Expert Evidence: Getting It In and Keeping It Out

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Background and Overview

Child protection cases often involve complex issues which may require the opinion of a professional to prove your case at trial. Who is chosen to provide that evidence is crucial, and the first step is to make sure the person who is retained to provide that opinion has the necessary expertise to meet the legal test the trial judge, or gatekeeper, will be applying. There are two aspects to this determination:

1) Is the specific area of expertise you wish to qualify the person in, a recognized and objectively defined body of knowledge? and
2) If so, is the particular person being proffered as an expert in that area, as a result of their education and experience, qualified to provide reliable information to assist the judge in making the determination he or she is being asked to make?

It is easy to put all the effort into the second question and forget about the first. The last thing you want is to obtain an expert report that is favourable to your case, only to find out when the evidence is tested at trial, you cannot meet the test at the initial stage of the *voir dire.* As a result of the miscarriages of justice which resulted from the misleading expert testimony of forensic paediatric pathologist Dr. Charles Smith of Toronto's Hospital for Sick Children and the more recent debacle of the use of hair test results by children's aid societies from the now discredited Motherrisk lab, judges have rightfully become far more vigilant in examining the rigour of the field in which they are being asked to rely on. As Justice Deborah Chappel stated in the 2021 decision *M.A.B. v. M.G.C., 2021 ONSC 8572*:

> The opinion rule is a general rule of exclusion. It flows from the evidentiary principle that witnesses may testify as to the facts which they perceived and not as to resulting opinions that they drew from the facts. In the law of evidence, an opinion means an inference from observed facts (see *R. v. Abbey* (1982), 1982 CanLII 25 (SCC), 68 C.C.C. (2d) 394 at 409; *R. v. Collins* (2001), 2001 CanLII 24124 (ON CA), 160 CCC (3d) 85 (Ont. C.A)). Opinion evidence is generally inadmissible because it is a fundamental

> principle of our system of justice that it is for the trier of fact to draw inferences from the evidence and to form their opinions on the issues in the case, not for the witness (*R. v. K.(A.),*1999 CanLII 3793 (Ont. C.A.); *White Burgess Langille Inman v. Abbott and Haliburton Company,* 2015 SCC 23 (S.C.C.), at para. 14). Another rationale for the general rule against the admissibility of opinion evidence is that inferences drawn by witnesses are not helpful to the trier of fact and might even be misleading (*White Burgess,* at para. 14).

This is particularly important in child protection cases where the stakes could not be higher. As Justice Madsen opined in the decision on the *voir dire* in *Children's Aid Society of the Niagara Region v. S.S. and T.F., 2021 ONSC 8582*:

> In the child protection context, and in particular in a case such as this where the Society seeks to permanently sever the legal relationship between the children and their parents while severely restricting contact, the dangers associated with admitting potentially unreliable experts are perhaps at their highest. As noted in the Report of the Motherisk Commission, losing one's child to an Order for extended Society care is the "capital punishment of child protection law." Thus, the import of rigorously scrutinizing proposed expert evidence can hardly be overstated.

In child protection cases, the information provided to an assessor of any type, and from whom this information comes, must be factual and not in itself in dispute. If an assessor receives unreliable information, or information from only one side, the assessment itself will be problematic because it is premised on inaccurate or a partial view of the situation only. It is bad practice for a Society to send only its version of events to an assessor, but it is equally wrong for another party to do so as well. Parents may retain an assessor, without knowledge of the Society but the credibility of any assessment produced will be substantially in question if the Society's evidence is not also presented to the assessor.

As the Supreme Court of Canada said in *R v. Abbey 1982 CanLII 25 SCC*:

> It was appropriate for the doctors to state the basis for their opinions and in the course of doing so, to refer to what they were told not only by Abbey but by others, but it was error for the judge to accept as having been proved the facts upon which the doctors had relied informing their opinions. While it is not questioned that medical experts are entitled to take into consideration all possible information in forming their opinions, this in no way removes from the party tendering such evidence the obligation of establishing, through properly admissible evidence, the factual basis on which such opinions are based. Before

> any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

Special Case of s. 98 CYFSA assessments

Even in the case where a court has determined that a particular person is qualified to perform an assessment pursuant to s.98 of the *Child, Youth and Family Services Act*, this does not mean that a trial judge will simply rubber stamp that earlier decision. Justice P. Jones in the case of *Children's Aid Society of the Region of Halton v. J.B 2018 ONCJ 884* stated, at paragraph 16:

> A *voir dire* on an expert's qualifications to give opinion evidence on a s. 98 assessment should be held routinely before the trial judge, especially when the opinions expressed in the report are not accepted by all the parties, and the answers in the assessment report to the questions posed in the assessment order, if accepted, would provide ready- made answers to the very questions before the court.

In the case of *Children's Aid Society of Algoma v. F.M. 2021 ONCJ 186*, Justice Kukurin was faced with a situation in which a person had been ordered to perform an assessment pursuant to s. 98, and noted:

> The statutory fiat in s.98(6) creates somewhat of a conundrum. If the PCA report generated under s. 98 is evidence and part of the court record of the proceeding, how does a judge tipsie toe around this fact to exclude as evidence, part or all of the report of the assessment. In the present case, regardless of the ostensible objective of the *voir dire*, that is indirectly what is being asked, by making the content of the report that is opinion of the assessor not be permitted as evidence, on the basis that the assessor is not qualified as an expert to give such opinion.
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> Justice Kukurin concluded, for multiple reasons, the particular person who prepared the assessment was not an expert and ruled that :
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> This court does not have the comfort of the assessors written acknowledgement of his impartiality and lack of bias. He stated to the mother, and confirmed at the *voir dire*, that he is working for a litigant in doing the PCA, namely the society. His receipt of materials that were undocumented by him in any relevant detail but were received from one litigant only casts a pall on whether any bias was created and existed in his mind, perhaps even without his awareness. More to the point, he did not acknowledge that he completed the PCA for the court, and that this duty prevailed over his duty to any other party.

Situation of Novel Science

Where the court is faced with a witness whose expertise is in novel science, special scrutiny of that science is required. There are many different tests that can be administered by a professional in assessing the presence of pathology in a person, measuring their likelihood of harming a child or their cognitive functioning. These tests not only need to be administered correctly, and scored correctly, the person administering the test has to determine whether the person to whom they are giving the test fits within the population the test was validated for. There are many articles on the challenges posed in interpreting test results when the person being assessed is from a different culture, speaks a different language or has had a history of negative interactions with persons in authority.

At some point the error rate or uncertainty becomes sufficiently high that a court must decide that it is insufficiently reliable to admit this type of evidence. Thus, for example, while phallometric testing is commonly used by clinicians working with sexual offenders to measure progress in treatment, and is sometimes considered by police or child protection workers in their investigations, the Supreme Court of Canada in 2000 in the case of *R. v. J.-L.J.* first noted that phallometry was generally accepted for the purpose of assessing the progress in therapy of people with known and admitted sexual disorders, but its use as a forensic tool to establish whether an accused committed an offense was not.

In *R. v. J.-L.J. (2000) 2 S.C.R.*, Binnie, J. set out the considerations on which the court must undertake its "special scrutiny" of novel science as follows:

1) Whether the theory or technique can be and has been tested:

> Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.

2) Whether the theory or technique has been subjected to peer review and publication:

> Submission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected.

3) The known or potential rate of error or the existence of standards; and,

4) Whether the theory or technique used has been generally accepted:

> A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community."
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> Widespread acceptance can be an important factor in ruling particular evidence admissible, and a "known technique which has been able to attract only minimal support within the community", …may properly be viewed with skepticism.

In the decision of *Ogwadeni:deo Six Nation Child Welfare v K.L.H.*, Justice K. Baker applied these considerations and determined that a paediatrician, Dr. Baird, who had been qualified as an expert on multiple occasions in court, could not be determined to be an expert in child maltreatment. Justice Baker determined this to be the case because, in her view, "child maltreatment" is a novel theory or technique, without a reliable foundation. It is informative to review the reasoning in this matter, as the focus of the Court centred on the area of expertise in which the Society wished to qualify Dr. Baird as an expert, and the rigour, or lack thereof, implicit in this area. The Court wrote:

> **[28]** There was no evidence to demonstrate what precisely are the theories or techniques employed in assessing child maltreatment as a general field of scientific or medical inquiry. Accordingly, there is no evidence that these theories/techniques/principles are even capable of being tested, let alone that they actually *have been* tested.
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> **[29]** There was no evidence that the discipline of child maltreatment assessment generally, has been the subject of scholarly consideration. Of the various scholarly articles that Dr. Baird co-authored, none were identified as having been peer reviewed. None were related to the reliability of a general field in child maltreatment. The articles that did pertain to child maltreatment were in relation to very specific aspects of what would appear to be physical examination of injuries — such as abdominal visceral injury, or head injury. Dr. Baird did co-author one article on medical evaluation of prepubertal children with suspected sexual abuse. There was however no indication of how that might validate a more general theory of assessment of child maltreatment.

> **[30]** There was no evidence as to what, if any, standards apply to a generalized theory/discipline of child maltreatment assessment. This is particularly concerning given that the process involves the taking of information upon which the opinions are based. So, for example, there appears to be no standard as to the quality of the information upon which the opinion is based. Here, there was no indication that Dr. Baird took any step to ensure that the information he was receiving and upon which he said he based his opinion, was reliable.
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> **[31]** The fact that the Royal College has accepted child maltreatment as a subspecialty does support that it has a degree of acceptance in the medical/scientific community. The absence of a universal or generally accepted training program, or pathway to accreditation however, together with the lack of any specific credential, derogates from the notion that there is a general acceptance of a theory or discipline of 'child maltreatment'.
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> **[32]** A significant part of the problem here arises from the amorphous nature of the medical/scientific discipline that was presented as the 'science' at hand. It was clear from the cross-examination that the Society sought to qualify Dr. Baird to opine that the child had been exposed to violent adult conflict directly or otherwise based on the 'information' that he was solely provided by the child protection worker. (Dr. Baird did not speak with the child other than to effect the physical examination, such as 'which ear would you like me to look in first?'). There was also no evidence that Dr. Baird took any steps to establish the *reliability* of the information which he used to form his opinions.
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> **[33]** 'Child maltreatment' then, was being presented as some overarching discipline wherein the 'expert' can ascertain whether a child has been the subject of *any* form of maltreatment. This seems to be where the concept truly breaks down. While it is understandable that a pediatrician might well have the expertise to assess a child's injuries as being likely caused by trauma (and thus maltreatment or abuse), it is less clear how a pediatrician could have expertise to assess child maltreatment on the basis of hearsay information of unknown reliability.
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> **[34]** Given the lack of threshold reliability in the discipline or theory of the area proposed, being 'child maltreatment', the proposed evidence fails to pass the first branch of the test for admissibility.

This view has not been applied and Justice Madsen, when she was faced with the Society attempting to qualify Dr. Baird as an expert in paediatrics only, noted the following in the *Niagara* decision cited above:

> That case, which is not binding on this court, is distinguishable in numerous respects: first, in that case, he was proffered as a participant expert in the field of child maltreatment, rather than as a pediatrician; the court in that case found that child maltreatment is a novel theory or technique; and, in that case Dr. Baird assessed the child in question once, when proceedings were commenced, and produced one report. In

> the circumstances of that case, the court also found that the proffered evidence was simply not necessary.

Conclusion

As new areas of expertise are always evolving, it is important that one ensures the "expert" you intend to involve in a case will stand up to the rigorous vetting imposed by the Court, for very good reason. In determining the future of a child and his or her family, the stakes could not be higher and counsel have an obligation to ensure that only evidence that meets this high standard is relied on to assist the Court in making these important and difficult decisions.