

# Lessons from Canadian Courts for All Expert Witnesses

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Expert witnesses have a special place in court, bringing their knowledge and skills in the form of opinion evidence to educate the court. This allows the fact-finder to make legal decisions more effectively. Although experts are often allowed a role in civil and criminal matters, this brings certain risks to the court process. Admissibility of expert witness testimony in Canada has generally paralleled American law, including the standards enunciated in *Daubert v Merrell Dow Pharmaceutical, Inc.* (1993). Recently, there has been a series of decisions in Canadian law that has focused on the role of the expert witness in the court. Although only having precedence in Canada, these cases highlight important legal principles that all expert witnesses must navigate, regardless of their jurisdiction. We review these significant cases to assist forensic psychiatrists in recognizing and professionally navigating potential pitfalls in giving expert opinions.

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Psychiatric experts have a special role in the judicial system. They provide opinion evidence to the fact-finder based on their specialized technical knowledge beyond what is likely held by a jury member or a judge. The goal is to assist the fact finder in making an informed legal decision. Forensic psychiatry experts enter the legal arena to educate the court about psychiatric illness. In criminal cases, psychiatric experts describe how particular psychiatric illnesses may affect thinking, decision-making, reality testing, mood, judgment, and cognition. We apply this knowledge to specific forensic questions, including whether a person qualifies for a defense of not guilty by reason of insanity (NGRI) or whether a person is competent to stand trial. In Canadian law, they are referred to as not criminally responsible on account of mental disorder (NCR) and fitness to stand trial, respectively. Psychiatric experts also educate the fact-finder about risk assessment and risk management for dispositions of NGRI/NCR detainees.

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The determination of sexually violent predator (and the Canadian equivalent, dangerous offender) status also requires psychiatric expertise.

For civil matters, psychiatrists may give evidence on the standard of care in a malpractice case. They might clarify psychiatric diagnoses and psychological harm stemming from a motor vehicle accident or from workplace violence. Psychiatric expertise can assist in determination of whether a physician, lawyer, or other professional is fit to practice. Regardless of the specific medico-legal issue, psychiatric experts frequently play a vital role for the courts by educating participants and decision-makers about diagnosis, treatment, and risk.

While our assistance to the court can be vital, there are several risks and potential pitfalls in allowing us into the legal arena. Experts may usurp the role of the fact finder. For example, a highly qualified expert might give an opinion on the ultimate issue, which may unduly influence a jury. Experts may give opinions that are based on novel but inaccurate science. They may be tempted to give opinions outside of their area of expertise. They may lose sight of their role in the court proceeding, moving from an unbiased educator to an active advocate for one side in the court process. They may be influenced by personal biases that distort their opinions.

**Table 1** Major Lessons for Experts

Potential danger	Cases	Lesson for expert
Usurping the role of fact finder	<i>R. v. Mohan</i> <sup>4</sup>	Admitted evidence must be relevant and necessary, come from a properly qualified expert, and not be subject to an exclusionary rule.
Bringing in nonvalidated novel science	<i>R. v. J.-L.J.</i> <sup>5</sup> <i>Daubert v. Merrell Dow Pharmaceuticals</i> <sup>1</sup>	Theories that are novel science undergo special scrutiny; they must be tested, subjected to peer review, have known error rates and standards, and have general acceptance.
Hearsay being used by experts	<i>R. v. Abbey</i> <sup>6</sup> <i>R. v. Lavallee</i> <sup>7</sup>	Experts can use hearsay and other information not in evidence, but the fact-finder decides the weight of the opinion and whether the information used is valid.
Reviewing reports with lawyers	<i>Moore v. Getahun</i> <sup>8</sup>	It is acceptable to review reports with lawyers and make edits, but the expert must still be fair, objective and non-partisan.
Reports entered into proceedings as an <i>aide memoire</i> but not as evidence	<i>Moore v. Getahun</i> <sup>8</sup>	Information that is not put into evidence cannot be considered.
Being in a dual role	<i>Westerhof v. Gee Estate</i> <sup>15</sup>	Expert opinions can come from different types of experts: Participant experts are treating physicians. Non-party experts are independent evaluators seeing the evaluatee for purposes other than the litigation. Litigant experts are independent evaluators seeing the evaluatee for the litigation.
Addressing bias	<i>Westerhof v. Gee Estate</i> <sup>15</sup> <i>White Burgess Langille Inman v. Abbott and Haliburton Co.</i> <sup>17</sup> <i>Daggitt v. Campbell</i> <sup>16</sup>	The courts are very concerned with bias: There is risk of advocating for the party who hired the expert. Special care must be taken to admit only unbiased evidence. Experts must strive to provide evidence that is fair, objective, and nonpartisan, although it need not necessarily be seen to be impartial. Past bias can potentially taint an expert's credibility.
Ghost writing	<i>Kushnir v. Macari</i> <sup>19</sup>	Experts should strive to write all portions of their reports and not employ ghost writers.
Charging of cancellation fees	<i>Kushnir v. Macari</i> <sup>19</sup>	Experts should charge reasonable fees for cancelled appointments.

Some experts could be consciously or unconsciously biased by those who hired them.<sup>2</sup>

Courts struggle with balancing the risks and benefits of allowing expert testimony. To mitigate some of the risks, courts have established rules for the admission of expert evidence. Expert evidence usually goes through two phases of analysis. In the first phase, the trial judge acts as a primary gatekeeper and will determine whether the expert's evidence should be admitted (i.e., allowed into the court for consideration by the fact finder). In the second phase, the fact finder will decide to what degree the admitted evidence should be given weight (i.e., believed).

In this article, we discuss some recent developments in Canadian case law (summarized in Table 1) that have articulated specific responsibilities of individuals providing expert evidence. Although the cases discussed are Canadian jurisprudence, they provide important lessons for all experts.

### Historical Lessons on Admissibility

In 2007, Glancy and Bradford<sup>3</sup> reviewed the rules on admissibility of expert evidence in Canada, in-

cluding how the court approaches expert evidence involving novel science. Their analysis included two major criminal cases from the Supreme Court of Canada. In *R. v. Mohan*,<sup>4</sup> Dr. Mohan was a pediatrician charged with a sexual assault on a 4-year-old girl. A psychiatrist intended to give evidence that Dr. Mohan did not meet the profile of a child molester. The court did not allow the evidence because it usurped the role of the fact finder in determining guilt. The court held that expert evidence could be admitted if four criteria were met:

The evidence to be provided is relevant and its probative value is not outweighed by its prejudicial effect;

The evidence is necessary because the information is outside the knowledge and experience of the judge and/or jury;

The evidence can only come from a properly qualified expert, and it must be scientifically acceptable; and

There is no exclusionary rule barring the evidence (e.g., hearsay evidence).

The Supreme Court confirmed this standard in *R. v. J.-L.J.*,<sup>5</sup> where it also addressed how novel science should be handled. In this case, police charged J.-L.J. with a series of sexual assaults on two young boys. The expert was to testify that J.-L.J. showed no sexual arousal to young boys when he underwent phallogometric testing. At the time, phallogometric testing (penile plethysmography) was a new science. The inference from the testing was that J.-L.J.'s lack of arousal meant he could not be the perpetrator. Ultimately, the Supreme Court of Canada confirmed the *Mohan* criteria and noted that special scrutiny is needed when determining the admissibility of novel scientific evidence, adopting the *Daubert* criteria<sup>1</sup>: the theory of the new science must be tested; the theory must have been subject to peer review; there must be known error rates and standards; and the theory must have general acceptance (the *Frye* standard). The court also highlighted the very important roles that trial judges play in the court, including that of gatekeeper. Judges must be given a great deal of discretion on admitting or excluding evidence.

The lesson from these cases is that only relevant and necessary expert evidence should come into the court, and it should come from a qualified expert. If it involves novel science, caution is warranted. Although opinions based on novel science can be admitted into evidence, special rules are needed to ensure that non-evidence-based opinions are not admitted.

### Historical Lessons on Hearsay Evidence

In addition to these admissibility concerns, the Canadian courts have addressed the problem of hearsay information and how it might be employed by an expert in forming an opinion. Routine psychiatric practice and forensic psychiatry evaluations often involve gathering information from a variety of sources. Sources might include information not offered to the court as evidence, such as an interview with a family member or the roommate of an evaluatee. Other sources of information might include talking with the evaluatee's treating psychiatrist, reviewing multidisciplinary notes from a hospitalization, and summarizing observations made by the team during an inpatient assessment. Putting all of this into evidence before the court would be unwieldy. Consequently, the court has generally given some flexibility to experts who rely on hearsay in forming their expert opinions.

The Supreme Court of Canada addressed the issue of hearsay in *R. v. Abbey*.<sup>6</sup> The case involved a manic and delusional cocaine smuggler, Mr. Abbey, who believed that part of his consciousness had "astro-traveled" apart from his body from Peru to Canada. He explained that he was simply coming to Canada to join that part of him, though he agreed that he was also hoping to make profit from the cocaine that he brought. The expert relied on hearsay evidence in forming his opinion. In this case, the Supreme Court of Canada confirmed that the expert could use hearsay to form an opinion that was admissible; however, hearsay could not be accepted as fact. The reliability of the hearsay may affect the weight that the fact finder gives to such an expert opinion.

The Supreme Court's view was confirmed in a later case, *R. v. Lavallee*,<sup>7</sup> which involved the "battered spouse" defense. In this case, police charged Ms. Lavallee after she shot her partner, Kevin Rust. Ms. Lavallee exercised her right not to take the stand and therefore the Crown could not cross-examine her. In forming an opinion for the court, the expert relied on the psychiatric interview of Ms. Lavallee in which she described the nature and severity of her abuse. The expert opinion was admitted despite relying heavily on this hearsay evidence from Ms. Lavallee. The court highlighted that there could be no assumption that Ms. Lavallee's description was true. To put weight on the expert's opinion, the court would need to be convinced through other evidence that such abuse occurred. The lesson here was that experts may share expert opinions that rely on hearsay. The hearsay cannot be accepted as the truth, however, and the expert does not establish the facts in a case. The fact finder must decide if the facts on which experts base their opinions are valid. If they are not, the opinions should carry little weight.

### A New Lesson on Draft Reports

As forensic experts, it is the norm to interact at various levels with the lawyer retaining our services to discuss the case. The lawyer may provide vital information about the case, give insights on relevant legislation, and raise reasonable questions about our evaluation. The attorney may provide input on what specific legal questions are to be addressed. Once an expert produces a report, the lawyer may request changes; this could include requests to correct minor typographical errors and errors of fact, or this could escalate to requests for amendments that would rep-

resent unethical behavior, such as making substantive changes to an opinion. Inexperienced experts may need to consult with colleagues about responding to such requests and recommendations from lawyers. Regardless of the experience of the expert, it is the norm for counsel to prepare witnesses and discuss their reports. Ultimately, the lawyer may elect to not enter the report as an exhibit, although the report may still have influence on settlement negotiations. The Court of Appeal for Ontario reviewed this practice in the case of *Moore v. Getahun*.<sup>8</sup>

In this case, Mr. Moore suffered a fractured wrist in a motorcycle accident. Dr. Getahun was a recently qualified orthopedic surgeon who applied a cast to the fracture. Mr. Moore subsequently suffered permanent damage to his muscle after developing compartment syndrome. Mr. Moore sued Dr. Getahun for medical negligence, and a contentious legal process ensued. Mr. Moore's expert was Dr. Richards, an experienced orthopedic surgeon who was a full professor in an academic health sciences center and had been qualified as an expert witness on many occasions. Dr. Getahun's defense experts included Dr. Taylor, a retired community hospital-based orthopedic surgeon, and Dr. Athwal, an orthopedic surgeon doing teaching and research but with limited clinical experience. In the trial, it came out that an expert for Dr. Getahun had spent 90 minutes in preparation with counsel before completion of the final report. There were concerns that the lawyers had unduly influenced the contents of the expert's report. Ultimately, the routine practice of lawyers meeting with experts in this manner was questioned. The trial judge addressed concerns about the scope of permissible interactions between lawyers and experts. The trial judge suggested that the established rules and standards of ethics were inadequate to deal with the bias and influence from this practice. She suggested that experts should produce reports without any input from lawyers, and that any communication around the report should be in writing and should be provided to the opposing side.

The legal community's response to this ruling was overwhelming, with numerous parties submitting positions acting as interveners at the appeal level.<sup>9</sup> The appeals court agreed that interactions between counsel and expert witnesses risk the loss of objectivity on the part of the expert.<sup>8</sup> Such interactions are necessary, however, especially in highly technical areas of law, such as patents. Despite the risk, these

interactions can assist experts in fulfilling their duties in the judicial process. The professional standards and ethics of the legal profession forbid engaging in practices likely to interfere with the expert's duty to be objective. The court noted that the professional standards and ethics of many professions require that individuals giving expert opinion do so while maintaining objectivity. Both the American Academy of Psychiatry and the Law (AAPL) and the Canadian Academy of Psychiatry the Law (CAPL) have ethics guidelines that include this principle.

The court highlighted that these ethics standards foster experts' objectivity; the adversarial process of the court, including thorough cross-examination, further encourages objectivity. The Court of Appeal for Ontario noted that experts must maintain high ethics standards to provide fair, objective, and non-partisan evidence to serve their primary duty of educating the court. Ultimately, the appeals court felt that it was not problematic for counsel to discuss findings and opinions with experts.

This case also addressed the handling of draft reports and whether experts should provide all draft reports to the court. The appeals court recognized that there was a risk that the efficiency of hearings could be compromised with materially irrelevant concerns, resulting in unnecessary expense of resources and time. The court held the opposing party could only request a draft report "where [there was] reasonable suspicion that counsel improperly influenced the expert" (Ref. 8, para. 78).

Finally, this case reviewed the approach to take when counsel makes an expert report available to the judge as an *aide memoire* but does not enter it into evidence. The presiding judge suggested that some experts were not credible because of inconsistencies between the reports and *viva voce* evidence, despite the reports not being part of the official evidentiary body. The Court of Appeal for Ontario determined this to be an error because the *aide memoire* report was not part of the record and did not come up in cross-examination. The expert witness is entitled to be openly confronted for inconsistencies but only if the written report is entered as evidence and not as an *aide memoire*.

### Recent Lessons on "Hired Guns" and Bias

The courts continue to wrestle with many aspects of expert witness testimony as experts continue to succumb to the pitfalls inherent in providing opin-

ion, particularly related to bias. Diamond<sup>10</sup> reviewed this in a historical context in his discussion of the disturbing biases of “Dr. Death.” Glancy and Regehr<sup>11</sup> discussed the Canadian case of Dr. Charles Smith, a pediatric pathologist working at a world-renowned children’s hospital in Toronto, Canada, from 1981 to 2005. Dr. Smith had no formal training in forensic pathology but was regularly called upon to give expert evidence in cases of alleged child abuse. A review of his expert testimony in child death and abuse cases ultimately showed that, in almost half of the cases, his conclusions were of questionable validity. Many of these cases resulted in convictions of innocent individuals. A judicial inquiry resulted in a scathing review of expert witness standards in criminal courts.<sup>12</sup> In Dr. Smith’s case, major concerns were identified, including the lack of appropriate training in forensic work combined with advocacy for one side (e.g., advocating for conviction in Dr. Smith’s case).

While Dr. Smith’s work raised concerns about the behavior of expert witnesses in criminal cases, similar problems arise in the civil arena. Unlike most criminal cases, it is often the norm in civil litigation to have numerous experts on both sides. This increases the potential for experts to exhibit problematic conduct in court. As a result, many jurisdictions have codified rules of conduct for experts. Around the same time that Dr. Smith’s cases were being scrutinized, civil courts in Ontario raised concerns about expert witnesses’ conduct, noting the growing trend of having battles of experts that increased the cost and complexity of cases. A judicial review was undertaken, resulting in the Osborne report.<sup>13</sup> In specifically addressing expert witnesses, Osborne wrote, “too many experts are no more than hired guns who tailor their reports and evidence to suit the client’s needs.”<sup>13</sup> He noted, “the issue of ‘hired guns’ and ‘opinions for sale’ was repeatedly identified as a problem during consultations.”<sup>13</sup>

Osborne offered numerous recommendations for reform of the civil litigation legislation. These recommendations were codified in the Ontario Rules of Civil Procedure.<sup>14</sup> Expert witnesses were mandated to provide evidence that is fair, objective, nonpartisan, and within the expert’s area of expertise. The information on which they base their opinions must be disclosed. The legislation included the mandatory signing of a “Rule 53.03 statement” confirming that the expert understands the obligation to be unbiased,

regardless of which party hired the expert. This was specifically required to eliminate the “hired guns” problem, although this may be an arguably naive solution for unethical behavior.

In *Westerhof v. Gee Estate*, the court noted that there are:

several problems with expert evidence, including, for example: the proliferation of experts and expert reports, resulting in an “industry” of competing experts and associated increases in costs; expert bias; lengthy and uncontrolled expert testimony; the absence of a rule requiring experts to meet to seek to narrow disputed issues; problems with the timelines of expert reports; and a lack of regulation of the standard context of expert reports (Ref. 15, para. 78).

### The Impact of Bias on Future Credibility

Ontario trial courts have raised the problem of bias in other cases. These cases highlight the potential consequences when the court sees a purported expert as biased. For example, in *Daggitt v. Campbell*,<sup>16</sup> Mr. Campbell rear-ended the vehicle driven by Ms. Daggitt. Ms. Daggitt could not return to work due to chronic pain, headaches, loss of enjoyment from life, and reduced sleep. Her family physician, and later her psychologist, diagnosed her with depression. Her depression improved with medications and psychotherapy, so she discontinued her treatment.

Ms. Daggitt complied with independent assessments by a physiatrist and an orthopedic surgeon. Mr. Campbell’s legal team requested that she also submit to a psychiatric evaluation given her previous depression. The trial court felt the request for a psychiatric evaluation was inappropriate. In making its ruling, the court castigated the proposed psychiatric expert. In short, the court noted that the psychiatrist had been found in a previous case to be biased and failed to undertake the mandated requirement to be fair, objective, and nonpartisan. The court commented that independent medical assessments are highly intrusive and, therefore, must be undertaken only when necessary and by individuals who do not have a history of biased conduct.

This case highlights the need for experts to strive to be as unbiased as possible. In making these comments, the judge in *Daggitt v. Campbell* cited similar cases where the expert was found to be a noncredible witness due to failure to honor the obligations to be fair, objective, and nonpartisan. The ruling in *Daggitt v. Campbell* suggested that part of the reason to deny the request for a psychiatric evaluation was because the defense had selected an expert who was

perceived to be biased. Interestingly, the judge commented that a psychological or neuropsychological evaluation may have been appropriate but had not been requested.

### Expert Evidence From Treating Physicians

Forensic psychiatry highly values the principle of avoiding a dual role where possible and suggests that treating physicians should avoid giving expert opinions about their patients, given the risk of therapeutic bias and the potential harm to the therapeutic relationship. This concern is less clear to courts. In many civil trials, courts are very interested in hearing from physicians who have treated litigants. As part of the treatment, physicians have usually formed a clinical opinion about diagnosis and other questions that may be relevant to the court; often this occurs near the time of the injury and before litigation is a goal. Alternatively, some clinicians may have evaluated litigants for purposes separate from litigation. For example, a psychiatrist may have assessed a person for disability benefits following a motor-vehicle accident, but then may be asked to testify in psychological harm litigation. The courts often view those not retained for litigation as being less biased. There had been uncertainty, however, on how courts should treat the evidence of such clinicians.

The Court of Appeal for Ontario clarified this matter in *Westerhof v. Gee Estate*.<sup>15</sup> Mr. Westerhof was hit from behind in a car, resulting in injuries, pain, depression, and anxiety, including some symptoms consistent with posttraumatic stress disorder. His treating family physician and treating chiropractor gave evidence about the acute physical symptoms for which he sought treatment. His family physician also discussed the psychological impact that became apparent further into Mr. Westerhof's treatment.

In the civil proceeding, Mr. Westerhof proposed to call nine experts. This included some of his treating physicians. One was the orthopedic surgeon who performed hip surgery on Mr. Westerhof after the accident. The defense sought to exclude the treating physicians' evidence as they had not complied with the statutory requirements for experts, including completing a Rule 53.03 statement that they would provide evidence that was fair, objective, and non-partisan. The trial judge agreed and prevented the treating clinicians from providing factual evidence about the clinical history reported by Mr. Westerhof and from providing opinion evidence about diagnosis

or prognosis. Some of the professionals had completed independent assessments of Mr. Westerhof outside of the litigation, such as for disability benefits. The judge excluded all evidence from those who were not retained as experts specifically for the litigation. Mr. Westerhof argued this was an error in law, as these individuals had important and relevant evidence.

In its ruling, the Court of Appeal noted that it was appropriate and even desirable that "a witness with special skill, knowledge, training, or experience" (Ref. 15, para. 60) who has not been involved directly in the litigation be able to give opinion evidence. They held that these experts who were exterior to the litigation could offer opinion evidence without the statutory requirement of a Rule 53.03 statement, suggesting that these witnesses may be less biased than litigant experts. Previously, courts generally considered such experts as fact witnesses and prevented them from giving opinion evidence (e.g., diagnosis, treatment, and prognosis). The appeals court felt these clinicians should be allowed to give opinion evidence.

In the case of treating clinicians, the court felt they were more appropriately called "participant experts" rather than fact witnesses. Participant experts are experts in their medical field who participated in the care of the individual. In the case of experts who were not part of the litigation, such as an individual who had completed an independent insurance evaluation, the court suggested that these individuals be referred to as "non-party experts." Both new categories of experts would not be required to complete a Rule 53.03 statement given the lower potential for bias toward a retaining party, but their opinions would be limited to clinical opinions arising directly from their previous involvement and within their expertise. The court highlighted that these individuals form their opinions and take notes at the time of their involvement prior to the litigation occurring, again suggesting less potential for bias. Finally, the court again confirmed in this case that the trial judge has a vital gatekeeper function to decide admissibility and that the trial judge has great discretion in making these decisions.

### Judicial Steps If Apparent Bias Is Present

In 2015, the Supreme Court of Canada confirmed a two-step analysis to be taken by trial judges for all expert evidence.<sup>17</sup> In this case, a chartered accounting company, White Burgess Langille Inman Char-

tered Accountants (WBLI) audited the shareholders of Abbott & Haliburton Company. The shareholders sued WBLI, suggesting that the financial statements contained incorrect and misleading information, and hired a new accounting firm. The shareholders hired a forensic accountant, Susan MacMillan, who worked for the new accounting firm in a different branch office. She produced a report and affidavit opining that auditors at WBLI did not comply with their professional obligations. WBLI argued that Ms. MacMillan was biased for several reasons: her firm could be liable if the court did not accept her approach; she could be personally liable as a partner in the firm if the court did not accept her approach; and she had a personal financial interest in the outcome of the case.

WBLI argued that the judge should exclude Ms. MacMillan from testifying given these potential biases. The trial judge agreed and did not allow the shareholders to offer Ms. MacMillan's opinion. The judge noted that expert evidence must not only be independent and impartial, but it must also be seen to be impartial. On appeal to the Supreme Court of Canada, the *Mohan* criteria were confirmed; to ensure only reliable and relevant evidence enter the court, judges should use a cost-benefit analysis in deciding whether to admit expert evidence. Evidence should be excluded when the prejudicial effect outweighs the probative effect.

The Supreme Court also outlined a two-step test for evaluation of expert evidence. The first step is to establish whether the threshold for admissibility is met using *Mohan* criteria. If the proposed testimony involves novel science, then the first step also involves establishing whether the threshold for admissibility is met using *Daubert/J.-L.J.* criteria. In step two, the trial judge weighs the risks and benefits of allowing the evidence. The Supreme Court found that questions about the expert's "independence and impartiality" can be a reason to declare opinion evidence inadmissible. For evidence that is admitted, these questions could also speak to the weight given to the evidence.

The Court held that the threshold for admissibility is met when experts testify under oath or attest that their primary duty is to the court and that they are willing and able to perform this duty. The Court put the onus on the opposing party to establish that the evidence should not be received. They also listed some conditions that may be considered in determining whether impartiality is possible, including

the nature and extent of potential conflict of interest and the connection to the case (i.e., the existence of some interest or relationship does not automatically render evidence inadmissible); direct financial interest in an outcome; a very close familial relationship with one of the parties; and situations where the proposed expert will probably incur professional liability if the opinion is not accepted by the court.

The question is not whether a reasonable observer would think the expert is not independent or impartial, but whether relationships or interests result in the expert being unable to carry out the primary duty to the court to provide fair, nonpartisan, and objective assistance. The professional who is not willing or able to perform this duty cannot be a properly qualified expert. Once expert evidence is admitted, the weight of the evidence will be examined. Other concerns, including apparent bias, may come to affect weight rather than admissibility. This approach has been applauded by legal writers.<sup>18</sup>

### Ghost Writing and Cancellation Fees

In *Kushnir v. Macari*,<sup>19</sup> the Ontario trial court addressed the subject of ghost writing, i.e., the practice of having someone other than the expert complete parts of the report. In this case, Mr. Macari's vehicle struck Ms. Kushnir, causing significant physical injuries. Ms. Kushnir agreed to be evaluated by Mr. Macari's experts under several conditions, including that the experts would not employ ghost writing. When Ms. Kushnir did not attend at the last minute for the evaluation, the expert charged a significant fee for the late cancellation. Ultimately, the court found that including the prohibition of ghostwriting in the conditions was "strident and overreaching." The court did state, however, that the legislation mandates the report only be written by the expert and that the report must comply with the legislation.

The court highlighted numerous concerns in their analysis. Ghostwriting was felt to have become a significant problem, and they noted cases of experts admitting under testimony that another author had written much of their report. This was of concern because many cases are settled based on the written opinion of the expert without the opportunity for testimony and cross-examination. As a result, the parties may never know that another person authored the report. Parties pay significant fees with a reasonable expectation that the listed author wrote

the report. Without this assurance, the legal process is undermined and further litigation is promoted. They also highlighted the potential privacy issues involved in having other individuals involved. This would suggest that experts should not be relying on records summarized or written by others in reports. In a separate issue from the case, the court found that the cancellation fee was excessive because it approached the cost of an actual evaluation and report; instead they suggested a more reasonable amount. The court felt other conditions agreed to by the parties were valid, including not recording the evaluation and not using a questionnaire.

The court has imposed numerous restrictions on what may be routine practice for some forensic psychiatrists, including having proofreaders for reports, relying on assessments of other team members, using summarized records, and administering questionnaires. There may be some strategies to allow for these components of routine assessment and forensic practice, while still addressing the underlying concerns raised by the court.

In some cases, the volume of materials to review in detail can be extensive, making a thorough review by a forensic psychiatrist time-consuming and cost-prohibitive. In these situations, the expert should still review all materials but may request that the parties provide an agreed-upon statement of facts. The expert may be able to use an individual qualified in handling sensitive health information to assist. Rather than a secretary, it might be acceptable to use a psychological associate, social worker, or other qualified individual to provide relevant summaries. Any summaries could be produced with clear authorship as an addendum to the main report or submitted as a separate report. It would be prudent to vet this practice with the party retaining the expert. Regarding other limitations to the assessment (e.g., not using questionnaires), the expert should appropriately advocate to include important pieces of a complete evaluation. If the parties tie the hands of the expert too much, the expert may not be able to provide a valid opinion with reasonable medical certainty, and the expert may elect not to participate under such conditions.

## Conclusions

Providing psychiatric expertise to courts is a privilege. Experts fulfill a special role in the legal system

through their ability to educate fact finders. This privilege brings numerous potential risks for the expert and for the court (see Table 1). We have discussed a number of these problems and ways that Canadian courts are addressing them. While forensic mental health professionals enjoy the privilege of acting as expert witnesses, the courts are increasingly scrutinizing how they navigate this role. If the profession does not self-regulate its practice, the courts will continue to do so.

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