CHALLENGING EXPERT EVIDENCE

By Bill McNally and Barb Cotton

The trend of the courtrooms to more readily accept expert evidence, including expert evidence in the "soft sciences", has been quite marked. Mister Justice Finlayson of the Ontario Court of Appeal commented upon this in *R.* v. *McIntosh*,[1] wherein he stated: "the courts are overly eager to abdicate their fact-finding responsibilities to experts in the field of the behavioral sciences" and chastised prosecutors for relying too heavily on the soft sciences.

Apart from the very real practical challenges expert evidence presents to the length of trials or to equal access to justice, expert evidence can impair the very integrity of the trial process by causing undue deference.[2]

Further, there is a real risk of bias in expert evidence as experts are generally not selected by the courts, but by the party litigants. The experts are invariably chosen for the compatibility of their views with the interests of the party calling them.[3]

Expert evidence can also be wrapped up in "scientific mystique", thus leading to its disproportionate influence.[4] [5]

What, then, can be done to challenge the admissibility of expert evidence?

There is a body of law that has been developed from the seminal Supreme Court of Canada case of *R.* v. *Mohan*[6] that has established a fairly comprehensive framework upon which plaintiff's counsel can challenge expert evidence, usually within the context of a *voir dire*, but also seemingly within the context of the trial *per se*.

One commentator[7] has noted that, technically, evidence that does not satisfy the rules should not be received, even in the absence of an objection by counsel. This means that where expert evidence is suspect, a court should insist on a "*Mohan* inquiry", even when no objection is made.

A "*Mohan* inquiry" is a four step procedure, requiring the court to determine the admissibility of expert opinion evidence by assessing:

i. relevance;
ii. necessity;
iii. the absence of any exclusionary rule; and
iv. whether the proposed witness is a properly qualified expert.

The onus is on the party seeking to admit the expert evidence, and the standard required to satisfy the prerequisites of admissibility is the balance of probabilities.[8]

The relevance criteria required in a *Mohan* inquiry has two components. The first is the basic requirement of logical relevance. Does the evidence, as a matter of logic or human experience, have some tendency to advance the inquiry?[9]

The second stage inquiry into relevance involves a cost-benefit analysis.

Evidence that is logically relevant may be excluded if:

i its probative value is overborne by its prejudicial effects;

ii the time required to receive it is not commensurate with its value; or

iii it may influence the trier of fact out of proportion to its reliability.[10]

With respect to the criteria of necessity, necessity is not met where the proposed evidence is merely helpful or might reasonably assist the jury. Necessity requires that the evidence be necessary to allow the fact finder:

i to appreciate the facts due to their technical nature; or

ii to form a correct judgment on a matter where ordinary persons are unlikely to do so without the help of those with special knowledge.[11]

It should be noted that, for "non-novel science", evidence must be "necessary", but for "novel" or "junk" science *Mohan* has established that the evidence must be "essential".[12]

With respect to the third criteria, this merely restates that evidence can be excluded on the basis of another exclusionary rule. For instance, the rule excluding "bad character evidence" is frequently salient when the expert has indulged him or herself in gratuitous comments in the report.

With respect to the fourth criteria, expertise has been described as having a "modest status". All that is required is that the expert possess special knowledge and experience going beyond that of the trier of fact.[13]

Another requirement beyond the *Mohan* criteria is established by the so called "*McIntosh* test", stemming from the Ontario Court of Appeal case of *R.* v. *McIntosh* [14]. This test requires that the first prerequisite to the admission of expert evidence is that the opinion or methodology must be grounded in science. Although it need not rest in physics, mathematics, psychology or anthropology, it must rest on established organizing principles and demonstrate a truth that emerged from an identifiable discipline.[15]

This test stems from the following passage of Mister Justice Finlayson in *McIntosh*:

> "Paraphrasing freely from the definition of "science" in *The Shorter Oxford English Dictionary on Historical Principles*, it seems to me that before a witness can be permitted to testify as an expert, the court must be satisfied that the subject-matter of his or her expertise is a branch of study in psychology concerned with a connected body of demonstrated truths or with observed facts systematically classified and more or less connected together by a common

> hypothesis operating under general laws. The branch should include trustworthy methods for the discovery of new truths within its own domain."

The expertise of the expert can be gained by formal study, practical experience, or both. The competence of the witness to give expert evidence does not depend on how the skill was acquired, only that it has been gained.[16]

The fact that a scientific theory is open to debate or exceptional cases fall outside the norm does not preclude the admissibility of opinion evidence based upon that theory.[17]

Looking then more closely at the leading cases, one begins with the modern seminal decision of *R.* v. *Mohan*, a decision of Sopinka J. for the Supreme Court of Canada.

In this case the respondent, a practicing pediatrician, was charged with four counts of sexual assault on four female patients, aged 13 to 16 at the relevant time, during medial examinations conducted in his office. His lawyer indicated that he intended to call a psychiatrist who would testify that the perpetrator of the alleged offences would be part of a limited and unusual group of individuals and that the respondent did not fall within that narrow class because he did not possess the characteristics belonging to that group. The psychiatrist testified in a *voir dire* that the psychological profile of the perpetrator of the first three complaints was likely that of a pedophile, while the profile of the perpetrator of the fourth complaint was that of a sexual psychopath. The psychiatrist intended to testify that the respondent did not fit the profiles but the evidence was ruled inadmissible at the conclusion of the *voir dire* by the trial judge.

The respondent was found guilty by the jury and appealed. The appellate court allowed the respondent's appeal, quashed the convictions and ordered a new trial. The Ontario Court of Appeal felt that the psychiatrist's evidence should have been admitted.

This was overturned on further appeal to the Supreme Court of Canada and it was held that the evidence was rightly excluded by the trial judge. In doing so, Sopinka J. established the leading modern principles regarding challenging expert evidence.

After establishing the fourfold criteria in assessing admissibility of expert evidence, Sopinka J. went on to expand on the concept of "relevance", at paras. 18-19, as follows:

> "Relevance is a threshold requirement for the admission of expert evidence as with all other evidence. Relevance is a matter to be decided by a judge as a question of law. Although prima facie admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs" . . . Cost in this context is not used in a traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule . . .
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> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves . . ."

With respect to the requirement of "necessity", Sopinka J. stated at paras. 22-24:

> "This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide evidence "which is likely to be outside the experience and knowledge of a judge or jury": As quoted by Dickson J. in *R.* v. *Abbey* [[1982] 2 S.C.R. 24]. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature . . . in order for expert

> evidence to be admissible, "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge" . . .
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> As in the case of relevance, discussed above, the need for evidence is assessed in light of its potential to distort the fact-finding process . . .
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> There is also a concern inherent in the application of this criterion that experts not be permitted to usurp the functions of the trier of fact. Too liberal an approach could result in a trial becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept."

With respect to so called "junk science", Sopinka J. stated at para. 28:

> "In summary, therefore, it appears from the foregoing that expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle."

The next leading case is *R.* v. *McIntosh*, a decision of the Ontario Court of Appeal per Finlayson J.A. In this case the appellants Paul McCarthy and Owen McIntosh were charged on a ten count indictment with attempted murder, robbery, assault with a weapon, and various firearms offences arising out of a robbery at a dry cleaning store. McCarthy was alleged to have struggled with and shot the victim, while McIntosh was alleged to have beaten the victim with a metal rod. The case for the Crown consisted primarily of three eyewitnesses, one of whom noted the licence number and description of the escaped vehicle. The appellants were subsequently stopped in this vehicle, which contained the pistol which the defence later admitted was used in the commission of the robbery. However, at trial the appellants denied their involvement. McIntosh stated that at the time of the robbery he was driving his mother home from work. The trial judge refused to admit expert evidence from a defence psychologist on the issue of eyewitness identification.

The appellants were convicted of aggravated assault as an included defence of attempted murder and of the other nine offences in the indictment. McCarthy was sentenced to a total of seven years in prison and McIntosh was sentenced to a total of five years. They both appealed against their convictions and McIntosh appealed against his sentence. The issue on appeal was whether the trial judge erred in refusing to admit the expert opinion evidence, *inter alia*.

Finlayson J. imposed the criteria of a scientific basis for the expert's opinion, as previously discussed.

He also had interesting comments at para. 14, as follows:

> ". . . However, I do not intend to leave the subject without raising some warning flags. In my respectful opinion, the courts are overly eager to abdicate their fact-finding responsibility to "experts" in the field of the behavioral sciences. We are too quick to say that a particular witness possesses special knowledge and experience going beyond that of the trier of fact without engaging in an analysis of the subject matter of that expertise . . . simply because a person has lectured and written extensively on a subject that is of interest to him or her does not constitute him or her an expert for the purposes of testifying in a court of law on the subject of that specialty. It seems to me that before we even get to the point of examining the witness' expertise, we must ask ourselves if the subject matter of his testimony admits of expert testimony. Where is the evidence in this case that there is a recognized body of scientific knowledge that defines rules of human behavior affecting memory patterns such that any expert in that field can evaluate the reliability of the identification made by a particular witness in a given case?"

The next leading case is the Supreme Court of Canada case of *R.* v. *D.(D.)*[18], a decision of Major J., with Iacobucci, Binnie and Arbour J.J. concurring, for the majority. In this case the complainant alleged that the accused, who lived with her mother, had sexually assaulted her on numerous occasions when she was five to six years old. The complainant told no one about the assaults for two and a half years, when a teacher referred the matter to the Children's Aid Society. Charges were laid and the matter proceeded to trial when the complainant was ten years old. On cross-examination defence counsel suggested that the delayed disclosure supported an inference that the complainant was not telling the truth. A *voir dire* was held to determine the

admissibility of expert evidence of a child psychologist, which the Crown sought to call in rebuttal. The expert testified that many factors can affect the timing of a child's complaint of sexual abuse, and that delayed disclosure is not diagnostic of whether alleged assault actually occurred. The trial judge ruled that the evidence was admissible, since it was relevant to the defence position that the complainant had fabricated the assaults and was necessary for the jury to reach a just verdict.

The Court of Appeal set aside the verdict on other grounds and ordered a new trial. It further held that the expert evidence on delay in reporting was neither relevant nor necessary, and was inadmissible at the new trial.

The Crown appealed the evidentiary ruling, and this appeal was dismissed by the Supreme Court of Canada.

Major J., for the majority, emphasized that, as stated in *Mohan*, "mere helpfulness" was too low a standard to warrant accepting the dangerousness inherent in the admission of expert evidence and that a finding that some aspect of the evidence "might reasonably have assisted the jury" was not enough. At para. 47 Major J. quoted Sopinka J. in *Mohan*:

> "expert evidence must be necessary in order to allow the fact finder: (1) to appreciate the facts due to the technical nature, or (2) to form a correct judgment on a matter if ordinary persons are unlikely to do so without the assistance of persons with special knowledge."[19]

In reviewing the "dangers" associated with the admission of expert evidence, Major J. identified:

- The primary danger that the jury may be usurped by the expert witness. "Faced with an expert's impressive credentials and mastery of scientific jargon, jurors are more likely to abdicate their role as fact-finders and simply attorn to the opinion of the expert in the desire to reach a just result."[20]

- Expert evidence is highly resistant to effective cross-examination by counsel who are not experts in that field, which will have the effect of depriving the jury of an effective framework within which to evaluate the merits of the evidence.

- Expert opinions are usually derived from academic literature and out of court interviews, which material if unsworn is not available for cross examination.

- Expert evidence is time consuming and expensive. "When the door to the admission of expert evidence is open too widely, a trial has the tendency to degenerate into "a contest of experts with the trier of fact acting as referee in deciding which expert to accept".[21]

The most recent statement from the Supreme Court of Canada on this issue is *R.* v. *J. - L.J.*[22], a decision of Binnie J. for the court.

In this case the accused was charged with a series of sexual assaults on two young male children. He tendered the evidence of a psychiatrist to establish that in all probability a serious sexual deviant had inflicted the abuse, and no such deviant personality traits were disclosed by the accused in various tests, including penile plethysmography. After a *voir dire*, the trial judge excluded the expert evidence because it purported to show only a lack of general disposition and was not saved by the "distinctive group" exception established in *Mohan*. The accused was convicted.

A majority of the Court of Appeal allowed the accused's appeal and ordered a new trial on the basis that the expert evidence was wrongly excluded.

On further appeal the Supreme Court of Canada held that the appeal should be allowed and the conviction restored. Novel science was subject to "special scrutiny". Binnie J. looked to the United States for guidance, and stated at para. 33:

"*Mohan* kept the door open to novel science, rejecting the "general acceptance" tests formulated in the United States in *Frye* v. *United States*, 293 F. 1013 (D.C. Cir. 1923), and moving in parallel with its replacement, the "reliable foundation" test more recently laid down by the U.S. Supreme Court in *Daubert* v. *Merrell Dell Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). While *Daubert* must be read in light of the specific text of the Federal Rules of Evidence, which differs from our own procedures, the U.S. Supreme Court did list a number of factors that could be helpful in evaluating the soundness of novel science (at pp. 593-94):

> (1) whether the theory or technique can be and has been tested:
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> Scientific Methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.
>
> (2) whether the theory or technique has been subjected to peer review and publication:
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> [S]ubmission to the scrutiny of the scientific community is a component of "good science", in part because it increases the likelihood that substantive flaws in methodology will be detected.
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> (3) the known or potential rate of error or the existence of standards; and,
>
> (4) whether the theory or technique used has been generally accepted:
>
> A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community".
>
> Widespread acceptance can be an important factor in ruling particular evidence admissible, and a "known technique which has been able to attract only minimal support within the community," . . . may properly be viewed with skepticism."

Two other interesting cases dealing with "junk science" are *P. (S.F.)* v. *MacDonald* [23], a decision of Veit J. of the Alberta Court of Queen's Bench, wherein the proposed evidence of a

psychiatrist on quantitative analysis of EEGs and brain mapping was not allowed as it did not meet the threshold test of a reliability, and *Wolfin* v. *Shaw*[24], a decision of Dillon J. of the British Columbia Supreme Court, wherein the results of a PET scan of the plaintiff was not admitted as the PET had not been accepted generally for the application in the clinical diagnosis of mild brain trauma.

Another leading case is that of the Alberta Court of Appeal *per curiam* in *R.* v. *N. (R.A.)*[25]. In this case the accused was convicted of sexual assault. The accused appealed the conviction on the ground that the trial judge raised the victim's mother's evidence of the victim's bedwetting to the level of expert evidence. The appeal was dismissed on the basis that the trial judge was allowed to use common sense and experience to understand why the complainant behaved in certain ways. Expert evidence was not always necessary to explain certain behaviors. Even if the trial judge relied on the mother's evidence to corroborate the victim's testimony, without expert evidence to link testimony, there was no error.

The decision is in general cautionary against the admission of expert evidence as common sense and the common experience of human behavior can guide the trial judge.

See also *Freyberg* v. *Fletcher Challenge Oil & Gas Inc.*[26], a recent decision of the Alberta Court of Appeal reviewing these principles.

It is an especially difficult situation for plaintiff's counsel when the expert indulges him or herself and wanders from their expert opinion to cast aspersions on the plaintiff. This situation may well be caught by the general exclusionary rule against "bad character evidence".

One of the early cases dealing with "bad character evidence" is *R.* v. *French* [27], without explicit discussion of this point. In this case the Crown witness who initially supported the accused's alibi later testified that she did so out of fear for herself and her child. On appeal against the conviction of murder, the accused argued that since the witness supported his alibi in the first instance she was an accessory after the fact and a specific warning as to the necessity for

corroboration should have been given to the jury. It was held by the Ontario Court of Appeal that the appeal should be dismissed. The earlier support given to the accused's alibi might have made the witness an accessory after the fact if she had done so to enable the accused to escape. Although this was a remote possibility considering the evidence it was a question for the jury. However, the trial judge's direction to the jury warning them to scrutinize most carefully the witnesses' evidence, for she was a person of ill repute with a criminal record, left no doubt as to the danger of convicting on the witnesses' uncorroborated evidence. There was therefore no substantial wrong or miscarriage of justice in failing to leave to the jury the question of whether the witness was an accessory after the fact.

At trial the defence sought permission to have a psychiatrist who had observed the Crown witness in court and reviewed her medical record give evidence that the witness suffered from a character disorder marked by the ability to fabricate a lie easily. On a *voir dire* the trial judge refused to admit the evidence. This ruling was upheld by the Ontario Court of Appeal. The psychiatrist had admitted to the trial judge that his assessment could have been reached by laymen and thus his evidence would usurp the jury's task of assessing the credibility of the witness on the basis of its own observation.

The particular facts of the "character disorder" which the psychiatrist sought to opine on are of interest and set out at paras. 19-20:

> "Nadine Deveau, who was 24 years old at the time of the trial, is not a model citizen. She had been a heroine user and was admitted to the Kitchener-Waterloo Hospital in February 1975, diagnosed as a heroine addict. She swore she had not used heroine since February 1975 but now used tranquilizers. She had begun smoking marijuana at 16 and then moved on to "speed" until she started using heroine. She acknowledged that she had been a persistent shoplifter in the past and had occasionally sold the stolen goods for money. She admitted a conviction for wounding and also admitted that in the few months preceding the trial she had a drinking problem as evidenced by the impaired driving charges recited. She said she was frightened and under a lot of stress in the past year and her drinking stemmed from that. She had been suicidal three times in the year previous to the trial because of the fear and stress. She admitted that she had lied to the police originally when she stated that the appellant had been in the City Hotel between 9

> and 11 p.m. on August 9th, the time when, according to her evidence, the murder was committed. A number of witnesses who were called by both the Crown and the appellant gave evidence to the effect that Ms. Deveau's reputation in the community was not good and they would not believe her under oath.
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> Dr. Malcolm, a psychiatrist of considerable experience, who has a number of publications in the field of drugs and psychiatry, was called by the defence. A voir dire was held on the admissibility of his evidence. He was present during the testimony of Nadine Deveau, and he had her hospital records from the Kitchener-Waterloo Hospital and Saint Mary's Hospital. He had not interviewed her. He stated that he had learned a great deal from his observations of Ms. Deveau in the witness box and from her medical records. She had a history of the use of a variety of psychoactive drugs over an extensive period of time. He was of the opinion that her evidence was highly suggestive that she fell into the category of persons with "character disorders" or "personality disorders", which meant that there was no psychosis or particular neurosis present, but there was a behavior problem. Indeed, he didn't really feel any hesitation in saying that she did suffer from a character disorder. He stated that to him it was established that she was quite capable of lying on the stand."

The trial judge did not allow this expert evidence on the basis that he was drawing conclusions that would be perfectly evident to a jury.

Another leading case on "bad character evidence" is *R.* v. *Pascoe*[28], a decision of the Ontario Court of Appeal per Rosenberg J.A. In this case the accused was charged with sexual assault and sexual interference. While sitting beside an 8 year old boy, he placed his hand on the boy's upper thigh and back for one or two seconds. While watching TV with an 11 year old boy, he patted the couch beside him, indicating that he wanted the boy to sit closer. The boy moved closer but remained several feet away. On another occasion the accused lifted the 11 year old boy off the floor by placing his hands around the boy's waist. The two boys were fully clothed and the incident lasted a few seconds. On the last occasion, the accused invited the 11 year old boy to sit on his knee. The boy refused and nothing else occurred.

The Crown sought to lead psychiatric evidence as part of its case in chief that the accused was a homosexual pedophile and that his conduct toward the boys, while superficially ambiguous, was

probably sexually motivated. On a *voir dire* the trial judge ruled that the psychiatric evidence was admissible.

This ruling was overturned on appeal and it was held that the restriction on the evidence of the Crown was based on similar policy considerations to the prohibition against the Crown leading evidence of the accused's bad character unless the accused placed his or her character in issue. The reformed law permitted the Crown to lead psychiatric evidence if the judge determined that the proposed evidence was relevant to a live issue, apart from its tendency to show propensity, and its probative value outweighed its prejudicial effects. If the primary relevance of the evidence was to show disposition or propensity, then the evidence must be excluded. If the live issues in the case or the way in which the evidence was adduced made it more likely that the jury would misuse the evidence, then the evidence should be excluded.

The appellate court held that the trial judge had misdirected himself as to the test for determining the probative value of the evidence. The trial judge had failed to note that the evidence was largely nothing more than the evidence of propensity and expression of personal opinion rather than a careful examination of the particular characteristics of the abnormal group to which the accused belonged. The prejudice to the accused was extremely high for a number of reasons, none of which were adequately addressed by the trial judge. There was obvious prejudice because the evidence showed the accused to be a person of bad character and linked him with a group which would be subject to loathing and fear in the community.

In *Children's Aid Society of Cape Breton-Victoria* v. *D.(N.)*[29] MacLellan J. of the Nova Scotia Supreme Court completely discounted the expert evidence of two individuals who sought to opine on the fitness of a mother to parent her children. In their reports the "experts" included irrelevant data, such as the fact that the mother had tattoos, and cast sweeping aspersions on her character which were not based on objective data.

See also *Johnstone* v. *Brighton*[30], a decision of G.A. Campbell J. of the Ontario Superior Court of Justice, wherein the evidence of a well known clinical psychologist with respect to the effect

of moves on a child and his attachment to his parents was not allowed. In preparing his report, the psychologist did not meet either the mother of the child or father, and did not meet the child himself. His opinion was based on "hypothetical" facts upon which he was asked to comment. During mid-trial his expert opinion evidence was challenged and it was held that the evidence was not admissible. After weighing the even marginal benefit that the psychologist's evidence might offer, together with the court's natural inclination to hear all the evidence that counsel decided to present, it was held that the impact of further financial costs to the parties, and delay, rendered the evidence inadmissible.

Thus it can be seen that, stemming from the seminal case of *R.* v. *Mohan*, the courts have articulated a framework within which expert evidence can be challenged by plaintiff's counsel and a ruling sought, generally on a *voir dire*, that the evidence is inadmissible.

ENDNOTES

[1] (1997), 35 O.R. (3d) 97 at 102

[2] David M. Paciocco, "Coping With Expert Evidence About Human Behavior" (1999), 25 Queen's L.J. 305 at para. 3

[3] David M. Paciocco, supra, at paras. 9-10

[4] David M. Paciocco, supra, at para. 60

[5] For a further exposition on the difficulties with expert evidence, see Paul Michell and Renu Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 Alta L. Rev. 635 and Tania M. Bubela, "Expert Evidence: The Ethical Responsibility of the Legal Profession" (2004), 41 Alta L.Rev. 853

[6] [1994] 2 S.C.R. 9

[7] David M. Paciocco, ibid at note 2

[8] David M. Paciocco, *supra*, at para. 20, citing *R.* v. *Terceira* (1998), 15 C.R. (5th) 359 (O.C.A., leave to appeal to S.C.C. granted 127 C.C.C. (3d) vi

[9] David M. Paciocco, *supra*, at para. 41

[10] *Watt's Manual of Criminal Evidence* § 29.01

[11] *Watt's Manual of Criminal Evidence* § 29.01

[12] David M. Paciocco, ibid note 2, at para. 31

[13] David M. Paciocco, supra, at para. 72, applying *R.* v. *Beland*, [1987] 2 S.C.R. 398 at 415

[14] (1997), 35 O.R. (2d) 97, leave to appeal to the S.C.C. refused at (1998), 111 O.A.C. 395

[15] David M. Paciocco, ibid at note 2, at para. 13

[16] *Watt's Manual of Criminal Evidence* § 29.02

[17] *R.* v. *N.(B.)* (1998), 21 C.R. (5th) 324

[18] [2000] 2 S.C.R. 275; [2000] S.C.J. No. 44; 2000 SCC 43

[19] citing J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 620

[20] David M. Paciocco, ibid at note 2, para. 53

[21] David M. Paciocco, supra, para. 56

[22] [2000] 2 S.C.R. 600; [2000] S.C.J. No. 52; 2000 SCC. 51

[23] (1998), 238 A.R. 175

[24] (1998), 43 B.C.L.R. (3d) 190

[25] (2001), 277 A.R. 288

[26] (2005), 363 A.R. 35

[27] (1977), 37 C.C.C. (2d) 201, affirmed at [1980] 1 S.C.R. 158

[28] (1997), 32 O.R. (3d) 37

[29] 2003 CarswellNS 227

[30] (2004), 6 R.F.L. (6th) 288