party's right to a fair trial. Olah, J., *The Art and Science of Advocacy*, Volume 1 (Toronto: Carswell, 1990) at 9-51, *citing MacIntosh v. Dominion of Can. General Insurance Co.*, [1936] 4 D.L.R. 111 at 123-24.

B. Objecting to the Closing Charge

If possible, counsel should raise objections to the charge before it is read to the jury, ideally at the pre-charge conference. At that time, counsel should also be prepared to request additions, corrections or deletions that would be beneficial to their case, and provide argument or authority for reasons to do so. Where the charge is not objected to before it is read, counsel should raise any outstanding objections as soon as possible thereafter, in the event the Judge must re-charge the jury.

"The law is generally that the failure to object to a civil jury charge is fatal to a request for a re-trial on appeal based on misdirection or non-direction. However, this rule is subject to the exception that where the misdirection or non-

direction resulted in a substantial wrong or miscarriage of justice, it may warrant a new trial." *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502 at para. 69.

I have posted two redacted closing charges, including one given by a Judge in a 2015 MVA case, on my website at http://www.michaelsfirm.ca/closing-charge-civil-jury-trial/. In Word format, it runs for nearly 80 pages, and summarized the evidence of all witnesses in exhaustive detail. The charge apparently included all instances where the plaintiffs' evidence was inconsistent, in a case which turned on credibility. Judgement in that case was returned for the defendant, who had been drinking prior to the accident and had fled the scene. There were certainly other problems with the plaintiffs' case, but the instruction was unlikely to have helped.

C. Objections To The Closing Charge – Quick Reference Chart

Incorrect in Law
Insufficient (fails to review the law, the applicable standard of care and/or the issues)
Unclear, confusing, repetitive
Misapprehends or misstates the evidence
Misstates the positions of the parties
Charge is unbalanced, unfair, slanted against a party, or unfavorably emphasizes one party's position (i.e. conveys the impression that one party's case is weak or expresses disbelief and/or hostility to a witness), such that a party's right to a fair trial is breached
Contents of the charge create a reasonable apprehension of bias, are prejudicial and undermine the fairness of the trial

14. JUSTICE PAUL PERELL – AN EVIDENCE CHEAT SHEET

Please refer to the online copy of An Evidence Cheat Sheet.

15. ONTARIO EVIDENCE ACT

Please refer to the Ontario Evidence Act.