Litigation vs. Participant Experts and the Family Law Rules

Under the jurisprudence and the recent amendments to the *Family Law Rules (*2019) there are 2 types of experts relevant to family law proceedings:

1. Litigation Experts
2. Participant Experts

Cases may turn on what type of expert a witness is. A witness may be put forward as a litigation expert and found to be a participant expert-or vice versa.

This summary looks at the following in relation to the Family Law Rules ("FLR"):

1. The Rules relating to litigation as vs. participant experts (the latter are not bound by compliance with the FLR)

2. Oral testimony of experts on motions (without reports)/type of expert

1. The Rules relating to litigation as vs. participant experts (the latter are not bound by compliance with the FLR)

A) **Family Law Rules**

Rule 20.2 of the *FLR* outlines the requirements for expert opinion evidence, as well as defines the different experts that may be before the court. Depending on the expert before the court, there are different criteria.

> **20.2** (1) In this rule,
>
> "joint litigation expert" means a litigation expert engaged to provide expert opinion evidence for two or more parties; ("expert commun du litige")
>
> "litigation expert" means a person engaged for the purposes of litigation to provide expert opinion evidence; ("expert du litige")
>
> "participant expert" means a person who is not engaged to provide expert opinion evidence for the purposes of litigation, but who provides expert opinion evidence based on the exercise of his or her skills, knowledge, training or experience while observing or participating in the events at issue. ("expert participant").[1]

Rule 20.2(2) of the *FLR* provides criteria to be met when a litigation expert submits a report.

EXPERT WITNESS REPORTS

[1] *Family Law Rules*, O.Reg 114/99, *Courts of Justice Act*, RSO 1990, c. C. 43 at r 20.2.

(2) A party who wishes to call a litigation expert as a witness at trial shall, at least six days before the settlement conference, serve on all other parties and file a report signed by the expert and containing, at a minimum, the following:

1. The expert's name, address and area of expertise.
2. The expert's qualifications, including his or her employment and educational experiences in his or her area of expertise.
3. The nature of the opinion being sought and each issue in the case to which the opinion relates.
4. The instructions provided to the expert in relation to the case.
5. The expert's opinion on each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,

    i. a description of the factual assumptions on which the opinion is based,

    ii. a description of any research or test conducted by or for the expert, or of any independent observations made by the expert, that led him or her to form the opinion, and, for each test,

    A. an explanation of the scientific principles underlying the test and of the meaning of the test results, and

    B. a description of any substantial influence a person's gender, socio-economic status, culture or race had or may have had on the test results or on the expert's assessment of the test results, and

    iii. a description and explanation of every document or other source of information directly relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 20.2) signed by the expert.[2]

Rule 20.1 of the *FLA* addresses an expert's duty. This duty applies to litigation experts and experts appointed by the court.

Duty of experts
Application
20.1 (1) This rule applies to,
(a) a person who is a litigation expert within the meaning of rule 20.2; and
(b) an expert who is appointed by the court under rule 20.3.
Duty of expert
(2) It is the duty of every expert to whom this rule applies to,
(a) provide opinion evidence that is fair, objective and non-partisan;
(b) provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

[2] *Family Law Rules*, O.Reg 114/99 at r 20.2(2).

(c) provide such additional assistance as the court may reasonably require to determine a matter in issue.

Duty prevails

(3) In the case of a litigation expert, the duty in subrule (2) prevails over any obligation owed by the expert to a party.[3]

In contrast to litigation experts, participant experts are governed by rule 20.2(14), which has less onerous requirements.

20.2 (14) Participant Expert

A party who wishes to call a participant expert as a witness at trial shall,

(a) at least six days before the settlement conference,

(i) serve notice of the fact on all other parties, and

(ii) if the party wishes to submit any written opinion prepared by the expert as evidence in the trial, serve the written opinion on all other parties and file it; and

(b) serve on any other party, at that party's request, a copy of any documents supporting the opinion evidence the participant expert plans to provide.[4]

There are situations where a joint litigation expert will be required, either for a decision-making responsibility or parenting time decision, or on any other matter specified by the court.

20.2(8) When Joint Litigation Expert Required

Litigation expert opinion evidence concerning the following matters may only be presented by a joint litigation expert:

1. A claim respecting decision-making responsibility, parenting time or contact with respect to a child, unless the court orders otherwise.
2. Any other matter specified by the court.[5]

Additional consideration should be given to the restriction on testimony outlined by Rule 20.2(6) of the *FLR*.

20.2(6) Restriction on Testimony

Unless a judge orders otherwise, a litigation expert may not testify about an issue at trial unless the substance of the testimony is set out in a report that meets the requirements of this rule.[6]

The requirements for the rule are those outlined in rule 20.2(2) above.

The application of these requirements has been adjusted by the legislation for motions for temporary orders or summary judgments.

[3] *Family Law Rules*, O.Reg 114/99 at r 20.1.
[4] *Family Law Rules*, O.Reg 114/99 at r 20.2(14).
[5] *Family Law Rules*, O.Reg 114/99 at r 20.2(8).
[6] *Family Law Rules*, O.Reg 114/99 at r 20.2(6).

APPLICATION TO MOTIONS FOR TEMPORARY ORDERS OR FOR SUMMARY JUDGMENT

20.2(15) Unless the court orders otherwise, this rule applies, with the following modifications, to the use of expert opinion evidence on a motion for a temporary order under rule 14 or a motion for summary judgment under rule 16:

1. Expert witness reports and any supplementary reports shall be served and filed as evidence on the motion in accordance with the requirements of subrules 14 (11), (11.3), (13) and (20), as applicable.
2. Any other necessary modifications.[7]

As per Rule 14(17)(3), the court may allow evidence to be given on a motion by oral evidence.

EVIDENCE ON A MOTION

14(17) Evidence on a motion may be given by any one or more of the following methods:

1. An affidavit or other admissible evidence in writing.
2. A transcript of the questions and answers on a questioning under rule 20.
3. With the court's permission, oral evidence.[8]

Rule 20 of the *FLR*, which addresses the issues of questioning a witness and disclosure, provides that when a person is made aware the information previously submitted in an affidavit is incorrect, or has changed to be no longer correct, they must make submissions to correct it.

20 (21) Duty to Correct or Update Answers
A person who has been questioned or who has provided information in writing by affidavit or by another method and who finds that an answer or information given was incorrect or incomplete, or is no longer correct or complete, shall immediately provide the correct and complete information in writing to all parties.[9]

B) Difference between a litigation expert and a participant expert

The legislation now outlines the difference between a litigation and participant expert. Prior to the amendments, courts followed the distinction presented in the case law. This was done clearly in the Court of Appeal case of *Westerhof v Gee Estate*.[10] The differences between these two types of experts and duties applying to each were discussed. There, the court determined a witness with "special skill, knowledge, training, or expertise who has not been engaged by or on behalf of a party to a litigation may give opinion evidence" without complying with rule 53.03 where the opinion is based on observation or participation in the events at issue and where the opinion was

[7] *Family Law Rules*, O.Reg 114/99 at r 20.2(15).
[8] *Family Law Rules*, O.Reg 114/99 at r 14(17)(3).
[9] *Family Law Rules*, O.Reg 114/99 at r 20.1(21).
[10] *Westerhof v Gee Estate*, 2015 ONCA 206.

formed as part of the ordinary exercise of their skill, knowledge, training.[11] The court draws a distinction between an expert giving evidence based solely on their observations as opposed to opinion evidence being asked to be admissible for its truth. This criteria is now reflected in the *FLR.*

In *LaRoche v Lynn*, Justice Ellies distinguished between a litigation expert and a participant expert on a motion considering whether spousal support should be varied. The court outlined a litigation expert under either the *Rules of Civil Procedure* or the *Family Law Rules* is required to provide the court with certain information for their report to be admissible. Justice Ellies analyzed whether a report submitted by a psychiatrist qualified them as a litigation expert or a participant expert. The formal requirements under the *Rules of Civil Procedure* are "nearly identical" to those under the *FLR* when determining if a report is admissible. Rule 20.2(2) of the *FLR* however, does not apply to participant experts, where the rules are more relaxed.[12] Rule 20.2 also applies equally to motions, which include summary judgments, as well as trials.[13]

The court identified that at trial, the judge relied on the same opinion of the psychiatrist that was being put forward as an expert on appeal. Portions of the report were "clearly outside of her expertise as a psychiatrist", where the doctor supported the notion the wife could not work and would require continued spousal support. The opinion of the wife not being able to work in the future "extends beyond the scope of the evidence of a participant expert and into the area of a litigation expert."[14] Thus, Justice Ellies found the psychiatrist to be a litigation expert, as opposed to the participant expert position advanced by the wife.[15] Despite determining the psychiatrist was a litigation expert, the court did not accept their report because it did not meet the requirements under r 20.2(2) of the *FLR*.

The court in *JKLD v WJA* considered how expert opinion evidence was to be admitted on a motion. Justice Finalyson highlighted r 20.2(15) of the *FLR,* which provides guidance on how expert opinion evidence can be used for an interim motion and for a summary judgment motion.[16] The court stated: "the rule says nothing about the evidence having to be sworn."[17] However, Justice Finalyson did state: "litigation experts are generally required to testify at a trial. There is no other rule or statutory provision allowing for the admission of their reports otherwise."[18] The court proceeded to follow the analysis of Justice Ellies in *LaRoche*. It agreed with the assessment of the Court of Appeal case of *Sanzone v Schechter*, where the court found the report by an expert to be "inadmissible because of its substance rather than its form."[19] The court found the Court of Appeals statement about a report having to be sworn was *obiter*, but was non the less persuasive commentary.[20] On the issue of having a report sworn for an interim motion, the court found it was unnecessary to obtain an affidavit, because a simple letter would be sufficient at trial, thus making an affidavit excessive. Justice Finlayson distinguished the circumstances from those previously used to find it necessary to have a sworn report before the court. The report submitted in *JKLD* was found to be that of a participant expert, despite being presented to the court as a litigation expert. On those grounds, the court allowed the report to be admitted unsworn, and held that the

[11] *Westerhof v Gee Estate*, 2015 ONCA 206 at para 60.
[12] *LaRoche v Lynn,* 2019 ONSC 6602 at paras 37-39.
[13] *LaRoche v Lynn,* 2019 ONSC 6602 at para 38.
[14] *LaRoche v Lynn,* 2019 ONSC 6602 at para 45.
[15] *LaRoche v Lynn,* 2019 ONSC 6602 at para 39.
[16] *JKLD v WJA*, 2020 ONCJ 335 at para 55-59.
[17] *JKLD v WJA*, 2020 ONCJ 335 at para 57
[18] *JKLD v WJA*, 2020 ONCJ 335 at para 68.
[19] *JKLD v WJA*, 2020 ONCJ 335 at para 67.
[20] *JKLD v WJA*, 2020 ONCJ 335 at para 67.

report did not need to comply with r 20.2(2) of the *FLR* because the doctor was not a litigation expert.[21] Commenting on the requirements of participant experts in the rules, the court noted that there is "no prescribed content of the written opinion of a participant expert. Indeed, a written opinion is not even a prerequisite for his or her testimony at trial or on a motion".[22]

The court in *Simcoe Muskoka Child, Youth and Family Service v AH* examined whether the expert opinion evidence of a psychologist whose report was attached as an exhibit to a Society worker's affidavit was admissible. [23] Counsel for the mother suggested the reports should be given no weight. The court was tasked with considering whether the reports were properly before the court and admissible for the purposes of the motion for summary judgement. The court followed *Sanzone* and *LaRoche*, determining the doctor to be a participant expert and their report to be observations of the child without the purpose of providing evidence in the litigation. [24] In undertaking a gatekeeping role, the court found r 20.2(15) contemplated the use of expert opinion evidence on motions, and gave no indication "the evidence must be sworn."[25] Therefore, the participant expert's unsworn report was admissible.

The court in *Ogwadeni:deo Six Nations Child Welfare v KLH* excluded a report by a doctor because the doctor was asked to examine the child after they had been removed from a parent's care. The court determined the Society was already planning litigation at the time the doctor was engaged to undertake the report requested. Further, the doctor was not the treating physician of the child and was engaged for the specific purpose of assessing the child in relation to maltreatment. The context necessitated the determination that the doctor was a litigation expert and that "the requirements of Rule 20.2(2) were engaged, but not complied with."[26]

At trial, the court in *Vieira. v. Vieira* admitted a one-page letter and two-page C.V. from a participant expert psychotherapist.[27] These documents were served and filed according to Rule 20.2(14). Letters from the children's current counselor were also admitted under Rule 20.2(14).[28] These experts were not required to testify in person, despite their materials being considered hearsay and not strictly necessary, since they could have been compelled to testify.[29] In doing so, the court noted opposing counsel did not object to this, the child focused perspective the parties took, and the objective of dealing with matrimonial litigation cases in a fair and proportionate manner.[30]

In *Gannon v. Gannon*, the court considered the issue of what procedure should apply to admitting litigation expert evidence on a motion. Valuator reports from proposed litigation experts were attached as exhibits to motion affidavits on the issue of child and spousal support.[31] The reports complied with formal requirements of rule 20.2(2), but the court noted that the proposed experts had not yet been qualified to testify as experts.[32] The court cautioned against making pronouncements about the substance or opinions in the reports at this stage, but stated they did

[21] *JKLD v WJA*, 2020 ONCJ 335 at paras 80-81.
[22] *JKLD v WJA*, 2020 ONCJ 335 at para 84.
[23] *Simcoe Muskoka Child, Youth and Family Services v AH,* 2021 ONSC 2789 at para 50.
[24] *Simcoe Muskoka Child, Youth and Family Services v AH,* 2021 ONSC 2789 at para 70.
[25] *Simcoe Muskoka Child, Youth and Family Services v AH,* 2021 ONSC 2789 at paras 58-59.
[26] *Ogwadeni:deo Six Nations Child Welfare v KLH,* 2021 ONCJ 339 at paras 48-50.
[27] *Vieira v. V*ieira, 2021 ONSC 5029 at para 16.
[28] *Vieira v. V*ieira, 2021 ONSC 5029 at paras 11-12.
[29] *Vieira v. V*ieira, 2021 ONSC 5029 at para 16.
[30] *Vieira v. V*ieira, 2021 ONSC 5029 at paras 15-16.
[31] *Gannon v. Gannon*, 2021 ONSC 7160 at para 50.
[32] *Gannon v. Gannon*, 2021 ONSC 7160 at para 63.

have some utility until there may be a *voir dire*.[33] The reports provided useful summaries of the data and the court could resolves some of the issues and come to their own conclusions without having to rely on the proposed expert opinions.[34]

In *Children's Aid Society of the Niagara Region v. S.S. and T.F.*, the court examined whether a pediatrician should be qualified as a participant expert or a litigation expert within an application for an extended care order. The court permitted the paediatrician to be a participant expert at trial since at the time the Society contacted him to provide support to the family, the father was voluntarily working with the Society and there was no court proceeding.[35] While the paediatrician was also involved after the proceedings had started, the court found it was not for the purpose of litigation as it was a continuation of services.[36] It also did not matter that he was just "a" treating paediatrician, and not their exclusive paediatrician.[37] In coming to this conclusion, the court found that his primary role and the substance of his role was as a paediatrician for the children.[38]

Despite the Society originally intending to call the paediatrician as a litigation expert, it did not change his involvement with the children nor the nature of his evidence.[39] Further, the fact that part of the expert's reports contained opinions going beyond the scope of what is permissible for a participant expert in Rule 20.2 did not prevent its admission. Rather, it is subject to an analysis identifying those statements that are admissible and those that are not.[40] While permitting him to be a participant expert, the court placed little weight on the expert's evidence at trial because of concerns with the links he drew and his failure to consider other explanations for the child's behaviour.[41]

On a *voir dire* for trial, the court in *M.A.B v. M.G.C*. considered the admissibility of evidence from a paediatrician with expertise in the assessment of children who suffered from maltreatment. The court found the expert to be a participant expert and not a litigation expert as it was clear the mother did not engage the paediatrician for the purposes of litigation.[42] The paediatrician had become involved after a referral from an emergency room doctor who had seen the child.[43] The short term and limited nature of the paediatrician's involvement did not prevent a finding that he was a participant expert.[44] Therefore, the expert evidence did not need to comply with rule 20.2(2) and the evidence met the requirements of rule 20.2(14).[45]

On a *voir dire* for trial, the court in *J.L. v. D.L*. considered whether it could exercise its discretion under rule 20.2(6) to permit a proposed expert to testify without having written a report. Before the court could consider doing so, the proposed expert would have to be a litigation expert.[46] The court was concerned that the proposed expert opinion was to be of a general nature and therefore did not attend to the requirements in Rule 20.2(2), specifically that evidence relate to

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[33] *Gannon v. Gannon*, 2021 ONSC 7160 at para 64.
[34] *Gannon v. Gannon*, 2021 ONSC 7160 at para 64.
[35] *Children's Aid Society of the Niagara Region v. S.S. and T.F.*, 2021 ONSC 8582 at para 36.
[36] *Children's Aid Society of the Niagara Region v. S.S. and T.F.*, 2021 ONSC 8582 at para 56.
[37] *Children's Aid Society of the Niagara Region v. S.S. and T.F.*, 2021 ONSC 8582 at para 38.
[38] *Children's Aid Society of the Niagara Region v. S.S. and T.F.*, 2021 ONSC 8582 at para 38.
[39] *Children's Aid Society of the Niagara Region v. S.S. and T.F.*, 2021 ONSC 8582 at para 47.
[40] *Children's Aid Society of the Niagara Region v. S.S. and T.F.*, 2021 ONSC 8582 at para 41.
[41] *Children's Aid Society of the Niagara Region v. S.S. and T.F.*, 2022 ONSC 744 at paras 44, 246.
[42] *M.A.B. v. M.G.C.*, 2021 ONSC 8572 at 34-35.
[43] *M.A.B. v. M.G.C.*, 2021 ONSC 8572 at 35.
[44] *M.A.B. v. M.G.C.*, 2021 ONSC 8572 at 36.
[45] *M.A.B. v. M.G.C.*, 2021 ONSC 8572 at 35-36.
[46] *J.L. v. D.L.*, 2022 ONSC 1004 at para 11.

specific issues in the trial and be based on proven factual assumptions in the case.[47] The court did not use its discretion to allow the proposed expert to testify as a litigation expert without a report and did not find it sufficient to "substitute" the proposed expert's will-say statement into a report.[48]

2. Oral testimony of experts on motions (without reports)/type of expert

As per Rule 14(17)(3) of the *FLR*, oral evidence is permitted on a motion with the court's permission.
The court in *LD v AE* canvased the applicable law for admitting oral evidence under the amended *FLR*.[49] It was recognized there is little guidance on how Rule 20.2(15) would admit expert opinion evidence on an interim motion.[50] Prior to the changes in the *FLR*, an application for admission of oral evidence required "special circumstances" to get the evidence before the court. The court stated: "arguably, the need for a *voir dire* to introduce expert evidence on a motion could be a "special circumstance" under which oral evidence might be permitted."[51] Justice Finlayson gave the example of *JKLD* and how the court had indicated it was prepared to hear oral evidence from a medical doctor because the report filed was a practitioners report, it was admitted into evidence on that basis, and s 52 of the *Evidence Act* requires cross-examination on request.[52] In *LD*, the court said in *obiter* that: "oral evidence on a motion is thus the exception, not the rule" and that reading Rule 14 as always requiring oral evidence would be contrary to the primary objective of the Rules.[53] Further, this reading would result in longer motions and further delays.

While the mother in *LD* submitted the expert as a litigation expert, the court found the expert had been engaged by the mother as the child's therapist. This factor is important as it signifies the therapist as a participant expert as opposed to a litigation expert, as per the legislated definitions in r 20.2(1). Regardless, the contents of the report did not comply with the criteria in rule 20.2(2) of the *FLR*. Additionally, it found that according to Rule 20.2(8), litigation expert opinion evidence can only be presented by a "joint litigation expert" in cases about custody and access under the *Children's Law Reform Act* "unless the court orders otherwise."[54] Here, the expert was not jointly retained, nor did the mother seek leave to present the evidence as required by the *FLR*. If anything, the expert was found to be a participant expert.

The court outlined multiple reasons why oral evidence would not be appropriate in this case, though did not "foreclose the possibility that oral evidence may be required on a motion, if that is needed for the proper presentation of expert opinion evidence, regardless of the type of expert opinion evidence."[55] However here, there was no need for a *voir dire* to qualify the expert, and any elaboration requested by the opposing party could be procured by other means (i.e. affidavit or supplementary letter).

[47] *J.L. v. D.L.*, 2022 ONSC 1004 at para 11.
[48] *J.L. v. D.L.*, 2022 ONSC 1004 at para 11.
[49] *LD v AE*, 2020 ONCJ 417 at para 205.
[50] *LD v AE*, 2020 ONCJ 417 at para 204.
[51] *LD v AE*, 2020 ONCJ 417 at para 206.
[52] *LD v AE*, 2020 ONCJ 417 at para 206.
[53] *LD v AE*, 2020 ONCJ 417 at para 208.
[54] *LD v AE*, 2020 ONCJ 417 at para 216.
[55] *LD v AE*, 2020 ONCJ 417 at para 221.

Before the release of the decision, the court received another affidavit with additional notes from the therapist. The notes were from both before and after the arguments were made before the court. There was no motion seeking leave to file new evidence, nor was there an indication as to whether there was consent from the other party to address the court directly.[56] The court examined this information, stating the information should have been previously disclosed to the father and that the disclosure of abuse was not new and had already been dealt with.[57]

Acknowledgment: This summary was prepared by Stefanie Hill, student at law, OCL and updated by Ellen Weiss, summer student, OCL.

[56] *LD v AE*, 2020 ONCJ 417 at paras 249-252.
[57] *LD v AE*, 2020 ONCJ 417 at para 272.