Chapter 9: Expert Evidence

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I. Introduction

When a person's mental state at the time of the alleged crime or her/his ability to stand trial is at issue, the evidence of mental health experts is often used to assist the trier of fact (judge or jury). Psychiatrists, psychologists, psychiatric nurses and social workers, among others, may be used as expert witnesses where mental illness is an issue. Where mental handicap[1] is an issue, the list of experts used may include special education teachers, speech and language pathologists, audiologists, physical therapists, occupational therapists, as well as those psychiatrists, psychologists, clinical social workers, psychiatric nurses and other mental health experts who have received the necessary education and training in mental handicap matters.[2]

Essentially, expert evidence can take four forms, although often an expert witness will present evidence that falls within more than one of these categories.[3] First, the expert may be a witness to the facts forming the foundation for the opinion. An example of this was given in the case of *R v Marquard* where a burn expert had examined the burn personally before diagnosing it.[4] The foundation of the expert's opinion that the court will scrutinize will be the degree of expertise and knowledge that the expert possesses. Second, the expert may form an opinion in advance of testifying based on an investigation. An example of this was found in the case of *R v Lavallee*, where the psychiatrist diagnosed the accused as suffering from battered women's syndrome.[5] As Paciocco notes, "it is important for the witness to articulate the foundation for the opinion, and the rule in *Abbey* is of importance where all or part of that foundation is hearsay or otherwise inadmissible information".[6] Again, the foundation that the court will scrutinize will be the expertise and knowledge of the witness as well as the

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1 While many current sources refer to this term as "intellectual disability", for consistency throughout our document (18 chapters), we have retained our original term "mental handicap". Please refer to Chapter One for our choice of terminology.

2 These are the experts recommended by the American Bar Association in ABA Mental Health Standards (ABA, 1989) at 7 (hereinafter ABA Mental Health Standards).

3 See DM Paciocco & L Stuesser, *The Law of Evidence 7th ed* (Toronto: Irwin Law, 2015) Chapter 6: Opinion and Expert Evidence, (QL) (hereinafter Paciocco and Stuesser).

4 [1993] 4 SCR 223 (hereinafter *Marquard*).

5 [1990] 1 SCR 852 (hereinafter *Lavallee*).

6 *Lavallee.*

thoroughness of the investigation and the soundness of the theory being advanced. Third, the expert witness may merely instruct the court on scientific knowledge that is important for an understanding of the facts of the case. The foundation under scrutiny in these cases is the scientific theories being employed. Fourth, the expert may be asked to relate a scientific theory or theories to the facts of the case, but may not have conducted any investigation prior to his or her testimony. The foundation under scrutiny in such a case would be whether the facts of the case exist in such a way that the theory being employed is applicable to those facts in the manner in which the expert articulates it. The facts of the case are for the trier of fact to decide, not the expert.[7]

Within these forms of expert evidence, the court generally requires of the mental health expert that they provide three distinct types of testimony: expert evidence, expert opinion and expert advice. Expert evidence consists of information related to the expert's special field. The expert must possess skills, knowledge and experience in the field of interest. When psychologists provide expert evidence, they are expected to provide psychological facts.[8] Second, expert witnesses are the only witnesses who are allowed to present opinion evidence. Other witnesses are limited to testifying about the facts alone. Based upon her/his training and experience, the expert giving her/his opinion is expected to provide conclusions drawn from the scientific facts that she/he has gleaned from literature and from her/his experience.[9] Third, the mental health expert may be asked by the court to advise as to the appropriate disposition or sentence for a person. For example, the court may ask whether the expert thinks that the person would respond to treatment.[10]

Because the expert has a crucial role in cases involving mental disability, it is necessary to examine in detail the role of the expert, the relationship of the expert to the adversarial

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7 *Lavallee*. See *Thorndycraft v McCully* (1994), 20 OR (3d) 373 (Gen Div). Paciocco opines that if the facts are in dispute the party calling the expert witness should present the expert with a hypothetical factual scenario that reflects the facts that he or she hopes the trier of fact will find. If the facts are not in dispute, the expert can be presented with them in a non-hypothetical form and be asked to present an opinion on them. See *Bleta v R* (1964), 44 CR 193 (SCC).

8 DJ Cooke, "Do I Feel Lucky? Survival in the Witness Box" (1990) 4 Neuropsychology 271 at 273-4 (hereinafter Cooke). See also: Ron Nichwolodoff, “Expert Psychological Opinion Evidence in the Courts” (1998) 6 Health LJ 279-301; D Faust & J Ziskin, "The Expert Witness in Psychology and Psychiatry" (1988) 241 Science 31; and *R v Mohan,* [1994] 2 SCR 9, (1994), 89 CCC (3d) 402.

9 Cooke, at 275.

10 Cooke, at 275.

legal system, and some of the difficulties associated with expert witnesses. Further, this chapter outlines some of the practical difficulties associated with the use of expert witnesses. Finally, it examines the legal aspects of expert testimony—admissibility, basis for opinion, hearsay and so on.

II. Role of Mental Health Experts

A. Role Assumed by Expert When Testifying

The role that the expert will likely assume when testifying usually becomes apparent once the lawyer and the expert develop a professional relationship.[11] For a variety of reasons, mental health experts may assume various roles in the courtroom. What role the expert assumes depends upon how he/she views herself/himself.

Rogers and Mitchell summarized their findings on how experts view themselves.[12] If an expert views himself/herself as a hired gun, he/she may deliberately bend or even change her/his opinion to suit the needs of the party who has hired her/him. These experts may appear very certain about their opinions. Because the hired gun's testimony can be easily shaped, this will likely be noticed in court and may affect her/his credibility.

Second, an expert may view herself/himself as an advocate—a team player. The advocate will attempt to present the data he/she has obtained in the best possible light but will not perjure herself/himself. When faced with vigorous cross-examination, an advocate will admit the information she/he had omitted.

Finally, an impartial expert will view himself/herself as objective and even-handed. She/He will strive to provide the whole truth regardless of who retained her/him. This type of expert will actively resist any attempts to mold her testimony and will likely appear very credible in court.[13]

The possibility that the professional might assume one of these roles underlines the necessity of a frank discussion with the expert, preferably before retaining him/her, about how

11 For some pointers on how to choose the right expert witness and how to manage an expert once he is chosen, see "Picking the Right Expert Witness is Key to Winning, Lawyers Learn" (1992) 12(3) Lawyer's Weekly at 6.
12 Rogers and C Mitchell, *Mental Health Experts and the Criminal Courts* (Toronto: Thomson Prof Pub, 1991) at 10-11 (hereinafter Rogers and Mitchell).
13Rogers and Mitchell, at 10-11.

he/she views his/her role in the courtroom. Further, knowledge of the various roles assumed by mental health experts may assist the lawyer in his/her cross-examination. The purpose of this cross-examination will be to shake the expert's confidence or to decrease the expert's credibility in the eyes of the jury.[14]

B. Situation in the United States

Because of the uncertainty about the nature and scope of expert testimony, it is useful to briefly examine the situation in the United States. The *Criminal Justice Standards on Mental Health* contain specific recommendations on the obligations of mental health and mental handicap (developmental disabilities) experts. These guidelines outline the roles of mental health and mental handicap professionals in the criminal process and provide recommendations for monitoring the performance of mental health, mental handicap and criminal justice professionals. They also include recommendations for education and training for lawyers, judges, mental health professionals and mental handicap professionals, who deal with mentally ill and mentally disabled persons in the criminal justice process.

The American Bar Association recommends that mental health and mental handicap experts offer opinions limited to their areas of expertise and consistent with that professional's ethical principles.[15] They recommend that the experts play five roles in the criminal process. The first role is evaluative. They must function objectively in offering expert opinions and testimony about scientific or clinical knowledge and in evaluating the mental condition of criminal defendants. Even though professionals are retained by the defence or by the prosecution (under a court order), the ABA believes that their evaluation or opinion should not be affected. Further, lawyers should respect this role when asking professionals to be expert witnesses for their clients. They should provide all records or information that an evaluator might need to provide a thorough evaluation and they should outline in writing each matter to be addressed in an evaluation.[16]

The second role played by the mental health and mental handicap experts is that of

14 Rogers and Mitchell, at 11-12.

15 *ABA Criminal Justice Standards on Mental Health*, 2016, Standard 7-1.3 (hereinafter ABA Criminal Justice Standards on Mental Health).

16 ABA Criminal Justice Standards on Mental Health, Standard 7-3.4(b), (e).

scientific expert. They offer expert opinions and testimony concerning scientific or clinical knowledge. They must function impartially within their area of expertise. They should possess a degree in an appropriate medical or scientific discipline, have relevant clinical or research experience and possess familiarity with current scientific information on the specific issue on which they are called to testify.[17]

Rule 702, amended in 2001, incorporates the *Daubert* standards into the Federal Rules of Evidence ("FRE").[18] This rule provides that a principle or methodology is presumed reliable if it has substantial acceptance within the scientific, technical or specialized community, whereas it will be presumed unreliable if it does not. A party can rebut the presumption of unreliability by showing that the methodology used is probably reasonably reliable.

A 1993 decision by the United States Supreme Court in *Daubert v Merrel Dow Pharmaceuticals*,[19] as well as decisions in *Joiner*[20] and *Kumho Tire*[21] led to the amendments in Rule 702.[22] In *Daubert*, the Court held that under FRE 702 district courts must serve as gatekeepers who exclude scientific expert testimony that does not rest on a reliable foundation. The Court also suggested several factors that courts might use in determining whether scientific testimony is in fact reliable. They have become known as the *Daubert* standards:

1. Can the theory being advanced be reliably tested?
2. Has the theory been subject to peer review and/or publication?
3. Does the theory have a reasonably low error rate?
4. Are there professional standards controlling its operations?
5. Is the theory generally accepted in the field?
6. Was the theory developed for purposes other than merely producing evidence for the present litigation?

In *Kumho*, the Supreme Court unanimously held that the gate-keeping obligation applies equally in the context of expert testimony based not on science but on "technical or

17 ABA Criminal Justice Standards on Mental Health, Standard 7-1.3(a)(iii).

18 See Federal Rules of Evidence (2004), Article VII. Opinions and Expert Testimony. Rule 702. Testimony by Experts. Online: <www.law.cornell.edu/rules/fre/overview.html#article%20vii>. Last accessed in May 2006.

19 509 US 579 (1993) (hereinafter *Daubert*).

20 522 US 136 (1997) (hereinafter *Joiner).*

21 526 US 137 (1999) (hereinafter *Kumho Tire*).

22 FRE 2001, Article VII, Rule 702.

other specialized" knowledge, such as testimony based on experience, skill and observation. Depending on the circumstances of the specific case, district court judges may rely on the *Daubert* factors when reviewing the reliability of such expert testimony, or on other, unspecified criteria. The Court emphasized the flexibility of the court's required inquiry, given the vast range of expert testimony court must review.

"*Daubert* Hearings" have been instituted wherein the admissibility of expert evidence is contested prior to trial, or during the process of qualification of the expert. Only a few Canadian cases have used *Daubert* hearings to assess expert witnesses.[23] To a large degree, Canadian developments in the law of expert evidence appear consistent with American law on the subject, and some authors argue that Canadian law has subsumed the *Daubert* standards within the *Mohan* test.[24] Other Canadian authors argue that a stricter application of the *Daubert* standards and an allowance for discovery of expert witnesses would result in a more efficient use of resources.[25]

The fourth role played by mental health and mental handicap experts is a treatment role where they act as therapists or habilitators. When professionals are acting as professional consultants or evaluators, they do not establish therapeutic relationships with defendants and therefore owe them no loyalty. However, once the mental health expert is retained to treat the client, he/she owes loyalty to the client.[26] If the professional comes to treat the client as a result of being a consultant or an evaluator for his/his lawyer, the problem of divided loyalties may result. Professionals may have difficulties safeguarding client confidentiality under these circumstances. If there are "dual loyalties" that may restrict traditional relationships between clients and professionals because of the client's involvement in the criminal justice system, the American Bar Association recommends that they be clearly identified for the client at the beginning of the relationship.

The fifth role played by those in the mental health profession involves helping policy

23 See *Grant v Dube*, 12 CPC (3d) 22 (1992); *Green v Lawrence*, [1996] MJ No 219; *Green v Lawrence*, [1997] MJ No 56 *Wolfin v Shaw,* [1998] BCJ No 5, Vancouver Registry No B 910339.
24 *Mohan*. See D. W. Eryou, below, at para 70.
25 See, for instance DW Eryou "Why Isn't Daubert Being Used in Ontario Civil Cases?" (2000-09) *Practical Strategies for Advocates IX*, The Advocates Society (Ontario), (QL).
26 ABA Criminal Justice Standards on Mental Health, Standard 7-1.3(e).

makers form policy that will improve the criminal justice system's treatment of those with mental illness or mental handicaps. Mental health professionals are in the unique position of having empirical and practical information at their disposal that can help policy makers make informed decisions when enacting statutes and guidelines that will impact how the criminal justice system functions. This can be provided to stakeholders through testimony, literature, and other mechanisms.[27]

III. Relationship Between the Legal Profession and Mental Health Profession

A. Similarities and Differences Between the Legal Profession and Experts

There is a great deal of misunderstanding and mistrust between the legal profession and the mental health professions.[28] The reason for the discomfort stems from differences in professional roles, training and ethics in the two fields.[29] There are differences in approach between psychology and law and between psychology and psychiatry. One basic difference between law and psychology is that psychology attempts to be value-free and objective in its description of the conduct of an individual. On the other hand, law is concerned with values and rules for appropriate behaviour.[30]

Because of this difference in underlying philosophies, each profession has a very different method for attaining knowledge and arriving at facts. In psychology, knowledge is attained through observation, experimentation and hypothesis testing.[31] Cooke asserts that because most of the psychological data is obtained by experiments and observation, psychologists are very hesitant to adopt new information because of concerns about inaccuracy. As a result, psychologists have very high standards for acceptance of new information.[32] Psychologists, "tend to describe 'facts' in terms of probability estimates and confidence limits while lawyers tend to favour absolutes: true and false, yes and no".[33]

Unlike psychological analysis, the nature of the judicial process forces the acceptance

27 ABA Criminal Justice Standards on Mental Health, Standard 7-1.3(f).
28 Rogers and Mitchell, at 1.
29 Rogers and Mitchell, at 3.
30 Rogers and Mitchell, at 3.
31 Rogers and Mitchell, at 3.
32 Rogers and Mitchell, at 3.
33 Cooke, at 274.

of facts in a different fashion. The court evaluates the information it hears and makes decisions about its application to the circumstances of the case. In a criminal trial, the prosecution is required to prove the guilt of the accused beyond a reasonable doubt. The judge weighs out the evidence and makes conclusions based upon both the testimony of witnesses and the physical evidence. The judge applies legal rules that are established by precedents[34] to these facts. These precedents are needed to ensure consistency at trial and accuracy and uniformity in the interpretation of the law.[35]

The difference in the way that psychology and law determine facts may affect the expert's testimony. For example, a psychologist may only be comfortable with probability, thus appearing uncertain, while a lawyer as advocate wants as much certainty as possible in order to provide the best services for his/her client. The appearance of uncertainty may also expose the mental health expert to brisk cross-examination. This is disconcerting because the psychologist has weighed out the facts in advance and may resent apparent attacks on his/her professional methods and conclusions.[36]

Another source of discomfort between the two fields is their basic difference in methodology. Lawyers wish to focus upon the characteristics of the individual accused and to present the accused's case in the best possible light, while the psychologist's basic method is to formulate a probable conclusion about groups of individuals with certain characteristics based upon scientific methodology and expertise. Psychologists are most comfortable testifying as to differences between certain groups and their performance on certain psychological tests (e.g., the Minnesota Multiphasic Personality Inventory).[37] Unfortunately, because of the nature of the justice system, lawyers would prefer that psychologists testify as to the specific characteristics of the accused.

B. Psychology, Psychiatry and Social Work

In addition to the basic philosophical and practical differences between law and psychology, there are also differences amongst psychiatry, psychology and social work. Rogers

34 Previous legal cases which interpret the law.
35 Rogers and Mitchell, at 3-4.
36 Rogers and Mitchell, at 3-4.
37 Rogers and Mitchell, at 2.

and Mitchell assert that psychiatry is based on the medical model where the emphasis is upon clinical training with the supervision of experienced colleagues. Like a medical doctor, the psychiatrist observes and interviews the patient and attempts to ascertain the difficulty based on his/her experience. This method is oriented to treating the individual case.[38] Psychiatry allows for the prescription of medication that other mental health professionals are not qualified to provide. It tends to lean toward a medical model in which mental health problems may be viewed from an organic perspective and emphasis may be placed on arriving at a label, which in turn, helps to determine the prescription to be given. While intrapsychic, social and neurological factors are included, the extent to which they are concentrated upon depends upon the training and orientation of the psychiatrist.[39] Conversely, because psychology and social work do not rely on medical training, these place more emphasis on social and psychological factors.[40]

The field of psychology focuses on observing, determining, identifying, measuring and interpreting various aspects of mental functioning such as: intelligence, behaviour, emotions and neurology. Hence, psychiatrists have developed testing materials that social workers and psychiatrists may not have the required training to administer or interpret. Psychological research examines trends and patterns. Because there is a possibility that a specific individual may not fit into a norm, due to an identified or unidentified variable, the psychologist keeps these points in mind when interpreting test material. Therefore, results may be interpreted in a manner that is less pragmatic than a psychiatrist's and that is usually tempered by clinical experience and interviews.[41]

Social work education places attention on how the process of a case evolves. The client is viewed as an individual, family or group in the entirety of its social system network. The social worker relies on the relationship between the client and himself/herself. The social worker's function is to use her/his knowledge and skill to optimize human relationships. The underlying assumption is that the necessary and significant factors of the case will emerge, and can only be dealt with through person-to-person interaction. Information, facts, research,

38 Rogers and Mitchell, at 4.
39 Pertaining to the mind.
40 Per Mary Krasinska, social worker.
41 Per Mary Krasinska, social worker.

theories of human behaviour, intervention, and access to social resources, are introduced to develop and to test hypotheses as necessary to deal with the case in question. The thinking is to minimize the imposition of a minimized view and to maximize an understanding and response to the full complexity of human beings. When testifying, social workers may resort less to research or information and more to observations, responses and interactions based on their relationship with the clients and the clients' social system network.[42]

These differences in methodologies and orientation amongst psychiatrists, psychologists and social workers may account for some of the discrepancies reported by mental health professionals. An understanding of the differences in orientation may help a lawyer to choose an expert witness that best fits the case at hand. Likewise, the different methodologies may help to clarify a complex case by addressing it from various angles.[43]

IV. Mental Health Experts and the Adversarial Legal System

A. Nature of the Canadian Legal System

The Canadian court system is adversarial in nature. The adversarial system requires that both the prosecution and the defence in a criminal trial present the best case possible and that the judge or jury decides who has won the case and ultimately whose version of the truth will be believed. In a criminal trial, the defence strives to force the prosecution to produce evidence that will prove his/her client's guilt beyond a reasonable doubt. The prosecutor attempts to form a logical case against the accused based on physical evidence, witness testimony and expert testimony. The defence strives to produce evidence that supports its side of the case.

Landau asserts that while a lawyer must not deceive the court or behave unethically, “our legal system is based on the premise that the truth will emerge as a result of the contest between strongly partisan combatants”.[44] On the other hand, most psychologists try to present the “whole truth” without focusing on the desired outcome of the case.[45] In this respect, they often feel that the adversarial system is “incompatible with the objectives and

42 Per Mary Krasinska, social worker.
43 Per Mary Krasinska, social worker.
44 B Landau, "The Psychologist as an Expert in the Courts" (1986) 3 CFLQ 83 at 84 (hereinafter Landau).
45 Rogers and Mitchell, at 4.

procedure followed by the helping professions."[46] Once psychologists have been hired to assist with a case, they are expected to become advocates for their client. Psychologists and social workers may consider that they are expected to present material in a more judgmental or opinionated fashion than they actually consider it to be. This makes some psychologists feel that they are forced to forfeit their integrity and violate their ethics.[47] Whether it is because of this expectation or because they wish to assist the accused, psychologists often arrive at divergent opinions about the mental condition of the accused. It is not unusual in a trial for the experts to disagree on whether the accused suffered from a mental disorder at the time of the offence and indeed on what type of mental disorder it was.

B. Battle of the Experts

The use of experts with conflicting opinions leads to what lawyers refer to as the "battle of the experts", where psychologists and psychiatrists appear to be advocates for the particular views of the defence or the prosecution. This underscores the concerns about the reliability of the testimony of mental health experts. The American Psychiatric Association (APA) observed in 1982 that the "battle of the experts" is a result of the adversarial system and is not limited to psychiatrists. For example, other medical experts may differ on the interpretation of x-rays.[48] The APA proposed that psychiatric testimony be limited to the medical information and opinion about the defendant's mental state. Further, the expert should not be required to make ultimate conclusions about legal issues. This requires the medical expert to infer the probable relationship between medical concepts and legal concepts. The APA stated that determining whether a criminal defendant was legally insane is a matter for the legal fact finders (jury or judge) and not the experts.[49]

In Canada, however, mental health experts are routinely expected to draw conclusions about the accused. When called upon to testify, the mental health expert utilizes his/her special knowledge, training and experience to assist the court in arriving at a conclusion. It is

46 Landau, at 83.
47 Rogers and Mitchell, at 4.
48 P Low, J Jeffries, Jr and R Bonnie, *The Trial of John W. Hinkley Jr. A Case Study in the Insanity Defence* (Mineola, New York: Fountain Press Inc, 1986) at 133 (hereinafter Low, Jeffries Jr. and Bonnie).
49 S Pearlstein, *Forensic Psychiatry and Legal Protections of the Insane* (New York: Oceana Publications Inc, 1986) at 116-117 (hereinafter Pearlstein).

not the role of the psychological expert to decide the question in issue—whether the accused was suffering from a mental disorder at the time of the incident and was thereby rendered unable to appreciate the nature and quality of his/her actions or to know that they were wrong. However, he/she is often called upon to make conclusions that are dangerously close to deciding the case. Many argue that the mental health expert's testimony should be limited to the mental state of the accused at the relevant time.[50]

Experts are often called upon to provide conclusions on the ultimate issue—did the mental disorder render the accused unable to appreciate the nature and quality of her/his act or to know that it was wrong? The general rule of evidence is that an expert cannot usually be asked to express an opinion upon any of the issues, whether law or fact, which the jury (or the judge) are to ultimately determine.[51] However, this rule is loosely applied in cases where the mental disorder of the accused is at issue.[52] Often testimony that goes to the ultimate issue is admitted. In these cases, the courts either recognize that the evidence is otherwise admissible and admit it on an ultimate issue,[53] or narrowly define the ultimate issue rule,[54] or exercise their discretion to relax the rule of inadmissibility.[55] Because there are so many exceptions created, some authors feel that the ultimate issue rule is an artificial and functionless rule of semantics.[56] In the case *R v Graat*, the Ontario Court of Appeal concluded that the doctrine of ultimate issue should now be regarded as having been virtually abandoned or rejected.[57]

Although the common law may be slightly unclear on the ultimate issue rule, it is quite obvious that Canadian courts will allow mental health experts to be asked about their ultimate conclusions about mental disorder and its effect on the accused. One danger of this practice is

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50 Law Reform Commission of Canada, *Mental Disorder in the Criminal Process* (Ottawa: Supply and Services, 1976) (P Hartt, Chair) at 29-30 (hereinafter LRC Report 5).
51 *Halsbury's Laws of England, 3rd ed,* vol 15 at 323 as cited in Schiffer, at 208.
52 M Schiffer, *Mental Disorder and the Criminal Trial Process* (Toronto: Butterworths, 1977) at 208 (hereinafter Schiffer).
53 *R v Lupien*, [1970] SCR 263 at 278 (hereinafter *Lupien*).
54 *Lupien,* at 270.
55 *R v Rabey* (1977), 40 CRNS 46 (Ont CA), aff'd (1980), 32 NR 451 (SCC) at 58 (hereinafter *Rabey*).
56 Schiffer, at 210; see also R. J. Delisle and D. Stuart, *Evidence: Principles and Problems*, 11th ed (Toronto: Carswell, 2015) at 970 - 972 (hereinafter, Delisle).
57 (1980), 55 CCC (2d) 429 (Ont CA), aff'd (1982), 2 CCC (3d) 365 (SCC). In *Mohan* at para 25, the SCC held that there is no longer a firm general exclusion for expert opinion evidence on the ultimate issue. In *R v Juneja*, 2010 ABCA 262 at para 12, 490 AR 127, the Alberta Court of Appeal stated that the test for admitting expert evidence regarding the ultimate issue is now much more nuanced.

the experts' apparent widespread lack of understanding about the proper application of the legal tests.[58] Further, in some cases, the experts have been misdirected by counsel as to the correct legal definitions.[59] Finally, Halleck asserts that asking a mental health expert to provide his/her opinion as to whether the patient's illness made him/her not criminally responsible on account of mental disorder under the legal standards currently employed is, "from a scientific perspective probably impossible".[60] He further argued that, "translating clinical data into opinions as to how mental illness makes a person legally insane and negates his responsibility for a criminal act is a task for which a psychiatrist has no training, no science, and no theories to guide him".[61] When an expert is asked whether or not an offender meets the standards of criminal responsibility, the jury may assume that he/she is making an expert opinion, when he/she may be making a moral judgment.[62] The courts and the psychiatrists may tend to view the opinion as scientific when it really is a moral conclusion arrived at in the same way as anyone else would arrive at it.

Unfortunately, if a psychiatrist refuses to reach a conclusive opinion, the lawyer may be reluctant to use her/him. This is likely because the lawyer assumes that the opposing side will employ a psychiatrist who will be willing to make a conclusive opinion and whose testimony will carry more weight and will prevail.[63] Therefore, although the practice of asking mental health experts for their conclusions on ultimate issues is quite widespread, there is some reason for caution.[64] If mental health experts are asked for their opinions on these issues, judges then will caution the triers of fact that they need not accept expert evidence, including their conclusions.

Some Canadian mental health experts have argued that they would best serve the

58 See the discussion of the Rogers and Turner survey under V. Obstacles Faced by Mental Health Experts in Criminal Trials.
59 See*: R v Barnier*, [1980] 1 SCR 1124 (BC) (hereinafter *Barnier*).
60 S Halleck, *Law in the Practice of Psychiatry, A Handbook for Clinicians* (New York: Plenum Medical Book Company, 1980) at 213 (hereinafter Halleck).
61 Halleck, at 213.
62 Halleck, at 213.
63 Halleck, at 214.
64 The American Bar Association stringently recommends against requiring medical experts to provide conclusive opinions on legal issues. See: ABA Mental Health Standards, at 122 - 125 (Standard 7 - 3.9).

courts by focusing on degree of responsibility.[65] When the issue of degree of responsibility is raised, mental health experts should testify primarily about facts and opinions based on clinical data. The courts would then determine the degree of responsibility to be assigned to the accused and the sentence or disposition appropriate to balance the protection of society with the rehabilitation of the convicted person. Courts should recognize that experts differ for non-scientific reasons (e.g., cultural, philosophical, political and religious reasons) on the degree of responsibility. The appropriate function and competence of the court should not be to determine whether there is a mental illness or disease of the mind, because no one, including experts, can answer these questions. The focus should be on the level of responsibility. Swadron and Sullivan stated that this would reduce the "futile and non-contributory disagreements of the experts".[66]

C. Cross Examination and Experts

The disagreement of opinions between experts leaves them open to damaging cross-examination. During a trial, the prosecution and the defence will attempt to show inconsistencies or weaknesses in the testimony of witnesses produced by the other side through cross-examination. The experience of being cross-examined is very stressful for most people. Some witnesses may even change their evidence under cross-examination. This zealous behaviour of lawyers on behalf of their clients makes some mental health experts uncomfortable. Psychologists feel that the process of being cross-examined is inefficient and does not assist in resolving the issues in the dispute.[67] Further, they find court appearances demoralizing. During cross-examination, they have their credentials attacked, their methodology criticized and their recommendations held up for scrutiny.[68]

On the other hand, rigorous cross-examination under the adversarial system may be required to ensure the accountability of all witnesses and it may be in the best interest of the client and the public to test the opinions of professionals. Cross-examination ensures that

65 B Swadron and D. Sullivan, eds, *The Law and Mental Disorder. Report of the Committee on Legislation and Psychiatric Disorder: A Committee of the National Scientific Planning Council of the Canadian Mental Health Association* (Toronto: Canadian Mental Health Association, 1973) at 138-141 (hereinafter Swadron and Sullivan).
66 Swadron and Sullivan, at 141.
67 Landau, at 83.
68 Landau, at 84.

there is a sound basis for the expert's opinion.[69] Further, because the expert knows that she/he will likely have to justify her/his opinions, she/he will likely be more careful when formulating those opinions. Another beneficial result of cross-examination is the fact that a professional is only one witness among many, all of whom will be cross-examined. Consequently, the trier of fact will have the ultimate responsibility in determining the facts making it less likely that decisions will be made because of unreliable information.[70]

V. Obstacles Faced by Mental Health Experts in Criminal Trials

It is highly likely that psychologists and psychiatrists will continue to be granted expert status and will play an influential role in mental disorder matters.[71] However, the difficulties with utilizing mental health experts do not end with the basic philosophical differences between the legal and the helping professions. Numerous studies have been undertaken that illustrate that lawyers should be cautious about firm conclusions made by psychologists and psychiatrists.

A. Problems with Evaluation

Although the increased acceptance of behavioural science has produced beneficial results and has enabled the questioning of long-held assumptions about human behaviour, there is also a downside to the use of expert evidence about such issues in the courts. Three difficulties emerge with the use of expert evidence in this area. The first difficulty arises in the area of criminal law. This issue deals with the fact that the mental state of the defendant at the time of the crime must be determined after the fact. The second difficulty deals with the problems associated with determining the reliability of the theory the expert advances, given that behavioural science is considered a "soft" science and it is often being applied retrospectively. The third difficulty deals with the danger associated with the possibility that the expert may elicit undue deference from the court, imperilling impartiality.[72]

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69 Landau, at 85.
70 Landau, at 85.
71 Stuart, at 317.
72 See DM Paciocco, "Coping with Expert Evidence about Human Behaviour" (1999) 25 Queen's LJ 305-346 (hereinafter Paciocco).

The first obstacle faced by mental health professionals in the context of a criminal trial where mental disorder is an issue occurs when the professionals are called upon to retrospectively evaluate a person's mental state. The psychiatric expert does not observe or directly participate in the disputed incident. He/She must, however, draw a conclusion about that person's mental state at the relevant time. This is not an easy task. The patient's current mental status may tell the psychiatrist very little about what the patient was like weeks earlier. By the time the mental health expert conducts his/her examination, the acute condition that was alleged to have been present at the time of the crime may have disappeared. Conversely, the patient may have developed new symptoms because of the stress of arrest and detention. Also, the patient may be inclined to distort his/her recollection of the events or he/she may have a poor recollection of them. In order to ascertain the mental condition of the accused at the time of the alleged offence, the psychiatrist will have to rely heavily on information from others—the police report, people who were in contact with the accused at the time of the alleged crime and family members.[73]

Second, there is some evidence to indicate that caution should be exercised in assessing the overall reliability of the conclusions reached by mental health experts.[74] In one study, groups of lay people, psychiatrists, forensic social workers, forensic psychiatric nurses and lawyers were asked to view videotapes of actual psychiatric interviews of accused individuals and to make decisions about their criminal responsibility. The members of the study were also asked to indicate the degree of confidence that they felt in their assessments. Generally, the decisions were very similar for all groups. One conclusion of the study is that if judges and lay jurors can arrive at the same decisions about mental disorder, arguably they need not rely upon determinations and recommendations provided by mental health experts at trial.[75] Furthermore, behavioural science is not as amenable to the scientific method as its practitioners would have us believe. As noted by Paciocco, “Whereas the results of scientific inquiry can be replicated and verified, it is much harder to reproduce the precise conditions of

73 Halleck, at 220.
74 See, for example, J. Ziskin, *Coping with Psychiatric and Psychological Testimony, 6th ed* (California: Law and Psychology Press, 2012) and the 1983 supplement at 28.
75 MW Jackson, "Lay and Other Professional Perceptions of Dangerousness and Other Forensic Issues" (1988) Canadian Journal of Criminology 215 at 225.

a behavioural study or to draw safe and sustainable conclusions. Nuances in questions, variations in the sample and the sheer complexity of potential influences on human behaviour combine to weaken the ability of behavioural science to provide consistent or scientifically reliable information."[76] An additional problem for the reliability of expert evidence is that experts are invariably chosen for the compatibility of their views with the interests of the party calling them, although the prospect of bias on this account should not alone be a basis for excluding such evidence.

The study also found that lawyers and psychiatrists were the most confident in their decisions about the subjects. Over-confidence in one's ability to assess mental disorder may cause experts to ignore opposing scientific evidence. This high level of self-confidence, in turn, may influence jurors. The jury may well accept the inaccurate conclusions of a professional who exudes confidence over the accurate conclusions of an opposing expert who expresses appropriate caution.[77]

The risk of undue deference toward the expert witness is inherent in the role that the expert behavioural or psychiatric witness undertakes vis-à-vis the trier of fact:

> [T]he expert is directly or indirectly instructing the trier of fact how to interpret the existing evidence (namely, the testimony about the way the protagonist acted or behaved), or how to evaluate the credibility of witnesses. The law assumes the trier of fact cannot trust his own experiences or common sense. Together, the devaluation of common sense coupled with the invitation to experts to comment even indirectly on the inferences that should be drawn is a recipe for deference.[78]

The nature of the subject matter with which behaviourists and psychiatrists deal also leads to a heightened risk of undue deference to experts. McLachlin J noted that determining credibility is "notoriously difficult" and that an expert's opinion may all too readily be accepted, "by a

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76 Paciocco, at 4.

77 D Faust and J Ziskin, "The Expert Witness in Psychology and Psychiatry" (1988) 241 Science 31 at 34-5 (hereinafter Faust and Ziskin).

78 Paciocco. See *R v D(D)* (1998), 21 CR (5th) 124 (Ont CA), leave to appeal to SCC granted [1998] SCCA No 638 (SCC), (QL) (hereinafter *D(D)).* The Court in D(D) "was critical of evidence as to why a child might delay reporting sexual abuse because the evidence was 'intended to discourage the jury from relying upon their own experience on this issue.'" The court held that the expert opinion violated the rule against oath-helping. Paciocco asserts though, that this conclusion is "probably not right."

frustrated jury as a convenient basis upon which to resolve its difficulties."[79] Paciocco contends that the problem of deference can be addressed by appropriate jury direction.[80]

B. Complexity in the Law Related to Mental Disability

Another problem is the complexity of the law in the area. Many forensic psychologists and psychiatrists do not understand the relevant legal standard. Rogers and Turner assert that in order to do an insanity evaluation, clinicians must have:

> (a) knowledge of the current mental disorder standard,
> (b) the ability to translate this legal concept into psychological constructs, and
> (c) the ability to apply these psychological constructs to an individual case.[81]

A survey was sent to members of the Canadian Psychiatric Association and the Canadian members of the American Academy of Psychiatry and Law as well as psychologists who were members of the criminal justice section of the Canadian Psychological Association. Almost 200 mental health professionals replied.

The results of the survey suggest that mental health experts do not have a very good understanding of the legal concepts in the area. Only one third of the sample had an accurate understanding of "disease of the mind" as it applied to mental disorder cases.[82] Even fewer understood the legal concepts of "appreciate", "nature and quality" and "wrongfulness".[83] The authors of the study concluded that only one of the nearly two hundred respondents had a complete understanding of the handicap standard. The amount of understanding did not vary significantly with the degree of experience in evaluations. Presumably, if clinicians do not understand the standard, they will be unable to successfully apply it.[84]

Rogers and Turner discuss several possible solutions. First, they note that in some jurisdictions in the United States, mental health professionals testify but are disallowed from making conclusive opinions on criminal responsibility. Some see this as a mere cosmetic

79 *Marquard*, cited in Paciocco, at 4.
80 Paciocco, at 4.
81 Dr R Rogers and Dr R Turner, "Understanding of Insanity: A National Survey of Forensic Psychiatrists and Psychologists" (1987) 7 Health Law in Canada 71 (hereinafter Rogers and Turner).
82 Rogers and Turner, at 73.
83 Rogers and Turner, at 73.
84 Rogers and Turner, at 74.

change that simply obscures the clinicians' misconceptions about criminal responsibility.[85] Second, they assert that lawyers should be permitted to cross-examine forensic experts regarding their understanding of the current legal standard. This alternative is seen as the easiest and most practical.[86] Third, special training and credentials could be required before permitting testimony. However, there is no data proving that those with special credentials or experience are more adept in conducting mental disorder evaluations.[87] Fourth, the development of standardized tests for the assessment of mental disorder and criminal responsibility is an alternative. It is difficult to assess how successful such an alternative would be. Finally, they recommend that the Canadian standard of insanity should be modified and clarified. Although there have been semantic changes in the wording of s 16 of the *Criminal Code*, the basic interpretation of the section has not changed. It is therefore unlikely that we will see such a change in the near future.[88] This study underscores the need for the forensic expert to have a basic understanding of the components of the mental disorder exemption before testifying.

C. Diagnosis and Classification Difficulties

Another fundamental difficulty in psychiatry is the problem with achieving a reliable system for diagnoses and classification. In addition to clinical examinations, there are numerous tests and measures used by the mental health experts to assist in the diagnosis of mental disorders.[89] Further, forensic psychiatrists often rely upon the results of psychological tests in determining criminal responsibility.[90] Unfortunately, some forensic psychologists do not realize the limitations of certain psychological tests.[91] For instance, the trial judge in *R v Gray* points out the difficulty in diagnosing Alcohol Related Neurodevelopmental Disorder or ARND, a subtle manifestations of Fetal Alcohol Syndrome.[92] He points out that paediatricians specializing in developmental disorders are more familiar with diagnosing FAS and ARND, yet

85 Rogers and Turner, at 74.
86 Rogers and Turner, at 74.
87 Rogers and Turner, at 74.
88 Rogers and Turner, at 74-5.
89 For example, see the discussion in Rogers and Mitchell, at 29-33.
90 Rogers and Mitchell, at 142.
91 The difficulties experienced in testing those with mental disabilities is discussed below.
92 *R v Gray*, [2002] BCJ No 428 at para 49 (Prov Ct).

they do not receive adequate funding allowing them to conduct assessments on adult offenders suspected of suffering from FAS or ARND. Thus, forensic psychiatrists are assigned to do a task for which they are untrained and in which they have no experience.

First, psychiatrists and psychologists often use clinical interviews. In this method, the expert uses a set of questions in an unstructured format, concentrating on symptoms, prior history of mental illness and current circumstances.[93] The greatest drawback to this method is the lack of standardization.

Second, traditional psychological tests may be used. Apparently, traditional psychological tests (e.g., the Minnesota Multiphasic Personality Inventory) do not differentiate between sane and insane individuals.[94] Furthermore, this test cannot be interpreted without interviews: the psychologist is required to assess whether test results are in accordance with observations drawn from clinical experience.[95] The results of these tests may be useful, however, for pointing out malingerers or for ruling out major psychopathology.[96] Projective testing, such as inkblots, human figure drawings and the incomplete sentence test, are often used to test insanity.[97] Most of the studies on these testing methods have focused on the controversial Rorschach test, one of the inkblot tests. One problem with the Rorschach test is that some psychologists score it in their own way and then testify as if it were scored by a standard method. This could lead to suspect interpretations.[98] Further, the Rorschach is susceptible to malingering.[99] There have not been many studies to see if these tests are useful in mental disorder determinations.[100]

Third, testing for mental disorders is done during structured interviews. The Schedule of Affective Disorders and Schizophrenia is used, although it is also subject to malingering. Here the expert utilizes an extensive semi-structured interview for rating symptoms. This test,

93 Rogers and Mitchell, at 19.
94 Rogers and Mitchell, at 140-141.
95 Per Mary Krasinska, social worker.
96 Rogers and Mitchell, at 141.
97 Rogers and Mitchell, at 141.
98 Rogers and Mitchell, at 141.
99 Rogers and Mitchell, at 141-142.
100 Rogers and Mitchell, at 143.

however, has little applicability to personality disorders.[101] Another interview test used is the Diagnostic Interview Schedule.[102] Some studies indicate that this test may be useful in establishing a retrospective diagnosis.[103] A third interview test, the Structured Clinical Interview for the DSM III-R Diagnosis, discussed below, consists of lists of criteria that are used to diagnose mental disorders.

Fourth, there are psycho-legal measures of mental disorders. Rogers and Mitchell state that two psycho-legal measures of insanity are used: the Mental State at the Time of the Offence Screening Evaluation (MSO) and the Rogers Criminal Responsibility Assessment Scales (R-CRAS).[104] The MSO was designed to screen for a variety of defences, including insanity, diminished capacity, automatism and others. It requires the clinician to ascertain the history of the disorder, the presence of impairment at the time of the offence and whether a mental status examination is required.[105] It is considered useful as a screening device, although the MSO may be less useful in insanity evaluations.[106]

The R-CRAS, based on the American Law Institute and M'Naghten standards, is made up of two parts. In the first part, clinicians rate variables critical to the evaluation of criminal responsibility. In the second part, there are decision models to apply the rating to insanity standards.[107] This test appears to have advantages over the MSO in reliability, validity and concordance with legal opinions; however, it must be remembered that it was tested on the United States standards, which differ from the Canadian standard for mental disorder (criminal responsibility).[108]

Not only are there different methods of diagnosing mental disorder, there are also differing methods of classification of disorders. In England, for example, “psychological casualties” are divided between severe and mild sub-normality and intelligence, and between psychoses and neuroses. There are psychoses that are organic in origin, such as epilepsy and

101 Rogers and Mitchell, at 19.
102 Rogers and Mitchell, at 143.
103 Rogers and Mitchell, at 32.
104 Rogers and Mitchell, at 143.
105 Rogers and Mitchell, at 144.
106 Rogers and Mitchell, at 144.
107 Rogers and Mitchell, at 144.
108 Rogers and Mitchell, at 144.

arteriosclerosis, and there are psychoses that are called functional because there is no physical cause (e.g., schizophrenia).[109] Unless a person has a very obvious case, diagnosis is difficult. Walker asserts that "each psychiatric label is a shorthand expression of relative rather than absolute conditions that are difficult to define; any one individual can present the conditions more strongly at some times rather than others, and each individual can present symptoms of more than one psychiatric label at any one time".[110]

The American Psychiatric Association has published the influential *Diagnostic and Statistical Manual of Mental Disorders* (*DSM)*. The first such manual was published in 1952, with revisions being published in 1968, 1980, 1987, 1995 and 2000. In May 2013, the American Psychiatric Association released the *Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), following a decade of revising the criteria for the diagnosis and classification of mental disorders.[111] It is available in both print form and through the internet.[112] The manual divides mental disorders into several categories, including intellectual disabilities, learning disorders and communication disorders, schizophrenia and other psychotic disorders, mood disorders, anxiety disorders and personality disorders. Each specific disorder is identified by a list of behaviours and other criteria. A certain number of symptoms must be present in order to qualify for a diagnosis. If certain other criteria are present, the diagnosis should be excluded.

For example, the criteria for antisocial personality disorder, a cluster B Personality disorder sometimes referred to as psychopathy or sociopathy, which is outlined in the internet version of *DSM-5* (2013) include exhibiting some of the following behaviours: failure to conform to social norms with respect to the law, impulsivity, deceitfulness, repeatedly getting into physical fights or assaults, reckless disregard to safety, consistent irresponsibility, and lack

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109 Dr N Walker, *Crime and Punishment in Britain (1968*) at 53-60 as cited in D Stuart, *Canadian Criminal Law: A Treatise* 7th ed (Toronto: Carswell, 2014) at 412 (hereinafter Stuart). However, many argue that schizophrenia can be physiologically based. According to Mary Krasinska, social worker, in North America, an individual is more likely to be diagnosed as schizophrenic and in England as depressed.

110 Stuart, at 318.

111 American Psychiatric Association, DSM-5 Implementation and Support, online: <http://www.dsm5.org/Pages/Default.aspx>.

112 Diagnostic and Statistical Manual of Mental Disorders (DSM) online: https://www.google.ca/search?q=diagnostic+and+statistical+manual+of+mental+disorders+5th+edition&ie=utf-8&oe=utf-8&gws_rd=cr&ei=z4lJWYkUi-SPA52Mn9gD

of remorse. Some of these behaviours must be present in the individual before the age of fifteen. These criteria differ from those outlined in the 1980 version of the *DSM.*

This system of classification has been criticized, but is the most reliable diagnostic manual available to date. There have been studies of the reliability of the *DSM III*, and only a few for the *DSM-5*. These studies indicate that there is room for concern about the reliability of this system and other systems of classification in ascertaining the nature of the mental disorder, especially some personality disorders.[113] A study published by the *American Journal of* Psychiatry, found that adequately tested diagnoses in the DSM-5 had good to very good reliability, with some in the questionable to unacceptable range. This study, however, had a very small sample size, and more research needs to be done.[114] Another area in which high rates of error occur is when forensic experts are required to decide if the person is malingering—whether the person is simulating the disorder.[115] Studies have shown that clinicians often cannot distinguish the psychological test results of normal subjects asked to feign psychosis and actual diagnosed cases.

It is therefore not surprising that the experts themselves often cannot agree on a diagnosis. Some studies indicate that the rate of disagreement for specific diagnostic categories often equals or exceeds rate of agreement.[116] For example, one study found that highly experienced psychiatrists who viewed the same psychiatric interview could not agree on the patient's diagnosis and other significant issues.[117]

Further, it is not clear what assistance a classification or label can be when considering the issue of legal responsibility. The label of anti-social personality disorder, for example, has been criticized as based on arbitrary criteria that are extremely ambiguous, over-inclusive and circular. Stuart asserts that, "the label seems to be a ragbag description of a persistent

113 Faust and Ziskin, at 31. See also Rogers and Mitchell, at 29-33.

114 Reiger, DA, Narrow, WE, Clarke, DE, Kraemer, HC, Kuramoto, SJ, Kuhl, EA, Kupfer, DJ, "DSM-5 Field Trials in the United States and Canada, Part II: Test-Retest Reliability of Selected Categorical Diagnoses", online: 2013 170:1 American Journal of Psychiatry < http://ajp.psychiatryonline.org>

115 Faust and Ziskin, at 241. For a detailed discussion on the different types of malingering, its detection and effective cross-examination techniques on the methods used to establish malingering see Rogers and Mitchell, at 14-27.

116 See: Faust and J Ziskin, at 31-32; Rogers and Mitchell, at 29-30.

117 R Stoller and G Geertsma, (1963) 151 J Nerv Ment Disord 58, cited in Faust and Ziskin at 241.

recidivist who carries on committing crimes for no apparent reason."[118] These labels do not tell us what causes the problem or how it should be treated. If used exclusively, the labels do not convey to the average jury any information about the actual behaviour of the individual. In other words, an individual may have a questionable label, but may not have committed the crime that is being examined.

It is clear that there are numerous difficulties in the relationship between the legal and the mental health professions. It is also clear that psychiatrists and psychologists will continue to play a role in the determination of mental disorder at criminal trials. A lawyer armed with the knowledge of the basic differences between the two fields and some of the pitfalls in the methods of diagnosis should be able to pursue a more effective cross-examination of the medical expert. However, in some cases there are very few experts willing to testify because of the inherent difficulties. The lawyer cross-examining a psychiatrist in one case may be relying upon the same person to testify on behalf of his/her client in the next case.

VI. Practical Considerations

A. Lawyer - Expert Relationship

Because the area of expert testimony is fraught with difficulties, it is useful to consider some practical information. Needless to say, the professional relationship between the lawyer and expert is important. Rogers and Mitchell suggest that the relationship should not be one of blatant self-service; the lawyer should not treat the expert as a person who is there just to serve the needs of the specific case. They assert that well-established experts who are honestly convinced in their opinions make better witnesses than those who can be bullied or bought.[119]

It is also important to understand the motivations behind wanting to testify as a mental health professional. Some experts are motivated by financial gain, others by the competition inherent in an adversarial process, others by feelings of self-importance in being involved in a real drama, and still others by academic interests. Some may be motivated by a combination of the above. Ascertaining the mental health expert's motivations may assist in developing a

118 Stuart, at 320.
119 Rogers and Mitchell, at 309.

better professional relationship.[120]

There are other methods of establishing a common goal with a mental health expert without resorting to pressure tactics. Efforts by the defence counsel to humanize the client through providing a history of the client may assist in developing a shared purpose. On the other hand, efforts by the Crown to show the gravity of the offence may assist in developing a rapport with Crown experts. This phenomenon is called forensic identification. Rogers and Mitchell suggest that defence counsel may counter such a phenomenon by requesting a pre-trial conference with the Crown's experts in order to show its side of the story.[121]

While it is important to develop a rapport with one's expert, the expert must not appear "owned" because her/his objectivity will appear to be compromised. There is a line to be drawn between influencing the mental health expert's general attitude towards a client and engineering her/his testimony.[122] If the expert is not convinced by the merits of the case, it is better not to use her/him than to try to distort her/his conclusions with clever questions during trial.[123]

Once an expert has been retained, there are four main areas that he/she should explore. First, any psychologist who is to appear in court should be aware of the rules of evidence that might affect his/her testimony. For example, if an expert does not do his/her own testing, opposing counsel may object to the quality of his/her opinion based on the grounds that he/she did not observe the subject's test behaviour.[124] Second, there is a danger that lawyers may misuse the psychologist to help their clients at the cost of the psychologist's reputation. Experts should be aware of this possibility. Third, because mental health experts have the natural desire to do the best for their clients, there is a danger that this may lead them to become over-involved in a case and to bias the appraisal and presentation of their evidence through overstatement or omission. Finally, expert witnesses need to become expert

120 Rogers and Mitchell, at 309.
121 Rogers and Mitchell, at 310.
122 Rogers and Mitchell, at 310-311.
123 Rogers and Mitchell, at 311. See also *R v Olscamp* (1994), 95 CCC (3d) 468 (Ont Ct Gen Div): Charron J held that the proposed expert testimony did not meet the criteria for admissibility set out in Mohan. She further held that the expert's attitude and manner during the voir dire displayed a notable lack of objectivity and professionalism.
124 Cooke, at 273.

at presenting their evidence. They must develop skills in presentation of evidence and in handling cross-examination.[125]

1. Disclosure Issues with Expert Reports

The general rationale for solicitor-client privilege is that persons must have the assistance of legal counsel because lawyers have made themselves indispensable to the administration of justice.[126] Privilege belongs to the client, and it is for the client not the solicitor, to waive this privilege. At trial, privilege may be asserted to exclude the admission of evidence constituted by communications made by the client to his/her solicitor for the purpose of obtaining professional advice or assistance. However, there are exceptions to the rule of solicitor-client privilege that clients and expert witnesses should be aware of. Exceptions are constituted where "innocence is at stake,"[127] in the "interests of justice"[128] or where the "safety of the public" is at risk.[129]

In *R v McClure*, the plaintiff appealed in a civil action against an order granting the accused McClure access to the plaintiff's civil litigation file.[130] McClure had been a librarian and teacher at a school attended by the plaintiff in the mid-1970s. In 1997, McClure was charted with sexual offences against 11 former students. After reading about McClure's arrest, the plaintiff gave a statement to the police alleging that McClure had sexually abused him, and he brought a civil action against McClure. McClure sought production of the plaintiff's civil litigation file in the criminal proceedings. Although the trial judge granted McClure access to the file, the Supreme Court allowed the plaintiff's appeal and held that solicitor-client privilege was to be infringed only where core issues going to the guilt of the accused were involved and there was a genuine risk of a wrongful conviction. The "innocence at stake" test was to be

125 Cooke, at 273. Cooke discusses several cross-examination techniques designed to unsettle the expert or to reduce credibility at 280 to 284. See also Landau at 102 - 103, where she lists specific hints for coping with cross-examination. See also A McGarry, W. Curran and S. Hyg, "Courtroom Presentation of Psychiatric and Psychological Evidence", in Curran, McGarry, and Petty, *Modern Legal Medicine, Psychiatry and Forensic Science* (Philadelphia: FA Davis Company, 1980) at 963.

126 See *Greenough v Gaskell* 39 Eng Rep 618 (Ch 1833).

127 See *R v McClure,* [2001] 1 SCR 445.

128 See *R v Jack* (1992), 70 CCC (3d) 67 (hereinafter *Jack*).

129 See *Smith v Jones,* [1999] 1 SCR 455 (hereinafter *Smith v Jones*).

130 *Smith v Jones*.

used to determine whether to set aside the privilege. Before the "innocence at stake" test is even considered by the court, the accused must establish that the information he is seeking from the solicitor-client file is not available from any other source and that he/she is unable to raise a reasonable doubt as to his/her guilt any other way. There are two stages to the test. First, the accused seeking production must provide some evidentiary basis upon which to conclude that there exists a communication that could raise a reasonable doubt as to his/her guilt. If he satisfies the judge that an evidentiary basis exists, then the judge must examine the record to see if there is something in the communication that raises a doubt about the accused's guilt. If this requirement is met, the judge can order production, but only that portion of the file that is necessary to make the defence claimed. In the case of McClure, the first stage of the test was not met as there was no evidence that the information sought by McClure could raise a reasonable doubt.[131]

Privileged communications may also have to be disclosed "in the interests of justice" to admit information against the accused. In *Jack*, at issue was the accused's state of mind prior to her disappearance, as three days before her disappearance she had visited her family lawyer.

Finally, if an expert moves from the role of confidential advisor to expert witness, the lawyer requesting her/his services loses any privilege that previously protected the expert's papers from production. Additionally, even though the psychiatrist provides her/his services at the request of defence counsel, he or she is permitted to disclose information regarding the accused if he/she considers the safety of the public to be at risk. In determining whether public safety outweighs solicitor-client privilege, the court will consider three factors: (1) Is there a clear risk to an identifiable person or group of persons? (2) Is there a risk of serious bodily harm or death? (3) Is the danger imminent? See the section on confidentiality for additional details regarding these criteria.

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131 This case was followed in *R v Brown*, [2002] 2 SCR 185, in which the Supreme Court referred to the innocence at stake test or the "McClure" test. The Court held that the McClure test for infringing solicitor-client privilege was stringent, and would only be satisfied in rare circumstances. The Supreme Court held, further, that while a McClure application should not be used as a discovery process to allow the defence or the trial judge to interrogate the solicitor, the disclosure should not be strictly limited to written communications contained in the file. The rationale for breaching privilege with respect to written material is equally applicable to oral communications.

In *R v Stone*, the Supreme Court of Canada considered whether the trial judge erred in compelling defence counsel to disclose to the Crown a copy of an expert report in circumstances where defence counsel commented with respect to the anticipated evidence of the defence expert in his opening address to the jury.[132] At the British Columbia Court of Appeal, McEachern C.J. affirmed that a report prepared by a defence expert would normally be privileged and not properly subject to a disclosure order. However, in light of comments made by the defence counsel at the opening of the defence case, and in light of the fact that the expert's report would have to be disclosed in any case as soon as he took the witness stand, there was no miscarriage of justice in ordering the disclosure of the report. The Supreme Court of Canada affirmed this decision but emphasized that *Stone* does not place a reciprocal onus on defence counsel to disclose an expert report to the Crown. *Stone* only speaks to the issue of privilege, and that an expert's report cannot be shielded by solicitor-client privilege. If the expert witness takes the stand or reference is made to the expert's report by counsel, the report must be disclosed. *Stone* highlights the risks involved in having an expert prepare a report that includes statements taken from the accused (or another witness expected to be called at trial). Such statements can be used by the Crown to cross-examine the accused as to alleged inconsistent statements, the practice of preparing expert reports that involve statements of the accused should be avoided.[133] Alternatively, "where the expert does not rely on information from the accused…a well crafted expert report can have a powerful and persuasive effect in concisely summarizing an expert's views."[134]

B. Expert Evaluations and Direct Testimony

The *American Bar Association Criminal Justice Standards on Mental Health* contain standards for conducting expert evaluations. First, the ABA recommends that when lawyers request an evaluation from professionals, they must improve communication with them. For example, if the purpose of the evaluation is to ascertain the defendant's mental condition at the time of the offence, lawyers must explain the nature of the crime and the legal test for

132 [1999] 2 SCR 290 (hereinafter *Stone*).

133 See SK Fenton, "The Defence Expert" (1999) Ontario Criminal Lawyer's Association Papers, online: QL (OCLARP).

134 Fenton at 42.

non-responsibility in their jurisdiction.[135]

Second, both the defence counsel and the mental health professional have a duty to explain the nature, purpose and extent of the evaluation to the client. The expert should explain to the client that the evaluation is not for treatment purposes, the nature of the evaluation techniques and that the expert may be required to relay statements that the client has made in the course of the evaluation to her/him at trial. The client should be made aware that the usual confidentiality that applies to a doctor and patient may not apply in an evaluation.[136] Further, if the expert will be talking to other people about the client, those individuals should be informed about the general nature of the inquiry, about the purpose for obtaining the information, that a report will be prepared based on the evaluation and that the information and its source will not be confidential.[137]

The American Bar Association specifies that lawyers must prepare experts to present direct testimony and respond to cross-examination. The lawyer should explain the legal implications of the expert's clinical observations and that the experts must use terminology understandable by lay-persons. Other evidentiary matters such as privilege should also be explained to the expert.[138] The expert must also be told the requirements for qualification as an expert and should be prepared to present the factual basis for his/her opinions and the reasoning process through which he/she arrived at those opinions.[139]

C. Cross-examination of Experts

Many experts will want to know more about cross-examination. The purpose of cross-examination is to explore and impair or destroy the confidence of the judge or jury in the validity of the expert's opinion.[140] This can be achieved in several ways.

Halleck outlines several cross-examination strategies. First, the expert's credentials may be questioned. Second, the cross-examiner may attempt to show that the testimony of the expert is suspect because he/she is a professional witness who has testified in other cases

135 ABA Criminal Justice Standards on Mental Health, Standard 7-3.5.
136 ABA Criminal Justice Standards on Mental Health, Standard 7-3.5.
137 ABA Criminal Justice Standards on Mental Health, Standard 7-3.5.
138 ABA Criminal Justice Standards on Mental Health, Standard 7-3.5.
139 ABA Criminal Justice Standards on Mental Health, Standard 7-3.9.
140 Halleck, at 202.

with regularity. A reference may be made to the amount of money that the expert is earning for her/his services.

Third, efforts will be made to weaken the factual basis for the expert's opinion. Here the cross-examiner will seek to show that the expert was not thorough in his/her methods or did not spend enough time with the accused. Fourth, the inferences that the expert has made from the data he/she has collected may be attacked. The depth of cross-examination will depend upon the lawyer's knowledge of psychiatric and psychological methods and some of the problem areas discussed above. Fifth, the expert will be asked to clarify any terms he/she has used and to clarify the basis for his/her conclusions. Any conclusions that the expert has reached must be backed up by data. Sixth, the cross-examiner may try to show that the expert does not have a proper understanding of the legal tests under which he/she is testifying.[141]

Although many mental health experts feel that rigorous cross-examination is upsetting, it is useful to remember that it is not they who are being attacked, but their opinions.[142]

While much has been written about strategies for surviving cross-examination, less material is available on effective cross-examination of experts. Rogers and Mitchell suggest three possible strategies. First, in the chip away strategy, the lawyer seeks gradually to change the position of the mental health expert that may provide room for doubt in the minds of the jury. The lawyer encourages the expert to make finer and more arbitrary distinctions until he/she doubts the accuracy of his/her conclusions. The danger with unskilful utilization of this strategy is that the cross-examination may lose momentum and direction. It may also alienate the expert and irritate the court if it appears that the lawyer is splitting hairs.

The pound away strategy involves strong cross-examination aimed at showing the limitations of the expert's evaluation and the frailties of his/her conclusions. It works best with hostile or vacillating experts. The danger of this method is in antagonizing the expert or appearing antagonistic oneself.

The confusion strategy may be used to disarm an expert who has presented an academic approach using technical terms in order to impress the jury. The lawyer focuses on the technical issues and becomes so embroiled in them that the jurors become confused and

141 Halleck, at 202 - 203.
142 Halleck, at 204.

decide to disregard everything that the expert has said. The danger is that the lawyer will appear disorganized and confused herself/himself.[143]

It is important to have an expert in court to advise the cross-examining lawyer. This expert will be able to spot technical weaknesses in the methodology or conclusions reached by the testifying expert.

Generally, books and articles are considered hearsay when they are relied upon for accurate information. The rules of evidence do not permit reliance on books and articles in the cross-examination of experts unless certain criteria are met. The expert can refer to and even quote from other authorities while testifying in chief so long as she/he adopts the opinions contained therein as his own by expressing agreement with them. This allows the trier of fact to accept the opinion as the expert's own. The expert can be cross-examined using texts, articles, and studies by scholars, but only where she/he acknowledges that the works being used are authoritative. Where the authorities of the works being used for cross-examination are acknowledged and adopted by the expert, they are considered to be part of her/his evidence. If the expert acknowledges the authority of the work but rejects its conclusions, she/he can be asked to explain why, and her/his responses can be of relevance to the credibility of the opinion he/she offers.[144]

The Supreme Court was asked to modify the rule that allows authorities to be used in cross-examination only if the expert witness recognizes their authority, so long as the reliability of the work is established independently or by judicial notice.[145] This is the approach taken by many American courts. With the Canadian approach, an expert unfamiliar with the authorities in his/her field cannot be confronted with the opinions of those authorities, which in effect insulates him/her from having to explain the inconsistency of his/her views with those of others in the field.[146] The court in *Marquard* avoided addressing the issue as the Crown failed to meet the more liberal standard of the Canadian court.

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143 Rogers and Mitchell, at 312-319.

144 See *R v Anderson* (1914), 22 CCC 455 (Alta CA) and *Cansulex v Reed Stenhouse Ltd* (1986), 70 BCLR 189 (SC).

145 See *Marquard*.

146 See Paciocco and Stuesser, "The Use of Written Authorities to Examine and Cross-Examine the Expert" at chapter 6, (QL).

Because it is likely that Canadian courts will continue to use experts in cases where mental health is at issue, it may be necessary to become familiar with some of the issues surrounding their use. Under these circumstances, the expert and the lawyer have difficult tasks. Each has to become familiar with territory that is foreign to his/her way of thinking and operating. They also have to develop a working professional relationship in order to provide the best services for the client. This is a difficult, but not impossible, task.

VII. Special Considerations for Experts and Mentally Handicapped Defendants

A. General

While most of the discussions pertaining to the difficulties encountered by experts in testifying when the client has a mental illness apply to the expert testifying as to the mental handicap of a defendant, there are some additional concerns. Although severely handicapped individuals may be diverted before trial, a significant number of moderately handicapped individuals are not even recognized as such by their lawyers. Lawyers are not trained in the mental health area and are not always able to ascertain that a client has a mental disability. Further, many mentally handicapped people have become adept at hiding their disabilities because of the stigma surrounding mental handicap.[147] As a result, few people with mental handicaps identify themselves as disabled when arrested or at any other point in the criminal justice system.[148] Thus, the person with a mental handicap may become involved in a trial without the benefit of any expert evidence as to his/her mental abilities.

When the lawyer recognizes that the accused has a mental handicap that may have affected his/her intention to commit the crime, he/she must decide which type of expert to utilize. It is important to select properly qualified professionals. Often psychiatrists and psychologists are relied upon to provide expertise in this area. However, they may not be the most qualified professionals under these circumstances. Psychiatrists receive virtually no training in issues related to mental handicap. Many writers have found that psychiatrists are

147 J Ellis and R Luckasson, "Mentally Retarded Criminal Defendants" (1985) 53(3-4) George Washington Law Rev. 414 at 430.

148 Ellis and Luckasson, at 431.

not particularly interested in or committed to the study of mental handicap.[149] Further, all psychiatrists' training is focused on the needs of mentally ill persons. Most psychologists' training is limited to the administration of intelligence tests and perhaps tests of adaptive functioning.[150] These experts may have minimal experience in observing and interviewing defendants with mental handicaps.[151] Thus, some special education experts who have training in impaired learning ability and assessment of deficiencies may be more appropriate choice for evaluation. The difficulty with these experts is that many of them have minimal experience and knowledge of forensic issues (legal tests).[152] The *ABA Criminal Justice Standards on Mental Health* preclude mental health professionals from testifying, evaluating, or otherwise participating in the trial and adjudication of a mentally handicapped individual if the mental health professional's expertise does not include training and expertise in the field of mental handicap.[153]

Unfortunately, some mentally handicapped persons also have mental illness. In this case, it may be necessary to consult experts in several fields or those few experts who may have expertise in both fields.

B. Cross-Examination of Mental Handicap Experts

As with other experts, those who measure mental handicaps are subject to vigorous cross-examination because of their methods of evaluation. There are several aspects to the thorough evaluation of a person with who is mentally handicapped. McGee and Menolascino describe the appropriate features of an evaluation:

> An evaluation needs to take into account mental retardation's global impact on every dimension of the person's being and identity: rigidity in thinking, perseveration, expressive and receptive language, socialization skills, interactions with others, attention, memory, impulse control, immature or incomplete concept of causation, understanding of the social situation and morality, self-concept, suggestibility, biased responding, motivation, problem-

149 Ellis and Luckasson, at 484-485.
150 R Petrella, "Defendants with Mental Retardation in the Forensic Services System" (Chapter 4), in R. Conley, R. Luckasson, and G. Bouthilet, eds., *The Criminal Justice System and Mental Retardation* (Toronto: Paul Brookes Publishing Co., 1991) at 82 (hereinafter Petrella).
151 Petrella, at 83.
152 Petrella, at 83.
153 ABA Criminal Justice Standards on Mental Health, Standard 7-3.9.

solving ability, intelligence quotients, and adaptive behaviours.[154]

Ellis and Luckasson state that, depending on the case, any or all of the following will be required: "personality assessment, adaptive behaviour assessment, moral development examination, speech and language evaluation, motoric functioning evaluation, or academic achievement evaluations—as well as mental retardation forensic evaluations in the indicated legal issues."[155] Although there is a catalogue of evaluation criteria, most lay persons focus on the intelligence quotients (IQs) and perhaps the adaptive behaviour indicators as the main measures of mental ability.

The most widely used test for the evaluation of intelligence in adults is the Wechsler Adult Intelligence Scale-Revised (WAIS-IV). It is regarded as highly reliable for the general population; however, little standardization has been completed for persons with mental handicaps, especially those who are severely handicapped. In fact, the test is designed only to assess intelligence quotients above 50. There are also concerns about its reliability for people with mild handicaps. For example, while there are few studies on the reliability of the WAIS-IV for those with intellectual disabilities, there is evidence that suggests that a previous iteration, the WAIS-R, overestimates ability in the borderline ranges by as much as 13 points.[156] Another commonly used test is the Stanford-Binet Scale: 5th edition (SB5). It is more useful for assessing ability in those with severe mental disabilities. It has been criticized for being too dependent on verbal ability, especially at the upper levels.[157] The Bender Gestalt test is used to screen neurological impairment. It identifies organic or emotional problems, indicating whether psychiatric or brain injury tests should be pursued. It is therefore used best in conjunction with other psychological tests.[158] Finally, the Halstead-Reitan is one of the most thorough of the psycho-neurological battery of tests. This test emphasizes the different parts of the brain. For example, it can determine if the front lobe of the brain has been injured,

154 J McGee and F Menolascino, "The Evaluation of Defendants with Mental Retardation in the Criminal Justice System", in R. Conley, R. Luckasson and G. Bouthilet, eds., *The Criminal Justice System and Mental Retardation* (Toronto: Paul Brookes Publishing Co., 1991) at 58 (hereinafter McGee and Menolascino).
155 Ellis and Luckasson, at 489.
156 McGee and Menolascino, at 65-66.
157 McGee and Menolascino, at 66.
158 McGee and Menolascino, at 66.

which could affect the inhibition of aggressive behaviour.[159]

The American Association on Intellectual and Developmental Disabilities (formerly The American Association on Mental Retardation) and the *DSM-5* have the same criteria for categorizing different levels of intellectual disability. Each recognizes four levels of impairment—mild, moderate, severe and profound. While both take into account IQ, these measurements are more impacted by adaptive functioning, as this will determine what supports are needed for the individual. In the past, when these levels were diagnosed by assigning IQ scores, the area that causes the most difficulty in court is where the person has an IQ of approximately 70.[160] There are several reasons for the difficulties. First, lay people tend to think of the IQ as a biological characteristic. However, it is not. It is merely a score on an intelligence test and the score depends on a number of factors such as the particular test used and the motivation of the client. Second, the decision of a cut off at 70 is purely arbitrary and a person with a score of 69 would not have an appreciable difference from one with a score of 71. Yet, one is classified as mildly handicapped while the other is not. Indeed, even the various test scores can vary as much as 20 to 30 points.[161] Further, cultural biases in intelligence testing may incorrectly cause a person to appear to have a mild intellectual disability (mental handicap) because many intelligence tests are based on the white American cultural standards.[162]

In the past, another complicating factor was that psychologists and other mental health experts might have focused on the Intelligence Quotient scores and adaptive functioning when evaluating a person with a mental handicap. Adaptive functioning refers to a person's ability to live in our society and is related to his/her ability with respect to social skills, communication and daily living skills.[163] For example, they will examine the person's lifestyle—does he/she have a job? Has he/she kept the job? Is the person married? The adaptive behaviour score is

159 Per Mary Krasinska, social worker.
160 G Baroff, "Establishing Mental Retardation in Capital Cases: A Potential Matter of Life and Death" (1991) 29(6) Mental Retardation 343 at 345-46 (hereinafter Baroff).
161 Baroff, at 346.
162 T Calnen and L Blackman, "Capital Punishment and Offenders with Mental Retardation: Response to the Penry Brief" (1992) 96(6) American J. on Mental Retardation 557 at 559 (hereinafter Calnen and Blackman).
163 American Association on Mental Deficiency, "New Definition for Mental Retardation" (1984) 4 Mental Retardation 3 at 28-29 as cited in D Praiss, "Constitutional Protection of Confessions Made by the Mentally Retarded" (1989) 14(4) American Journal of Law and Medicine 431 at 441(hereinafter Praiss).

correlated with the level of intellectual functioning and the overall result is the diagnosis of mental handicap.

The inclusion of measures of adaptive behaviour into the assessment of mental handicap has led to difficulties. For example, the criteria do not address whether the adaptive behaviour impairments are directly caused by the person's intellectual functioning (e.g., inability to read) or whether they are merely associated with it (e.g., criminal behaviour). Further, an adaptive behaviour score in the "non-handicapped" range might penalize criminal defendants because it does not assist the court in ascertaining the individual's capacity to form the required intention to commit the crime.[164]

Additional difficulties in assessing brain disorders such as fetal alcohol syndrome arise due to the lack of available resources and knowledge needed to diagnose victims of FASD who may already be embroiled in the criminal justice system. Although it is thought by many that the signs of FASD, such as facial dysmorphology, developmental delays and mental handicap are highly visible, 70 to 90% of children affected by FASD will look normal, have normal physical development and test in the normal range for intelligence. They are generally treated as though they do not have a handicap and are expected to behave and respond as such. However, they are not without a handicap and only lately have the more subtle variations of FASD been diagnosed. Children and adults with Alcohol Related Neurodevelopmental Disorders (ARND) tend to blend in with the general population with the result that their brain injury is never taken into consideration when they come in contact with the criminal justice system. Because people with FASD often have an inability to think laterally or in a rational fashion, and because people with FASD tend to process information differently than the majority of the population, those suffering from FASD or ARND often end up in the criminal justice system. Forensic psychiatrists are not skilled at assessing FASD or ARND. Trial judges have noted that developmental paediatricians are generally the most skilled group of professionals when it comes to diagnosing such brain disorders but that there is a lack of expertise and resources in this area.[165] For instance, in British Columbia, Sunnyhill Hospital and the Asante Center are the only tertiary health care facilities in the province with the expertise

164 Baroff, at 347-49.

165 See *R v Gray*, [2002] BCJ No 428.

to diagnose FASD.

C. Direct Testimony

When testifying on behalf of a mentally handicapped accused, the expert may be exposed to many of the pitfalls that an expert testifying on behalf of a mentally ill accused would face. First, it appears that forensic training is quite rare for mental handicap professionals.[166] This means that lawyers will have to engage in some efforts to instruct these experts on the nature of the mental disorder tests and the legal issues. Second, the mental health expert may be subjected to rigorous cross-examination on the validity of the assessment because of the existence of significant variation in I.Q. and adaptive behaviour scores. This is especially true where the expert is called upon to provide an opinion on the relationship between the mental handicap and the person's ability to appreciate what he/she was doing or the individual's ability to form the requisite intent.

The evaluation of the mentally handicapped client is useful to the lawyer because it provides valuable information. Even if the lawyer decides not to argue that the client was not criminally responsible, the information may be useful in the sentencing stage or to argue for consideration of guilt of a lesser-included offence. Unfortunately, even in the United States cases where expert evidence was provided on the defendant's criminal responsibility, a very small proportion of mentally handicapped defendants were recommended as not criminally responsible.[167] However, perhaps with increased efforts, this number may change.

VIII. The Law—Expert Evidence

A. Qualification of Experts

There are some procedural rules governing the use of expert evidence. Division 2 of Part 5 of the *Alberta Rules of Court* set out the procedural rules for experts and expert reports.[168] For example, Rule 5.35 sets out the sequence in which an experts' report must be served if a party intends to use the evidence of an expert at trial.[169] Unless the parties

166 Ellis and Luckasson, at 489-90.
167 *Petrella,* at 91.
168 *Alberta Rules of Court,* Alta Reg 124/210.
169 *Alberta Rules of Court*, Rule 5.35(1).

otherwise agree or the Court orders otherwise, the sequence of service must be as follows: first, the party who bears the primary onus of proof must serve on each of the other parties the report of that party's expert; second, if the other party or parties has a rebuttal report, they must serve it, and they may include in the report issues not raised in the initial expert report; and third, the party that served the initial expert's report may serve a surrebuttal expert's report that responds only to the new issues raised in the rebuttal report.[170] If an expert changes his/her opinion on a matter in their report after the report has been provided by one party to another, the changes of opinion must be disclosed by the expert in writing and immediately served on the other parties.[171] The *Alberta Rules of Court* also set out the procedure to be followed regarding: questioning experts before trial; the use of an expert's report at trial without the exert present; an expert's attendance at trial; and objection to an expert's report.[172]

Once the matter has proceeded to trial, section 7 of the *Canada Evidence Act* deals with the use of expert witnesses in order to provide opinion evidence.[173] Each side is limited to no more than five expert witnesses unless it has leave of the court. This section does not set out the exact qualifications that an individual must possess in order to be considered an expert witness. However, the common law has arrived at some conclusions about the qualification of experts and the admission of their evidence. If a matter proceeds to court, the expert will be called by counsel as her/his witness.

Once the expert takes the stand, counsel must qualify the expert. The purpose of qualifying the expert is to establish that the individual is an expert and can give opinion evidence. In order to qualify the expert, the lawyer asks a number of questions about the expert's training and experience. The opposing counsel may argue that the court should not accept the evidence because the individual does not have the specific training or experience necessary in the case, that the case does not require an expert opinion because the jury is capable of drawing its own conclusions from the facts, or that the information upon which the expert is likely to base her/his opinion is so unreliable as to create a risk if it were admitted as

170 *Alberta Rules of Court*, Rule 5.35(2).
171 *Alberta Rules of Court,* Rule 5.38.
172 *Alberta Rules of Court,* Rules 5.37, 5.39, 5.40, and 5.36.
173 *Canada Evidence Act,* RSC 1985, c C-5, s 7.

expert evidence, because the jury would be relying on unreliable data or unproved theories.[174] The issue of the competency or qualifications of expert witnesses is a question of law alone and is determined by the trial judge, not the jury.[175] Unfortunately, there are no apparent guidelines governing the judge in her/his assessment.[176]

It is not clear when an expert will be considered qualified to testify. In *R v Kierstead*, a doctor called by the defence stated that he/she was not an expert on the subject of insanity.[177] The court of appeal stated that the doctor did not appear to be an expert and therefore his/her evidence was improperly admitted. At the new trial, which was ordered for reasons unrelated to this ruling, the trial judge held that any objection to the evidence of the doctor went to its weight and not to its admissibility.[178]

In *R v Lyons,* the Supreme Court of Canada approved of the use of psychiatric evidence in dangerous offender applications.[179] Counsel for the accused argued that psychiatrists are unable to predict future events accurately. The Supreme Court of Canada held that the evidence of the psychiatrist was relevant so it should be admitted. The Court held further that, "psychiatric evidence is clearly relevant to the issue whether a person is likely to behave in a certain way and, indeed, is probably relatively superior in this regard to the evidence of other clinicians and lay persons".[180]

Generally, the expertise of the expert is determined in a *voir dire* (trial within a trial; usually not in the presence of the jury). "Expertise" is a modest status that is said to be achieved when the "expert . . . possesses special knowledge and experience going beyond that of the trier of fact".[181] If the expert meets this first threshold level, deficiencies in expertise may affect the weight of the evidence but not its admissibility.[182] An expert witness should not be allowed to offer opinion evidence on matters beyond their established area of expertise.

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174 *Landau*, at 99.
175 *R v Faulds* (1987), 36 CCC (3d) 566 (Ont CA); *R v Stevenson* (1990), 58 CCC (3d) 464 (Ont CA) (hereinafter *Stevenson*).
176 Schiffer, at 198.
177 (1918), 42 DLR 193 (NBSCAD) (hereinafter *Kierstead)*.
178 (1918), 33 CCC 288 (NBSC).
179 (1988), 61 CR (3d) 1 (SCC), affirming (1984), 15 CCC (3d) 129 (NSCA) (hereinafter *Lyons*).
180 *Lyons*, at 48.
181 *R v Beland*, [1987] 2 SCR 398 at 415.
182 See *Marquard* and *R v R(WD*).

However, Canadian court's judgments in this matter sometimes produce conflicting results. In *R v Wade*, the Ontario Court of Appeal approved the qualifications of a general practitioner to testify regarding whether the accused was feigning automatism.[183] Yet in *R v Selles*, the same court failed to qualify a witness as an expert because general practitioners were not held to be qualified to offer opinions about whether psychological harm was suffered by a sexual assault complainant.[184]

In *R v Olscamp*, Charron J held that the expert witness in the case lost her status as an expert because the quality of her/his evidence was so poor as to be unscientific.[185] The Crown proposed a psychologist as expert witness in the case. The psychologist had supervised play therapy sessions conducted by a psychometrist with the complainant. The psychologist would testify that the seven-year-old displayed symptoms of a child who had been sexually abused. The psychologist had never interviewed the child and her opinion was based solely on her observations of the psychometrist's sessions with the child. The court rejected her evidence because there were no existing records kept by the psychologist that could be objectively reviewed and she had no empirical data to support her opinion. The prejudicial effect of the evidence was seen to outweigh its probative value. Evidence "dressed up in scientific language" may be given more weight by a jury that it merits. Despite the decision in *Olscamp*, the Ontario Court of Appeal in *R v L.S.*[186] determined that concerns about the way a witness gives evidence relates to weight and not admissibility, a decision which would seem to disagree with Charron J's judgment in *Olscamp*.

B. Admissibility of Expert Evidence

Once an expert is qualified, the issue becomes whether his/her evidence is admissible. The basic principle in Canadian law is that an opinion based on observed facts is inadmissible because it is the function of the judge to draw any conclusions or inferences. However, an exception is made where the opinion is outside of the experience and knowledge of the jurors. The general rule is that expert testimony will not be admissible unless: (1) the subject matter

183 (1994), 18 OR (3d) 33 (CA), overturned on other grounds [1995] 2 SCR 737.
184 (1997), 34 OR (3d) 332 (CA).
185 (1994), 35 CR (4th) 37 (Ont Gen Div) (hereinafter *Olscamp).*
186 (1999), 133 CCC (3d) 493 (Ont CA).

of the trial or inquiry involves issues beyond the competence of a lay jury to determine if unaided by experts and (2) the witness' expertise was gained through a course of study or habitual practical experience.[187] The function of the expert is to provide the judge and jury with an inference that the judge and jury, due to the technical nature of the facts, cannot make without assistance.[188]

The expert's opinion is admissible to furnish the court with scientific information that is likely to be outside the experience and knowledge of a judge or jury. If, on the evidence presented, a judge or jury can form their own conclusion without help, then the opinion of an expert is unnecessary. In fact, where an expert testifies unnecessarily, his/her opinion may influence the jury because he has impressive credentials.[189] This proposition was adopted by the Supreme Court of Canada in *Abbey,* where Dickson J. stated: "With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference that the judge and jury, due to the technical nature of the facts, are unable to formulate."[190]

To be admissible in court, the expert's evidence must flow from a discipline demonstrating scientific methods, accuracy, and recognized validity.[191] One difficulty in the area of mental disorder is the view that psychiatry is not an exact science. In fact, many psychiatrists admit that their methods and programs are not scientific and that they do not evaluate their work by controlled studies as is common in traditional scientific method.[192] Further, because there are competing theories in psychology and psychiatry, critics have argued that these professions have little science to offer and that much of their testimony fails to meet the legal standard of expertise.[193]

Psychiatric or psychological testimony falls within the category of expert evidence because in some circumstances the average person may not have sufficient knowledge of or

187 *Kelliher v Smith*, [1931] SCR 672 at 684. See also: R v and Phillips (1987), 36 CCC (3d) 481 (SCC).
188 *R v Abbey* (1981), 21 CR (3d) 63 (BCCA) rev'd (1982), 29 CR (3d) 193 at 210 (SCC) (hereinafter *Abbey*).
189 *R v Turner*, [1975] QB 834 (CA).
190 *Abbey*, at 210.
191 Rogers and Mitchell, at 5.
192 Rogers and Mitchell, at 6.
193 Rogers and Mitchell, at 6.

experience with human behaviour to draw an appropriate inference from the facts before him/her.[194] The need for expert evidence in the area of human behaviour is sometimes negated by the attitude that judges and juries are thoroughly knowledgeable about human nature and that no more is required.[195] However, there are certain circumstances where expert evidence on human behaviour is relevant and necessary. For example, in *Lavallee*, expert evidence of the effect of battering on wives and common law partners was admitted because battered wife syndrome is an area that is subject to a large group of myths and stereotypes and beyond the knowledge of the average juror.[196] Similarly, in *Kagan*, expert evidence of the characteristics of Asperger's Syndrome should have been admitted, because Autism is an area about which little is known. The average juror may not know that personality traits precipitated by Asperger's Syndrome could have led the accused in this case to believe on reasonable grounds that he was in danger and, as a result, acted in self-defence.[197]

Opinion evidence may not be given upon a subject matter that is within the "common stock of knowledge".[198] However, even if the matter is within the jury's competence, expert evidence may be admitted if the expert's special knowledge may help the jury. In *Fisher* (Ont), the accused was charged with murder by stabbing his victim 15 times. He raised the defence of drunkenness. A dispute arose as to the admissibility of a psychiatrist's opinion that anyone capable of doing what the accused was alleged to have done would possess the capacity to form the intent to commit murder. Counsel for the accused argued that the psychiatrist had never conducted a medical examination of the accused and was asked to give his opinion based upon a statement of hypothetical facts. The Ontario Court of Appeal held that the doctor was better qualified than the layperson to express such an opinion and stated:

> It is trite to say that a witness may not give his opinion upon matters calling for special skill or knowledge unless he is an expert in such matters nor will an expert witness be allowed to give his opinion upon matters not within his particular field. Finally, opinion evidence may not be given upon a subject matter within what may be described as the common stock of knowledge. Subject to these

194 *Lavallee*.
195 *Lavallee*, at 111.
196 *Lavallee*, at 112 -13.
197 *Kagan*, at 11.
198 *Fisher v The Queen* (1961), 130 CCC 1 (Ont CA), aff'd [1961] SCR 535 (hereinafter Fisher (Ont)).

> rules, the basic reasoning which runs through the authorities here and in England, seems to be that expert opinion evidence will be admitted where it will be helpful to the jury in their deliberations and it will be excluded only where the jury can easily draw the necessary inferences without it.[199]

The Supreme Court of Canada upheld this decision, adopting the reasons expressed by the Court of Appeal.

In *R v Wald,* the accused were convicted on a number of charges involving a sexual assault and unlawful confinement.[200] The complainant claimed that she could not remember anything that happened from approximately 6 o'clock in the morning after the alleged offences took place until approximately 11 o'clock in the morning two days later. It was the theory of the defence that she feigned this memory loss in order to avoid cross-examination on inconsistent statements that she had made during this time. The lawyers for the accused sought to call an expert with a PhD in psychology and a specialty in learning and social psychology. In a *voir dire*, the trial judge permitted her to testify as an expert in the field of learning of which memory is a subset. The expert had been present during part of the testimony of the complainant and had been able to see a transcript of all of the evidence of the complainant and the cross-examination of the complainant's sister. She testified that the evidence was inconsistent with the memory loss of which the complainant had testified. The trial judge refused to permit the expert to testify before the jury because she had no clinical experience in diagnosing this kind of memory loss, she was not qualified to express an opinion on the effect of drugs on memory loss, she had not considered the trauma of reporting the events as distinct from the events themselves, there had been no medical assessment of the complainant, and the jury was equally capable of assessing the evidence as to her memory loss.

The Court of Appeal held that the trial judge erred in refusing to allow the testimony. First, the fact that the expert did not have clinical experience in diagnosing memory loss did not render her evidence inadmissible. The court relied upon the case *R v Godfrey* for the

199 *Fisher*, at 19 (CA).
200 (1989), 47 CCC (3d) 315 (Alta CA) (hereinafter *Wald).*

proposition that an expert does not have to acquire his/her skill or knowledge in a particular way.[201] Second, it was not necessary for anyone to have examined the complainant. It is acceptable if a psychiatrist is provided with a statement of hypothetical facts upon which he may express an opinion.[202] The evidence of a psychologist should not be treated any differently than that of a psychiatrist. Third, if the expert was not qualified to testify as to the effect of drugs on memory loss, then he should not have been permitted to do so. However, he could still testify on the other aspects of memory loss. All of the factors mentioned by the trial judge went to weight and not admissibility. Further, the Court of Appeal held that amnesia as a loss of memory is a mental disorder that does not fall within the common stock of knowledge.

In *R v Osolin,* the accused was charged with kidnapping and sexual assault. At issue was whether the victim consented to the sexual assault. During the alleged assault, the accused had tied the victim.[203] He argued that the victim had consented to this activity. The defence sought to introduce expert evidence that the accused had voyeuristic sexual tendencies and not sadomasochistic ones. In relying upon *Fisher* (Ont), the trial judge ruled that the evidence was inadmissible since it would not give the jury any appreciable help on the issue of consent or the belief of the accused about the consent. The British Columbia Court of Appeal upheld this ruling.

Another issue that has arisen is whether expert evidence that arose during the accused's fitness trial is admissible to show he/she is mentally disordered. In *R v Curran,* the accused was charged with theft under $200 and pleaded not guilty to the charge.[204] The accused was subsequently remanded to hospital for a psychiatric examination. The Crown called a psychiatrist who testified as to the accused's fitness to stand trial. He also gave evidence as to the mental condition of the accused. After it was determined that the accused was fit, the trial continued. At the conclusion of the trial, the defence counsel urged the judge to find the accused not guilty because there was insufficient evidence to convict him.

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201 (1974), 18 CCC (2d) 90 (Alta SCAD), leave to appeal dismissed 18 CCC (2d) 90n (SCC).
202 See *Fisher*, at 21.
203 (1992), 10 CR (4th) 159 (BCCA), leave to appeal to SCC granted June 4, 1992; application by AG to intervene on non-constitutional issue dismissed [1993] 2 SCR 313 (hereinafter *Osolin*).
204 (1974), 21 CCC (2d) 23 (NBCA) (hereinafter *Curran*).

However, defence counsel did not raise the issue of insanity. The trial judge found the accused not guilty on account of insanity and ordered him committed to the Provincial Hospital. The accused appealed this verdict on two grounds; one was that the trial judge erred in considering the psychiatric evidence that was given in order to determine of the accused was fit to stand trial. In allowing the accused's appeal and ordering a new trial, the Court of Appeal of New Brunswick held that the evidence given by the expert on the issue of fitness is only admissible if the accused specifically consents. In this case, the accused did not consent, and therefore the evidence was inadmissible.

In 1994, the Supreme Court of Canada summarized these criteria and set out a test for determining the admissibility of expert opinion evidence in the case of *R v Mohan*.[205] One author suggests that *Mohan* "has provided a template for case-by-case assessment."[206] Although *Mohan* did not change existing law, it clarified the approach to be taken towards the use of expert evidence. Before the court applies the *Mohan* test, however, they must establish that the opinion or methodology of the expert is grounded in science. The *Daubert* principles referred to earlier can be imported for use in this assessment. The opinion or evidence "must rest on established organizing principles and demonstrated truths that emerge from an identified discipline."[207] Although this prerequisite has emerged from *Mohan*, it is known in Ontario as the *McIntosh* test.[208] Once this precondition is met, the admissibility of evidence is determined according to the variable application of the four criteria articulated in

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205 See also: *R v Parrott* [2001] SCJ No. 4; *R v DD* [2000] SCJ No 44; *R v J-L,* [2000] SCJ No 52, (hereinafter *R v J-L*); R v Connors, 2006 NLTD 68. Each of these cases uses the "*Mohan* Criteria" to decide whether the expert evidence in question is outside the ordinary knowledge and experience of the trier of fact and if not, whether the expert evidence should be excluded because it purports to show only lack of general disposition and is not saved by the "distinctive group" exception recognised in *Mohan*.

206 Paciocco, at para 28. Paciocco notes, however, that many judges have found refuge in the practice of relying on precedent. If the Supreme Court of Canada or a cluster of lower courts decide that a specific kind of expert evidence is admissible, its reliability effectively becomes insulated from a Mohan scrutiny even where the integrity of that science has not been properly challenged. Paciocco, at para 25.

207 Paciocco at para 13.

208 *R v McIntosh* (1997), 35 OR (3d) 97 (CA), leave to appeal to SCC refused (1998), 111 OAC 395 (hereinafter *McIntosh)*. "While the *McIntosh* test emerged from *McIntosh, Mohan* is the leading case on the criteria for the admission of expert evidence. Although Mohan does not list 'scientific foundation' as a separate precondition to admission it is an obvious prerequisite. The *Mohan* case turned ultimately on the fact that the theory of the defence was not supported by a scientific theory. The Mohan court melded the absence of a 'scientific foundation' into its 'necessity' and 'relevance' inquiry. Since 'scientific foundation' is a precondition to admissibility, however, the Ontario Court of Appeal has adopted the sage practice of treating it separately." See Paciocco, at para 13.

Mohan:

1. Evidence must be necessary to assist the trier of fact and assist the trial judge in deciding whether the behavioural profile which the expert is putting forward is in common use as a reliable indicator of membership in a distinctive group;
2. The evidence must have logical and legal relevance;
3. The evidence given by the expert must not offend other exclusionary rules of evidence, most particularly:
    a. the rule against bad character evidence,
    b. the hearsay foundation rule,
    c. the *Mohan* rule relating to exculpatory character, and
    d. the rule against oath-helping.
4. Evidence must be given by a properly qualified expert.

The *Mohan* criteria should not be applied as rigid, technical rules.[209] Rather, they should be viewed as context-specific criteria for admissibility.[210] The trial judge must act as a gatekeeper in order to ensure that expert evidence is admitted only in cases where it is warranted.[211] If the trial judge determines that any costs or problems caused by admitting the expert evidence would outweigh the benefits in doing so, the evidence will be inadmissible, either in whole or in part.[212]

Necessity in assisting the trier of fact is the first element of the *Mohan* criteria for determining whether expert evidence should be admissible. According to Paciocco, expert evidence will be admissible "where the expert deals with a subject matter that ordinary people are unlikely to form a correct judgement about without assistance[213]…where the expert provides information likely outside the experience and knowledge of the judge or jury[214]…or where the technical nature of information requires explanation."[215] Expert evidence

209 Paciocco and Steusser at 208.
210 Paciocco and Steusser at 208.
211 Paciocco and Steusser at 208.
212 Paciocco and Steusser at 208. The "benefits" of expert testimony mean the probative value of the evidence. See *R v D(D),* [2000] SCR 275 at para 49, 148 CCC (3d) 41. The "costs" are "the distracting and time consuming thing expert testimony can become." For example, the credentials of the expert or the scientific or technical content of expert testimony can cause triers of fact to adopt expert evidence without adequate scrutiny.
213 For example, the cause of a fire or the interpretation of forensic clues regarding the cause of a car crash. See: *Hung-Huang Enterprises Ltd. v Sovereign General Insurance,* [2001] OJ NO 2678; *Taylor v Sawh*, [2000] OJ No 257 at para 18.
214 For example, parliamentary procedures. See: *Goddard v Day,* [2000] AJ No 1377 (QB).
215 For example, the analysis of DNA. See: *R v Terciera*.

should not be admissible if normal experience enables triers of fact to understand the nature of the issue in question.[216]

Paciocco notes that "depending on the starting point that one adopts, the necessity test can be applied with varying degrees of strictness."[217] Justice O'Connor in the Ontario Court of Appeal case *R v F(DS)* stated that "[t]here is no exact way to draw the line between what is the normal experience of a judge or a jury and what is not. The normal experiences of different triers of fact may differ. Over time the subject matters that come within the normal experiences of judges and juries may change. The normal experiences of those in one community may differ from those in other communities. In the end, the court in each case will be required to exercise its best judgment in deciding whether a particular subject matter is or is not within the normal experience of the trier of fact".[218]

Although the evidence must be "necessary", and for novel science it is "essential," "absolute necessity" is not required.[219] An important consideration in assessing necessity in a particular case may depend on whether the expert evidence relates to a medical or psychiatric condition or whether the behaviour or ability being described is peculiar to a class of persons to which jurors do not belong. In *R v Lovie*, the Ontario Court of Appeal was unsympathetic to defence claims that the trial judge should have paid more attention to defence psychiatric evidence when directing the jury.[220] The Court said that the evidence should not have been admitted on the issue of planning and deliberation because the experts offered no diagnosis of the accused. The experts simply explained why he committed the murder, which, absent mental disorder or other exceptional circumstances, the triers of fact could judge for themselves. Appellate courts will generally show deference to the opinions of the trial judge on the necessity issue.

The second *Mohan* criteria for admissibility is that evidence given by the expert must

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216 For example, a psychologist's evidence that witnesses have problems with perception and recall when events are brief and stressful would not be outside the normal experience of a trier of fact. See: *R v McIntosh* (1997), 117 CCC (3d) 385 (Ont CA).

217 Paciocco refers to *R v C(G)* (1997), 8 CR (5th) 21 at para 59 and Justice Hill's comments in that case. See Paciocco, at para 30.

218 *R v F(DS)* (1999), 169 DLR (4th) 639 at para 65 (Ont CA) (hereinafter *F(DS)*).

219 *R v Bell*, [1997] NWTR 45 at para 19 (CA) (hereinafter *Bell*).

220 (1995), 24 OR (3d) 836 at 848 (CA) (hereinafter *Lovie*).

have logical and legal relevance. The court must weigh the importance of the evidence by weighing its probative value and its reliability against the costs associated with calling it. The costs under consideration are economic costs as well as costs associated with time spent and the degree to which the evidence may confuse the trier of fact or solicit undue deference from a jury. Legal relevance is determined if the benefits of calling the evidence outweigh its potential costs. To satisfy the condition for logical relevance the expert opinion must be so related to a fact in issue that it has some tendency as a matter of human experience to help resolve the issue. This has two components. The first, referred to as "materiality" asks whether what is sought to be proved is at issue in the case.[221] The second, referred to as "relevance" asks whether the evidence has a tendency, as a matter of human experience or reason, to assist in establishing what it is being used to prove.[222] It is imperative that the expert evidence remain relevant and that it be used solely for relevant purposes.

The third *Mohan* criterion requires a court to consider exclusionary rules. In effect, this means that the expert evidence must meet each of the other *Mohan* standards while not contravening other exclusionary rules of evidence.

The law generally prevents the use of character evidence where it is offered to support an inference that the accused is "the type of person" who would have committed the offence in question.[223] This type of evidence often presents a serious risk of prejudice and reflects a distrust of jury members and how they may use the information, and has the potential to create distracting and time-consuming side issues. There is often insecurity surrounding the relevance of the evidence and its true probative value where the character of the person is not directly in issue.

The Crown also cannot present evidence that shows specific acts of discreditable conduct by the accused on other occasions, or the general character of the accused for the purpose of establishing that the accused is the kind of "bad person" who has a tendency to commit the

221 See *R v C(G)* (1997), 8 CR (5th) 21 (Ont Gen Div). Hill J excluded post-traumatic stress disorder evidence that would confirm sexual abuse. He noted that such evidence could have probative value if used for rehabilitative purposes. For example, if defence counsel was to address any of the symptoms of post-traumatic stress-disorder as constituting indicia of her unreliability as a witness (e.g., emphasizing her erratic behaviour), then this would make the evidence material.

222 See *R v B(L)* (1997), 35 OR (3d) 35 at 44-45 (CA) (hereinafter *B(L)).*

223 See *R v Morris*, [1983] 2 SCR 190 and *Mohan.*

crime with which he or she is charged.[224] However, the evidence will be admissible if its probative value "significantly" outweighs its prejudicial effect.[225]

An expert opinion can be based on a mélange of admissible and inadmissible information, although there must be some admissible evidence presented to establish the factual foundation on which the expert opinion is based. This is referred to as the hearsay foundation rule. The expert can describe both the admissible and the inadmissible information upon which he/she has relied. The reason for this is to explain the foundation of his/her opinion for the trier of fact. The inadmissible information is received solely to enable the trier of fact to understand and assess the expert opinion. An expert opinion is admissible even if it is based on inadmissible information, as the expert is allowed to relate inadmissible information that forms part of the basis of his or her opinion. However, the facts upon which the opinion is based must be found to exist on the basis of admissible evidence.[226] In *Lavallee* the Supreme Court of Canada asserted that although it is necessary for the facts supporting the opinion to exist, it is not necessary to establish each and every fact on which the expert relied. However, the judge must caution the jury that the more an expert relies on facts not proved in evidence the less weight the jury may attribute to the opinion.[227]

The rule against oath helping is based on the idea that the judge and jury can decide for themselves whether a witness is credible and the evidence reliable.[228] According to this rule, an expert is forbidden to offer an opinion on whether a witness is telling the truth for the purpose of bolstering the credibility of the witness. Thus, evidence that is presented solely for the purpose of proving a witness is credible or truthful would not be admissible.[229] The rule against oath helping also prohibits witnesses from offering an opinion that another witness is not credible.[230]

In *R v Lovie,* the rule against oath helping was considered breached when defence psychiatrists failed to offer any diagnosis relating the accused and simply repeated his reasons

224 See *Marquard*, *Pascoe* and *B(L).* This can also be referred to as the "similar fact evidence" rule.
225 See *R v Arp*, [1998] SCJ No 82. See also *R v B(CR)* (1990), 76 CR (3d) 1 (SCC).
226 See *Abbey*.
227 Paciocco and Steusser, at 141.
228 See *R v Beland* (1987), 60 CR (3d) 1 (SCC).
229 *R v Llorenz*, [2000] OJ No 1885 at para 27 (hereinafter *Llorenz*).
230 *R v Rogers* (2005), 198 CCC (3d) 449 (BCCA).

for why he committed a murder.[231] The rule was also violated in *R v Sault* when the expert testified that a bruise on the complainant was caused by a sexual assault when the opinion was based entirely on the expert's belief in what the complainant said.[232] However, although the rule prevents an expert about giving advice "about" credibility, it does not preclude expert testimony "relevant to" credibility—a distinction that makes the rule difficult to apply.[233] Additionally, Paciocco states that "if there is a utility apart from simple oath-helping in having a witness express an opinion on the credibility or reliability of another witness, and the probative value of that opinion outweighs the risk of prejudice it presents, an opinion on the credibility or reliability of another witness can be received."[234]

The last of the requirements is the rule regarding properly qualified experts, which has already been discussed.

Mohan did not include any criteria that stated that expert witnesses need to have, and have the appearance of, impartiality in order to have their testimony admitted, though Canadian Courts often infer it. Some Courts have also dealt with this by including impartiality under the relevance branch of the *Mohan* criteria, such as in *R v Abbey*.[235] The necessity of impartial experts was recently discussed in *Abbott and Haliburton Company v WBLI*. This was a civil case concerning professional negligence. The plaintiffs commissioned an expert in forensic accounting to defend their motion, but the expert's affidavit was expunged by the trial judge, because the expert worked for the plaintiff 's new accounting firm and had a financial stake in the outcome of the trial. While there was no evidence that the witness was partial in actuality, the appearance of impartiality was enough for the trial judge to not admit her report. On appeal to the Nova Scotia Court of Appeal, the Court reversed this decision, and held that the appearance of impartiality should not be considered when deciding admissibility, but instead should be applied to the weight of the testimony.[236] The case was once again appealed to the

231 (1995), 24 OR (3d) 836 (CA) (hereinafter *Lovie).*

232 [1999] OJ No 504 (Ont CA), (QL).

233 In *R v B(FF),* [1993] 1 SCR 697, the court referred to this same distinction as one between evidence directed at the truthfulness of the witness (which violates the rule) and evidence directed at the truth of the testimony (which does not). See Paciocco, at para. 70.

234 Paciocco at 188. See: *Llorenz* at paras 30-31; *R v Burns*, [1994] 1 SCR 656.

235 *R v Abbey*, 2009 ONCA 624, 97 OR (3d) 330.

236 *Abbott and Haliburton Co v White Burgess Langille Inman*, 2013 NCSA 66, 2013 CarswellNS 360.

Supreme Court of Canada, which reversed the Court of Appeal's decision, and ruled that impartiality must be taken into account when judging the admissibility of expert evidence, in conjunction with the other *Mohan* criteria.[237]

In summary, witnesses generally testify about facts and the judge or jury draws inferences from those facts. However, where the inference calls for special knowledge, an expert in that field of knowledge may provide an opinion. The expert witness draws on special scientific information that is likely to be outside the field of knowledge or experience of the trier of fact. If the trier of fact can form her/his own conclusions without help, the expert's opinion will be unnecessary. The expert must possess the necessary qualifications to form her opinion and the facts upon which the opinion is based must be found to exist on the basis of admissible evidence, although the expert's general opinion can be based on both admissible and inadmissible evidence. The judge determines if the expert is properly qualified in a particular area of expertise. These issues will be discussed in further detail in the following sections.

C. Purposes for Admitting Expert Evidence

Counsel may seek to have expert evidence admitted for a variety of purposes. Aside from using the expert evidence to analyze the mental condition of the accused, counsel may also use expert evidence to show competence, credibility and character.[238] Expert evidence may also be used to help prove that the accused lacked the required level of intention to commit the crime.

When the expert is testifying as to the competence of the accused to testify, she/he is asserting that the accused is able to give sworn or affirmed evidence in court.[239] Where there is an issue of mental disorder, the person's capacity to testify may be affected. The competence of an adult witness to give evidence is presumed unless an objection is raised.[240] Once the objection is made, the judge must conduct an inquiry as to whether the person understands the nature of an oath and whether the person can communicate the evidence.[241]

237 *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23, 2015 CSC 23.
238 Schiffer, at 190-196.
239 Schiffer, at 190.
240 *Prescott v Jarvis* (1849), 5 UCQB 489 (CA) as cited in Schiffer, at 190.
241 See s 16 of the *Canada Evidence Act*, RSC, 1985 c C-5.

The evidence of the expert may be useful to assist in situations where the mental handicap or mental illness of the proposed witness may prevent her/him from properly testifying. The mere fact that a person is suffering from a mental disorder does not necessarily exclude her/him from testifying. However, where the delusions of the proposed witness relate to the very subject of her/his testimony, the evidence of such witness may have to be excluded. In *Hawke,* it was held that the reception of such evidence was grounds for a mistrial.[242]

Second, psychiatric evidence may be utilized to assist in ascertaining the credibility of the witness. However, the judge or jury ultimately determines the credibility of the witness.[243] This is only the case where her/his credibility relates to the possibility that he/she is mentally disabled. The expert evidence is admissible to show that the witness suffers from a mental disability that affects the reliability of her/his evidence. The evidence will be admitted to show the basis for the opinion that the witness may not be reliable and to show the extent to which the credibility of the witness is affected.[244] In *R v Phillion,* the Ontario Supreme Court allowed the defence to call psychiatric evidence that the accused was truthful and permitted evidence of the basis of that opinion to be disclosed to the jury.[245] Where no evidence exists that a witness' mental abnormality affects her/his credibility, there is no foundation for the reception of medical evidence related to credibility.[246]

Expert testimony may also be admitted to show character. The testimony is used to prove that because of her/his disposition or nature, the person is more or less likely to have committed the act or to have had the required intention. Generally, evidence of the accused's general character will be allowed only as to her/his reputation and not as to his/her disposition. Therefore, once an accused has put his/her general character in issue, the Crown

242 The issue of competency to testify is discussed in Chapter Three, Solicitor and Client Issues.

243 *Marquard*. The Supreme Court also held that the witness must be expert in the particular area of human conduct; the evidence must be the sort that the jury needs because the problem is beyond their ordinary experience; and the jury must be carefully instructed as to its function and duty in making the final decision without being unduly influenced by the fact that an expert gave the evidence.

244 *Toohey v Metropolitan Police Commissioners*, [1965] 1 All ER 506 (HL); followed in *R v Hawke* (1975), 7 OR (2d) 145 (CA) (hereinafter *Hawke)*, *Wald,* and *R v Rosik* (1970), 13 CRNS 129 (Ont CA), aff'd (1970), 14 CRNS 400 (SCC) (hereinafter *Rosik*); *R v Nickerson* (1993), 21 CR (4th) 262 (NSCA). But see *Osolin* where expert testimony was not admitted where the witness was capable of giving reliable evidence, although she was also capable of lying.

245 *R v Phillion* (1972), 21 CRNS 169, aff'd (1972), 37 CRNS 362 (Ont CA), aff'd (1977), 37 CRNS 361 (SCC) (hereinafter *Phillion*). See also: *R v Béland,* [1987] 2 SCR 398.

246 *R v Desmoulin* (1976), 30 CCC (2d) 517 (Ont CA).

cannot put in expert evidence regarding his/her disposition.[247] However, if the offence has distinctive characteristics that constitute a special or extraordinary class, evidence of character is admissible to show that the accused does or does not fall within this class of persons.[248]

Expert character evidence has been admitted when the defence wishes to show that a third party was more likely to have committed the offence because of her/his mental or emotional state. The length to which the defence may go depends upon the relevance of the evidence. In *R v McMillan*, the accused's infant daughter died of a fractured skull. The accused made statements to the police to the effect that he had hurt the baby. At trial, he testified that he made the statements in order to protect his wife.[249] A psychiatrist called by the defence testified that the wife suffered from a psychopathic personality disorder and that she would be a danger to her child. Other witnesses were also called to testify as to the wife's violent behaviour. These witnesses were called to support the defence theory that it was more likely that the wife had caused the baby's injuries. The Crown was not permitted to cross-examine the psychiatrist or to call evidence in reply as to the mental condition of the accused. The accused was acquitted.

At the Court of Appeal it was argued that the psychiatric evidence should not have been admitted or that the Crown should have been able to cross-examine the psychiatrist or to call evidence in reply. The Court of Appeal held that psychiatric evidence on the personality traits of an accused or another is admissible provided that (a) the evidence is relevant to some issue in the case, (b) the evidence is not excluded by a policy rule, and (c) the evidence falls within the proper sphere of expert evidence.[250] Further, because the entire nature of the defence had the effect of asserting that the accused was a normal person, the Crown was entitled to show that the accused had his own difficulties. The accused had opened up the question of his own mental makeup by introducing psychiatric evidence to show that his wife was more likely to have caused the injuries. As a result, the Crown should have been permitted to call psychiatric evidence in reply and to cross-examine the defence psychiatrist.

The Supreme Court of Canada agreed with the Ontario Court of Appeal and added that

247 *Lowery v The Queen*, [1974] AC 85; *R v Robertson* (1975), 29 CRNS 141 (Ont CA) (hereinafter *Robertson*).
248 *Thomson v The King,* [1918] AC 221 as cited in Schiffer at 195.
249 (1975), 29 CRNS 191 (Ont CA), aff'd [1977] 2 SCR 824 (SCC) (hereinafter *McMillan*).
250 *McMillan*, at 205 (CA).

the defence was limited by the relevance of the evidence when seeking to produce evidence that some third party, by virtue of her mental condition, is a more probable perpetrator. There must be some connection to the offence in order for the evidence to have probative value.[251]

Expert evidence may also be admitted where the identity of the accused is at issue. In *R v Walker*, a psychiatrist testified that the circumstances of the assault crime indicated that it must have been committed by a person with antisocial personality disorder.[252] The psychiatrist found that as there was no indication that the accused suffered from this disorder, it was highly unlikely that he had committed the offence. In convicting the accused, the trial judge indicated that he found this evidence of no assistance as the psychiatrist could not definitely say that the accused could not have committed the offence. In ordering a new trial, the Ontario Court of Appeal held that the opinion of the psychiatrist was relevant. It was an error in law to hold that the opinion had to rule out the possibility of the appellant being the perpetrator in order for that evidence to be useful to the court on the issue of identification.

In *R v Mohan,* the Ontario Court of Appeal held that opinion evidence is admissible in a case where it would appear that the perpetrator of the crime is a person with an abnormal propensity or disposition that stamps him as being a member of a special and extraordinary class.[253] An expert was available at trial to testify that the sexual offences of which Mohan was accused were unlikely committed by the same person and that the persons who committed the sexual offences were paedophiles and sexual psychopaths. It was his opinion that the accused did not fit into these classifications. The trial judge, however, did not permit the expert to testify about these issues and the accused was convicted. The Supreme Court of Canada reversed the decision of the Court of Appeal after an appeal by the Crown from the decision allowing the respondent's appeal from conviction for sexual assault. The appeal was allowed on the grounds that the expert evidence was inadmissible. The trial judge found that there was no evidence to indicate that the profile of a pedophile or psychopath was

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251 The connection between the alternate suspect and the offence does not need to be established by direct evidence. In *R v Grandinetti* (2005), 191 CCC (3d) 449 (SCC) at para 47, the Supreme Court stated that "[t]he evidence may be inferential, but the inferences must be reasonable, based on the evidence, and not amount to speculation."

252 (1990), 57 CCC (3d) 207 (Ont CA) (hereinafter *Walker).*

253 (1992), 71 CCC (3d) 321 (Ont CA), (hereinafter *Mohan)*. Reversed [1994] 2 SCR 9.

standardized to the extent that it could be said that this profile matched that of the offender depicted in the charges. The psychiatrist's group profiles were not reliable enough to say that the evidence was necessary to clarify an otherwise inaccessible matter.

Where psychiatric evidence is tendered to show that an accused's psychological makeup does not include a tendency to be violent and where the crime is "ordinary", it is inadmissible and a new trial is usually ordered. In *Robertson,* defence counsel was permitted at trial to admit psychiatric evidence that the accused, who was charged with murder, did not have violent or aggressive tendencies. The victim, a nine-year-old girl, was likely kicked to death. The Ontario Court of Appeal, in finding that the evidence was inadmissible and in ordering a new trial, held that "evidence that the offence had distinctive features which identified the perpetrator as a person possessing unusual personality traits constituting him a member of an unusual and limited class of person would render admissible evidence that the accused did not possess the personality characteristics of the class of persons to which the perpetrator of the crime belonged".[254] Although this case showed an act of great brutality, it could not be said that this act would only be committed by a person with recognizable personality traits. Therefore, the psychiatric evidence as to the non-violent character of the accused was not admissible.

In *Morin,* the accused was acquitted at trial on a charge of first degree murder. At trial, the Crown attempted to have evidence provided by a psychiatrist ruled as relevant to the issue of identity.[255] The evidence was that the accused, suffering from schizophrenia, was a person quite capable of committing the type of offence they were considering in the case. The trial judge instructed the jury that they must not use that evidence as proof, or indication of proof, that the accused committed the murder. On Appeal to the Ontario Court of Appeal, the Crown successfully argued that the evidence was relevant and admissible as proof of identity. The Supreme Court of Canada reversed the Court of Appeal. The Court held that the evidence, while relevant, should be excluded because its probative value did not exceed its prejudicial effect. Further, in order to be relevant on the issue of identity, the evidence must tend to show that the accused shared a distinctive unusual behavioural trait with the perpetrator of the

254 *Robertson*, at 183.
255 *R v Morin*, 44 CCC (3d) 193, [1988] 2 SCR 345.

crime. The trait must be "sufficiently distinctive that it operates as a badge or mark identifying the perpetrator."

In summing up the authorities in the area, the Quebec Court of Appeal held in *R v Garfinkle* that psychiatric evidence with respect to personality traits of an accused is admissible if: it is relevant to the issue of identity or some other issue; it is not excluded by a policy rule; and it falls within the proper sphere of expert evidence.[256] If the offence alleged is characteristic of a disposition that is abnormal or outside ordinary human experience, then psychiatric evidence will be admissible to show the accused does not have that disposition.[257] Only the accused may adduce psychiatric evidence in these cases, as a policy rule of fairness prevents the Crown from doing so.[258] In *R v Abbey*, the Supreme Court held that a psychiatric opinion was admissible, even where it was based on inadmissible hearsay, where the sanity of the accused was at issue, as long as the facts upon which the psychiatric opinion were based were be proved by admissible evidence.[259]

In addition to showing competence, credibility and character, medical evidence may be admissible to show that the accused lacked the required level of intention to commit the crime. In *R v Meloche,* the accused was found guilty of the murder of three of his superiors at work. At trial, the defence sought to introduce evidence of earlier suicide attempts by the accused to show that the accused did not have the requisite intent to commit murder.[260] The trial judge excluded the expert evidence. On appeal from his convictions, the Quebec Court of Appeal ordered a new trial, holding that the trial judge had erred in excluding the psychiatric evidence. The evidence was relevant to the accused's mental state at the time of the offence and should have been admitted.

Thus, although the main reason for using expert testimony may be to obtain an opinion as to the mental condition of the accused at the relevant time, there are other purposes for using expert testimony.

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256 (1992), 15 CR (4th) 254-256 at para 4 (Que CA) (hereinafter *Garfinkle*).
257 *Garfinkle.*
258 *Garfinkle.*
259 *R v Abbey*, [1982] 2 SCR 24, 69 CCC (2d) 394.
260 (1975), 34 CCC (2d) 184 (Que CA) (hereinafter *Meloche*).

D. Basis for Opinion

The calibre of expert opinion is dependent upon its foundation in fact, and the relevance of the theory being advanced to the facts of the case. The best source of diagnostic material to be used in formulating an opinion is personal examination of the accused. The law does recognize, however, that mental health experts may be asked to testify based on other means of gathering information. These include hearing or reading transcripts of all of the evidence presented in the courtroom, the presentation of information to the expert in the form of a hypothetical question or expert interviews with the accused or others. Some of these methods are perhaps more reliable than others. The way in which the expert's opinion is formulated may affect its weight. This is discussed below.

The admissibility of expert opinion based upon less than totally reliable information has been an issue for a long time. The issue first arose in the context of experts who had not directly examined the accused. In *M'Naghten*, it was held that a doctor who had been present in court and heard the evidence could be asked for his opinion as to whether the evidence, supposing it to be true, showed a state of mind incapable of distinguishing between right and wrong. This was followed and expanded upon in *R v Dubois*.[261] It was held that in cases where the defence of insanity had been raised, a medical expert who had not been present in court but had read all of the evidence and who assumed the facts were as stated to him, could give an opinion on the whether the accused was capable of distinguishing right from wrong. More recently, in *Fisher*, the Supreme Court of Canada allowed a psychiatrist to express his opinion as to the accused's capacity to form the required intent for murder, based on the strength of having read the accused's statement.

There are some criticisms of this approach, however. If the expert testifies after hearing or reading all of the evidence, and some of the facts are controversial, there is a danger that the judge or jury will not know upon which facts the expert based her/his opinion. This could render the psychiatric evidence useless.[262]

Traditionally, experts have provided their opinions in court through hypothetical questions. The expert is asked to assume that certain facts as recited by counsel are true and

261 (1890), 17 QLR 203 (Que QB) (hereinafter *Dubois*).
262 Schiffer, at 202-203.

to base his/her opinion on them. The use of the hypothetical question is arguably more reliable than expert testimony after hearing or reading the transcript. The content of hypothetical question makes it clear which facts the expert has assumed are true when formulating his/her opinion. If the judge or jury finds that the facts assumed by the expert have been proven by other evidence, the expert's opinion becomes relevant.

While evidence about the accused's state of mind may ordinarily be given after a hypothetical question, if the facts are contradicted, they may be put to the expert in a direct form.[263] In *Bleta*, the defence of automatism was raised in response to a murder charge. The psychiatrist who was called for the defence obtained his information only from his examination of the accused and from the evidence he heard at the trial. A hypothetical question was not put to the expert before he testified. The Supreme Court of Canada found that this did not necessarily render the psychiatric evidence inadmissible and stated:

> Provided that the question is so phrased as to make clear what the evidence is on which an expert is being asked to found his conclusion, the failure of counsel to put such questions in hypothetical form does not of itself make the answers inadmissible. It is within the competence of the trial Judge in any case to insist upon the foundation for the expert opinion being laid by way of hypothetical question if he feels this to be the best way in which he can be assured of the matter being fully understood by the jury, but this does not, in my opinion, mean that the Judge is necessarily precluded in the exercise of his discretion in the conduct of the trial from permitting the expert's answer to go before the jury if the nature and foundation of his opinion has been clearly indicated by other means.[264]

When cross-examining an expert witness, one must keep the case *R v Howard* in mind.[265] In *Howard*, the accused was charged with first-degree murder in the death of a taxi driver. The body of the deceased was found in a field and near the body were a number of footprints. Two individuals were charged with the crime. This was the second trial on the same issue. Howard testified that he was with the co-accused (Trudel) at the relevant time and

263 *Bleta v The Queen,* [1964] SCR 561 (hereinafter *Bleta)*. See also: *R v Holmes,* [1953] 1 WLR 686 (Eng CA); *Fisher.*
264 *Bleta*, at 6. See also: *R v Curry*, 38 NSR (2d) 575, 69 APR 575.
265 (1989), 48 CCC (3d) 38 (SCC) (hereinafter *Howard*).

denied that they had killed the deceased. The accused proposed to call an expert on footprints to testify that the footprints found near the body could not have been made by the co-accused. The trial judge ruled that Crown counsel could cross-examine the expert on whether or not he had taken into account the fact that Trudel had pleaded guilty before the second trial and had admitted that the footprints were his. The accused was convicted of first-degree murder and his appeal to the Ontario Court of Appeal was dismissed.

On a further appeal to the Supreme Court of Canada, Howard's appeal was allowed and a new trial was ordered. A majority of the Supreme Court held that it was not open to a cross-examiner to put as a fact, or even a hypothetical fact, that which is not and will not become part of the case as admissible evidence. An expert may be cross-examined to determine what he considers relevant, whether there are relevant matters that were not considered and whether the expert might have arrived at his conclusion as a result of considerations irrelevant to his particular expertise. However, an expert should not be expected to consider an irrelevant matter. The minority of the Supreme Court disagreed and stated that the trial judge has discretion to allow cross-examination of expert witnesses on some aspects that do not necessarily form part of the body of admissible evidence.[266]

E. Hearsay and Experts

Ideally, the psychiatrist who has examined a defendant will base her/his opinion of the person's mental condition on objective criteria such as the psychological and medical test results or observation. However, it is sometimes necessary for the expert to base her/his opinion on what the accused tells her/him. This is especially the case where the expert is to deduce the nature of the accused's mental condition as it existed at a previous time, yet the condition was temporary and no signs of it remain.[267] The general rule is that if an expert testifies as to what the accused has told her/him, this evidence would be considered inadmissible because it is hearsay. However, there may be some exceptions allowed under certain circumstances.[268]

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266 *Howard*, at 55.

267 Schiffer, at 207.

268 In recent years, courts have moved away from a categorical approach to hearsay exceptions, and have adopted a principled approach that intends to make the rules governing hearsay exceptions more responsive to individual situations. See *R v Parrott*, 2001 SCC 3 at para 3, [2001] 1 SCR 178 [*Parrott*]. See also: *R v Khan*, 1990 CanLII

Evidence based on an out-of-court statement that is given to establish the truth of what is contained in the statement is called hearsay (second-hand) and is generally not permitted in court. The Anglo-American system of evidence considers the ability to cross-examine a witness to test her/his evidence as a vital feature of the legal system.[269] When a witness provides evidence of something that someone has said and he/she intends that the evidence is to be taken as proof that the statement is true, this evidence can only be provided if it is made on the witness stand, under oath, where it is subject to cross-examination; however, there are exceptions made under certain circumstances. For example, evidence is admissible if it is provided to establish that the statement was made but not that it was true.[270]

When an expert has based her/his opinion on what the accused has told her/him, yet this information has not been proved as a fact at the trial, the evidence is hearsay. This does not mean that the evidence of the expert is inadmissible. It does mean that if the expert evidence is based on hearsay information, the facts asserted in this hearsay evidence are not admissible for their truth.[271] The expert may give evidence about what the patient told her/him in order to explain the grounds on which she/he came to the conclusion about the patient's mental condition.

In the field of mental expert testimony, not all second-hand evidence is hearsay. Statements of the accused that would tend to show that he was suffering from a disease of the mind may be introduced as circumstantial evidence. In *Kirkby,* the accused did not testify.

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77 (SCC), [1990] 2 SCR 531; *R v Smith*, 1992 CanLII 79 (SCC), [1992] 2 SCR; and *R v Starr,* 2000 SCC 40, [2000] 2 SCR 144. For example, in *Parrot* at para 3, the Court stated: "[w]hen dealing with young children or people with mental disabilities, this approach seeks to address the necessity and reliability required for the admission of the evidence while at the same time safeguarding the dignity and integrity of the complainants or witnesses." Under the modern principled approach, hearsay statements may be admitted if they are reliable and reasonably necessary (*Parrott* at para 4).

269 *Wigmore on Evidence, 3rd ed, vol v*, para 1367, as cited in Rosik (1970).

270*Cross on Evidence*, at 348 as cited in Rosik at 136. Also, see *Subramaniam v Public Prosecutor*, [1956] 1 WLR 965 (PC) and R v Collins (1987), 56 CR (3d) 193 (SCC) where the out of court statements were allowed because of the effect they had on the listener's state of mind, effects which contributed to the behaviour for which they were being charged. The probative value of the statement was not dependent on its truth.

271 *Abbey; R v Kirkby* (1985), 21 CCC (3d) 31 (Ont CA), leave to appeal to the SCC refused, [1986] S.C.R. vii (hereinafter *Kirkby)*; *Lavallee; R v Atkinson* (1979), 19 AR 202 (Alta. SCTD) (hereinafter *Atkinson*); *R v Augustus* (1977), 5 AR 499 (CA) (hereinafter *Augustus); Phillion; R v Giesbrecht* (1993), 20 CR (4th) 73 (Man CA), affirmed [1994] 2 SCR 482.

However, a psychiatrist called by the defence testified that he had gathered from talking to the accused and others that the accused had previously suffered from the delusion that he was a "tough Mafia biker". The trial judge held that there was absolutely no evidence on which the jury could find that the accused was legally insane under subsection 16(2) (as it then was). On appeal, the Ontario Court of Appeal discussed *Abbey* and held that not all statements by a witness of what he heard someone else say are necessarily hearsay. "Evidence of a statement made to a witness is not hearsay, but is 'original evidence' when the witness is asked to narrate another's statement for some purpose other than that of inducing the court to accept it as true".[272] When expressing an opinion as to the mental condition of the accused, the psychiatrist can relate what he has been told by the accused when such information is the basis of her/his opinion. Also, statements of a preposterous nature may be relevant to the issue of mental disorder and may be original evidence on that issue.[273]

These statements are not used to prove any facts asserted in them, but are circumstantial evidence to support an inference that the accused suffers from delusions or hallucinations. In this particular case, however, the statements that the accused once suffered from delusions were not admissible to prove that fact and the psychiatrist's opinion that the accused suffered from a delusion that he was a biker and member of the Mafia was of no weight.

Where the expert has based his/her opinions on hearsay, the jury must be instructed that the testimony cannot be taken as evidence of the truth of what was allegedly said, but only considered in assessing the expert opinion, particularly where the accused has not testified. Therefore, the accused's untruthfulness to the examining psychiatrist would destroy the foundation of the expert's evidence.[274] Thus, while medical experts are entitled to consider all available information in forming their opinions, "this in no way removes from the party tendering such evidence the obligation of establishing, through properly admissible

272 *Kirkby*, at 53.

273 See also: *R v Baltzer* (1974) 27 CCC (2d) 118 (NSCA) (hereinafter *Baltzer*). It was noted in the case of *R v Wright* (1979) 48 CCC 2(d) 334 (Alta CA) (hereinafter Wright) at page 345 that "…in the absence of a finding of insanity, lack of intent cannot be based on a lack of mental capacity to form the requisite intent". However, the Court went on to say that such evidence could be used for the limited purpose of showing that the accused did not in fact form the requisite intent.

274 *Rosik*, at 145.

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".[275]

Consequently, although expert evidence may be initially admissible, the method used to arrive at an expert opinion may affect the weight that the testimony is given by the judge or jury in its deliberations.

F. Weight

1. Conflicting Expert Evidence and Expert Credibility

Although the testimony of experts is often very relevant, a judge or a jury need not accept their professional opinions as determinative of the issues. The judge or jury must examine all of the evidence, including the expert evidence, before reaching a decision, and may arrive at an opinion directly contrary to that stated by the experts.[276] Because it is the judge or jury who decide the ultimate issue, the weight to be given to the expert's evidence (or any evidence) becomes an important consideration.

One factor that may affect the weight given to an expert's opinion is the expert's credibility. There are several factors that might affect the credibility of the expert witness. They include: the qualifications of the expert, the methodology used in the case and how it is similar to the methods used by others in the same field, the code of ethics followed, the facts upon which the expert drew her/his conclusions, the external appearance of the expert, whether the expert appears impartial based upon her/his handling of the available reports and so on.[277] If an expert is not particularly credible, then the judge may not assign much weight to her/his testimony.

The expert's credibility is sometimes questioned because of the general attitude of mistrust of expert testimony. For example, in *Taylor on Evidence,* one finds the following:

> Perhaps the testimony which least deserves credit with a jury is that of *skilled witnesses.* These witnesses are usually required to speak,

275 *Abbey*, at 214. See also: *R v Lortie* (1986), 54 CR (3d) 128 (Que CA) and *Lavallee.* In *Lavallee*, the Court held that while the facts supporting the opinion must be found to exist on the basis of admissible evidence, every fact the expert relied on does not need to be established. An opinion can be accepted as long as there is some admissible evidence to establish the foundation for that opinion. However, in such a case the judge must warn the jury that the more the expert relied on facts that were not proved in evidence, the less weigh the jury should give the opinion.
276 *Baumann v Nordstrom* (1959), 30 WWR 385 (BCSC).
277 Landau, at 99-100.

> not to facts, but to *opinions*, and when this is the case, it is often quite surprising to see with what facility, and to what an extent their views can be made to correspond with the wishes or the interests of the parties who call them. They do not, indeed wilfully misrepresent what they think, but their judgments become so warped by regarding the subject in one point of view, that even when conscientiously disposed, they are incapable of forming an independent opinion. Being zealous partisans, their Belief becomes synonymous with Faith as defined by the Apostle ... and it too often is but 'the substance of things *hoped for*, the evidence of things *not* seen'. To adopt the language of Lord Campbell, 'skilled witnesses come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence.[278]

Because this statement is highly cynical and disparaging, it has been held inappropriate for use in a charge to the jury.[279] However, it is possible that this quotation (or ones like it) may still be used by courts of appeal if they are seeking to comment upon the evidence of expert witnesses.[280]

Because of the frequent accusations of bias made towards courtroom experts, their credibility may be bolstered by the evidence of other concurring experts. This is not to say that jurors will not reject the evidence of concurring experts. However, if the testimony falls outside an area of the court's or jury's expertise, they may be persuaded by concurring expert evidence.[281]

Although it may be most desirable to have concurring expert opinions, often expert witnesses will disagree.[282] The weight assigned to an expert's testimony may be affected by the existence of contradictory evidence provided by another expert or by other witnesses. Psychiatry is not an exact science; individual judgment is always a factor in arriving at

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278 12th ed. (London: Sweet and Maxwell, 1931), vol 1, at 59, para 58 as cited in Schiffer at 211. This quotation appeared sporadically in Canadian legal decisions. See: *R v De Tonnancourt et al* (1956), 24 CR 19 (Man CA) (hereinafter *De Tonnancourt*) at 22-23.

279 In *More v The Queen*, [1963] SCR 522 (hereinafter *More*), the Supreme Court of Canada held that reading this quotation to the jury was a misdirection amounting to a substantial miscarriage of justice.

280 See: Schiffer, at 212.

281 Schiffer, at 214.

282 For an example of a case where there is extensive review of the various experts' sometimes contradictory opinions, see *R v Romeo* (1991), 117 NBR (2d) 271 (NBQB) (new trial that was ordered by SCC in (1991), 119 NR 309).

opinions.[283] Individual interviewing techniques have been blamed for some of the differences in diagnoses. According to Schiffer, "[u]nhappily, this disparity becomes magnified once psychiatrists, having been placed on the witness stand, are forced to translate their diagnoses into an assessment of the accused's behaviour at a specific point of time in the past".[284] The experts often disagree not on the medical aspects of the case, but on the legal questions put to them. Schiffer asserts that "[o]ften the psychiatrist's capacity for answering such questions is not better than that of the average layman; for the tools he must use in making the decision are not the tools of his profession, but rather the personalized values and morality he possesses as a private citizen."[285]

Where both sides call expert evidence, and their evidence is contradictory, the battle of the experts makes the task of weighing the evidence very difficult for the judge or jury. The proper direction to be given the jury in a case where conflicting expert evidence is said to be provided in the case *R v Platt.*[286] In that case, two pathologists, one testifying for the prosecution and the other for the defence, had expressed differing opinions as to the maximum time between the infliction of certain injuries and the brain death of the victim. When instructing the jury as to the conflicting evidence, the trial judge stated, "You have to decide whose evidence you prefer." The Court of Appeal allowed an appeal from a conviction of manslaughter, and said:

> The only safe way of directing the jury was either to tell them that before they accepted the opinion of the prosecution's pathologist they must feel sure that he was correct, or else to tell them that they were to assume that the defence pathologist was right and, therefore, to approach the case on the other evidence solely and not base their approach on the pathologist's evidence at all. Unfortunately the judge had done neither but had asked the jury to decide which of the two bodies of medical evidence they preferred. In the extraordinary circumstances, that was a misdirection and the conviction should be quashed.[287]

283 Schiffer, at 215.
284 Schiffer, at 216. See: *R v Bernardo* (1995), 42 CR (4th) 96 (Ont Gen Div).
285 Schiffer, at 216.
286 [1981] Crim LR 332 (hereinafter *Platt)*.
287 *Platt*, at 333.

In *R v Rafuse*, the Alberta Court of Appeal reiterated this view and stated that it is not enough to reject one expert opinion in order to accept another expert opinion.[288] The court must examine the evidence of the expert and see if it can accept the opinion.

In *R v Parnell,* the accused was charged with first-degree murder in the death of his girlfriend.[289] There was conflicting evidence as to the manner in which the deceased had died. It was the theory of the defence that the accused had accidentally caused the death. The accused testified that he had argued with the deceased and that after she hit him, he had suddenly grabbed her around the neck but without the intention of hurting her. It was the theory of the Crown that the accused had choked or suffocated the victim with a pillow. The coroner, who had seen the body some hours after the death and the pathologist, who had seen the body 40 hours after the death, testified that in their opinion the cause of death was choking or suffocation. A pathologist called by the defence testified that there was insufficient evidence to determine what was the cause of death, but that the evidence was consistent with an event called vasal, where the victim dies suddenly when grabbed in the neck area.

The trial judge directed the jury that when there is a conflict between experts it would "not be out of place for you to ask yourselves, well, which expert really had the best opportunity to examine the evidence about which he spoke and from which he drew his conclusions. Which based his opinion on his own observations and which had to depend on the observations of others?" The accused was convicted of second-degree murder. The Ontario Court of Appeal granted a new trial on a different ground, but also dealt with the issue of the trial judge's misdirection to the jury.

The Court of Appeal held that although the Crown's expert had a better opportunity to make direct observations, this was only a factor in weighing the conflicting opinions. The defence witness had based his opinions on the primary findings. Further, the conflict in the testimony of the experts arose not on the basis of observations of the condition of the body but on the conclusions to be drawn from those observations. The Court held that "[i]n cases of

288 (December 1, 1992), Calgary 11447 (Alta CA) [not to be confused with the 1982 BCCA decision cited earlier].
289 (1983), 9 CCC (3d) 353 (Ont CA), leave to appeal to SCC refused (1984), 9 CCC (3d) 353n (hereinafter Parnell); followed in *R v Molnar* (1990), 76 CR (3d) 125 (Ont CA).

competing expert evidence, it is not proper to limit the jury by asking whose evidence is preferred or who had the better opportunity to observe. It is correct to point to the latter, as a factor only, to be considered in resolving the question whether the Crown has proved guilt beyond a reasonable doubt."[290]

In *R v St.-Coeur,* the accused was charged with the first-degree murder of her 11-year-old daughter.[291] Before trial, the accused agreed to plead guilty to second-degree murder after the Crown agreed to join with the defence in making a submission that the period of parole ineligibility under subsection 742(b) not be increased above the 10-year minimum. At the sentence hearing, both the Crown and the accused filed psychiatric reports. The report of the Crown psychiatrist indicated that the accused acted in a conscious and deliberate manner. While the defence counsel agreed that the accused was not mentally disordered under section 16, his expert's report indicated that the accused was in a depressed and altered state of mind. The trial judge stated that the facts tended to support the opinion of the Crown psychiatrist and increased the period of parole ineligibility to 15 years.

In allowing the appeal and reducing the period of parole ineligibility to 10 years, the Quebec Court of Appeal indicated that where there is a disturbing conflict between two experts' opinions as to the accused's mental state at the time of the offence, the trial judge should not have resolved this conflict adversely to the accused. Emphasis was placed on the fact that neither expert had testified so the Court of Appeal was in the same position as the trial judge when reading the reports.

In *R v Ewert,* there was a battle of the experts. The accused relied on the defence of mental disorder to a charge of first-degree murder and called a psychologist who testified that the accused was suffering from a borderline personality with features of episodic dyscontrol that constituted a disease of the mind rendering him mentally ill within the meaning of section 16.[292] In reply, the Crown called three psychiatrists who testified that the accused was not suffering from a disease of the mind as described by the defence expert, but rather had a psychopathic personality. The defence applied to recall its psychiatric expert on surrebuttal to

290 Parnell, at 364.
291 (1991), 69 CCC (3d) 348 (hereinafter *St.-Coeur*).
292 (1989), 52 CCC (3d) 280 (BCCA) (hereinafter *Ewert*).

meet the rebuttal evidence of the Crown. The trial judge denied the request and the accused was convicted. The Court of Appeal held that this denial was grounds for a new trial because the defence must be given a full opportunity to answer all Crown evidence, even that given on rebuttal.

In *R v Conroy,* the Ontario Court of Appeal ordered a new trial after setting aside a conviction for first degree murder.[293] One basis for the accused's successful appeal was the trial judge's charge to the jury regarding the purpose of reading an excerpt from a book by another expert to the defence expert during cross-examination. These excerpts stated sentiments to the effect that the author could often draw a conclusion to suit whichever party employed him. The Court of Appeal held that the trial judge should have stated that the excerpts read in court were not to be used for the purpose of proving the truth of the opinions expressed therein, but as a means of challenging the expert's credibility or of testing the value of his opinion.

It would appear that where there are contradictory opinions provided by experts, the judge or jury has the very difficult task of sorting out or weighing that evidence. In the case of *R v Smith* the Supreme Court of Canada reformulated its approach in determining the admissibility of hearsay statements.[294] They relied on the principles of necessity and reliability. The admission of the hearsay statement must be reasonably necessary in that the declarant may have died, or is otherwise unable to testify, cannot remember all of the statement, or if it is a matter of financial necessity. In order to admit the hearsay in evidence, there must also be a circumstantial guarantee of trustworthiness, or reliability, in the statement. The court will look at the context in which the statement was made to determine its reliability.[295] If admission of the hearsay evidence has the potential to have a highly prejudicial effect on the trier of fact, it will not be admitted. If the hearsay statement is admitted, the decision

293 [1993] OJ No 1860.

294 (1992), 15 CR (4th) 133 (SCC). This case was questioned in *R v AM,* [2004] OJ No 3770, but it has not been overturned. The principles relating to hearsay evidence as outlined in the case are still relevant law.

295 See *R v Bernardo* (1995), 42 CR (4th) 96 (Ont Gen Div). The Crown experts were prepared to diagnose the witness Karla Homolka, as suffering from battered women's syndrome. To arrive at this conclusion the experts relied primarily on the out-of-court statements of Homolka, an accomplice, who plea bargained with prosecutors and was not examined by experts until about two years after the acts. This caused the reliability of her accounts and the reliability of the expert evidence to suffer.

regarding its reliability will determine the weight that the trier of fact attaches to it.[296]

2. Weight—Basis of Opinion

A second factor that affects the weight given to the expert's testimony is the nature of the facts upon which the opinion is based. It often happens that the expert's testimony will provide some evidence that is admissible (e.g., her/his personal observations) and some evidence that is hearsay. This is because the expert will most likely have based her/his opinion on both types of information.

In *Abbey*, the accused was charged with importing narcotics and relied upon the defence of insanity. He did not testify. The defence called a psychiatrist who testified that he was of the opinion that Abbey was insane at the time of the offence. The expert relied upon out of court statements made to him by the accused in order to formulate his opinion. He related many of the statements in his testimony. The accused was successful at trial. On appeal, the Crown argued that the trial judge erred because he had treated the hearsay evidence as facts. The British Columbia Court of Appeal dismissed the Crown's appeal.

The Supreme Court of Canada allowed the Crown's appeal and ordered a new trial. The court held that the judge made an error when he accepted as proven facts the statements upon which the doctors had relied in forming their opinions. The court stated:

> 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. [297]

Some believed that this statement meant that all the facts upon which an opinion was based had to be proved in evidence before the opinion could be given any weight.[298] This would have had the effect of overruling a body of law that had held that expert opinions are receivable although all the facts upon which the opinions are based are not otherwise

296 See *R v Starr*, [2000] 2 SCR 144 for a recent discussion of the Supreme Court on this issue.
297 *Abbey*, at 214.
298 R. J. Delisle, "Lavallee: Expert Opinion Based on 'Some Admissible Evidence' - Abbey Revisited" (1990), 76 CR (3d) 366 (annotation) at 367 (hereinafter Delisle Annotation).

proved.[299] However, a recent decision of the Supreme Court of Canada has shed some light on this area.

In *Lavallee,* the accused was charged with murder. She pled self-defence using the battered wife syndrome, but did not testify. A psychiatrist called by the defence testified that he believed that when she shot the victim she was convinced that her actions were to defend herself. He based his belief on information provided by the accused. The testimony of the psychiatrist referred to hearsay evidence such as interviews with the accused, interviews with her mother and a police summary of the accused's statement. The trial judge instructed the jury to give the psychiatric evidence as much weight as the other evidence. The accused was acquitted. The Court of Appeal set aside the acquittal and found that the instruction was in error. However, the Court of Appeal recommended that the Crown proceed with a manslaughter charge rather than with the murder charge.

On further appeal to the Supreme Court of Canada, the acquittal was restored and the trial judge's decision was upheld. The majority of the Supreme Court of Canada set out four rules in which it distilled the ratio (legal holding) in *Abbey:*

> 1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.
>
> 2. This second hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.
>
> 3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.
>
> 4. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.[300]

In interpreting the fourth rule, the majority held that there must be some admissible evidence on which the expert's opinion is based, but every fact relied upon need not be proved before

299 *Wilband v R*, [1967] SCR 14 (hereinafter *Wilband)*; *Lupien*; *Saint John (City) v Irving Oil Co*, [1966] SCR 581, as cited in Delisle Annotation, at 367.
300 *Lavallee,* at 127-8.

the opinion is given some weight. The court affirmed this interpretation in *Lavallee*. Where the expert testimony contains a mixture of admissible and inadmissible evidence, the trial judge must caution the jury that the weight attributable to the expert testimony is related to the amount and quality of admissible evidence on which it relies. The more the expert relies upon facts not proved in evidence, the less weight the jury must give to that opinion.[301]

In *R v Scardino*, a psychiatrist called by the defence testified that the accused was suffering from depression and paranoia.[302] The doctor opined that this would have prevented him from appreciating the nature and quality of his act. In reaching his opinion, the doctor relied upon (1) the appellant's account of his conduct and state of mind on the evening of the killing, (2) the evidence he heard at trial, and (3) the medical tests that were performed on the appellant. He testified that the "central" and "most important" factor in the formation of his opinion was the factual account provided to him by the appellant. The trial judge informed the jury that the weight given the doctor's opinion was dependent upon the extent that he relied upon the accused's account. In dismissing the accused's appeal from a conviction of second degree murder, the Court of Appeal held that the weight to be given an opinion based on a narrative had reached the vanishing point.[303]

A related issue is whether the expert can testify to matters that are not present in the accused's evidence. In *R v Moase,* the accused was charged with the second degree murder of his wife.[304] The defence was lack of intent and was based on evidence of intoxication and psychiatric evidence. The accused testified as to his intoxication. A psychiatrist was called to give evidence about the accused's mental state. The expert repeated statements made to him by the accused, but that the accused had not provided in his testimony. The Crown objected. The trial judge held and the Court of Appeal agreed that the psychiatrist could not testify about additional matters that the accused told him but that were not covered while the accused was in the witness stand. The defence counsel informed the court that it would not

301 If an opinion is based predominantly on information that is not proved by admissible evidence, it may be appropriate for a judge to direct the jury that the opinion is entitled to no weight. For example, see: *R v Scardino* (1991), 6 CR (4th) 146 (Ont CA) (hereinafter *Scardino*) and *R v Grandinetti* (2003), 178 CCC (3d) 449 (Alta CA).
302 *Scardino*.
303 Also, see *R v Grosse* (1996), 107 CCC (3d) 97 at 101 (Ont CA).
304 (1989), 51 CCC (3d) 77 (BCCA).

further examine the psychiatrist and declined an offer to re-call the accused to cover the additional matters. The Court of Appeal held that in these circumstances the opinion of the psychiatrist based on those out-of-court statements could be given no weight. It was open to the trial judge to conclude that the defence was attempting to lead self-serving evidence through the psychiatrist while avoiding being cross-examined on that evidence.

There are many legal and practical issues to consider when choosing an expert witness. Since it is quite possible for experts to have differing opinions, the expert's credibility seems to be a very crucial consideration. The weight assigned to the expert's opinion by the judge or jury would appear to be influenced at least in part by credibility, preparation and demeanour on the witness stand.

IX. Conclusion

Choosing an effective expert witness is a difficult, yet important task.[305] In the area of mental disability, the judge or jury will rely on expert opinion to help determine some very important issues. Further, the accused's lawyer or the Crown prosecutor may also be relying quite heavily upon the expert to assist in proving his/her case on the issue of mental disability.

Although experts play an important role in these cases, the relationship between mental health professionals and lawyers remains quite complex. Part of the difficulty derives from the different philosophical and procedural bases of the two fields. Some of the difficulty evolves because of the role that the expert is expected to take or because of the role he/she chooses to take while testifying.

Finally, because of the complexity of the relationship between the legal field and medical experts, and because of the unique opinion-giving role granted experts in the courtroom, the common law surrounding expert evidence is quite complex. Therefore, using an expert witness involves a great deal of planning and preparation.

305 See A. Samuels, "Finding the Expert, the Right Expert, the Expert Expert" (2001) 69:3 Medico-Legal Journal.

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