When are Accountants Liable for Providing Negligent Tax and Estate Planning Advice?

By : Peter Weissman and David Wagner[1]

Accountants are often called upon to develop and implement strategies to achieve tax benefits for their clients. The strategies are often complex, multifaceted, and challenging to execute for even the most experienced and capable professionals.

The consequences of failing to comply with all of the technical and substantive requirements of the *Income Tax Act*, the relevant folios, information circulars, technical interpretations and the rules established by case law make it even more important that these strategies be implemented properly. A flawed plan will not only risk the client losing the desired benefit, but may also expose the client to additional professional fees, penalties, interest, and trigger, premature or unnecessary tax consequences.

Since rectification is only available in limited circumstances in Canada,[2] the taxpayer's only recourse will often be to sue the tax advisor for damages arising from professional negligence. As the Supreme Court of Canada explains,[3]

> "when taxpayers agree to certain transactions and later claim that their advisors made mistakes by failing to properly advise them that the transactions they agreed to would produce unintended tax consequences, the appropriate avenue to recoup their ensuing losses is not through the retroactive amendment of their agreement. Rather, if the mistakes are of such a nature as to warrant it,

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[2] *771225 Ontario Inc. v. Bramco Holdings Co.,* 1995 CanLII 745 (ON CA), 1995 CarswellOnt 194 (*Bramco)*; *Canada Life Insurance Company of Canada v. Canada (Attorney General),* 2018 ONCA 562 at para. 46

[3] *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General),* 2016 SCC 55 at para. 43

> taxpayers can bring a claim against their advisors, who generally have professional liability insurance, and try to prove that claim in the courts".

However, liability in negligence does not necessarily follow where the conduct of one person has caused economic loss to another. Crucial to a finding of negligence is the existence of a duty of care and a failure on the part of the defendant to meet the required standard of care owed.[4]

In this paper we aim to explore when accountants' tax advisory mistakes may amount to professional negligence, the accountant's role when such claims are litigated, and what steps tax advisors can take to mitigate their exposure to liability.

Duty of Care

The first step in considering whether tax advisors will be liable for providing negligent advice is determining the existence of, and defining, the duty of care owed to a client.[5]

The Supreme Court of Canada established the following two-part test for whether a duty of care exists in negligence, known as the *Anns/Kamloops* test.[6]

> (1) [I]s there a sufficiently close relationship between the parties...so that, in the reasonable contemplation of the alleged wrongdoer, carelessness on its part might cause damage to that person? If so,
> (2) are there any considerations which ought to negate or limit (a) the scope of the duty and (b) the class of person to whom it is owed or (c) the damages to which a breach of it might give rise?

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[4] *Garratt v. Orillia Power Distribution Corp.,* 2008 ONCA 422 at paras. 36-37
[5] *Godina v. Tripemco Burlington Insurance Group Ltd.*, 2013 ONSC 979 at para. 14
[6] *Nielsen v. Kamloops (City),* [1984] 2 SCR 2, 1984 CanLII 21 at para. 40

The purpose of the *Anns/Kamloops* test is to determine (a) whether or not a *prima facie* duty of care exists and then (b) whether or not that duty ought to be negated or limited.[7]

The first step of the *Anns/Kamloops* test presents a relatively low threshold. It requires the plaintiff to show that a relationship of proximity existed between the parties such that it was foreseeable that a careless act by the defendant could result in injury to the plaintiff.[8]

Where someone purports to possess a special skill and s/he undertakes, irrespective of contract or remuneration, to apply that skill for the assistance of another person who relies on it, the first step of the *Anns/Kamloops* test will generally be satisfied and a duty of care will arise. The duty of care arises when a person giving advice knew, or ought to have known, that the person receiving the advice would act upon it believing the advice to be accurate. The duty lies both in contract and in tort.[9] Chartered Professional Accountants of Ontario concurs that its members have this duty of care whether or not they are remunerated for their services[10].

Under the second step of the *Anns/Kamloops* test, the question to be asked is whether there are broad policy considerations that would make the imposition of a duty of care unwise. This stage of the analysis is about the effect of recognizing a duty of care on other legal obligations, the legal system, and society more generally.[11]

In the context of a client asserting that his/her former tax advisors provided negligent advice, the case law has considered some of the following policy considerations.

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[7] *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 SCR 165, 1997 CanLII 345, 1997 CarswellMan 198 (SCC) at para. 37 (*Hercules*)
[8] *Ryan v. Victoria (City),* [1999] 1 SCR 201, 1999 CanLII 706, 1999 CarswellBC 79 at para. 23
[9] *Econome Inc. v. Ginsberg, Gluzman, Fage & Levitz*, 1994 CarswellOnt 247 (Ont. Gen. Div.) at para. 45 *Odumeru v. Ekeh*, 2015 CanLII 38181 (ON SCSM), 2015 CarswellOnt 10138 at para. 34; *Haig v. Bamford (1976)*, [1977] 1 SCR 466, 1976 CanLII 6, *Hercules, Supra* note 7; *Central & Eastern Trust Co. v. Rafuse* [1986] 2 SCR 147, 1986 CanLII 29
[10] Chartered Professional Accountants of Ontario Code of Professional Conduct at 1, February 26, 2016
[11] *Barkley v. Tier 1 Capital Management Inc.*, 2018 ONSC 1956 at para. 86

(a) the imposition of indeterminate liability[12],

(b) whether liability should be imposed where the tax advice given includes a disclaimer and non-reliance clauses[13] -

(c) whether finding liability in respect of opinion letters could have the effect of restricting the public's access to such opinions. If a duty of care is found in such cases, tax advisors would generally feel compelled to provide much more extensive and detailed opinions that address issues, considerations and risks not material to the specific issues they are being asked to opine on. This would generally increase costs of providing such opinions and further restrict access to these types of opinion letters.[14]

Additionally, tax advisors may be found to owe their clients fiduciary duties.[15] The differences between the ordinary duty of care and fiduciary responsibilities are subtle, but important. In particular, "while both negligent misrepresentation and breach of fiduciary duty arise in reliance-based relationships, the presence of loyalty, trust, and confidence distinguishes the fiduciary relationship from a relationship that simply gives rise to tortious liability.[16]

For example, in *Hodgkinson v. Simms*, the defendant, a chartered accountant, advised the plaintiff on buying tax shelters but failed to disclose his relationship with the developers selling the tax shelters and the fees received from developers for structuring the projects. The Supreme Court of Canada enforced fiduciary duties on the defendant chartered accountant, because the very existence of the relationship, like many professional advisory relationships, "particularly in areas such as law, taxation and investments, is premised on full disclosure by the client of vital personal and financial information that inevitably results in a "power-dependency" dynamic and found that the

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[12] *Ibid* at para. 87

[13] The Court has had to consider whether, if lawyers and other professionals are unable to protect themselves from liability in respect of advice or opinions they give by disclaimers and limiting language, it will have a chilling effect on the way professionals act (See [13] *Schneider v. Royal crown Gold Reserves Inc.*, 2016 SKQB 380 at para. 125)

[14] *Schneider v. Royal crown Gold Reserves Inc.*, 2016 SKQB 380 at para. 125

[15] *Hodgkinson v. Simms*, [1994] 3 SCR 377, 1994 CanLII 70 at para. (*Hodgkinson*)

[16] *Ibid* at para. *Boyse v. Saxe,* 2015 ONSC 6381 at para. 26

defendant breached his fiduciary obligations by failing to disclose his relationship with the vendor.[17]

Standard of Care

Once it has been found that a duty of care exists, the Court proceeds to determine the appropriate standard of care[18], which clarifies the extent of the duty.[19] The standard of care in negligence cases is that of a reasonable person in similar circumstances.[20]

In many negligence cases, expert evidence will not be necessary to determine the standard of a reasonable person in similar circumstances.[21] However, where the plaintiff sues his former tax advisors for professional negligence, the plaintiff must present expert opinion evidence to prove what another reasonably skilled and experienced professional would have done in the circumstances of the case.[22]

This general rule is subject to two narrow exceptions:[23]

(1) Cases in which it is possible to reliably determine the standard of care without the assistance of expert evidence. "This will be the case only where the court is faced with 'nontechnical matters of those of which an ordinary person may be expected to have knowledge'"; and

(2) Cases in which the impugned actions of the defendant are so egregious that it is obvious that his or her conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard

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[17] *Hodgkinson*, *Supra* note 15 at para
[18] *Donoghue v. Stevenson* [1932] UKHL 100, [1932] AC 562 at 620-621
[19] *Ryan v. Victoria (City)*, [1999] 1 SCR 201, 1999 CarswellBC 79 at para. 21
[20] *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41
[21] *Resurfice Corp. v. Hanke*, 2007 SCC 7 at para. 9 citing *R. v. Mohan*, [1994] 2 S.C.R. 9 at 23-24, 1994 CanLII 80 (*Mohan*)
[22] *Bari v. Ahuja*, 2018 ONSC 5726 at para. 65; *Vernon v. NEO Family and Children's Services*, 2018 ONSC 7231 at para. 6
[23] *Krawchuk v. Scherbak*, 2011 ONCA 352 at paras. 132-135

In contrast to claims for damages flowing from an accountant missing a filing deadline,[24] where the plaintiff is suing for professional negligence in respect of the formulation and implementation of complex, nuanced tax or estate planning strategies it is unlikely that either of the two narrow exceptions will apply and it will almost always be necessary to procure expert evidence.

In such situations, it is imperative that the plaintiff procure an expert's report that complies with the *Rules of Civil Procedure* and meets the test of admissibility. If the plaintiff fails to provide such evidence, s/he will "have no hope of success".[25] The case law goes so far as to suggest that the allegations in a statement of claim that are not supported by a proper expert report, if necessary, fail to even raise a genuine issue for trial. The plaintiff, therefore, is at risk of having his/her claim dismissed on a motion for summary judgment.[26]

Defining the parameters of the standard of care is dependant on the particulars facts of each case and will vary with the services that the accountant has agreed to be retained to perform,[27] regardless of whether or not a fee was charged.

While defining the appropriate standard of care is ultimately a question of law, [28] in the context of professional negligence claims against accountants, the Court will often pay particular attention to evidence of the general practice of accountants in like circumstances[29] and refer to the professional standards of conduct required by the accountants' governing body. In Canada, regulation of conduct of Chartered Professional Accountants ("CPA") is administered at the provincial or territorial level.

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[24] *Dyck v. F.M.A. Farm Management Associates Ltd.*, 1996 CanLII 6766 (SK QB), 1996 CarswellSask 14
[25] *Ferroni v. St. Joseph's Health Centre*, 2012 ONSC 1208 at para. 26
[26] *Kobilke v. Jeffries*, 2014 ONSC 1786 at para. 49; *Sutherland v. Brown,* 2010 ONSC 2895 at paras. 9-12; *Barber v. Mustard*, [1993] O.J. No. 2872 (Ont. Gen. Div.) at paras. 10-12.; *Samuel v. Ho*, 2009 CanLII 940 (ON SC), [2009] O.J. No. 172 (Ont. S.C.J.) at paras. 26-34; *Bramco*, *Supra* note 2, at para. 8.
[27] *466715 Ontario Ltd. v. Proulx*, 1998 CarswellOnt 3321 (Ont. Gen. Div.) at para. 57
[28] *Kripps v. Touche Ross & Co.*, 1997 CanLII 2007 (BC CA), 1997 CarswellBC 925 at para. 70; *Canadian National Railway v. Vincent*, [1979] 1 S.C.R. 364, 1978 CanLII 166, 1978 CarswellQue 137 at para. 22
[29] *W.H. Rasley & Associates Ltd. v. Tyler & Tyler*, (1984), 56 N.B.R. (2d) 98 (NB CA), 1984 CarswellNB 214 at para. 12

Our references will be to Chartered Professional Accountants of Ontario's CPA Code of Professional Conduct[30] (the "Code") as it is similar to the rules espoused by each provincial or territorial CPA body.

The Code applies to all CPAs and CPA firms no matter what type of professional service they provide, irrespective of whether the services are provided for remuneration or not, and lays out the elements confirming that a CPA's activities are those of a "profession", specifically:

- *there is mastery of a particular intellectual skill, acquired by lengthy training and education;*
- *the traditional foundation of the calling rests in the provision of services to others through the application of the acquired skill to their affairs;*
- *the calling centers on the provision of personal services rather than entrepreneurial dealing in goods;*
- *there is an outlook, in the practice of the calling, which is essentially objective;*
- *there is acceptance of a responsibility to subordinate personal interests to those of the public good;*
- *there is acceptance of being accountable to and governed by professional peers;*
- *there exists a developed and independent body, comprising the members of the profession, which sets and maintains standards of qualification, attests to the competence of the individual members and safeguards and develops the skills and standards of the profession;*
- *there is a specialized code of ethical conduct, laid down and enforced by that body, designed principally for the protection of the public; and*
- *there is a belief, on the part of those engaged in the calling, in the virtue of interchange of views, and in a duty to contribute to the development of their profession, adding to its knowledge and sharing advances in knowledge and technique with their fellow professionals.*

[30] Adopted February 26, 2016 and ratified September 22,2016 (*The Code*)

By these criteria chartered professional accountancy is a profession.[31]

The Code requires CPAs and firms to act in the public interest. By itself, this sounds like a reasonable requirement, but it is a subjective test that is open to much interpretation.

To help frame the subjectivity of interpretation and clarify what is expected of members and firms, the Code lists five principles that are to be followed:

1. **Professional Behaviour**
   Chartered Professional Accountants conduct themselves at all times in a manner which will maintain the good reputation of the profession and serve the public interest.
2. **Integrity and Due Care**
   Chartered Professional Accountants perform professional services with integrity and due care.
3. **Objectivity**
   Chartered Professional Accountants do not allow their professional or business judgment to be compromised by bias, conflict of interest or the undue influence of others.
4. **Professional Competence**
   Chartered Professional Accountants maintain their professional skills and competence by keeping informed of, and complying with, developments in their area of professional service.
5. **Confidentiality**
   Chartered Professional Accountants protect confidential information acquired as a result of professional, employment and business relationships and do not disclose it without proper and specific authority, nor do they exploit such information for their personal advantage or the advantage of a third party.[32]

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[31] *Ibid* at 2
[32] *Ibid* at 3-4

The above factors are contained in the preamble in the Code. Specific rules regarding the "maintenance of the good reputation of the profession" are contained in section 200 of the Code.

Rule 201.1 states that:

> *"A member or firm shall act at all times with courtesy and respect and in a manner which will maintain the good reputation of the profession and serve the public interest."*

Rule 202.1 states that:

> *"A member or firm shall perform professional services with integrity and due care."*[33]

The Code only states what the relevant governing body expects from its members. The jurisprudence makes it clear that while conformity with professional standards will not preclude a finding of liability of negligence, it may raise a presumption that the defendant(s) met the necessary standard of care, which the plaintiff can disprove if s/he can show that the standards adhered to were in themselves negligent.[34]

However, a client's reasonable expectations may be different than those of the accountant's regulatory body. Notwithstanding this fact, the profession's code of conduct is a good starting point for clients and their advisors to consider in determining whether they feel an accountant has met the standard of care that could have reasonably been expected or not.

Some Examples of Matters that can Lead to a CPA's Exposure to Liability

A professional will owe a duty of care (and faces exposure to liability) where s/he holds her/himself out as possessing special skill and knowledge and then fails to use

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[33] *Ibid*, r 201-202

[34] *466715 Ontario Ltd. v. Proulx*, 81 ACWS (3e) 1026 (Ont. Gen Div.), 1998 CarswellOnt 3321 at para. 65

reasonable diligence, care, knowledge, skill, and caution in carrying out those duties. Moreover, where an accountant agrees to devise tax strategies for a client, there is on her/his part an implied warranty that s/he possesses the necessary skill and is competent to complete the task undertaken.[35]

The following are some common unidentified or poorly managed tax issues which may be beyond the scope of a general practitioner's skill and knowledge, but which could ultimately expose a general practitioner to liability if such advice on these issues was either given by him/her to their client, or is simply overlooked in providing certain advice.

Below we also set out what we believe would be reasonable for a general practitioner to do when dealing with these various issues.

a) Subsection 75(2) – reversionary trusts

This provision applies to attribute the income earned in some trusts, to the person who contributed the property, when certain conditions are met. Not only does the attribution in this provision usually result in punitive taxation of income but the application of the provision precludes a tax free roll out of property from the trust to its beneficiaries. Often, the problem is identified when the trustees decide to roll property out of a trust to avoid the 21 year deemed disposition of its assets. If this provision applied at any time during the life of the trust the transfer to the beneficiaries will not be tax free unless the beneficiary is also the person who contributed the property in the first place.

This provision is not one that most general practitioners should be expected to understand and plan for. Even identifying that there is a possible issue may not be within the purview of many general practitioners who do not advise on the use of trusts. In these cases, the clients will likely already be relying on a specialist rather than the general practitioner. However, if the general practitioner engages in advising a client with respect to the use of trusts, s/he should be aware that this provision must be

[35] *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham*, 1996 CarswellOnt 5562 (Ont. Gen. Div.) at para. 78; *Douglas v. Kinger*, 2008 ONCA 452

considered. It would be acceptable to just identify that there is a risk and then refer the issue to a tax specialist but, in this type of scenario, not identifying the provision would, in our opinion, not meet the minimum standard of care.

b) Attribution

When it comes to regular income attribution rules, a general practitioner can be expected to identify that there are rules to be aware of, but not necessarily know how they apply. However, understanding and advising with respect to these rules is certainly within the expertise of many general practitioners so it would not be unreasonable for a client to rely on a general practitioner who chose to advise in this area. Again, the duty of care is determined by the advisor's actions rather than any designation or regulated code of conduct.

c) Section 84.1 - surplus stripping

While we have not confirmed this statement, it is our understanding that the application of this provision is the source of a large number of accountant negligence claims. The provision converts certain amounts that would normally be received tax free, to taxable dividends. The provision can apply when a client engages in a reorganization or even when simple rollovers are being performed. Any general practitioner who takes it upon her/himself to discuss reorganizations or rollovers with clients should, at a minimum, know that this provision exists and determine whether a tax specialist should be consulted.

d) Butterfly transaction

Just like a chemical reaction cannot be reversed to release the original elements, it is difficult to unwind combined corporate ownership once it has been created. Subsection 55(2) of the income tax act is an anti-avoidance rule that can convert tax free intercorporate dividends into capital gains (taxable) even where you would think there is nothing egregious about the transaction. The provision potentially applies to any split up of corporate assets and even in cases as simple as the payment of dividends to a holding company.

A “butterfly transaction” derives its name from the way the corporate structure looks as one maps out the steps involved and refers to a transaction undertaken to avoid the application of subsection 55(2). This anti-avoidance rule is very complicated and highly technical. In many cases the application of the rules is so uncertain that taxpayer’s apply for an advanced tax ruling from the Canada Revenue Agency before proceeding with a butterfly.

This is a very dangerous area for a general practitioner and even many tax specialists to meddle in. If they do so, it could be to their peril as it is easy to accidentally be caught by subsection 55(2).

e) Estate planning and post-mortem strategies

This is another area of tax planning which usually requires an expert, as there are various considerations that need to be addressed to effectively execute any pre or post-mortem planning. An expert in this area would be expected to know the different post-mortem tax planning strategies available, how to effectively execute estate planning prior to death, how to cater to different client objectives, and what the common issues are (e.g. valuations, maintaining control, double or triple taxation and so on). This area of practice requires detailed knowledge of numerous tax provisions, an ever changing or evolving scope of legislation and administrative provisions and important deadlines.

The general public should not expect a general practitioner to provide this type of planning unless the practitioner holds her/himself out to be conversant in this area and/or provides advice.

f) U.S. Citizens or Green Card Holders

The United States taxes its citizens on their worldwide income no matter where they reside. Common Canadian tax planning tools such as the capital gains exemption, the principal residence exemption, tax free capital dividends, estate freezes and even the mere use of a holding company go by the wayside if the client is also a U.S. citizen or Green Card holder. In recent years this reality has become more widely known

amongst the public and accountants. In our opinion the minimum standard of care a general practitioner owes her/his client more often than not now includes identifying this issue and referring the client to a specialist.

In summary, the level of tax knowledge within the accounting profession is stratified in a fashion similar to the medical profession. In particular, some accountants are general practitioners who could be reasonably expected to identify tax issues but would not reasonably be expected to resolve them.[36] While it would be reasonable to expect that most CPAs in Canada understand tax filing deadlines, the concept of residence and the fact that most trusts have a deemed disposition of assets every 21 years, diagnosing and treating these issues are very different.

Once the general practitioner diagnoses a problem, s/he should determine whether s/he can address it or whether they should refer their client to a specialist. If the general practitioner attempts to resolve the tax issue the client will likely perceive that s/he is suitably trained to represent the client regarding the specific issue and be responsible for errors.

On the other hand, if such accountant subsequently determines that a specialist is required, making an appropriate referral would, depending on the circumstances, likely be appropriate rather than indicative of negligence. For example, an accountant advising a client regarding an estate freeze should refer the work to a specialist when it is learned that one of the family members is a U.S. citizen, if the accountant does not have the knowledge to address the significant issues U.S. citizenship poses in this context. Not identifying the issue or properly addressing it could be the difference between negligence and acting professionally.

Where there is no established certification for the particular matter at issue, or the matter at issue exists as a subcategory of a more general field this criterion becomes somewhat subjective and can be difficult to apply.

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[36] Unless they explicitly state or imply that they have the requisite expertise

Admissibility of Expert Evidence

As noted above, in cases of professional negligence, expert evidence will often be required in order for a plaintiff to establish that it has a meritorious claim. Conversely, a professional may require his/her own expert to defend against such assertions.

The need for expert evidence in these type of cases, is contrary to the general rule of exclusion which states that opinion evidence is generally inadmissible, because it is a fundamental principle of our system of justice that it is up to the trier of fact to draw inference from the evidence and to form his or her opinions on the issues in the case.[37]

As the Supreme Court of Canada has explained, the admissibility of expert opinion evidence on matters requiring specialized knowledge functions as an exception to the general exclusionary rule because:.

> the law recognizes that, so far as matters calling for special knowledge or skill are concerned, judges and jurors are not necessarily equipped to draw inference from facts stated by witnesses. A witness is therefore allowed to state his opinion about such matters, provided he is expert in them".[38]

However, because of the danger that expert evidence will be misused to distort the fact-finding process and is subject to the abuses applicable to the other forms of hearsay evidence, a guarded approach is necessary regarding its admissibility.[39]

This "guarded approach" is reflected in Rule 53.03 of the *Rules of Civil Procedure*[40] (the "Rules"), which provides a detailed regime for the introduction of expert reports. Its purpose is "to ensure that experts understand that they have a duty to the court; the

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[37] *R. v. K. (A.)*, 1999 CanLII 3793 (ON CA), 1999 CarswellOnt 2806 at para. 71
[38] *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 15
[39] *Kozak v. Funk*, 1995 CarswellSask 285 (SK QB) at para. 7
[40] *Rules of Civil Procedure*, O. Reg. 575/07, s. 6 (1), r 53.03 (*Rules*)

opinion proved must be unbiased and objective; should not be partisan; should not favour the party who retained them and an expert should also indicate when the subject matter falls outside their area of expertise".[41]

Since failure to comply with Rule 53.03 means that the safeguards to ensure the expert's impartiality and objectivity are absent, the Court can exercise its discretion and exclude the expert reports entirely.[42]

To be admissible, the expert evidence must not only comply with the *Rules,* it must also satisfy the specific criteria established by the Supreme Court of Canada, which are commonly known as the *Mohan* criteria.[43] Namely,

(1) relevance;
(2) necessity in assisting the trier of fact – whether the expert is capable of assisting the trier by providing information likely to be beyond the trier's knowledge and experience[44];
(3) the absence of any exclusionary rule; and
(4) a properly qualified expert.[45]

Most challenges to the admissibility of expert evidence tend to focus on whether the expert is suitably qualified and typically fall into the following two categories;

(1) challenges to the expert's qualifications and experience to render an expert opinion on the matters at issue; and

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[41] *Keen Landscaping Inc. v. Stewart*, 2017 ONSC 1925 at para. 11 citing *Beasley v. Barrand*, 2010 ONSC 2095 at para. 25.
[42] *Keen Landscaping Inc. v. Stewart*, 2017 ONSC 1925 at para. 14
[43] *Meady v. Greyhound Canada Transportation Corp.*, 2010 ONSC 6437 at para. 8 citing *Mohan*, *Supra* note 21 at para. 17
[44] *Alfano v. Piersanti*, 2012 ONCA 297 at para. 104 (*Piersanti*)
[45] Expert not just an accountant – PW to provide cases he was involved in that address those issues

(2) challenges to the expert's independence and raising doubts regarding whether the opinion is fair, objective, and non-partisan as required by Rule 4.1.01 of the *Rules.*

Expert's Qualifications

The purpose of expert evidence is to assist the trier of fact by providing insight that the average trier of fact does not already have. Accordingly, an expert witness must be shown to have acquired special or peculiar knowledge through experience or study in respect of the matter on which s/he will testify.[46] If, however, "the witness's 'special' or 'peculiar' knowledge on a subject matter is minimal, he or she should not be qualified as an expert with respect to that subject".[47]

In certain cases, it is not difficult to satisfy this criterion. For example, where a geriatric psychiatrist or certified capacity assessor opines on an individual's capacity to appoint a power of attorney. Certain fields have measures which avoid this uncertainty and subjectivity. For example, the law society of Ontario certifies lawyers as specialists in particular fields, which provides an easy avenue to determine if a proposed expert is sufficiently qualified.[48]

In contrast, CPA Ontario, the regulatory body for accountants in Ontario and its cohorts in the other provinces and territories, do not offer similar types of certifications for tax accountants. Most tax accountants in Canada have completed (or are in the process of completing) CPA Canada's In-Depth tax course and/or The University of Waterloo's Masters of Taxation Program. The Trust and Estate Practitioner (TEP) designation provided by the Society of Trust and Estate Practitioners of Canada is an identifiable designation that some tax practitioners possess, but it neither covers the whole range of tax services nor is limited to accountants.

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[46] *Mohan, Supra* note 21 at para. 27
[47] *R. v. K. (A.)*, *Supra* note 37 at para. 103
[48] Law Society of Ontario. (2019), online: https://lso.ca/lawyers/about-your-licence/manage-your-licence/certified-specialists

The lack of identifiable credentials for accounting tax professionals is compounded by its broad spectrum of services as well as the specialized subsets included in the tax advisory profession. Given this level of uncertainty, a challenge as to whether an accountant is sufficiently qualified to opine on the specific matters at issue in a particular case is not uncommon.

For example, in *Imeson v. Maryvale (Maryvale Adolescent and Family Services)* the trial judge admitted the evidence of Dr. Smith, a mental health clinician, who provided expert evidence with respect to whether the alleged sexual assaults occurred and whether Mr. Imeson suffered harm from the alleged sexual assaults. However, the trial judge's determination was overturned on appeal, because, while the Ontario Court of Appeal acknowledged that Dr. Smith had the qualifications of a mental health clinician his qualifications did not demonstrate that he had specific expertise in sexual abuse.[49]

The Court of Appeal excluded Dr. Smith's expert evidence, because he lacked specific experience and qualifications in the particular subfield at issue. This decision stands in stark contrast to the Court's analysis in *R. v. Amara*, where the Court admitted the evidence of Dr. Syed, a qualified psychiatrist, even though Dr. Syed did not have any experience in relation to psychiatry of those engaged in terrorism offences or indeed in any form of criminal activity, which was at issue. The Court held that the fact "that he is not a forensic psychiatrist goes to weight" not admissibility.[50]

While there is good reason to exclude evidence from unqualified "experts", especially in jury trials, once it is demonstrated that the expert is qualified on the general issue, the expert's experience and qualifications with respect to the unique factors in that case should go to weight as opposed to admissibility. The reason being that, in each case, the issue the expert is being asked to opine on will have some unique factors and

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[49] *Imeson v. Maryvale (Maryvale Adolescent and Family Services)*, 2018 ONCA 888 at paras. 86-90 (*Imeson)*
[50] *R. v. Amara*, 2010 ONSC 251 at para. 44

determining which factors create a new subcategory of expertise is somewhat subjective. Returning to *Imeson* for example, would it be necessary to establish expertise in the mental health aspect of sexual abuse in the specific gender, age category, cultural environment, race, religion, and many other nuanced elements of each particular case? Similarly, must an accountant acting as an expert witness regarding the application of a non-industry specific tax rule for an oil and gas company have experience applying the non-industry specific tax rule in that particular industry to be admissible? In our opinion, no. We feel the suitability of an expert will likely only be successfully challenged based on the specific tax issues or conduct carried out, exclusive of apparent but irrelevant taxpayer factors.

Expert's Independence

For their evidence to be admissible, experts must be "neutral and objective. To the extent that they are not, they are not property qualified to give expert opinions".[51] As a matter of common sense, "a biased expert is unlikely to provide useful assistance".[52]

While experts are retained by the litigants, the case law makes it clear that expert witnesses should not become advocates for the party by whom they have been retained and their evidence must be a product of the expert's independent analysis.[53]

The common law duty of an expert witness "to provide opinion evidence that is fair, objective and non-partisan" are codified in the Rules.[54] Specifically, Rule 4.1.01 provides that,

> *It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,*

[51] *Bank of Montreal v. Citak*, 2001 CarswellOnt 944, at para. 5 quoting ….
[52] *Piersanti*, *Supra* note 44
[53] *Ibid* at para. 108
[54] *Rules*, *Supra* note 40, r 4.1.01 and 53.03

> *(a) to provide opinion evidence that is fair, objective and non-partisan;*
>
> *(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and*
>
> *(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.*

While maintaining independence is crucial, it does not mean that experts are precluded from consulting with the lawyers who retained them regarding draft reports. However, if such discussions do occur, the Court may, in certain limited circumstances, order disclosure to ensure that there has not been any interference.[55]

The Court may also disqualify an expert where the surrounding circumstances give rise to concerns about the expert's independence. For example, in *Ebrahim v. Continental Precious Minerals Inc.* the defendant's proposed expert was also under a general retainer with the defendant. The Court ruled that the expert lacked the independence "necessary to provide opinion evidence that is "fair, objective and non-partisan" and was therefore inadmissible. [56]

In most cases, issues raised in respect of the expert's independence or objectivity are addressed as a matter of weight to be attached to the expert's evidence rather than as a challenge to its admissibility. However, given that expert opinion evidence can compromise the trial process, the Court retains a residual discretion to exclude it entirely, if appropriate.[57]

Formulating an Opinion on the Standard of Care

[55] *Moore v. Getahun*, 2015 ONCA 55
[56] 2012 ONSC 2918 at paras. 45-46
[57] *R. v. Abbey*, 2009 ONCA 624 at para. 91

Assuming that an accounting expert is qualified and permitted to give evidence to the Court, the accounting expert will be taxed (pardon the pun) with assessing whether the accountant exercised reasonable skill and care in the performance of his/her duties.[58]

The measure of what is “reasonable” depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.[59]

This inherently variability is readily apparent from the case law. For example, where a professional holds themselves out as a specialist, they must exercise the degree of skill of an average specialist in that field.[60]

As such, in formulating the standard of care, the expert ought to go beyond the Code and should refer to leading texts as well as the exercise of professional judgment.[61]

Beyond the duty of care in the code, jurisprudence concludes that an expert must;

(1) possess knowledge of the basic principles of tax law which are commonly known by reasonably well-informed accountants and to discover and consider other aspects of tax provisions which may readily be found by the careful application of standard research techniques.[62]

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[58] *Odumeru v. Ekeh*, 2015 CanLII 38181 (ON SCSM), 2015 CarswellOnt 10138 at para. 34
[59] *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, 1999 CanLII 706, 1999 CarswellBC 79 at para. 28
[60] *Ter Neuzen v. Korn*, [1995] 3 SCR 674, 1995 CanLII 72, 1995 CarswellBC 593 at para. 46; see also *Newton v. Netwon*, 2005 BCSC 1880 where the Court held that, in certain circumstances, an accountant may be held to the standard of care of normally applied to a solicitor.
[61] *Proulx*, *Supra* note 34 at para. 28
[62] *Fukushima v. R.*, 1999 CanLII 148 (TCC), 1999 CarswellNat 190 at para. 19

(2) If the matter involved the preparation of income tax returns, the standard of care is to correctly and accurately prepare clients' income tax returns according to income tax law.[63]

(3) Acknowledge that the standard of care is not perfection – the question in each case is whether the person retained to prepare the tax return lives up to the standard of care of a reasonable tax return provider.[64]

From a practical perspective it is, in our opinion, incumbent upon an expert witness to avoid the use of hindsight and perform satisfactory due diligence regarding the facts of the engagement under review, to assess whether the accountant's actions met the minimum standard of care the client could have expected based on the facts and the state of the law and administrative practices during the year in which the alleged breach occurred.

This is a difficult task because the question posed relates to the standard of care that could have been expected at the time of the alleged negligence, not at the time the expert is forming her/his opinion.

It is important for an expert witness to obtain all documents, and have answers to all questions, s/he feels are relevant.

There is no definitive list of required documents but the following are some of the more common documents an expert witness will request:

- Any statement of facts and/or assumptions provided by the litigator;
- Engagement letters, if any, outlining what services the accountant agreed to provide to his/her client.
- All pleadings including the statements of claim and defense;
- Transcripts of examinations for discovery of the accountant and other parties the accountant worked with or reported to;
- Transcripts of examinations for discovery of co-defendants and/or relevant witnesses;
- Responses to undertakings resulting from examinations for discovery;
- Correspondence (formal and informal) between the accountant and client and other parties involved in the relevant engagement;
- Planning letters and memorandums provided by the accountant;
- Planning letters and memorandums provided to the accountant;
- Calculations and spreadsheets prepared by the accountant;
- Tax assessments and reassessments;
- Correspondence from and to the CRA during any relevant audit;

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[63] *Beuker v. H&R Block Canada Inc.*, 2000 SKQB 584 at paras. 109-110
[64] *Jeffrey v. Maritime Accounting Services*, 2008 NSSM 60 at para. 34

- Notices of objection, the supporting documents and all related correspondence;
- Tax court transcripts, if applicable;
- Legal and other documents (draft and final) the accountant either relied upon or provided input on;
- Damage calculations for background information, not approval, unless damage quantification may prejudice the expert's objectivity or is part of the expert's engagement. Normally, damages are calculated by a accredited valuator or someone with expertise in damage quantification;

Conclusion

Accountants perform a broad spectrum of services that range across many distinct and nuanced practice areas, some of which, such as tax advisory services, are informally recognized as specialized fields of practice. When providing these services, accountants owe their clients a duty of care and, if negligent, could be liable for their client's resulting economic loss.

In most industries, the governing regulatory body identifies fields of specialty and recognizes the professionals that have the skills and knowledge to offer these services. For the public, this helps ensure that they are working with a competent, capable professional who they can trust. For professionals, delineating specialized fields of practice acts as a warning that expertise may be necessary and a specialist should be consulted before dabbling.

Unfortunately, CPA Ontario and its other provincial and territorial cohorts do not offer any type of tax specialist designations or certifications to their members. Moreover, the designations that do exist are generalized and fail to identify whether the accounting tax professional is certified in the specialized subset on which s/he is being asked to consult. For example, many tax specialists are not qualified to carry out butterfly transactions or advise on public company matters.

Among other things, the lack of formal recognition of tax as a specialty area as well as the existence of these specialized subsets of tax advisory services introduces a level of uncertainty and subjectivity when it comes to accountants acting as expert witnesses.

Since the regulatory body has not identified which specialized subsets require additional knowledge, the Court has no reference and must make that determination itself.

The introduction of identifiable credentials for tax accountants would help guide the public towards qualified tax accountants, may help general practitioners avoid practicing beyond the scope of their expertise and would make the identification of appropriate expert witnesses more certain.