

# Advice on Expert Testimony: Experts in Custody & Access Cases

Andrea Himel: Himel Mediation Services (Chair)  
Nick Bala: Professor, Faculty of Law, Queen's University  
Hon. Emile R. Kruzick: Superior Court of Justice  
Patrick Schmidt: Thomson, Rogers

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# The Law of Expert Evidence: A Short Introduction

Prof. Nick Bala  
Queen's University



“I told the custody assessor that I live in a gated community.”

# Issues in Custody & Access Cases

- “The Law” of Expert Evidence – *R v Mohan*, SCC 1994
- Whether to order an assessment?
- Whether to admit?
  - Court-ordered assessment report/testimony
  - Party-retained expert/critique
- Weight to court-appointed assessor or party-retained expert?
- What scope for judicial knowledge of social science research *without* expert evidence?

# An expert can

- give an “opinion” (and not just testify about “facts” i.e predictions/recommendations)
- testify about “hearsay” basis of opinion (statements or work of others)
- summarize and comment on social science research

## SCC on expert witnesses (criminal cases)

### *R v Mohan* (1994, Sopinka J)

- judge is “gatekeeper”
- expert must satisfy “threshold” of being scientifically “reliable”
- then “cost benefit” weighing of 4 factors
  1. relevance
  2. “necessity” to assist trier of fact,  
-> not mere “helpfulness”
  3. properly qualified expert
  4. no exclusionary rule
- In *Mohan* SCC rules that psychiatrist **cannot** testify that accused is not the type of doctor who would sexually abuse adolescents as proposed evidence “not reliable” [no research basis]

# Why Family Law Cases are Different:

Arguably, *Mohan* not strictly applicable to court ordered assessments

- jury vs judge
- retained by one party vs. court-appointed
- institutional role of assessments in child cases:
  - legislative mandate
  - assessor may be a “delegated fact finder” (+/or clinician)
  - settlement promotion function

# When to seek an assessment: CLRA s. 30 or OCL investigation

- Often ordered in high conflict cases
  - Wishes of children
  - Observation of parent-child interaction
  - Contact “collaterals”
  - Possibility of psychological testing and clinical assessment
  - Relate social science research to family
- Need to be aware of limitations
  - Not a pure science
  - values & experiences of assessors matter
- NOT appropriate for all cases
  - Delay/timing
  - Expense & availability
  - No genuine issue for trial

# Weight of the assessment

- Never binding, often influential
- Bias – hard to argue if court appointed
- Professional pre-disposition?
- Qualifications/knowledge for specific issues
  - Eg domestic violence, alienation, csa
- Factual error?
  - Relied too much on statements of one party (manipulation?)
  - Failed to investigate important allegations (eg domestic violence)
- Process error that leads to factual error?
  - Failed to contact important collateral

# The Party-retained expert

- Has only seen one parent (and sometimes not children)
- Potential for bias (in selection)
- Needs to be qualified as an “expert” on a matter at issue:
  - Could be alienation
    - Dr. Fidler on alienation, had not seen the child  
*SGB v SJL*, 2010 ONSC 3717
  - If therapist for one parent without experience in assessments, court may conclude not an expert on any matter at issue: *Sordi v Sordi*, [2009] OJ 5899 (SC), per Timms J.
- Less value to general social science knowledge if not related to all facts of case
  - *Johnstone v Brighton*, [2004] OJ 3267, per Campbell J

# Questions for Discussion

1. When is an Expert necessary?
2. How are court-appointed Experts chosen?
3. How should lawyers prepare clients for assessments?
4. What is the role of the Expert hired to assist Counsel?
5. What should be the future use of Experts to help resolve child related disputes?

# Some References

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