

# Expert Evidence, Assessments & Judicial Notice: Understanding Children and the Family Context

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Montréal, QC  
Feb. 10, 2024

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# Role of Expert Evidence (Common Law)

- Only an “expert” can express an “opinion”
  - fact of bruising vs injury inconsistent with parent’s explanation
- Law of Expert Evidence

## Admissibility

- *White Burgess Langille*, 2015 SCC 23
- role of the Judge as “Gatekeeper” (do not admit unreliable evidence)
  - 1<sup>st</sup> stage – “threshold”**
- relevant; necessary; **a properly qualified expert (education, lack of bias etc.)**
  - Plus if there is “novel science” or new use, it must be “reliable”
    - eg Motherisk hair testing (Beaman, 2018)

## 2nd stage – gatekeeping

- residual discretion to exclude if prejudice exceeds probative value, including issue of partiality of expert

## Weight (if admissible)

- Judge may also consider bias & reliability as to weight

**If court appointed for PPE– strong presumption of admissibility and usually considerable weight**



# Types of Experts: Family Law Rule 20.2 (Ontario, 2020)

## Participant vs Litigation

### Joint Litigation Expert vs Party Retained

**“participant expert”** means a professional who provides expert opinion evidence based on the exercise of his or her skills, knowledge & training while participating in the events at issue.”

- Treating physician or mental health professionals for parent or child

**“litigation expert”** means a person retained for the purposes of litigation to provide expert opinion evidence;

**“joint litigation expert”** means a litigation expert retained to provide expert opinion evidence for the court -> Parenting Plan Evaluation

- parents jointly pay vs in some places govern may pay (esp. if social worker)

**Party-retained expert** : may be participant or litigation expert

**“Critique evidence”** : *M v F (ONCA 2015)* questions **admissibility** of critique of party-retained litigation expert in parenting case; more scope in child protection case

Courts rarely rule that report of court-appointed (joint) expert is inadmissible in family case



# Parenting Plan Evaluation



- Must be single expert appointed by court and/or with consent of both parties
- Must evaluate both parents and children, also contact others (new partners, teachers)
- Expert (clinician/therapist) who has just seen one parent **cannot** express an opinion about parenting plan
- May conduct psychological testing (if qualified)
- May be by psychologist, psychiatrist or social worker
  - courts sometimes give less weight to opinions of social worker or restrict scope of testimony (but most treat equally)
  - e.g. in Ontario Office of Children's Lawyer has social workers who are not permitted to express opinion about "parental alienation"



# Controversy Over Recommendations in PPE

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- Common to include a recommendation for parenting plan, unless more focused instructions or directed not to
- But controversy about whether even a court-appointed evaluator can express a “valid” and reliable opinion about plan (Tippins & Wittman, 2005; Garber, 2023)
  - lack of long term (or even short term) research or consensus on predictors of which factors are most important – how to weigh factors
  - not a “science” (might not meet test of USA *Frye* or *Daubert*)

“The reliability, validity, efficacy, and efficiency of CCE has never yet been adequately demonstrated. The science has yet even to define and measure the variables that constitute a healthy family, much less how one is to measure and recommend changes for conflicted systems in the midst of tectonic transitions.” Dr. Benjamin Garber
- BUT most judges and lawyers want recommendations and generally useful for lawyers to settle and judge (Axelson & Gentile, 2023; Bala, 2005)
  - neutral “fact finder”-> recognize limitations but also value
  - courts accept recommendations 50%-90% of cases
  - recommendations can have value, but need caution



# Judicial Notice: Social Science Without Experts

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- Expert evidence may be useful in family case to inform court about parenting and child development issues, but expert evidence is expensive for family litigants and may not necessary,
  - eg alienation can be determined without expert evidence  
*AM v CH*, 2019 ONCA 764: cites Bala & Hunter
- Acceptable for a trial judge to quote academic literature “ for the purpose of providing a convenient summary of generally-known concepts that he was bringing to bear on the case.” Not “expert evidence,” but may be used to e.g. to assess “red flags of alienation”
  - *M.M.B.(V.) v. C.M.V.*, 2017 ONSC 3991, cites Fidler, Bala & Hurwitz on alienation
  - *R v Hernandez-Lopez*, 2020 BCCA 20: cites Bala et al article to help assess credibility of 4 year old



# Some References

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