USE OF EXPERT EVIDENCE IN SEXUAL ASSAULT CASES:
*R. v. Mohan-Before* and After

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Jane received a B.A. from the University of Saskatchewan in 1968 and her Bachelor of Laws from the University of Saskatchewan in 1974. She was called to the Bar in Saskatchewan in 1976. Jane, articled with the Saskatchewan Legal Aid Commission and has been employed in several of the area offices since her call to the Bar.

In 1992 to 1993, she was the acting Chair of the Saskatchewan Legal Aid Commission and was appointed Chair of the Commission in April 1993. She was appointed Queen’s Counsel in 1994 and was elected Bencher from the Saskatoon Bar in 1995. Her preferred areas of practice have been in the area of criminal and family law. She has been active in the Saskatchewan Public Education Association and has been a lecturer at the Bar Admission course since 1991 in the area of criminal law.
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Use of Expert Evidence in Sexual Assault Cases: *R. v. Mohan* - Before and After

**Introduction:**

In the good old days it was easy for judges and lawyers to understand the role of the expert witness. The expert was called by one or the other party and allowed to testify in matters which were beyond the knowledge of the judge or the jury.

The traditional view of expert evidence was that it would be admitted only on matters where the judge or the jury could not draw the proper conclusions or understand what was at stake without expert assistance. The expert was to testify only on matters of opinion, and, he could never testify on the ultimate issue which was considered to be in the sole purview of the judge or jury.

Well, we're not in Kansas anymore, Toto!

Nowhere have the changes in the role and testimony of experts changed as rapidly as in the area of sexual offences. It is in those areas involving sexual matters especially with children, that a new species of experts are appearing more often during trials.

In this paper, I restrict my discussion to the use of expert evidence in sexual assault cases especially in light of the recent Supreme Court of Canada Case of *R. v. Mohan*. To see where this case takes us, it is necessary to see where we have been in the area of expert evidence.

I acknowledge the assistance from the following papers from the National Judicial Institute: *Evaluating Expert Opinion Evidence for the Purpose of Determining Admissibility: Lessons from the Law of Evidence* by Professor David Paciocco, University of Ottawa and *The Use and Misuse of Expert Evidence* by the Honourable Madam Justice Beverley McLachlin, Supreme Court of Canada.

**Before Mohan:**

The use of expert evidence is a product of recent times. People lived in small, homogeneous communities and citizens relied on the church for guidance in religious matters and judges in matters of the law. Expert evidence was viewed with caution and distrust. This caution can be seen in the following passage from a 1906 work entitled "A Treatise on the Law of Evidence", page 63:

> The testimony of skilled witnesses is perhaps that which deserves least credit with a jury. These usually speak to opinions and not to facts; and it is often really surprising to see the facility and extent to which views can be made to coincide with wishes or interests. Skilled witnesses do not, indeed, wilfully misrepresent what they think; but their judgements have often become so warped by regarding the subject from only one point of
The traditional view of expert evidence can be outlined as follows:

1. Expert evidence should be used only when the judge or jury could not understand or draw the proper conclusions without expert assistance. This would limit expert evidence to very technical subjects: see in *R. v. Abby* (1982) 68 C.C.C.(2nd) 394; (S.C.C.).

   An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of the judge and jury. If, on the proven facts, a judge and jury can form their own conclusions without help, then the opinion of the expert is unnecessary.

2. The expert should testify only on matters of opinion. The expert should be used to draw the inferences which a lay person could not. This lead to the use of hypothetical questions wherein the facts were presented by other witnesses in the case as evidence, and then provided to the expert who would use those facts to provide his opinion. No factual evidence - no basis for opinion.

3. The expert could not testify on the ultimate issue which was considered to be purview of the judge and the jury. It was the court to decide who was guilty or not guilty - not an expert for one side or the other.

These three limitations are more honoured in the breach in recent developments in admissibility of expert evidence. The speed in which this has happened is in no small measure to the significant number of cases dealing with sexual assault, spousal assault, and child sexual abuse. The courts struggle with increasing numbers and kinds of social science evidence. Much of this type of expert evidence is very recent and yet can be very persuasive as we try and make sense of the world in our court rooms. Professor Paciocco in his paper, *Evaluating Expert Opinion Evidence for the Purpose of Determining Admissibility: Lessons from the Law of Evidence*, makes an important and valid point that we should maintain our caution about embracing social science theory without engaging in a meaningful examination of the validity of the theories that support it.

**Leading up to Mohan:**

In the last decade, the traditional limitations of expert opinion evidence have been replaced by the following considerations which replaces hard and fast rules with a more discretionary point of view of admissibility of evidence.
The law of exclusion of opinion evidence has been replaced by a less exacting standard in which the expert's opinion will be admitted if it is "relevant and does not entrench unduly on the judge's or jury's ultimate task" R. v. Seaboyer, (1991), 66 C.C.C. (3rd) 321 (S.C.C.) at page 400.

This test of relevance and helpfulness, according to Professor Paciocco, consists of two questions.

1. Is the opinion one that is relevant and helpful?

2. Does the relevance and or helpfulness of the evidence outweigh any tendency it may have to mislead, confuse, or overwhelm the jury or otherwise prejudice the accused?

The problem with such a test is in the area of social science, where there has been less rigorous scientific evaluation of the competing theories.

Professor Paciocco provides a list of factors that courts should consider before admitting novel scientific techniques, or social framework testimony and I reproduce it in this paper as I think it is of assistance in figuring out if the expert evidence you wish to call or which you wish to challenge meets the criteria. In a sea of changing rules, it helps to have a compass. Professor Paciocco used the following cases in compiling his list:

3. R v Melargani (1992) 76 C.C.C. (3r) 78
7. United States v Downing 735 F.2d 1224.

1. RELIABILITY OF THE WITNESS

   (1) The quality of the credentials of the expert witness who is providing the background information,

   (2) The prospect of bias or interest on the part of the expert.

2. RELIABILITY OF THE PROCESS

The soundness and reliability of the process, technique or field of study that is used to generate the evidence.

   (a) Considerations relating to the extent of information about the technique, process
Considerations relating to the use that is to be made of the information provided:

(i) The breadth of the inferences adduced,
MATERIALITY: The nature of the issue to which the evidence is directed,

RELEVANCE: The existence and nature of the inferences that link the evidence to a material issue,

The extent to which the evidence depends upon subjective interpretation.

4. ASSESSABILITY OF THE EVIDENCE

The clarity with which the technique may be explained,

(The lack of foundational evidence) - the extent to which the basic data will become known to, and may be verified by the court and jury,

The availability of other experts to evaluate the technique,

The possibility for the opposing party litigant to conduct independent tests.

5. THE PREJUDICIAL EFFECT OF THE EVIDENCE

The prospect that the evidence may be given undue weight, either because it appears to bear the prestige of science, or because of the nature of the proof,

The prospect that the evidence will cause the jury to decide on an emotional rather than reasoned basis,

The prospect that the general nature of the evidence might divert the trier of fact from the specific facts of the case,

The prospect that the evidence will mislead the trier of fact because its technicality precludes a full understanding of its limitations and weaknesses.

The prospect that the evidence will otherwise confuse the jury.

6. THE UNDUE CONSUMPTION OF TIME

The prospect that more time will be taken to present the evidence than its probative value warrants,
(ii) Delay in the trial related to the obtainment of the evidence or to preliminary issues about the evidence,

(iii) Is the evidence "needlessly cumulative."

7. PROCEDURAL SAFEGUARDS

(i) The prospect that cross-examination can expose weaknesses inherent in the process,

(ii) The prospect that difficulties can be clarified by a charge to the jury,

(iii) The provision of notice and discovery to the opposing party litigant.

(iv) Theories on which the expert opinion evidence is widely accepted throughout society and are based on rigorous and wide empirical testing or observation.

Admissibility of Expert Evidence as to Disposition - Prior to Mohan

Expert opinion evidence with respect to the absence or presence of a particular disposition is admissible to raise a reasonable doubt whether the accused committed the offence, if the perpetrator of the crime had distinctive behavioural characteristics. Evidence of the absence of a particular disposition may be admitted where the offence alleged is of a kind committed by persons with distinctive behavioural characteristics not possessed by the accused. Expert evidence which would show the accused did not have the distinctive behavioural characteristics which the perpetrator must have would also be admissible. Where expert evidence with respect to absence of disposition is adduced, the accused may be found to put his character in issue, allowing the Crown to adduce evidence of bad character.

Cases dealing with disposition of the accused:

1. **Lupien** (1969), 9 C.R.N.S. 165, [1970] 2 C.C.C.193 (S.C.C.) The accused conviction on a charge of gross indecency was restored. The defence sought to adduce psychiatric evidence indicating the accused had a defence mechanism that made him react violently to any homosexual activity and he would not knowingly engage in homosexual activity. The majority of the court ruled that the evidence was not admissible as it involved an opinion upon the issue to be determined by the jury and was based on information which was not before the jury.
2.  *McMillan* (1975), 23 C.C.C. (2d) 160, (S.C.C.) - the accused was entitled to adduce expert evidence indicating that his wife was a psychopath and of such a disposition as would make it more probable that she inflicted the injuries on the child. With respect to the evidence of the disposition of the accused's wife the Court stated that the disposition of a person to do a certain act is relevant to indicate the probability of his or her doing the act, and is admissible provided that it has sufficient probative value in the circumstances of the case. In this regard Martin J.A. stated (at C.C.C., 169):

One of the exceptions to the general rule that the character of the accused, in the sense of disposition, when admissible, can only be evidenced by general reputation, relates to the admissibility of psychiatric evidence where the particular disposition or tendency in issue is the characteristic of an abnormal group, the characteristics of which fall within the expertise of the psychiatrist.

...In my view, the sum of Mrs. McMillan's personality traits constituted a disposition of a kind which, in the circumstances of this case, was relevant to the issue as to the child, than that her husband had inflicted them. The "cluster" of characteristics exhibited by Mrs. McMillan was diagnostic of an abnormal group and as such was capable of being proved by the expert evidence of a psychiatrist.

Martin J.A. summarized the principles governing the admissibility of expert evidence with respect to disposition and indicated that where an offence is of a kind that is committed only by members of an abnormal group, expert evidence that the accused did nor did not possess the distinguishing characteristics of that group is admissible to bring him within, or to exclude him from, that group (at C.C.C., 173-174):

I do not consider that, because the crime under consideration was not one that could only be committed by a person with a special or abnormal propensity, psychiatric evidence with respect to Mrs. McMillan's disposition, was, therefore, inadmissible, in the circumstances of this case.

All evidence to be admissible must, of course, be relevant to some issue in the case. Psychiatric evidence with respect to the personality traits or disposition of a person, whether the accused or another, may be admissible for different purposes. While those purposes are not mutually exclusive, evidence which is relevant for one purpose may not be for another.
Psychiatric evidence with respect to the personality traits or disposition of an accused, or another, is admissible provided:

(a) the evidence is relevant to some issue in the case;

(b) the evidence is not excluded by a policy rule;

(c) the evidence falls within the proper sphere of expert evidence.

One of the purposes for which psychiatric evidence may be admitted is to prove identity when that is an issue in the case, since psychological as well as physical characteristics may be relevant to identify the perpetrator of the crime.

Where the offence is of a kind that is committed only by members of an abnormal group, for example, offences involving homosexuality, psychiatric evidence that the accused did or did not possess the distinguishing characteristics of that abnormal group is relevant either to bring him within, or to exclude him from, the special class of which the perpetrator of the crime is a member. In order for psychiatric evidence to be relevant for that purpose, the offence must be one which indicates that it was committed by a person with an abnormal propensity or disposition which stamps him as a member of a special and extraordinary class.

Psychiatric evidence with respect to the personality traits or disposition of the accused, or another, if it meets the three conditions of admissibility above set out, is also admissible, however, as bearing on the probability of the accused, or another, having committed the offence.

3. Garfinkle (1992), 15 C.R. (4th) 254 (Que.C.A.), the Crown appealed the acquittal of accused charged with sexual offences on two boys aged 10 and 11. Using the approach in McMillan, supra, the Court ruled that the trial judge did not err in allowing the defence to adduce expert evidence that the accused did not have the disposition to use young boys for sexual gratification. The Court stated that a disposition of this nature should be classified as abnormal and accordingly, an expert opinion to show the accused did not have such a disposition was admissible.
4. *M.L.* (1993), 64 O.A.C. 216 (ant. C.A.) the Court held the trial judge erred in refusing to permit the defence to adduce psychiatric evidence indicating he could not have committed some of the acts because of their homosexual nature. A new trial was ordered.

**RvMOHAN**

The leading case in this area is *R v. Mohan* (1994), 89 CCC(3rd) 401, 29 C.R.(4th) 243 (S.C.C.). The Supreme Court of Canada allowed the Crown’s Appeal and restored the conviction on four counts of sexual assault. The accused, a physician, was alleged to have sexually assaulted four female patients aged thirteen to sixteen during the course of medical examinations in his office. The accused testified and denied committing the sexual acts alleged against him. A *voir dire* was conducted in which a psychiatrist (Dr. Hill) testified that in his opinion three of the four acts were likely to have been committed by a pedophile while the fourth was likely to have been committed by a sexual psychopath, and if the same individual committed all four acts he would “belong to a very small, behavioural distinct category of persons”. Dr. Hill also testified that the category would be narrower if the perpetrator was a physician who had committed the offences in his office. It was contemplated by Dr. Hill that the accused did not fall within the three groups into which most sex offenders fall. The trial judge ruled that the evidence of Dr. Hill was not sufficient to establish that doctors who commit sexual assaults upon patients are part of a distinctive group in psychiatric terms. The trial judge also stated that it is the size and degree of distinctiveness of the unusual group that determines whether expert opinion will be helpful in defining the group and placing the accused inside or outside the group.

The Court of Appeal held the trial judge had erred in refusing to allow the defence to adduce the expert evidence which would indicate that the accused was not a member of the group of persons likely to have committed the offence.

The Supreme Court of Canada concluded that the trial judge was not satisfied that the person who committed the offences belonged to a group possessing behavioural characteristics that were sufficiently distinctive to be of assistance in identifying the perpetrator. Sopinka J, on behalf of the Court, stated (at C.C.C., 423):

> Before an expert's opinion is admitted as evidence, the trial judge must be satisfied, as a matter of law, that either the perpetrator of the crime or the accused has distinctive behavioural characteristics such that a comparison of one with the other will be material assistance in determining innocence or guilt. Although this decision is made on the basis of common sense and experience, as Professor Mewett suggests [in "Character as a Fact in Issue in Criminal Cases"
(1984-95), 27 Crim.L.Q.29], it is not made in a vacuum. The trial judge should consider the opinion of the expert and whether the expert is merely expressing a personal opinion or whether the behavioural profile which the expert is putting forward is in common use as a reliable indicator of membership in a distinctive group. Put another way: Has the scientific community developed a standard profile for the offender who commits this type of crime? An affirmative finding on this basis will satisfy the criteria of relevance and necessity. Not only will the expert evidence tend to prove a fact in issue but it will also provide the trier of fact with assistance that is needed. Such evidence will have passed the threshold test of reliability which will generally ensure that the trier of fact does not give it more weight than it deserves. The evidence will qualify as an exception to the exclusionary rule relating to character evidence provided, of course, that the trial judge is satisfied that the proposed opinion is within the field of expertise of the expert witness.

In Mohan, the Supreme Court of Canada placed the admissibility of expert evidence with respect to disposition within the confines of the general requirements for the admissibility of expert evidence. These can be summarized as follows:

1. **The evidence must be relevant**
2. **The evidence must be necessary to assist the trier of fact**
3. **The evidence must not be the subject of an exclusionary rule**
4. **The evidence must be adduced through a properly qualified expert**

1. **The evidence must be relevant**

The Court stated that evidence is relevant if it is so related to the fact in issue that it tends to establish it, but it would be inadmissible "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." Sopinka J. emphasized the need to consider the relationship between the reliability of the evidence and its effect in assessing admissibility, having regard to the possibility that the expert evidence will be given more weight that it deserves.

2. **The evidence must be necessary to assist the trier of fact**

The Court stated that the expert must provide information which is likely to be outside the experience and knowledge of the trier of fact. Sopinka J. indicated a concern
that this evidence may distort the fact-finding process by giving more weight to the expert opinion evidence than it deserves. There is a concern that experts not be permitted to usurp the functions of the triers of fact, especially on the ultimate issue. Sopinka J. concluded (at C.C.C., 415):

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.

3. The evidence must not be subject to any exclusionary rule

The court ruled that even compliance with the criteria in 1, 2, and 4 will not ensure admissibility of expert evidence if there is an exclusionary rule separate and apart from the opinion rule itself. For example, if the accused has not put his disposition in issue, the Crown cannot adduce evidence of this disposition unless the accused has put his character in issue. See R. v. Morin (1988),44 C.C.C. (3d) 193 (S.C.C.)

4. The evidence must be adduced through a properly qualified expert

The evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he undertakes to testify.
Conclusion

There appears to be concern on the part of legal scholars, judges and lawyers that we are reaching the high water mark in the area of expert opinion in court proceedings and the battle of the paid and partisan witnesses may confuse rather than assist the triers of fact. Madam Justice McLaughlin suggests that we should return to the wisdom of earlier cases:

- where the judge and the jury can understand, let them decide;
- where matters go beyond the understanding of the judge and jury, let the parties call experts to enlighten them
- in all cases, distinguish between the facts in issue in the case, which must be proved in the ordinary way by admissible evidence; and the inferences from these facts, which may call for learned opinion.
APPENDIX

Expert's opinion on child abuse symptoms ruled too unreliable to admit at man's trial

By Cristin Schmitz

OTTAWA—In what may be the first Canadian case of its kind, a court has ruled that so-called 'expert' testimony in support of child sexual abuse allegations is too unreliable to be admitted at a criminal trial.

Ontario Court (General Division) Justice Louise Charron ruled last December that "the present state of knowledge in the field is such that the soundness and reliability of any expert opinion purporting to characterize behavioural symptoms as 'consistent with sexual abuse' cannot be demonstrated."

Madam Justice Charron refused to admit the opinion evidence of psychologist Sandra Wieland at the trial of Frank Olscamp, an Ottawa man in his late 50s who is accused of sexually assaulting a seven-year-old girl in 1988.

Dr. Wieland, who was to testify for the Crown, specializes in the field of child sexual abuse. She had been qualified as an expert at almost 20 trials before local defence counsel Lawrence Greenspon successfully challenged the admissibility of her testimony during 3-1/2 days of cross-examination late last year.

After considering dozens of scientific articles provided by the defence, Madam Justice Charron concluded that "if there is any consensus to be found among the experts, it is that there is no valid profile in existence which can enable one to identify a child who has been sexually abused."

"While the symptoms that have often been identified as 'consistent with abuse' may indeed be related to the fact that a child has been sexually abused, the research shows that no single symptom or constellation of symptoms has been found to have any real discriminant validity, i.e. they do not serve to single out children who have been subjected to sexual abuse from children who have suffered some other kind of abuse or trauma or even from the general population of children."

The judge held that "based on the present state of the art, the evidence could not be offered by any expert in the field. The difficulties are even greater when one considers the proposed expert witness in this case and the quality of her testimony."

"The Crown wished to call Dr. Wieland to support the testimony of the now 13-year-old complainant. The psychologist was to have described the general behavioural and psychological characteristics of child victims of sexual abuse and to testify that the complainant exhibited some symptoms consistent with sexual abuse."

This kind of evidence, supplied by social workers, psychologists and others, has often been admitted at Canadian trials, and its admissibility, for some purposes, has been affirmed by the Supreme Court of Canada and several provincial appeal courts.

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Expert's opinion

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But the Widerly validity of such evidence was not contested in any of the reported cases, Madam Justice Charron emphasized.

According to Mr. Greenspon's research, the Olscamp decision breaks new ground in the legal field. "I believe it's the first time in Canada that an expert in a sexual abuse case has had their qualifications challenged as a result of which the judge has ruled that they are not able to testify," he told The Lawyers Weekly.

"The general principle is that...that kind of evidence—it doesn't depend on the expert—is not recognized and scientifically validated, and as such that kind of evidence should not be admitted."

Mr. Greenspon called such evidence "devastating" and "outrageously prejudicial" to the accused, yet few defence counsel attack the witnesses' qualifications, he maintained.

"The whole area is now open to challenge...because there is a General Division judge who has turfed the whole thing on the basis that it's not scientifically proven.

"I think the next time somebody gets in the box and says 'I'm an expert, and I can tell that this child shows symptoms of having been sexually abused,' I think they should be blown out of the water," Dr. Wieland never actually talked to the complainant or her parents, but she closely supervised the psychologist who conducted play therapy sessions with the child.

At the accused's preliminary hearing, he testified that the complainant displayed symptoms of a sexually abused child.

"Ultimately, the determinative question was not so much whether Dr. Wieland could give the proposed opinion..." evidences but whether anyone could do so having regard to the present state of knowledge in the field," Madam Justice Charron said.

Applying the guidelines for the admissibility of expert opinion evidence set out in R. v. Mohan, [1994] 2 S.C.R. 9, the judge ruled that the prejudicial effect of the evidence so far outweighed its low probative value so it should not be admitted.

"This trial will turn on a question of credibility," Madam Justice Charron observed.

"Although a distinction can be made between evidence going to credibility alone and this kind of evidence admitted in support of the complainant's testimony, the line is a very fine one. The admission of evidence dressed up in scientific language (Mohan at 21) in support of the complainant's testimony may well be given far more weight by the jury than it deserves and may even become determinative of the ultimate issue."

Although the judge said the present state of scientific knowledge prevents any expert from offering such evidence, she was also critical of Dr. Wieland as an expert witness. "Overall, Dr. Wieland's testimony lacked the objectivity and professionalism expected from someone who undertakes such an important role, particularly at a criminal trial," the judge said.

Madam Justice Charron found that the psychologist showed little appreciation of the limits of her role as an expert witness. She sometimes misrepresented the degree of scientific validity of the theory he was advancing, and referred to studies or other existing data in her field "in a general and sweeping fashion."

When she was asked to provide specifics, Dr. Wieland either couldn't or did so "without proper care as to the accuracy or completeness of her answer," the judge said.

Dr. Wieland also gave her evidence as if what she said was accepted scientific knowledge in her field, even where she was offering a professional opinion based on her personal clinical experience. "This tends to give a certain scientific aura to her testimony that is greater than is sustainable," the judge said.

"The distinction between a purely personal proretrial opinion and mere generally accepted scientific knowledge is crucial to the trier of fact who is called upon to evaluate the validity and reliability of the opinion."

(Reasons in R. v. Olscamp, 1435-008, 22 pp. are available from FULL TEXT.)