



ACCESS TO JUSTICE

LEGAL ISSUES FOR THE INJURED AND PEOPLE WITH DISABILITIES

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EXPERT WITNESSES

WHY DO WE NEED THEM?

Expert witnesses are used frequently in personal injury trials because they can give evidence about things ordinary witnesses know less about. Ordinary witnesses are limited to testifying about what they directly saw, heard, smelled, tasted or touched. Experts, on the other hand, may be called to give opinions about such things as:

- o who caused the accident
- o whether the occupant of the car was wearing a seatbelt
- o what injuries the plaintiff sustained in the accident
- o whether and to what extent the plaintiff's current problems relate to the accident or to some other factors
- o whether the plaintiff will be able to work in the future and if so, what likely income the plaintiff will be able to generate
- o whether the plaintiff will require support in the future (for their physical, emotional and/or vocational needs)

For example, a witness might say he saw the plaintiff stagger around after the accident, unable to answer any of the questions put to her. A medical expert who'd interviewed the plaintiff, accident witnesses, family, and friends, and reviewed the medical records could testify that, in his/her opinion, the plaintiff had suffered a mild traumatic brain injury.

Note that expert evidence is only allowed where it is needed to understand what happened. And the expert evidence must be within what is accepted by the mainstream scientific community. Furthermore, it is still the judge's or jury's job to accept or reject some or all of an expert's opinion evidence. It is also the judge's or jury's job to put it together with any other opinions and evidence present to arrive at a finding of fact. But a plaintiff ignores relevant experts at their peril because good expert evidence is often critical to a case.

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WHAT MAKES THEM EXPERT?

When an expert witness first takes the stand, the party calling them must establish that the person has sufficient training in the field about which they're about to testify that they qualify as an expert. If they qualify as an expert, their opinion evidence will be limited to those specific areas in which they are an expert. If the expert tries to give opinions about things which aren't in their field of expertise, those opinions may be cut from their reports.

Where the lawyers for the plaintiff and defence agree that the person is an expert, information about the person's credentials is not closely scrutinized by the trier of fact because it is assumed that opposing parties would only agree if the qualifications were evident to everyone.

Where the opposing side disagrees that a person is an expert, the court will conduct a "voir dire." This is where, in the absence of a jury, the lawyers are given an opportunity to prove/disprove that person's credentials. If a decision is made not to accept the person as expert, the person cannot provide any expert opinions. They may still be able to testify about what they saw, etc. as with any ordinary witness.

One area that often confuses experts is the degree of certainty required to give evidence. Some experts are concerned they will not be qualified to give an opinion in court if they cannot prove they are 100% (or even 95%) correct. While in their scientific field this standard might be required, the level of proof required in the courts (for real people in real time) is whether it is more likely than not that what they are saying is true.

THE GOOD EXPERT WITNESS

A person may have the training to be considered an expert but still perform poorly on the witness stand. A good expert witness:

- ✓ is truly knowledgeable about the field in which they are testifying. They keep abreast of important research and developments in their field of expertise. They are professionals who pursue excellence in their chosen vocations;
- ✓ can understand questions and speak clearly, simply, and loudly enough to be heard. This includes being able to explain complicated information in a simple and concise way, without resorting to professional jargon (which may be confusing or frustrating for the lawyer and the trier of fact) unless it is absolutely necessary;
- ✓ knows all of the relevant facts. Merely being intelligent and knowledgeable isn't enough. If an expert hasn't spent the time to accurately cover the key facts that are relevant to the issue (including deciding what facts are relevant and which ones are not), they are vulnerable to attack. The facts are the foundation for an opinion. If an expert's understanding of the facts is distorted, their entire opinion may crumble in court;
- ✓ considers all the alternative explanations for the facts. They don't jump to conclusions; they synthesize the relevant data in a logical, coherent manner to arrive at solid opinions and conclusions;
- ✓ is impartial. They arrive at their opinion because that opinion is honestly the most convincing to them. On cross-examination, they will concede those aspects of their testimony on which they are legitimately challenged;
- ✓ listens carefully to the questions asked and responds to them, not only in court but in their reports. They don't expound generally on a topic unless asked to do so. Nor do they disregard relevant legal issues (e.g. which problems arise from the accident and which don't) to focus exclusively on issues they consider important (e.g. how to treat the problems, regardless of their origin).

Ideally, the expert answers questions the trier of fact could have only guessed at without the expert. And if the answers are presented clearly, honestly, and credibly, they not only shed light on some of the mysteries of life, they also move the ultimate findings closer to both truth and justice.