TAB 7

# But We Went to Law School Because We Can't Do Math or Science: Expert Evidence in Trust, Estate and Capacity Litigation

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# But We Went to Law School Because We Can't Do Math or Science: Expert Evidence in Trust, Estate and Capacity Litigation

**by Clare E. Burns[1] and Erin Pleet[2]**

## 1. Introduction

There is an old joke that people take the L.S.A.T. and apply to law school, because their aptitude for science and math leaves them no other professional avenue in life. If that is true of some members of the bar, it is not true of those who practice trust, estate and capacity litigation. In those arenas issues of science and math arise in almost every case.

The genesis of this paper was two-fold. First, we had occasion to read a quote from the Honourable Mr. Patrick Lesage. He said:

> I must say it came as somewhat a shock to me, having spent forty (40) years plus in the justice system, to hear some of the scientific experts speaking about the uncertainty and the lack of clarity in areas of science which I had always thought were far more certain than they really are. And I felt very guilty that I had not better educated myself on these areas long before.[3]

Second, the *Rules of Civil Procedure*[4] as they relate to experts were amended effective January 1, 2010. These two events caused us to think again about the role of expert evidence.

The purpose of this paper, then, is to consider how the amendments to the *Rules* were arrived at and what effect they may have on trust, estate and capacity litigation.

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[3] The Honourable Stephen T. Goudge, "Inquiry into Pediatric Forensic Pathology in Ontario" (September 2008) (the "Goudge Report"), p. 501, quoting Mr. Lesage at a roundtable on experts.
[4] R.R.O. 1990, Reg. 194, as amended [*Rules*].

## 2. The Supreme Court of Canada: The Standard for Admissibility of Expert Evidence

Most of the law in Canada related to expert evidence has been developed in the context of the criminal law. However, the principles developed there are directly transferable to the arenas of trust, estate and capacity litigation.

### (a) The *Mohan* Test

The Supreme Court in 1994, in *R. v. Mohan*,[5] established a four-part test for the admissibility of expert evidence. Specifically, the Court required that henceforth expert evidence be admitted only where it is:

(1) relevant;

(2) necessary in assisting the trier of fact;

(3) not otherwise subject to an exclusionary rule; and

(4) given by a properly qualified expert.

Subsequently, the Supreme Court has made it clear that the second element of the test will only be met "when lay persons are apt to come to a wrong conclusion without expert assistance, or where access to important information will be lost unless [the Court] borrows from the learning of experts."[6]

Since *Mohan* was decided much has been written about what test must be met to demonstrate that the proposed evidence is necessary to the trier of fact. It is in this commentary and jurisprudence that the concept of threshold reliability has come to the fore.[7] Threshold

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[5] [1994] 2 S.C.R. 9 [*Mohan*].
[6] *R. v. D. D.*, [2000] 25 S.C.R. 275, at para. 57.
[7] Goudge Report, p. 477; *R. v. K. (A.)* (1999), 137 C.C.C. (3d) 225 (Ont. C.A.); *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239 [*Trochym*].

reliability is the concept that requires a court to be satisfied that proferred expert evidence meets certain standards of scientific reliability before the evidence will be admitted.

**(b) *Daubert*: The Reliable Foundation Test**

A debate raged for much of the 1990s in both the United States and Canada about whether expert evidence should be admitted if it was based on "generally accepted" principles in the expert's discipline or whether, instead, the courts should engage in a more rigorous review designed to determine if there was a "reliable foundation" to the discipline about which the expert was testifying. In the United States, this issue was resolved by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[8] when that Court held that in order to be satisfied that a scientific technique is reliable, a court must look to four factors:

(1) whether the technique has been tested and found subject to falsification;

(2) whether the technique has been subject to peer review and publication;

(3) whether the technique has a known or potential error rate and whether there are existing standards controlling its operation; and

(4) whether the technique has general acceptance.

[8] 509 U.S. 579 (1993) [*Daubert*].

In Canada, the debate raged on after *Daubert*, in part because concerns were raised by dissenting members of the United States Supreme Court in that case, and by others, in subsequent legal commentary, about the ability of judges to engage in this kind of review.[9] This concern can be summed up crudely as "but we went to law school because we can't do math or science".

Ultimately, the Supreme Court of Canada has concluded that a concern about judicial ability to conduct the necessary review of the science does not abrogate the courts' obligation to inquire into the threshold reliability of the evidence offered. Thus, in *R. v. J.-L. J.*,[10] the Supreme Court concluded that although penile plethysmography may be generally accepted as a therapeutic technique, it was not "sufficiently reliable to be used in a court of law to identify or exclude the accused as a potential perpetrator of an offence."[11] Similarly, the Supreme Court, in *R. v. Trochym*,[12] and the Ontario Court of Appeal, in *Re Truscott*,[13] have commented about the need to use the *Daubert* criteria in order to protect against miscarriages of justice occurring as a result of faulty expert evidence.

Importantly, the Supreme Court of Canada has made it clear that the *Daubert* criteria are to be used to review not only expert evidence based on novel science, but also scientific evidence that might previously have been admitted. In *Trochym*, the Court observed that:

> ... while some forms of scientific evidence become more reliable over time, others become less so as further studies reveal concerns.

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[9] Scott Brown, "Scientific Expert Evidence Testimony and Intellectual Due Process" (1998) 107 Yale L.J. 1535; Adina Schwartz, "A 'Dogma of Empiricism' Revisited: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*" (1997) 10 Harv. J.L. & Tech. 149.
[10] 2000 SCC 51, [2000] 2 S.C.R. 600 [*J.-L.J.*].
[11] *J.-L.J.*, at para. 35.
[12] [2007] 1 S.C.R. 239 [*Trochym*].
[13] (2007), 225 C.C.C. (3d) 321 (Ont. C.A.).

> Thus a technique that was once admissible may subsequently be found to be inadmissible.[14]

In the period during which various lower courts were debating whether the *Daubert* criteria should be adopted in Canada, various judges and commentators made attempts to further particularize the questions a court should consider in applying the *Daubert* criteria. These lists ranged in length from six to twenty-four questions.[15] The immediate result, at least in the criminal arena, as counsel and judges struggled to be satisfied that the *Daubert* criteria were met, was *voir dires* of increasing length. Anecdotally, there was a concomitant increase in the length of *voir dires* concerning expert evidence in the civil courts, particularly in family and personal injury litigation.

## 3. The Osborne Report: The Practical Problems

It was in that environment that the Government of Ontario commissioned the Honourable Coulter A. Osborne, Q.C., to conduct a review of the Ontario civil justice system and make recommendations about methods to improve affordability and accessibility to the civil courts. The Osborne Report[16] was released in November 2007 and addressed, in part, the use of expert evidence.

### (a) Increased Costs

The Osborne Report noted, in that regard, that there was an increasing concern among litigants, counsel and the judiciary that "too many experts are no more than hired guns

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[14] *Trochym*, at para. 32.
[15] See: *R. v. Johnston* (1992), 69 C.C.C. (3d) 395 at 415 (Ont. Ct. (Gen. Div.)); *R. v. J.E.T.*, [1994] O.J. No. 3067 at paras. 73 and 75 (Gen. Div.); G. Edmond, "*Pathological Science? Demonstrable Reliability and Expert Forensic Pathology Evidence*", Goudge Report (also [2008] UNSWLRS 6).
[16] The Honourable Coulter A. Osborne, Q. C., "*Civil Justice Reform Project: Summary of Findings and Recommendations*" (November 2007) (the "Osborne Report").

who tailor their reports and evidence to suit the client's needs"[17] and further that the "increased use of experts was a factor that was increasing the costs of litigation and causing delay through trial adjournments."[18]

**(b) Three Recommendations**

As a consequence, the Osborne Report set out three recommended changes to the *Rules of Civil Procedure* to address the problems of so-called "hired guns" and increased litigation costs arising from the use of experts. The recommended changes were to amend the *Rules*:

(i) to reflect the duty of the expert to provide objective, unbiased evidence;

(ii) to standardize the content of the expert report so as to increase the transparency of the reports; and

(iii) to encourage collaboration among competing experts.

Mr. Osborne's vision was, in essence, to enshrine the existing case law about impartiality of experts and, at the same time, codify best practices about the format of expert reports.

It is these recommendations that resulted in the January 2010 amendments to the *Rules of Civil Procedure* at rules 4.1.01, 53.03 and 20.05 which are discussed in more detail below.

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[17] Osborne Report, p. 71.
[18] Osborne Report, p. 68.

## 4. The Goudge Report: A Consideration of the Problem of Flawed Expertise

### (a) Why the Report?

As the Osborne Report was being released, another inquiry was underway into the tragic results of flawed expert evidence: *The Goudge Inquiry into Pediatric Forensic Pathology in Ontario*.

That inquiry was called as consequence of serious concerns that had arisen about the forensic pathology work of Dr. Charles Smith in the period from 1981 to 2005 at the Hospital for Sick Children. Those concerns were two-fold:

(a) a peer review had concluded that the opinions of Dr. Smith in expert reports and testimony he delivered were unreliable in 20 of 45 cases reviewed; and

(b) convictions had been entered and children permanently removed from the care of their parents as a consequence of Dr. Smith's opinions and testimony.[19]

The terms of reference of the Goudge Inquiry focused on the production of recommendations "to restore and enhance public confidence in pediatric forensic pathology in Ontario and its future use in investigations and criminal proceedings."[20] The reader may ask what relevance the Inquiry has to trust, estate and capacity litigation? The answer is that the Goudge Report contains a masterful review of the law of expert evidence historically and makes suggestions about how that law should be advanced. In our opinion, it should be mandatory reading for all litigators, particularly those dealing with capacity issues of any kind.

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[19] Goudge Report, pp. 6–8.
[20] Goudge Report, p. 8.

### (b) Systemic Obligation

The Goudge Report made it clear that all the participants in the criminal justice system have an obligation to protect the public from flawed or misunderstood pediatric forensic pathology evidence. In that regard, the report identified coroners, police, Crown counsel, defence counsel and judges as having key roles to play.

How should that systemic obligation get met by specific participants in the system? The Goudge Report makes particular recommendations about this in the criminal context.

Inasmuch as the Report has received widespread attention among the judiciary, special regard should be had to those recommendations and consideration given to how they translate to participants in trust, capacity and estate litigation.

Arguably, the same obligations extend to the participants in the civil justice system when dealing with trust, estate and capacity litigation. Specifically, when decisions are being made in litigation based on the evidence of capacity assessors, treating physicians, handwriting experts, neurologists, and chartered business valuators, we have a systemic obligation to make sure that that evidence is reliable.

### (c) Role of the Experts

The Goudge Report's recommendations for experts are focused, as the Osborne Report was, on clarity and transparency. Specifically, the Report recommends that:

(a) experts' reports be not only accurate but also clear, plain and unambiguous;[21]

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[21] Goudge Report, p. 72.

(b) experts should adopt an evidence-based approach (this is really a confirmation of the importance of the *Daubert* criteria);[22] and

(c) experts should identify areas of controversy that may be relevant to their opinions and place their opinions in that context.[23]

Too often expert reports in will challenges, in particular, fail to meet any of these criteria as they are conclusory in nature and based on personal experience. The Goudge Report is particularly critical of this type of expert evidence because evidence given on that basis can seldom be quantified or independently validated.[24] Following the Osborne and Goudge reports, it is highly unlikely that these types of reports will continue to be acceptable.

**(d) Role of the Lawyers**

Heavy emphasis is placed in the Goudge Report on the duty of counsel both to properly prepare experts and to vigorously cross-examine them.[25]

Proper preparation involves early preparation of reports and early disclosure in light of amended rule 53.03 discussed below. However, care must be taken not to cross the line between preparation and interference with the production of impartial evidence. The case of *Frazer v. Haukojia*[26] is instructive in this regard. There, the Court rejected proferred medical evidence because, among other things, the expert had spent several hours in consultations and meetings with counsel before producing his report.[27] Similarly, counsel providing a report to his or her client for comment before finalization may also be found to cross the line between proper

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[22] Goudge Report, p. 72.
[23] Goudge Report, p. 74. In this context, the Goudge Report also suggests experts must comply with the standards of their professional colleges.
[24] Goudge Report, p. 73.
[25] Goudge Report, p. 47.
[26] [2008] O.J. No. 3277 (S.C.J.).
[27] See also: *Southcott Estates Inc. v. Toronto Catholic District School Board*, [2009] O.J. No. 428 (S.C.J.).

preparation and interference with impartiality.[28] With those limitations, proper preparation of experts is a crucial part of a lawyer's role in preventing the system's reliance on faulty evidence in trust, estate and capacity matters.

Equally important is the vigorous cross-examination by counsel of any proferred expert both as to qualifications and as to the substance of their reports.

Fruitful areas of inquiry might include:

(i) whether the method used to arrive at the opinion is employed both forensically and therapeutically;[29]

(ii) whether the method used is consistent with the guidelines or regulations of the expert's governing body;

(iii) whether the methodology used is peer-reviewed and has a known error rate;

(iv) whether there is any controversy about the methodology employed; and

(v) and whether the expert is a "hired gun", captive to a particular law firm or perspective (e.g., propounders of wills).[30]

Although as an economic reality it is not possible in every case to become "as expert as the expert" so as to competently examine on the science underlying a report, it is possible on a proportional basis to meet the obligation of counsel as described in the Goudge Report by conducting this sort of cross-examination on a more limited basis.

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[28] See: *Poirier v. Poirier*, [2005] O.J. No. 4471 (S.C.J.).
[29] See below regarding discussion of capacity assessors.
[30] See: *Frazer v. Haukojia*, [2008] O.J. No. 3277 (S.C.J.).

### (e) Role of the Judge

The Goudge Report identifies the judge as "the ultimate gatekeeper in protecting the system from unreliable expert evidence."[31] Importantly, the Report sets out some considerations that a judge might have regard to in determining whether to admit expert evidence. They are:

> 1 the reliability of the witness, including whether the witness is testifying outside his or her expertise;
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> 2 the reliability of the scientific theory or technique on which the opinion draws, including whether it is generally accepted and whether there are meaningful peer review, professional standards, and quality assurance processes;
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> 3 whether the expert can relate his or her particular opinion in the case to a theory or technique that has been or can be tested, including substitutes for testing that are tailored to the particular discipline;
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> 4 whether there is serious dispute or uncertainty about the science and, if so, whether the trier of fact will be reliably informed about the existence of that dispute or uncertainty;
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> 5 whether the expert has adequately considered alternative expert explanations or interpretation of the data and whether the underlying evidence is available for others to challenge the expert's interpretation;
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> 6 whether the language that the expert proposes to use to express his or her conclusions is appropriate, given the degree of controversy or certainty in the underlying science; and
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> 7 whether the expert can express the opinion in a manner such that the trier of fact will be able to reach an independent opinion as to the reliability of the expert's opinion.[32]

Counsel in dealing with experts in trust, estate and capacity matters must now pay special attention to these seven criteria both in retaining their own experts and cross-examining

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[31] Goudge Report, p. 47.
[32] Goudge Report, p. 495.

others'. If a proposed expert cannot satisfy counsel as to their ability to withstand cross-examination on these issues, the question that must be asked is "Why are we retaining this person?"

Critically, the Goudge Report makes it clear that a judge's review is not "an all or nothing exercise" and suggests that the seven considerations be addressed with respect to each part of the expert opinion.[33]

This kind of partial review will necessarily be of particular concern in trust, estate and capacity litigation where experts give evidence based, in part, on conclusions outside their own expertise. For example, in Justice Lederer's decision in *Re Kaptyn Estate*,[34] he rejected one medical expert's opinion because the expert concluded that the wills at issue were complex and therefore difficult to understand requiring a higher degree of cognitive acuity. His underlying concern was that the doctor did not have the expertise to opine on the complexity of the wills. Thus the parsing of the report rendered it functionally useless.

**(f) The Goudge Report Going Forward**

The view could be taken that the Goudge Report presents an unattainable, Utopian model for the delivery of expert evidence. Such a view is best avoided, however, in light of the amendments to the *Rules of Civil Procedure* which came into force in January 2010. Those rules are, in our opinion, the basis on which the system will hold itself accountable to meet the standards set by Mr. Osborne and Justice Goudge.

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[33] Goudge Report, p. 48.
[34] (2008), 43 E.T.R. (3d) 219 (Ont. S.C.J.) [*Re Kaptyn*].

## 5. Amendments to the *Rules of Civil Procedure*: Rules 4.1.01 and Rule 53

As set out above, the *Rules of Civil Procedure* were amended effective January 1, 2010 to incorporate the recommendations of the Osborne Report. The text of the amended rules is set out below.

**Rule 4.1.01**

**DUTY OF EXPERT**

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

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue. O. Reg. 438/08, s. 8.

Duty Prevails

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged. O. Reg. 438/08, s. 8.

**Rule 53.03(2.1) and (3)**

**EXPERT WITNESSES**

...

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.

2. The expert's qualifications and employment and educational experiences in his or her area of expertise.

3. The instructions provided to the expert in relation to the proceeding.

4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

6. The expert's reasons for his or her opinion, including,

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

ii. a description of any research conducted by the expert that led him or her to form the opinion, and

iii. a list of every document, if any, relied on by the expert in forming the opinion.

...

Sanction for Failure to Address Issue in Report or Supplementary Report

(3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,

(a) a report served under this rule; or

(b) a supplementary report served on every other party to the action not less than 30 days before the commencement of the trial. O. Reg. 348/97, s. 3.

## 6. Rule 4.1.01: The "Fair, Objective and Non-Partisan" Conundrum

### (a) What does rule 4.1.01's requirement of a fair, objective and non-partisan report mean in a trust, estate or capacity matter?

Rule 4.1.01 has not yet been considered in many cases. In the trust, estate and capacity arenas there appears to be only one reported case, the decision in *McCullough v.*

*Riffert*.[35] There, a disappointed beneficiary was suing a solicitor for allegedly failing to have a will drafted and executed in a timely fashion. Two lawyers gave evidence as to the standard of care. A fact in dispute between the two parties was whether the defendant lawyer had received a phone call concerning the declining health of the deceased a week before the deceased passed away. Interestingly, one expert gave an opinion based only upon the fact of that call having happened being accepted by the Court, the other expert gave two alternative opinions depending upon whether the Court found that the call had occurred. Although the Court never expressly evaluated the competing opinions, the Court did rely upon the expert who had offered the two sets of analysis in the alternative. It appears from the decision that the expert who had proferred only one opinion had a more difficult time in cross-examination.

The lesson to be taken from this case is, in our view, that where there are a small number of material facts in dispute in a trust, estate or capacity matter and expert evidence is required, serious consideration should be given to having the expert opine in the alternative based on the possible alternative fact findings the Court might make. It is worth noting that such an approach might have saved the expert evidence in the *Re Kaptyn* case referred to above: the expert presumably could have opined based on two scenarios: one in which the Court found the wills to be complex; the other in which the Court did not.

In summary then, serious consideration should be given by counsel to what the factual underpinnings are of their proposed expert evidence in all trust, estate and capacity litigation so as to be sure the opinion evidence will be accepted as fair, objective and non-partisan.

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[35] 2010 ONSC 3891, [2010] O.J. No. 2921.

### (b) What About Enforcement?

The difficulty that still remains with the expert's duty to be fair, objective and non-partisan is that there is currently no direct remedy for a breach of that duty. As Lang and Ellard have observed in their excellent paper, "*The Recent Amendments to the "Rules of Civil Procedure: Changing Rules and Roles for Expert Witnesses*",[36] a refusal to admit the evidence, or an appeal and retrial, remain the only real disincentive to partisan, biased expert reports.

## 7. Summary Judgment and "Hot Tubs" of Experts: Rule 20.05(2)(k)

In dealing with expert evidence in trust, estate and capacity litigation, special care must be taken in respect of summary judgment motions. Specifically, the amendments to the *Rules of Civil Procedure* provide at rule 20.05(2)(k) that in disposing of a summary judgment motion a judge may order any group of experts whose evidence is proferred to meet, confer and narrow the issues.[37] The judge can, among other things, require the experts to prepare a joint statement setting out the areas of agreement and areas of disagreement and the reasons for it. This process has long been referred to in Australia, in the context of intellectual property litigation, as an experts' "hot tub".

In many trust, estate and capacity proceedings, the paramount issue is capacity. Competing neurological evidence will be proferred. Estate litigators must now consider how they will prepare their neurological experts for the hot tub process with due regard to the risks of that preparation being characterized at a later date as partisan interference. This will be no easy task. Thought should be given to counsel agreeing in advance to the form of the report that is to come out of the hot tub and to delivering any preparatory materials in writing as opposed to

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[36] Adrian C. Lang & Paloma Ellard, "The Recent Amendments to the "Rules of Civil Procedure: Changing Rules and Roles for Expert Witnesses" (Summer 2010) 29 Advocates' Soc. J. No. 1, pp. 15–18.
[37] See rule 20.05(2)(k).

through oral meetings. Careful attention will have to be paid to how this area of the law develops.

## 8. Problematic Areas of Expertise

For all the reasons described above it is clear that expert evidence is being reviewed in all courts in Ontario with a new, or perhaps simply revived, vigour. Moreover, it is clear that the courts will be more active in participating in efforts to resolve differences of opinion among experts. Because there is to be judicial scrutiny of all expert evidence, whether based in novel science or not, trust, estate and capacity litigators need to consider what sorts of expertise commonly currently relied upon may be vulnerable to being excluded in the future. Set out below are some musings about possible areas of concern.

### (a) Handwriting Experts

Many estate, trust and capacity cases include issues about the validity of signatures on documents as diverse as wills, real estate acknowledgments, and bank drafts. The practicing bar makes regular use of handwriting analysis experts in these cases. However, handwriting analysis is one type of evidence singled out in the Goudge Report as having been subjected to little empirical validation and therefore arguably being suspect.[38] It may be therefore that the Courts will be less willing to accept this evidence in the future.

### (b) Capacity Reviews by General Medical Practitioners and Neurologists

It is not uncommon in guardianship applications to see opinion evidence offered by general medical practitioners and neurologists about the capacity of a person based on the

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[38] Goudge Report, pp. 481–482, citing Mike Redmayne, *Expert Evidence and Criminal Justice* (Oxford: Oxford University Press, 2001), p. 116.

criteria in the *Substitute Decisions Act, 1992*.[39] However, at the 2010 Law Society Special Lectures[40] several clinicians offered their view that, absent specific capacity assessment training, the average general practitioner or neurologist does not have the foundational expertise to give this evidence. In the face of that, very careful thought needs to be given on a go-forward basis to whether such evidence will be accepted by the courts. It is worth noting that the desire for reliable evidence in this sphere must be weighed against the need to respect the dignity of the person who is the subject of the proceeding. Specifically, where such a person has a long-term treating physician who is prepared to give the opinion and the application is uncontested, are that individual's interests really served by requiring a capacity assessment by a stranger?

### (c) Mentally Incapable Persons' Views and Preferences

From time to time litigation involves a judicial determination of the views and preferences of a mentally incapable person as part of the analysis of their best interests. To date, section three counsel have often been allowed to deliver those views and preferences from the counsel table. Consideration needs to be given to whether section three counsel's statements in that context amount to an expert evaluation of their client's ability to independently express such views and preferences. Regard therefore needs to be had to whether such statements continue to be appropriate or whether, in fact, the principles in *Re Khan*[41] and the law related to evidence regarding children's view and preferences in custody-access and child protection litigation should govern. That is a discussion beyond the scope of this paper. However, even if the principle is that a third party social worker should give such evidence prevails, there will remain

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[39] *Substitute Decisions Act, 1992*, S.O. 1992, c. 30; *General*, O. Reg. 26/95.
[40] LSUC 2010 Special Lectures: *A Medical-Legal Approach to Estate Planning, Decision-Making and Estate Dispute Resolutions for the Older Client* (April 14–15, 2010).
[41] [1990] 25 S.C.R. 531.

an issue about the expertise of that individual proffering the evidence of the person's views and preferences.

### (d) Forensic Psychiatric Reports in Will Challenges

The use of forensic psychiatric evidence in will challenges may turn out to be the most problematic area in light of the tightened review of the threshold reliability of expert evidence. Often these reviews are conducted where the deceased had no cognitive evaluation, MRIs or CT scans prior to death. In those circumstances, the experts are extrapolating from nursing notes, parties' statements about the deceased's behaviour, medication lists, and in the absence of any physical examination. Their work is therefore open to criticisms about the lack of peer review, a failure to be evidence-based, and bias. It remains to be seen how this area will develop as there simply may be no more reliable way to obtain expert help with respect to these situations.

## 9. Conclusion

The fluidity of both the case law on experts and the science that trust, estate and capacity litigators rely on everyday cannot be understated. It must therefore be remembered, as we move forward under the new *Rules of Civil Procedure*, that no scientific theory is sacred and that we must have constant regard to the decisions in *Mohan* and *Daubert* as we assess, prepare and argue our cases.