Playing Doctor: Judging Judges' Analyses of Medical Expert Evidence in Canadian Medical Malpractice Lawsuits

A thesis submitted to McGill University in partial fulfillment of the requirements of the degree of LL.M © by John Petrella, Faculty of Law, McGill University, Montreal, August, 2021

Supervisor: Professor Lara Khoury

Table of Contents

Abstract

When medical malpractice cases reach trial, judges' lack of medical expertise requires that they receive assistance from medical experts to reach informed decisions. Accordingly, in both theory and practice, medical expert evidence dictates whether plaintiffs receive compensation for their injuries and whether physicians' competence is criticized publicly. This thesis identifies why, and how, judges decide to rely on some, rather than other, medical expert evidence. Utilizing a Discourse Analysis methodology, this thesis establishes the prominent discourses constructed by judges to justify their assessments of expert evidence through both quantitative and qualitative analyses.

Acknowledgments

In this most unprecedented year, this section remains the most difficult to write. To my wife, thank you for your unwavering love, support, and encouragement.

I also thank my supervisor, Lara Khoury, for her valuable feedback and suggestions.

Chapter 1 - Introduction

The Context

Medical malpractice lawsuits are a regular occurrence in Canadian law.[1] According to the Canadian Medical Protective Association ("CMPA"),[2] patients sued doctors for alleged medical malpractice 732 times in Canada in 2020.[3] Lawsuits, in Canada, are the only way to legally mandate a physician to compensate a patient (or their family) for substandard medical care that the physician provided.[4] Civil liability, in Canada, is, in the vast majority of cases, a fault-based system of compensation.[5] It is distinct from other ways of governing the care the physicians provide to their patients, such as the role that professional regulatory bodies, like provincial Colleges of Physicians and Surgeons across Canada, which may make findings of professional incompetence or misconduct, but lack the legal authority to order the compensation of patients.[6] Nonetheless, a court's decision serves to stabilize, and set, behavioural expectations by

[1] The term 'malpractice' extends beyond cases involving allegations of negligence. Malpractice is an umbrella term that extends to any conduct of a physician toward a patient that is improper or inappropriate in any way. For example, cases of intentional torts such as assault and battery are cases of medical malpractice. See Jocelyn Downie, Timothy Caulfield, & Colleen Flood, *Canadian Health Law and Policy*, 4th ed (Markham: LexisNexis Canada, 2011) at 116 [*Canadian Health Law & Policy*].

[2] The CMPA is a mutual defence association that provides physicians with advice and assistance when medico-legal difficulties arise. See CMPA, "About the CMPA" online: <https://www.cmpa-acpm.ca/en/about>.

[3] CMPA, "2020 Annual Report" online: <https://www.cmpa-acpm.ca/en/about/annual-report> [*2020 Annual Report*]. On the regularity of medical malpractice lawsuits, see also Ontario, Ministry of Health and Long Term Care, *Report to Ontario Ministry of Health and Long Term Care Re: Medical Liability Review*, by the Honourable Stephen Goudge, online: <http://www.health.gov.on.ca/en/common/ministry/publications/reports/medical_liability/>, (2018) at 6.

[4] Contrast the Canadian example with, for example, New Zealand which has a no-fault system for accident compensation (including injury caused by treatment). For an overview of various health law frameworks, see, for example, Joan Gilmour, Health Policy Research Program, *Patient Safety, Medical Error and Tort Law: An International Comparison*" (Health Canada, 2006) at 24 [*Patient Safety*]. See also Lorian Hardcastle, *"*Government Tort Liability for Negligence in the Health Sector: A Critique of the Canadian Jurisprudence" (2012) 37 Queen's LJ 525 at 573-574 [*Government Tort Liability*].

[5] Lewis Klar, *Tort Law*, 3rd ed (Toronto: Thomson, 2003) at 9.

[6] See, for example, *Regulated Health Professions Act*, SO 1991, c 18, schedule 2, *Health Professions Procedural Code,* s 26.

determining when medical care and treatment was substandard and, thus, when a patient deserves compensation.[7]

If the lawsuit does not settle, the final stage of the lawsuit is a trial. Judges are tasked with adjudicating the dispute. Accordingly, understanding why, and how, a judge resolves a medical malpractice lawsuit is of paramount importance to patients and their families. Equally, the doctor who has been sued for alleged medical malpractice has great interest in understanding how the judge resolves the case as well. Doctors face the risk of having their professional competence criticized in a publically disseminated legal decision if the judge finds that their care for a patient was negligent. The consequences of a judge's medical malpractice decision, for both patient and doctor alike, are of the utmost importance. For the doctor, there are both immediate and longer-term consequences if they are found negligent in a given case. In the short term, they may, though highly unlikely, have to personally compensate the plaintiff.[8] In the longer-term, their reputation may be irrevocably damaged. For example, reputation has been analogized to a "Plant of tender growth [whose] blossom, once lost, is not easily

[7] Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge: MIT Press, 1996) at 195 [*Between Facts and Norms*].
[8] Defendant physicians who are sued in Canada, generally, have liability protection coverage through the CMPA. The CMPA, however, is not an insurer and it affords physicians medical-legal assistance on a discretionary basis. The CMPA's discretion extends to whether or not the CMPA will indemnify any damages awarded to a patient by virtue of a physician's substandard medical care. Therefore, a physician who was negligent may be required to pay damages to the patient personally. On the discretionary role of the CMPA see *Shannon v Canadian Medical Protective Association*, 2016 NBQB 4 at paras 70-71. *Shannon* involves allegations of sexual misconduct, therefore making it unique from medical malpractice lawsuits, nonetheless, given its discretionary capacity to extend assistance, and pay damages, on behalf of physicians, the risk of personally paying damages is, however unlikely, a possibility. See also *Canadian Health Law and Policy*, *supra* note 1 at 140-141.

restored."[9] Moreover, the Supreme Court of Canada has recognized that an individual's *professional* reputation deserves special protection.[10]

A poor professional reputation can impair a physician's ability to earn a living. For example, a physician who has been labeled as negligent in caring for a patient may find that hospitals refuse to grant them hospital privileges.[11] Alternatively, the physician's regulatory College may become concerned about the physician's competency and commence an investigation into their practice. Such an investigation could, in turn, lead to regulatory sanctions, such as placing restrictions on the physician's license to practice medicine or requiring them to engage in education and remediation. Patients, on the other hand, may be left without compensation despite increased medical needs following the care they received from a doctor if the judge dismisses their lawsuit. For example, suppose that a patient is left with significant functional limitations following a medical procedure and requires outpatient rehabilitation not publically subsidized, such as physiotherapy. For both plaintiffs and defendants in medical malpractice lawsuits, the stakes are extremely high. How then can courts, comprised of judges and jurors who, in the vast majority of circumstances, are not physicians determine whether to compensate a patient or criticize a physician?

---

[9] *Botiuk v Toronto Free Press Publications Ltd,* [1995] 3 SCR 3, 126 DLR (4th) 609 at para 92.
[10] *Platnick v Bent*, 2020 SCC 23 at para 137. See also John Carson, "Every expression is watched: Mind, medical expertise and display in the nineteenth-century English courtroom" (2018) 48(6) Social Studies of Science 891 at 897-898.
[11] See Lorian Hardcastle, "Legal Mechanisms to Improve Quality of Care in Canadian Hospitals" (2017) 54:3 Alta L Rev 681 at 692-693. Hardcastle observes that hospitals have processes in place to either suspend or revoke a physician's privileges. Hardcastle, however, suggests that privileging decisions often involve little scrutiny. To improve patient care in hospitals, Hardcastle suggests reform of the privileges model. Notwithstanding the deficiencies in the current privileging model in Canadian provinces, as Hardcastle outlines, there remains a risk that if a physician's professional reputation and competency is impugned in a publically disseminated legal decision, there is a risk to their professional livelihood.

Expert Evidence in Medical-Malpractice Lawsuits

In common language, expertise means possessing "great skill or knowledge in a particular field."[12] The Supreme Court of Canada succinctly described the role that experts serve in the trial process in the seminal expert evidence *R v Mohan* decision: "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."[13] Expert evidence, therefore, comports with the overarching goal of the adjudicative legal process to search for the truth and to preserve the integrity of the administration of justice.[14]

A judge's ability to adjudicate a medical malpractice lawsuit is dependent on expert evidence. As the Supreme Court of Canada, in *ter Neuzen v Korn*, highlighted, "Courts should not involve themselves in resolving scientific disputes which require the expertise of the profession. Courts and juries do not have the necessary expertise to assess technical matters relating to the diagnosis or treatment of patients."[15] The necessity of expert evidence in medical malpractice lawsuits is inherently commonsensical. Judges are legally trained, not medically trained. The issues that judges will inevitably be faced with at a medical malpractice trial will be focused on the practice of medicine and the exercise of professional skill and judgment.

The technical matters of diagnosing and treating patients makes the importance of expert evidence in medical malpractice lawsuits more evident than in other areas of civil

---

[12] Jukka Varelius, "Medical expertise, existential suffering and ending life" (2014) 40:2 J Medical Ethics 104 at 105 [*Medical Expertise*].
[13] [1994] 2 SCR 9, 114 DLR (4th) 419 at para 23 [*Mohan*].
[14] See, for example, A(LL) v B(A), [1995] 4 SCR 536, 130 DLR (4th) 422 at para 66. On the development of the notion that trials are an exercise of seeking the truth, see generally Keith Kilback & Michael Tochor, "Searching for Truth but Missing the Point" (2002) 40:2 Alta L Rev 333 at 335-337.
[15] *ter Neuzen v Korn,* [1995] 3 SCR 674, 127 DLR (4th) 577 at para 44 [*ter Neuzen*].

disputes. For example, in *Tahir v Mitoff*, it was stated "Perhaps there is no civil case where the expert plays a more important role than in matters involving alleged professional negligence. The court must rely on the experts to articulate the standard of care in the circumstances, whether there was a breach of the standard and if so, whether the injury was a consequence of the breach."[16] It is abundantly clear, therefore, that judges "must be cautious to base their conclusions upon the expert evidence before them, and not to speculate as to the adequacy of professional standards in the absence of expert evidence attacking those standards."[17] How would a judge be able to determine whether or not a physician exercised the care and skill reasonably expected of a normal, prudent practitioner of the same experience and standing without assistance in ascertaining what should be expected of a normal and prudent practitioner?[18]

Judges' use of expert evidence is not solely confined to assisting in a determination of whether or not a physician met the applicable standard of care in a given case. Rather, medical expert evidence is frequently utilized to assist a judge in reaching the determination of whether, or not, the physician's medical care and treatment caused the plaintiff's harm and damages.[19] As with expert evidence in the standard of care context, the justification for judges' use of expert evidence to determine causation is easily understood and can be demonstrated by use of an example. Imagine that a medical

---

[16] *Tahir v Mitoff,* 2019 ONSC 7298 at para 46 [*Tahir*]. Justice Trimble's assertion that courts require expert evidence in order to determine whether a physician's act or omission caused the plaintiff's damages is, as set out at notes 27 and 28, inaccurate. Nonetheless, Justice Trimble's point is well taken: expert evidence is extremely important in medical malpractice lawsuits.

[17] *Smith v Kane*, 2020 ONSC 329 at para 42 [*Smith*].

[18] See *Crits v Sylvester*, [1956] OR 132, 1 DLR (2d) 502 (CA) at para 13, aff'd [1956] SCR 991, 5 DLR (2d) 601.

[19] See, for example, Ellen Picard & Gerald Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 4th ed (Toronto: ThomsonCarswell, 2007) at 395 [*Legal Liability of Doctors and Hospitals*] at 271, 395. The authors note that while causation expert evidence is not necessary to prove a party's case, if, for example, a plaintiff fails to adduce expert causation evidence in the face of expert causation evidence adduced by a defendant, it is "very unlikely" that the court will find that an inference of causation can be drawn.

malpractice lawsuit is premised on the theory that a physician's failure to order a chest x-ray at the time when the patient's symptoms ought to have warranted that a chest x-ray be ordered and the failure to order the chest x-ray deprived the patient from the opportunity to have their underlying cancer identified, treated, and cured. Determining causation in such a situation may depend on highly technical matters such as the rate of cancer growth, the size at which a cancerous tumor is detectable on diagnostic imaging, and the size at which a cancerous tumor is amenable to oncological treatment resulting in curative treatment.[20] Experts can assist judges in deciding technical and complicated causation questions that arise during trial.

While judges' reliance on expert causation evidence is a practical reality in many medical malpractice cases, expert evidence is not, strictly speaking, required in order for a judge to make a finding that a physician's conduct did, or did not, cause the alleged harm and damages.[21] Causation expert evidence is not essential in medical malpractice cases for two principal reasons. One, causation is a question of fact.[22] Judges do not require expert evidence in order to make findings of fact.[23] Two, causation in Canada is assessed by the judge using a robust and pragmatic assessment of the facts to determine whether, on a balance of probabilities, the defendant caused the plaintiff's harm.[24] Accordingly, because medical experts "ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by law," it is not essential that medical

[20] A similar factual situation to my hypothetical occurred in *Benhaim v St-Germain,* 2016 SCC 48 at paras 79-81 [*Benhaim*].
[21] See *Snell v Farrell,* [1990] 2 SCR 311, 72 DLR (4th) 289 at 330 [*Snell*].
[22] *St. Jean v Mercier*, 2002 SCC 15 at para 98 [*St. Jean*].
[23] For a recent discussion of the application of this principle to mental injuries, see *Saadati v Moorhead,* 2017 SCC 28 at paras 14, 16, 28, 29, 35, and 38, which holds that expert evidence is not *necessary* in order to prove causation for mental injuries, as had already been the case for physical injuries.
[24] *Snell*, *supra* note 21 at 330.

experts provide a firm opinion supporting the plaintiff's argument on causation.[25] The difference in the way in which medical experts and judges determine whether one event caused a subsequent event is an example of the cultural conflicts that exist between the disciplines of medicine and law.[26]

Thesis Purpose

As discussed, medical expert evidence is an essential factor in the adjudication of medical malpractice disputes. However, judges may find it difficult to assess and analyze expert evidence, given their lack of knowledge of medicine, particularly when confronted with disagreeing experts, as is inevitably the case in medical malpractice trials. Given the profound implications of a judge's decision to rely on one party's expert evidence rather than the other party's expert evidence on patient and physician alike, this thesis seeks to bring to light the specific reasons judges use to justify their decisions to rely on certain expert's evidence rather than other expert evidence and critically assess their reasons. Judges' specific reasons for favouring one expert's evidence at the expense of another's evidence constitutes the legal institutionalization of how an expert's evidence ought to be assessed and what markers identify an expert upon whom a judge should rely in rendering their decision.[27]

Identifying the specific factors that guide judges' decisions in this regard facilitates an appreciation for what judges believe separates 'good' expert evidence from 'bad' expert evidence or, in a more nuanced manner, what makes one expert's evidence 'better' than another expert's evidence. Given the difficulty that judges face in assessing

[25] *Ibid*.
[26] David Faigman, *Legal Alchemy: The Use and Misuse of Science in the Law* (New York: WH Freeman, 2000) at 51 [*Legal Alchemy*].
[27] *Between Facts and Norms*, *supra* note 7 at 127.

medical expert evidence to begin with, the particular reasons why judges adopt certain expert's evidence is in and of itself important to identify in order to determine how judges assess medical expert evidence. However, the analysis that this thesis carries out identifies the normative implications of the specific markers that judges identify as proof of 'good' and 'bad' expert evidence by determining what particular markers (i.e. conduct, demeanour, level of expertise) are correlated with a judge relying upon an expert's evidence and whether, or not, those markers are persuasive. To facilitate this analysis, I utilized a discourse analysis methodology. Discourse analyses identify discourse themes and narratives that serve to develop and entrench what is constitutive of knowledge.[28] Applied to this thesis, I identified what narratives and themes pervaded judges' analyses of expert evidence and how those discourses served to disperse power and authority amongst the various experts testifying at trial.

In addition to identifying what specific reasons judges construct to justify their decisions to rely on certain expert's evidence, this thesis also identifies the power effects of discourses judges use to justify their assessments of expert evidence. Narrative and discourse legitimizes behavioural expectations as well as what constitutes 'good' and 'bad' expert evidence.[29] The legitimizing function narrative and discourse can serve is dependent on the acceptability of the rationale buttressing narrative and discourse as well as the persuasiveness of the narrative or discourse.[30] Judges' written decisions reverberate amongst judges, lawyers, and experts through the principle of *stare decisis* because, simply put, past juridical acts can serve to justify a judge deciding a particular case in a

[28] Reiner Keller, *Doing Discourse Research: An Introduction for Social Scientists*, translated by Bryan Jenner (London, UK: SAGE, 2013) at 2, 86 [*Doing Discourse Research*].
[29] *Between Facts and Norms*, *supra* note 7 at 80.
[30] *Ibid* at 36.

certain way based on past precedent.[31] This reflects that the rule of law, and legal systems that exemplify the rule of law, ought to, amongst other things, have laws that are clear, coherent, and sufficiently stable.[32] The implications of judges' written decisions, therefore, extend beyond the ramifications of the decision on the parties to the lawsuit, reflecting Ronald Dworkin's rather direct, but apt, observation that "the law often becomes what judges say it is."[33]

Further, assessing the power effects of discourses also facilitates an evaluation of what legal norms underlie and legitimize judges' assessments of expert evidence and their construction of discourses surrounding medical expert evidence. Uncovering the discourses constructed by judges to legitimize their decisions about medical expert evidence allows for an assessment of the assumptions and legal norms that underlie judges' assessments of expert evidence.

Chapter Outline

Chapter two contains my literature review which focuses on the unique role expert evidence plays in Canadian lawsuits, its specific necessity in medical malpractice lawsuits, various difficulties that have been identified that impede its effective use, as well as prospective solutions to optimize the way that expert evidence is utilized by courts.

Chapter three sets out the methodology and methods I employed to conduct my research. As will be elaborated upon, I performed a discourse analysis to identify the

[31] John Finnis, *Natural Law and Natural Rights*, 2nd ed (Oxford: Oxford University Press, 2011) at 269.
[32] *Ibid* at 270.
[33] Ronald Dworkin, *Law's Empire* (Cambridge, USA: Harvard University Press, 1986) at 2 [*Law's Empire*].

common discourses constructed by judges to justify their decisions to rely on some, rather than other, expert evidence.

Chapter four describes the findings of my research. I identify the most recurrent themes and discourses used by judges in their written decisions and identify the legal norms underlying those themes and discourses.

Chapter five provides my concluding remarks and identifies avenues for future research in the area of medical expert evidence.

Chapter 2 - Literature Review

Expert Evidence: Foundations, Necessity, and Challenges

As outlined in Chapter 1, the Supreme Court of Canada in *R v Mohan* explained that the purpose of expert evidence is to assist the trier of fact resolves issues that, due to their technical nature, are outside the trier of fact's expertise.[34] Expert evidence is an exception to the rule that a witness may not offer an opinion.[35] Expert witnesses, therefore, are unique from other witnesses. Justifying experts' *sui generis* role in the litigation process is their specialized knowledge of a particular field of inquiry, allowing them to deviate from the law's usual expectation that witnesses provide evidence based on first-hand knowledge of the factual circumstances of the case.[36]

The prevalence of the use of expert evidence, in particular scientific evidence, at trial is increasing over time.[37] One of the difficulties that judges face in assessing and analyzing medical expert evidence in the context of medical malpractice lawsuits is their lack of knowledge and expertise relating to matters of medicine. The difficulty utilizing scientific evidence generally, therefore including medical expert evidence, led former Supreme Court of Canada Justice Ian Binnie to call on courts to better utilize scientific evidence in the future in order for courts to maintain their legitimacy as adjudicators of disputes that implicate scientific or medical issues.[38] Social theorist Jurgen Habermas argues that courts' claim to legitimacy as arbiters of what conduct is, and is not, legally

---

[34] *Mohan*, *supra* note 13 at para 23.
[35] Paul Michell & Renu Mandhane, "Uncertain Duty of the Expert Witness" (2005) 42:3 Alta L Rev 635 at 636 [*Uncertain Duty of Expert Witnesses*].
[36] David Paciocco, "Taking a 'Goudge' Out of Bluster and Blarney: An 'Evidence-Based Approach' to Expert Testimony" (2009) 13 Can Crim L Rev 135 at 140 [*Bluster and Blarney*].
[37] The Honourable Beverley McLachlin, "Judging in a Democratic State" (Lecture delivered at the Sixth Templeton Lecture on Democracy, University of Manitoba, 3 June 2004), online: < https://www.scc-csc.ca/judges-juges/spe-dis/bm-2004-06-03-eng.aspx>.
[38] See, for example, The Honourable Mr. Justice Ian Binnie, "Science in the Courtroom: The Mouse that Roared" (2007) 56 UNBLJ 307 [*Mouse that roared*].

permissible in a given situation, is contingent on courts delivering their decisions in a manner that allows all participants in the lawsuit to understand the decision as a rational one, based on the matters at issue.[39] Simply put, judges' legitimacy as adjudicators of legally permissible conduct depends on explaining the decisions they reach in a manner that others understand to be rational and the exercise of doing so is becoming increasingly influenced by scientific based evidence, including medical expert evidence.

As identified in Chapter 1, medical expert evidence holds considerable importance in medical malpractice lawsuits because of the highly technical nature of the questions at issue, namely whether appropriate medical care was provided in the circumstances.[40] Therefore, expert evidence holds considerable import in the adjudication of medical malpractice lawsuits. Inevitably, in a medical malpractice lawsuit, a judge will be faced with medical experts that disagree with one another. If a party to a medical malpractice lawsuit does not obtain expert evidence supporting their theory of the case, the case will, likely, be resolved prior to trial by way of a settlement (i.e. where the physician pays money to the plaintiff or where the plaintiff agrees to a without costs dismissal of the case) or a summary dismissal of the case, by virtue of the case having no reasonable chance of success. Therefore, at trial, a judge will be faced not only with experts opining on matters outside the judge's expertise, but also experts who disagree with one another. Disagreeing expert witnesses have been described as an endemic problem facing the law and determining which of the disagreeing experts holds a view that is, for example, a reasonable formulation of what the standard a reasonably prudent

[39] *Between Facts and Norms*, *supra* note 7 at 198.
[40] *ter Neuzen*, *supra* note 15 at para 44.

practitioner would be expected to meet in the circumstances, further challenges a judges' ability to effectively utilize expert medical evidence.[41]

A judge's role, when faced with conflicting evidence, is to "unravel" the evidence in order to determine if a defendant is liable for the plaintiff's damages, or not.[42] Put differently, Emma Cunliffe describes a judge's decision-making process as one in which the judge restructures evidence in a way that prioritizes one outcome as the most coherent decision based on the underlying evidence.[43] One theory of decision-making is the story model of decision-making. The story model of decision making suggests that a decision is made after the decision-maker constructs a story of the problem they are assessing and select certain facts to rely upon that align with the story of the problem they have constructed.[44] Fitting pieces of information into a story in order to reach a decision reflects the human tendency to seek coherence when faced with problems that require solving.[45] Adopting the story model of decision-making, judges will, in resolving a lawsuit, create a story to understand the dispute and select certain pieces of evidence in order to support the story that they have constructed to buttress and support the decision they ultimately render.

Ultimately, a judge's determination as to what expert's opinion they prefer (in the case of two conflicting expert opinions) is a subjective assessment. Subjective

---

[41] Gary Edmond & Kent Roach, "A Contextual Approach to the Admissibility of the State's Forensic Science and Medical Evidence" (2011) 61 UTLJ 343 at 396 [*Contextual approach to admissibility*].
[42] *White v Gerhicke*, 2013 BCSC 377 at para 50.
[43] Emma Cunliffe, "Judging, fast and slow: using decision-making theory to explore judicial fact determination" (2014) 18 Int'l J of Evidence & Proof 139 at 146 [*Judging fast and slow*] citing Nancy Pennington & Reid Hastie, "Evidence Evaluation in Complex Decision Making" (1986) 51 J of Personality & Social Psychology 242 at 254.
[44] Nancy Pennington & Reid Hastie, "Explanation-Based Decision Making: Effects of Memory Structure on Judgment" (1988) 14 J of Experimental Psychology: Learning, Memory & Cognition 521.
[45] See generally, Daniel Kahneman, *Thinking, Fast and Slow* (Toronto: Doubleday, 2011) [*Thinking fast and slow*].

assessments, even those made by judges, are vulnerable to error.[46] That is because judges, like all people, bring their attitudes, experiences, and belief about the world with them when they are tasked with adjudicating a dispute.[47] For the same reason, a medical expert's opinion about a particular case can be wrong and, therefore, judges are encouraged to critically assess expert evidence.[48]

The considerable difficulties facing judges when they encounter scientific evidence, such as medical expert evidence, led the National Judicial Institute, a judge-led organization focused on providing judicial education, to create a specific "Science Manual" to educate judges as to how they ought to assess scientific evidence presented during the course of a trial.[49] Judges must not simply accept that because an expert has provided an opinion, that the opinion they have provided is, necessarily, accurate in the circumstances. Rather, judges must assess what the expert says during their testimony and assess it against the entirety of the evidence adduced at trial rather than looking only to an expert's credentials and demeanour in determining whether to accept that opinion evidence, or not.[50]

The need for a critical assessment of an expert's evidence, in other words not taking it as a given that an expert's evidence accurately assesses a particular issue, and indeed an expert's relative expertise to the matters at issue in the trial, reflects the fact

---

[46] On the susceptibility of subjective assessments to error, see Gary Edmond et al, "Forensic Science Evidence and the Limits of Cross-Examination" (2019) 42:3 Melbourne UL Rev 858 at 881 [*Limits of Cross-Examination*]. See also, in the medical context, Linda Kohn, Janet Corrigan & Molla Donaldson, eds, *To Err Is Human: Building a Safer Health System* (Washington: National Academy Press, 2000). See also, David Faigman, John Monahan, & Christopher Slobogin, "Group to Individual (G2i) Inference in Scientific Expert Testimony" (2014) 81(2) U of Chicago L Rev 417 at 453-456.
[47] *Judging fast and slow*, *supra* note 43 at 146.
[48] National Judicial Institute, "Science Manual for Canadian Judges" (last updated 1 July 2018) online: < https://www.nji-inm.ca/index.cfm/publications/science-manual-for-canadian-judges/> at 142, 153, 154 [*Science Manual*].
[49] *Ibid*.
[50] *Ibid* at 142.

that assessing medical expertise is far more difficult than, say, judging expertise in the game of chess.[51] Whereas the chess player with the higher level of expertise can be judged based on who wins a particular game, medical expertise is derived from a combination of training and practicing the skills and techniques that have been learned.[52] Luckily, judges have their own expertise, namely judges are trained to think logically in assessing evidence.[53]

Notwithstanding judges' apparent expertise in assessing evidence, all subjective assessments, like judges' assessments of evidence at a trial, are susceptible to error. Errors in judges' assessments of evidence can emanate from a multitude of sources. Judges, as previously highlighted, may have difficulty assessing expert medical evidence because of its highly technical nature. Errors in assessments of evidence could also stem from inherent difficulties to assessing credibility.[54] In fact, the Supreme Court of Canada has affirmed, "the assessment of credibility is more of an art than a science."[55] As an art, rather than a science, credibility assessments are "highly individualistic[56]" and may

[51] Anders Ericsson, "Acquisition and Maintenance of Medical Expertise: A Perspective From the Expert-Performance Approach With Deliberate Practice" (2015) 90:11 Academic Medicine 1471 at 1472.
[52] *Thinking fast and slow*, *supra* note 45 at 240. While the combination of training and practice experience are the primary factors relating to the acquisition of expertise, other factors influence the acquisition of expertise, such as an individual's level of engagement and motivation to learn and put their skills to the test in practice at 250. See also Robin Hogart, "On the learning of intuition," in Henning Plessner, Cornelia Betsch, & Tilmann Betsch, eds, *Intuition In Judgment and Decision Making* (Mahwah, USA: Lawrence Erlbaum Associates, 2008) 91 at 94-95 where it is specifically stated that expertise and expert intuition is developed by experience.
[53] *Science Manual*, *supra* note 48 at 173.
[54] The Honourable Justice Lynn Smith, "The Ring of Truth, the Clang of Lies: Assessing Credibility in the Courtroom" (2012) 63 UNBLJ 10 at 13 [*Ring of truth*]. Justice Smith acknowledges that even experts on credibility are not particularly competent in assessing credibility.
[55] *R v S(RD)*, [1997] 3 SCR 484, 151 DLR (4th) 193 at para 128.
[56] *Ibid*.

depend on things such as non-verbal communication and changes in a witness's demeanour.[57]

As a result, judges have a duty to provide substantial reasons for decisions that relate to the credibility of witnesses.[58] Former Supreme Court of Canada Justice Ian Binnie reminds judges that "the credibility of the outcome of these cases [*cases that involve the management and evaluation of expert evidence*] in the eyes of the litigants, lawyers and the broader community will often depend on how the expert evidence is handled."[59] Numerous reasons exist for a judge's duty to write sufficient reasons for their decisions. Sufficient reasons justifies and explains their decision, tells the losing party why they lost, provides public accountability, satisfies the public that justice has been done, and permits effective appellate review.[60] According to Ronald Dworkin's theoretical conception of the law as integrity, integrity requires that judges identify and endorse principles to justify what decision they have arrived at to resolve a legal dispute that they feel as fair and just.[61] In discharging their duties to provide reasons for their decisions, judges are simultaneously authors of the law as well as critics of the law.[62]

Compounding the difficulties facing judges in their assessments of medical expert evidence is the way in which expert evidence is procured in Canada. Unlike other

[57] R v S(N), 2012 SCC 72 at paras 24, 26. This is notwithstanding psychological research that demonstrates that demeanour and behaviours widely associated with deception, such as gaze aversion, fidgeting show no compelling correlation with deceit see for example, Bella DePaulo et al, "Cues to Deception" (2003) 129 Psychological Bull 74, and Charles Bond & Bella DePaulo, "Accuracy of Deception Judgments" (2006) 10 Personality and Social Psychology Rev 214.
[58] See *R v Sheppard*, 2002 SCC 26.
[59] *Science Manual*, *supra* note 48 at 142.
[60] *FH McDougall*, 2008 SCC 53 at para 98 [*McDougall*]. More recently, see *Champoux v Jefremova,* 2021 ONCA 92 at para 18.
[61] *Law's Empire*, *supra* note 33 at 184 and 258.
[62] *Ibid* at 229.

witnesses, experts are paid by a party to the litigation to give their evidence to the court.[63] This makes experts susceptible to bias.[64] The expert's retaining lawyer provides them expert with the evidence to review in order to formulate their opinion and, often, the lawyer will outline the specific questions they want the expert to answer. These practical realities result in concerns that the retaining lawyer may unduly influence the expert's opinion.[65] In other words, the expert's opinion to the court might be biased or partisan. If a judge relies upon an expert opinion that was biased in some way, there is an increased likelihood that the judge's ultimate decision may be incorrect.[66] This is due to the fact that the biased expert has not objectively and independently applied their expertise to the matters at issue, possibly disregarding facts that would have led the expert to an alternative opinion.

The potential for expert witnesses to be biased or partisan, therefore, undermines the assistive function that experts are designed to serve to the court. Accordingly, case law has made it clear that experts' opinions must be objective and non-partisan. Encapsulating this expectation, the Supreme Court of Canada, in *White Burgess, Langille, Inman v Abott and Haliburton Co*[67] explained, "expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware

---

[63] *Ibid*.
[64] David Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune of Partial Experts" (2009) 43 Queen's LJ 565 at 565-566 [*Jukebox Testimony*]. See also Tania Bubela, "Expert Evidence: The Ethical Responsibility of the Legal Profession" (2004) 41 Alta L Rev 853.
[65] *Uncertain Duty of Expert Witnesses*, *supra* note 35 at 645-647.
[66] *Ibid* at 659. The presence of biased experts not only is problematic for a judge in assessing the expert's evidence. Biased experts may influence other experts to deliver biased opinions in response to opinions they feel are biased and, ultimately, may result in unbiased experts leaving the medical expert market.
[67] 2015 SCC 23 [*White Burgess*].

of this duty and able and willing to carry it out."[68] Judges are expected, therefore, to critically assess whether or not an expert is biased while presiding over a trial.[69]

Buttressing case law, which outlines the expectation that judges discharge their role in a lawsuit objectively and independently, is various rules of court across Canada that specifically state their expectations that experts be objective and independent.[70] Furthermore, rules of court in some Canadian provinces are not satisfied merely stating the expectation that expert's evidence be independent and non-partisan and, instead, require that the expert certify that they aware of their duty to assist the court and act independently and objectively.[71] If an expert is independent and objective, it makes a judge's job in assessing competing expert evidence easier by removing one variable from, as previously discussed, an already complicated task.

Requiring medical, and other, experts to deliver objective and independent evidence does not merely comport with the proper administration of justice. Rather, ensuring medical experts provide the court with their evidence in a manner that is objective and independent has important ramifications on public perception of the medical profession generally. While the public retains a high level of trust in

---

[68] *Ibid* at para 10. Unfortunately, since *White Burgess*, the number of cases in which lawyers have challenged the admissibility of expert evidence because of perceived bias has increased. See, for example, Jason Chin, Michael Lutsky & Itiel Dror, "The Biases of Experts: An Empirical Analysis of Expert Witness Challenges" (2019) 42:4 Man LJ 21.

[69] *Science Manual*, *supra* note 48 at 169. See also, David Paciocco, "Evaluating Expert Opinion Evidence for the Purpose of Determining Admissibility: Lessons from the Law of Evidence" (1994) 27 CR 302 at 313-318.

[70] See, for example, British Columbia, *Supreme Court Civil Rules*, rr 11-12 [*Supreme Court Rules*], Ontario, *Rules of Civil Procedure*, r 53 [*Rules of Civil Procedure*], and Saskatchewan, *Queen's Bench Rules*, r 5(37).

[71] See for example *Supreme Court Rules*, supra note 70 at r 11-2(2). See also *Rules of Civil* Procedure, *supra* note 70 at Form 53: Acknowledgment Duty.

physicians[72], that trust is susceptible to wane if physicians, acting as expert witnesses, act in a biased fashion as expert witnesses. For that reason, regulatory Colleges, such as the College of Physicians and Surgeons of Ontario, have made their expectations to potential expert witnesses clear: a physician acting as an expert witness must act objectively and independently in that role.[73]

Despite the well-established expectation that experts act in an objective and independent fashion when providing their evidence to the court, concerns about their impartiality, or lack thereof, remain. No doubt, the continued way that expert evidence is procured, by having one of the parties to a lawsuit retain and instruct the expert, plays a considerable role in the persistent concerns about experts' objectivity. Even steps that have been taken to diminish the prevalence of biased expert evidence have failed to eradicate biased experts. For example, in 2020 Justice Gans, in *Boutcher v Cha*,[74] wrote that Ontario's requirement that a 'Form 53' (acknowledgment of an expert's duty to the court) be executed "does nothing to assist the trier of fact in wrestling to the ground the impartiality and acceptability of yet to be tendered evidence."[75] Accordingly, in that same decision, Justice Gans pleaded for the establishment of panels of experts in medical cases "rather than those routinely 'hired' to espouse the theories consonant with those of their retaining counsel."[76] In other words, to date, there has been no antidote to experts' bias and partisanship in medical cases.

---

[72] Noam Levey, "Medical Professionalism and the Future of Public Trust in Physicians" (2015) 313:18 American Medical Assoc 18 at 18. This is not to suggest that some individuals or segments of society do not trust physicians, but rather to highlight the general public perception.
[73] College of Physicians and Surgeons of Ontario, "Medical Expert: Reports and Testimony" (June 2021) online: < https://www.cpso.on.ca/Physicians/Policies-Guidance/Policies/Third-Party-Medical-Reports>.
[74] 2020 ONSC 7694 [*Boutcher*].
[75] *Ibid* at para 36.
[76] *Ibid* at para 28.

Despite all the difficulties inherent in judges' use of medical expert evidence, judges play an important role in the legitimation of particular experts' evidence and the construction of what constitutes 'good' expert evidence. The mere fact that an expert supports a defendant physician's care does not, necessarily, lead to a finding that the defendant's conduct met the standard of care.[77] An expert may have, for example, failed to consider some of the relevant underlying facts giving rise to the lawsuit. Judges must critically assess the expert evidence to ensure it comes from an individual with sufficient qualifications and experience to assist the court, that it is credible, and that it is logically and factually sound.[78] Doing so diminishes the risk of the medical profession succumbing to a "self-serving temptation to set low standards" or accepting standards that do not conform to the reasonable expectations of medical practitioners.[79]

The effective use of expert evidence by judges is obscured by a host of factors, as outlined above. Unsurprisingly, therefore, there is a robust body of research, case law, and rules that have developed that seek to optimize the utility of expert evidence in the adjudication process.

Suggestions to Improve Judges' Use of Expert Evidence Moving Forward

The copious amount and depth of the general research and judicial commentary about expert evidence provided a robust foundation for my study of how judges assess and analyze expert evidence in medical malpractice trials. Government inquiries, resulting from concerns about expert evidence and seeking to optimize its use and role in

[77] *Legal Liability of Doctors and Hospitals*, *supra* note 19 at 364.
[78] See, for example, *Sit v Trillium Health* Centre, 2020 ONSC 2458 at para 13 [*Sit*].
[79] *Canadian Health Law and Policy*, *supra* note 1 at 123.

the litigation process, notably the Goudge Report,[80] help to identify factors that judges must be attuned to when assessing expert evidence in a trial. Studies calling for changes to the way that courts utilize expert evidence range from judges' personal perspectives on the challenges that they have faced assessing scientific evidence or assessing witnesses' credibility[81] to academic research about the cognitive processes that may underlie, and possibly impair, judicial assessments of expert evidence.[82]

Alternatives to the adversarial model of expert evidence that Canada, and the United States, currently embrace have been proposed for quite a long time. For example, in the late 1800's, William Foster, a judge in the United States, assessed various alternatives to the use of expert witnesses who have been retained by the parties to a lawsuit.[83] These alternatives included using panels of experts and/or court appointed experts.[84] Calls for alternatives to the current practice have continued, a particularly well-discussed option emanates from Australia and is referred to as 'hot-tubbing,' a process that involves bringing opposing experts together for a meeting in order to seek consensus between experts and streamline areas of contention.[85] In Quebec, the *Code of Civil Procedure* was amended in recent years to establish a default position whereby parties

---

[80] Ontario, Ministry of the Attorney General, *Inquiry into Pediatric Forensic Pathology in Ontario*, by the Honourable Stephen Goudge (Toronto: Ontario Ministry of the Attorney General, 2008).
[81] See *Mouse that roared*, *supra* note 38; *Ring of Truth*, *supra* note 54; William L Foster, "Expert Testimony Prevalent Complaints and Proposed Remedies" (1897-1898) 11:3 Harv L Rev 169 [*Prevalent complaints*]; The Honourable Frank Iacobucci and Graeme Hamilton, "The Goudge Inquiry and the role of medical expert witnesses," (2010) 182(1) Canadian Medical Assoc J 53 [*Role of medical expert witnesses*].
[82] See *Judging fast and slow*, *supra* note 43, *Limits of Cross-examination, supra* note 46, *Contextual approach to admissibility*, *supra* note 41. See also Carla MacLean, Lynn Smith & Itiel Dror, "Experts on Trial: Unearthing Bias in Scientific Evidence" (2020) 53:1 UBC L Rev 101.
[83] *Prevalent complaints*, *supra* note 82. See generally Tal Golan, *Laws of Men and Laws of Nature: The History of Scientific Expert Testimony in England and America* (Cambridge, USA: Harvard University Press, 2004) at 255. The author identifies numerous examples of disagreements between jurists and scientists from the eighteenth to early twentieth century about how to best utilize expert scientific knowledge during lawsuits.
[84] *Ibid*. See also *Uncertain Duty of Expert Witnesses*, *supra* note 35.
[85] Freya Kristjanson, "Hot-Tubs' and Concurrent Evidence: Improving Administrative Proceedings" (2012) 25 Can J of Admin L & Prac 79.

are expected to obtain joint expert opinions and, if the parties seek to deviate from that default position, Courts can order that the parties, notwithstanding their wish to do otherwise, obtain joint expert opinions.[86]

Research literature has also made suggestions of how judges should assess expert evidence. Gary Edmond and Kent Roach encourage judges to conduct contextual analyses of expert evidence, requiring that they engage with the substance of the evidence rather than solely relying on credibility assessments.[87] Others, such as David Paciocco, concur that judges should take an approach to the assessment of expert evidence that assesses the expert's theory and the reasoning process they have employed to arrive at their opinion.[88] Furthermore, within the expert evidence literature, assessments of judges' narratives about expert evidence in their written decisions have been limited to the analyses of very few cases, rather than a large number of cases to assess narratives that may extend beyond on particular decision.[89]

A review of the applicable literature reveals that the academic, judicial, and governmental assessment of expert evidence is primarily focused in the area of criminal law. This is perhaps unsurprising given the consequences that a finding of guilt can have, namely depriving the accused of their liberty. However, as noted, the importance of medical malpractice lawsuits to both patients and physicians alike, and the paramount importance of expert evidence in the outcomes of medical malpractice lawsuits, warrants academic study of how judges assess medical expert evidence and how they reach at decisions when medical expert witnesses disagree with one another. Moreover, expert

[86] art 477, paras 148(4), 158(2) CCP.
[87] *Contextual approach to admissibility*, *supra* note 41 at 403.
[88] *Bluster and Blarney*, *supra* note 36 at 140.
[89] See, for example, Emma Cunliffe, "(This is Not A) Story: Using Court Records to Explore Judicial Narratives in R v Kathleen Folbigg" (2007) 27:1 Aust'l Feminist LJ 71.

evidence academic research in Canada has not focused on the empirical study of how judges assess expert evidence, rather focusing, generally, on the challenges that face judges in assessing that evidence and providing recommendations to improve the use of expert evidence generally. My research, therefore, can fill a significant gap in the expert evidence literature by adding an empirical assessment of how judges specifically assess medical malpractice expert evidence.

Chapter 3 - Methodology and Methods

Having established medical expert evidence's integral role in determining the outcome of medical malpractice lawsuits and the corresponding importance of, therefore, understanding why and how judges choose to favour some expert evidence rather than other expert evidence in Chapter 1, I will now describe the methodology and methods I used to undertake my analysis. I will begin by describing the overarching methodology I employed to guide my data analysis. Second, I will discuss the specific methods that I utilized within the overarching methodology in order to identify, code, and categorize the data.

Methodology

I conducted a discourse analysis to study judges' assessments of medical expert evidence. Discourse analysis is a methodology most frequently used in the social sciences. At its core, discourse analyses aim to excavate how knowledge and meanings are constructed and ordered through the use of language in a given social institutional context.[90] Consequently, discourse analyses search for the effects of institutional power and authority on the developing, and entrenching, of particular discourses that are deemed constitutive of knowledge.[91] In other words, the specific ways that judges analyze the expert evidence presented during a medical malpractice trial serve to justify their decision to rely on one expert's evidence, rather than that of another expert, by setting out specific reasons why that expert evidence is more helpful, or authoritative, in adjudicating the dispute.

[90] *Doing Discourse Research*, *supra* note 28 at 2, 86.
[91] *Ibid* at 62, 70.

Leading discourse analysis methodologist Reiner Keller characterizes the term discourse as a statement event (i.e. a particular way of characterizing something), or a series of events (i.e. repeated instances of characterizing something in similar ways). [92] This is the way discourse is defined for the purposes of this thesis. So, when a judge in a written decision describes one expert's evidence as, for example, impartial because the expert conducted themselves in a fair and open-minded way during the trial, the statement event is the way in which the judge has constructed impartiality as meaning the fair and open-minded delivery of expert evidence during a trial. Discourses can be stabilized by well-known narrative patterns, rules, or expectations. Rules of court across Canada require that an expert be objective and independent. If a judge appeals to, for example, a specific rule of court in a province, such as Rule 53 of Ontario's *Rules of Civil Procedure*, that emphasizes the expectation that an expert provide their evidence in an objective and independent manner, a judge's criticism about an expert's conduct during a trial by virtue of it revealing a lack of objectivity and independence, is stabilized.

Alternatively, discourse about what constitutes persuasive medical evidence, in a judge's opinion, can be stabilized by the judge contrasting the evidence she feels is persuasive with other evidence that she finds less persuasive. Comparisons, for example, between different medical expert evidence may, therefore, order knowledge and authority as between different experts by identifying what expert evidence is helpful to the judge and what expert evidence is not helpful to the judge. Discourses, therefore, both reflect and constitute how power is dispersed amongst different actors in the institutional setting of a trial (i.e. between a judge, expert witnesses, and lawyers).[93]

---

[92] *Ibid* at 71-72.
[93] *Ibid* at 70.

The discourse analysis that I performed to facilitate my study examined the specific narratives and rhetorical strategies, metaphors, and images conjured by judges in their written decisions to explain and justify their decisions to rely on some medical expert evidence rather than other medical expert evidence.[94] This follows Reiner Keller's perspective that discourse analyses ought to identify how contingent knowledge and power is rooted in certain discourses. Keller opines that discourse analyses seek to analyze the linguistic and rhetorical strategies employed, the extent to which discourses are reproduced over time, and when specific discourses appear or disappear.[95] Discourses can root specific understandings of particular concepts.[96] If one characteristic is repeatedly identified as revealing bias, that specific discourse can become received knowledge, leading one to believe that the specified characteristic is inextricable from bias.

Identifying discourses consisted of a process of data coding and subsequent analysis. While the data coding and subsequent analysis will be discussed in greater detail in the Methods subsection, below, the data coding process involved identifying broad concepts that appeared to influence the judge's assessment of expert evidence and identifying specific events that characterized a judge's assessment of the concept and how it influenced their decision.[97] For example, bias or partisanship influenced judges' assessments of expert evidence. A broad thematic code was, therefore, created to identify the specific ways that experts were determined to possess bias or partisanship, how the bias or partisanship impacted the judge's decision, and what particular linguistic and

---

[94] *Ibid*.
[95] *Ibid* at 74, 112.
[96] *Ibid* at 25. See also Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (New York: Routledge Classics, 1970) at 86 [*Order of Things*].
[97] *Ibid* at 118-120.

rhetorical devices were used to characterize an expert's evidence as biased or partisan. Qualities analogous to bias or partisanship, such as lacking in impartiality, objectivity, or independence, were categorized together under the code of bias and partisanship. After grouping similar statements about expert bias and partisanship together, my analysis of the discourse themes involved an assessment of the legal norms that underlie the themes (i.e. the specific institutional expectations of experts and what constitutes appropriate expert evidence) as well as the normative implications of discourses on the outcome of cases and the authority of an expert's evidence.[98]

Law is particularly well suited to discourse research. Law is a social institution that stabilizes behavioural expectations.[99] If there is a dispute between individuals (or other entities, like corporations or governments) about whether certain conduct is legally permissible or not, judges have the power and authority to resolve that dispute. In this way, law is simultaneously a system of knowledge (i.e. there are specific legal doctrines and norms that have been developed over time that define what is, and is not, legally permissible conduct in a given context and the law has the capacity to continue to define what is, and is not, legally permissible conduct in the future) and a system of action (i.e. the decision of a judge has tangible consequences on the parties involved in a legal dispute, such as ordering one party to compensate another).[100] Therefore, discourses developed and repeated across time and place by judges have a direct impact on how conduct between individuals is regulated and in, correspondingly, how behavioural expectations are set.

[98] The types of comments that I grouped together under two broad thematic codes are noted in Appendix 1.
[99] *Between Facts and Norms*, *supra* note 7 at 195.
[100] *Ibid* at 79, 114.

Michel Foucault and Ronald Dworkin theoretically inform my discourse analysis. I adopt the Foucauldian assumptions that discourses exist as groups of practices that systematically form the objects of which they speak and that all knowledge has been constructed by establishing an ordering of knowledge through establishing differences between different knowledge.[101] Similarly, I, like Foucault, believe that knowledge and language are rigorously interwoven, supporting and complementing one another.[102] I, therefore, have endeavored to excavate particular statements by judges over a number of years and in different jurisdictions to determine what themes and narratives pervade judicial discourse as it relates to the analysis of medical expert evidence.[103] By doing so, the dominant discourses that define judicial assessments of medical expert evidence were identified and studied. Correspondingly, I analyzed how discourses interact with other discourses in order to critically assess how discourses produce legal knowledge based on what judges write about medical expert evidence.[104] In other words, I examined the effects of discourses on the outcome of the case, the relative weight afforded to different expert's evidence, and what specific signs or markers were associated with expert evidence that was accepted and followed by judges.

Embracing Foucauldian understandings about the relationship between language and knowledge also accords with the manner in which judges' written decisions constitute what the law is and what it should be in the future. Canadian law obligates judges to write detailed reasons for their legal decisions to, amongst other things, justify and explain their decision, provide public accountability and satisfy the public that justice

---

[101] Michel Foucault, *The Archaeology of Knowledge* (New York: Tavistock Publishing, 1972) at 49. See also *Order of Things*, *supra* note 96 at 95.
[102] *Order of Things*, *supra* note 96 at 95.
[103] *Doing Discourse Research, supra* note 28 at 49.
[104] *Ibid*.

has been done, and to permit effective appellate review.[105] Judges' obligation to write clear, cogent, and persuasive reasons reflects Jurgen Habermas' observation that, "what is valid must be able to prove its worth against any future objections that might actually be raised."[106] Writing reasons as a way to assuage possible objections to a judge's decision appreciates that judges' reasons are "constantly exposed to the risk of being invalidated by better reasons and context-altering learning processes."[107] Accordingly, judges' written decisions *should* provide readers with a clear, cogent, and persuasive account of why a given judge has decided to, for example, adopt the view of one expert medical witness while rejecting the view of another.

The legal requirement that judges write detailed reasons for their decisions *and* the Foucauldian understanding of the inextricable connection between language and knowledge, and the influence of power on the developing and entrenching of discourses that constitute and are constitutive of knowledge, led me to choose judges' written decisions as my data set. Examining written data is justified given the questions that discourse research seeks to analyze.[108]

Judges' written decisions are further justified as a data set given that, according to Ronald Dworkin, "Courts are the capitals of law's empire, and judges are its princes."[109] Accordingly, courts are the venue in which knowledge of what is, and is not, permissible medical conduct is adjudicated and entrenched. Due to the fact that the adjudication of medical malpractice lawsuits is heavily contingent on medical expert evidence, courts also represent the venue where legal precedent is set as to what marks more authoritative

[105] *McDougall*, supra note 60 at para 98.
[106] *Between Facts and Norms, supra* note 7 at 35.
[107] *Ibid* at 36.
[108] *Doing Discourse Research*, *supra* note 28 at 87.
[109] *Law's Empire*, *supra* note 33 at 407.

expert evidence from less authoritative expert evidence and what factors guide the decision to adopt one expert's view of the case. To extrapolate Dworkin's analogy further, judges act as courts' institutional decision maker who ultimately makes the decision as to what types of conduct is, or is not, legally permissible and what expert evidence is, and is not, persuasive in guiding their decision in that regard. Simply put, the law relating to medical liability becomes what judges say it is depending on the medical expert evidence they do, and do not, accept.[110]

If Foucauldian thought underlines *why* this study assesses judicial discourses characterizing medical expert evidence and *how* I analyzed these discourses in relation to the construction and ordering of knowledge, Ronald Dworkin's constructive interpretation of law and his concept of law as integrity provides an analytical foil against which to assess judicial discourses concerning medical expert evidence. The process of a judge deciding a particular medical malpractice case *should,* from a Dworkinian normative perspective, be premised on a judge imposing a purpose onto the medical expert evidence they are assessing (i.e. this evidence is supposed to help me determine if the doctor cared for the patient appropriately and this evidence should be free from partisanship and bias) in order to render their decision in a way that conforms with the practice of medicine they are assessing.[111] In other words, judges should *not* assess medical expert evidence in a manner that is devoid of the expectations and realities of the practice of medicine.[112] Moreover, the principle of integrity requires that the law is morally coherent and, correspondingly, judges, when they adjudicate disputes, must

[110] *Ibid* at 2.
[111] *Ibid* at 52.
[112] *Ibid*.

respect a coherent set of principles when reaching a decision.[113] Integrity also commands a horizontal consistency, in addition to the vertical consistency characteristic of the law (i.e. 'lower' courts following precedents set by 'higher' appellate courts), and therefore their ought to be consistency in how judges assess, characterize, and rely upon medical expert evidence in trial courts across Canada.[114] A degree of consistency between how judges in different cases assess medical expert evidence should, therefore, be present, particularly in light of the proliferation of more national standards of practice.[115]

Accordingly, after the discourses that define and characterize judges' written decisions have been identified and analyzed, those decisions were judged against whether or not they were clear, cogent, consistent, and persuasive reasons to accept, or reject, medical expert evidence. If judges' written decisions fail to meet the expectations of clarity, cogency, consistency, and persuasiveness, it becomes difficult to accept those decisions as rational ones.[116] Put differently, judges' decisions to rely on one expert's evidence rather than another expert's evidence must be understandable based on the facts and sufficiently persuasive to be capable of satiating objections and alternative viewpoints.[117] Failing to provide persuasive written reasons for how judges assess medical expert evidence undermines the legitimacy of judges' capacity to arrive at rational and just decisions. In turn, one would need to question whether judges are, in fact, best placed to resolve legal disputes about medical care.

---

[113] *Ibid* at 176, 217.
[114] *Ibid* at 227.
[115] *Legal Liability of Doctors and Hospitals*, *supra* note 19 at 251.
[116] *Between Facts and Norms, supra* note 7 at 198.
[117] *Ibid* at 35-36.

Methods

There is a multitude of ways that discourse analyses can be conducted.[118] I performed my discourse analysis according to the methodological steps and framework set out by Reiner Keller in *Doing Discourse Research*: *An Introduction for Social Scientists*.[119] The first step I took was to identify the field of knowledge I wanted to investigate.[120] The field of knowledge I studied, as discussed previously, were judges' written decisions following medical malpractice trials. More specifically, I studied judges' assessments of medical expert evidence. The question I sought to answer within this field of knowledge was how and why judges decide to rely on some expert evidence presented in a lawsuit rather than other expert evidence presented in the same lawsuit. My research was inductive, however, to the extent I had a hypothesis it was that judges' reasons, for why they relied on certain experts' evidence, should clearly explain the reasoning behind those choices.

In order to examine how, if at all, patterns, rules, and assumptions underlie the constitution and construction of meaning and orders of knowledge, I assessed Canadian trial decisions from across common law jurisdictions 2017 to 2021. This timeframe provides a comprehensive account of the current discourses regarding medical expert evidence in medical malpractice cases. Case law between 2017 to 2021 reflects what Canadian common law courts currently accept as persuasive, and unpersuasive, medical expert evidence.[121] Further, current case law builds upon, and is constrained by, earlier case law by virtue of the principle of *stare decisis* and the rule of law.

---

[118] *Doing Discourse Research*, *supra* note 28 at 86.
[119] *Ibid*.
[120] *Ibid* at 91.
[121] *Between Facts and Norms, supra* note 7 at 198-199.

I chose to study a five-year time period of case law to guard against the risks associated with smaller sample sizes, namely that the specific data set may not be representative or generalizable. A one-year sample size could, for example, be an outlier as compared with case law from other years. A five-year sample size diminishes this risk. From a practical perspective, judges' written decisions are the most publically available and accessible way to assess how medical expert evidence is assessed during trials, as juries do not give reasons for their decisions.[122]

With my field of inquiry, research question and data set identified, the second step of my research required me to determine *how* to determine why judges relied on certain experts' evidence. Given that this study was inductive, I began by coding or 'tagging' each time judges referred to the experts involved in the trial.[123] After coding every reference that judges made about the experts involved in the trial, I returned to each reference to identify the ways in which the various experts, and their evidence, were differentiated from one another in order to understand why one expert's evidence was preferred to that of another. While I examined individual statements and utterances made by judges in particular cases in their own right, I endeavored to identify common themes from across different judgments in order to situate individual statements as parts of a more comprehensive discourse structure.[124]

To facilitate my identification of discourse themes to the ways that judges differentiated between different experts' evidence, I engaged in axial coding.[125] Axial

---

[122] A Judge may, in narrow circumstances, require a juror to provide particulars for their verdict, see, for example, *Judicature Act*, RSNS 1989, c 240, s 34. As it relates to why the law closely guards the secrecy of jury deliberations, see *R v Pan*, 2001 SCC 42 at para 100. On this point, see also *R v Find*, 2001 SCC 32 at para 1.
[123] *Doing Discourse Research*, *supra* note 28 at 91.
[124] *Ibid* at 3, 66.
[125] The types of statements that I grouped together under thematic codes are outlined in Appendix 1.

coding is the process of identifying pieces of data that convey particular information (i.e. why an expert's evidence was accepted) and/or describe how particular information is conveyed (i.e. by drawing an analogy to highlight why an expert's evidence was accepted) that are similar to one another. Axial coding, therefore, is the process of grouping similar statements and descriptions in judges' decisions together under a broad thematic code or category.[126] Data coding, as discussed earlier in this chapter, grouped together similar types of descriptions about experts and their evidence that judges made in their written decisions. For example, negative assessments of an expert's independence (i.e. labeling them as biased, assuming the role of an advocate, that they lacked objectivity, or that they were not impartial) were grouped together under a code of biased or partisan expert evidence. Within each broad thematic code I tracked the personal characteristics of the experts, such as their sex and medical experience, as well as the types of rhetorical and linguistic strategies that judges used when justifying their decision to fit an expert's evidence under the code of, for example, biased or partisan expert evidence. Therefore, I assessed correlations between particular types of characteristics that resulted in, for example, an expert being identified as 'less' expert than another expert, as well as how that determination was justified by the judge.

The data coding process in this study was qualitative, however I used a reflexive worksheet to guide my analysis of individual cases to enhance the reliability of the coding process, as the same questions were assessed when I analyzed each individual case. The reflexive worksheet was not intended to be exhaustive but, rather, to ensure I constantly reminded myself of the various ways that a discourse could appear within a

[126] Stefan Titscher et al, *Methods of Text and Discourse Analysis* (Thousand Oaks: SAGE Publications, 2000) at 79-80. See also, Juliet Corbin & Anselm Strauss, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory,* 4th ed (Thousand Oaks: SAGE Publications, 2015).

decision and, consequently, what effects the discourse may have on the relative authority of the experts in the case and how that discourse was presented in a way that may persuade a reader of the decision that the judge's assessment of the evidence was compelling or, at minimum, reasonable. I have included my reflexive worksheet as Figure 1.

Figure 1

When do discourses appear?	What linguistic and rhetorical devices are used?
• Certain discourse when parties win or lose?	• Foreshadowing, sympathy, criticism, comparison, irony, metaphor, moral judgments, aesthetical characterizations, fact based arguments?
• Correlation between discourses and personal characteristics of an expert like sex, experience	• What emotions are aroused?
• Geographical trends to the presence of particular discourses?	• What institutional specific norms are being applied?
• Are there specific outcomes associated with certain discourses?	• Are there normative lessons to be learned from the judge's assessment of expert evidence?

The analysis of data after it was coded was essentially threefold. One, I critically assessed what assumptions, understandings, and legal norms underlined these themes. Two, I analyzed how particular discourses correlated with the outcomes of cases. For example, is the discourse of bias or partisanship correlated with a judge finding that the defendant was negligent? Three, I identified specific words, actions, qualifications, or past conduct that were designated of markers of a particular code, again, for example, the code of bias or partisanship (i.e. what specifically caused the judge to identify an expert as biased). I then proceeded to consider whether, or not, the discourses that judges

construct and reinforce in their assessments of medical expert evidence meet the requirements of clarity, cogency, and persuasiveness. In essence, do judicial discourses satisfy Dworkin's notion of integrity in adjudication: is there a coherent set of principles relied upon to arrive at the best resolution in the circumstances? Therefore, while the themes that I have identified are the product of a qualitative assessment of the data, I quantitatively assessed correlations that between certain themes and discourses and particular outcomes.

I utilized the legal databases CanLII and WestLawNext to identify medical malpractice trials that were between 2017 to 2021. CanLII and WestLawNext are two of Canada's largest case law databases. I chose to use two case law databases to allow for cross referencing to ensure that one particular database was not missing, for whatever reason, cases decided during that timeframe. I used broad search terms in order to capture the most possible medical malpractice cases. Specifically, I used the terms "medical negligence" AND "expert" and "medical malpractice" AND "expert."

Within my search results, I only assessed trial court decisions. This decision is justified because trial judges make findings of fact, such as whether a medical expert's opinion is consistent or reconcilable with the facts, that are entitled to significant deference on appeal.[127] Accordingly, trial judges' assessments of medical expert evidence are, by in large, determinative of discourses constituting what is, and is not, persuasive medical expert evidence.

Limitations

The major limitations of my research are twofold. First, I am unilingual and, therefore, was unable to read decisions written in French in their original form.

[127] *Schwartz v Canada*, [1996] 1 SCR 254, 133 DLR (4th) 289 at para 32.

Accordingly, identifying analogous cases from Quebec, as compared to the ones identified from Canadian common law jurisdictions, necessitated the use of English translations and, even still, may have failed to identify all decisions from the 2017 to 2021 timeframe. Accordingly, due to the confounding variables of whether, or not, the English translations matched the intent and character of decisions originally written in French and, correspondingly, the distinct possibility that using the same search terms as were used above may have failed to identify all medical malpractice decisions that assessed medical expert evidence, I have focused this study on Canadian common law jurisdictions. Second, the primary source data used to conduct this research was limited to judges' written decisions. Accordingly, my research does not assess discourses that are formed during the delivery of oral testimony in a trial, nor court transcripts and expert's written reports. Therefore, apart from noting that certain elements of a trial (like an expert's written opinion) have been silenced or marginalized because, for example, they were not referred to in the judge's written decision, I am unable to determine how soundscapes (i.e. oral testimony) and other documents (i.e. a written expert report) conflict with, or challenge, the discourses that are evident in the judge's written decision unless the judge specifically refers to those other aspects of a trial.[128]

[128] See Ruth Buchanan & Jeffrey Hewitt, "Encountering settler colonialism through legal objects: a painted drum and handwritten treaty from Manitoulin Island" (2017) 68:3 N Ir Leg Q 291 at 294 [*Painted Drum and Handwritten Treaty*]. See also Linda Edwards, "Once upon a Time in Law: Myth, Metaphor, and Authority" (2010) 77:4 Tenn L Rev 883 at 885 which suggests that to fully understand the rhetorical situation in a judge's decision, the analysis must start with assessing the advocates' written submissions [*Once Upon a Time in Law*].

Chapter 4 - Results and Analysis

Overview

I begin this chapter by outlining the quantitative component of my research, specifically identifying any statistical trends that were evident in the cases studied. After doing so, I set out my qualitative analysis of the two broad discourses, and corresponding sub-themes, that judges constructed to justify and guide their assessments of medical expert evidence. The two broad discourses discussed in this chapter are 1) bias and partisanship, and 2) relative assessments of expertise. The qualitative component of this chapter sets out and analyzes each broad discourse theme in turn. Specifically, I begin by outlining the *indicia* of bias/partisanship and relative expertise that judges identified in their decisions. After doing so, I assess the implications of the way in which judges construct bias, partisan, and experts' relative expertise. Finally, I conclude this chapter by summarizing the findings of this study and identifying ways in which judges can further strengthen the persuasive value of their assessments of medical expert evidence.

Quantitative Analysis

My quantitative analysis focused on identifying statistical trends and correlations across the cases examined. In order to do so, I tracked the outcomes of the cases (i.e. a finding of liability or not), how often judges' assessments of expert evidence were characterized by identifying bias and partisanship or the analysis of experts' relative expertise, which party retained the expert who was deemed to be biased and/or possessed more or less expertise than an opposing expert, and whether any personal characteristics of experts (i.e. sex, area of practice, experience) were correlated with a judge constructing a particular discourse.

In the last five years, from 2017 to 2021, I identified 34 decisions from Canadian common law jurisdictions that judges authored following judge-alone trials. The jurisdictions from which these decisions emanated are set out in Table 1, directly below.

Table 1

Jurisdiction	**Total Number of Cases**	**Number of Cases Assessing Standard of Care**	**Number of Cases Assessing Causation**
Ontario	16	16	15
British Columbia	3	2	3
Alberta	9	9	9
Manitoba	3	3	2
New Brunswick	2	2	2
P.E.I	1	1	0

No cases from the last five years were identified from the provinces of Nova Scotia, Saskatchewan, or Newfoundland and Labrador. As identified in Table 2, below, the vast majority of medical malpractice decisions from the last five years assessed both the standard of care and causation. Exceptionally, the defendants admitted a breach of the standard of care, and therefore the presiding judge did not analyze the issue of standard of care.[129] It was similarly exceptional that a judge did not analyze causation in their written decision. On two occasions, judges did not discuss causation in their written decisions.

[129] The single case in which a judge did not assess the standard of care was *Baglot v Fourie,* 2019 BCSC 122. Justice MacDonald notes, at para 3, that the defendant "admitted the prescription error and that it breached the applicable standard of care."

Both situations involved circumstances in which the judge had already determined that the defendant physician had not breached the standard of care.[130]

Decisions from judge-alone medical malpractice trials between 2017 and 2021 overwhelmingly resulted in outcomes favourable to defendant physicians. Table 2 sets out the outcomes of the 34 cases examined in this thesis.

Table 2

Jurisdiction	**Finding of Liability**	**Finding the defendant was not liable**	**Percentage of cases where the defendant was found not liable**
Ontario	4	12	75%
British Columba	1	2	67%
Alberta	2	7	78%
Manitoba	1	2	67%
New Brunswick	0	2	100%
P.E.I	0	1	100%
Total	**8**	**26**	**76%**

Medical malpractice lawsuits that reach trial are cases that can be classified as 'close-calls.' Cases where the defendant physician's conduct is clearly indefensible will, likely, have been settled by way of payment of money to the plaintiff before a trial takes

[130] The two cases were *MacWilliams v Connors,* 2017 PESC 2 [*MacWilliams*] and *Jaques et al v Francis*, 2018 ONSC 1120 [*Jaques*]. While not made explicit in the decisions, one can surmise that, having found that the defendant was not negligent, the judges did not feel the need to address causation because it was rendered moot following the conclusion that the defendant met the applicable standard of care.

place.[131] Correspondingly, cases where the plaintiff is unable to obtain expert support of their allegations of negligence against the defendant will, likely, have been dismissed on a without costs basis or dismissed summarily by the court.[132] Cases that proceed to trial involve care that is not obviously negligent or not negligent, as well as cases that the defendant is confident of a favourable outcome but the plaintiffs have sufficient evidence to avoid having the case dismissed summarily by the court and, thus, insist on proceeding to trial. Simply put, the high probability of judges' decisions favouring defendant physicians should not be taken to assume that patients are not receiving compensation for losses sustained by virtue of deficient medical care.

Across the cases that were studied in this thesis, two discourse themes permeated judges' decisions across the country. As will be outlined in the next section of this chapter, both were chief rationales employed by judges to justify their decision to adopt or reject a given expert opinion.

Discourse theme #1: Bias and partisanship

The first discourse theme judges constructed to justify their decisions to rely on a certain expert's evidence was the bias and partisanship, or lack thereof, of the experts at trial. In total, there were 12 cases that contained the discourse of expert bias or partisanship impacting on judges' evaluations of the expert evidence. In other words, in 35% of the cases studied, the judge specifically diminished an expert's authority to assist the court with their evidence because of their bias, partisanship, and/or lack of objectivity. Table 3 identifies the party who retained experts that judges labeled as biased or partisan as well as the outcome of cases that contained this discourse theme. Notably,

[131] *2020 Annual Report*, *supra* note 3 indicates that of the 645 lawsuits that were resolved in 2020, 349 were dismissed, discontinued, or abandoned.
[132] *Ibid*. Of the 645 lawsuits that were resolved in 2020, 259 were settled with the plaintiff.

one case labeled both parties' experts as biased and partisan, which is why the Table identifies 13 instances where the respective parties' experts were criticized for bias and partisanship, despite there only being 12 cases in total that did so.

Table 3

Party that retained the biased expert	**Findings of bias against their expert**	**Favourable outcome**
Plaintiff	11	2
Defendant	2	10

Plaintiff experts' objectivity and impartiality was criticized in 92% (11 out of 12) of cases when judges identified that an expert was biased or partisan. Conversely, defendant experts' objectivity and impartiality was criticized in 17% (2 out of 12) of cases when judges identified that an expert lacked objectivity and impartiality. When the discourse of expert bias or partisanship appeared in a judge's decision, there was an extremely strong correlation with a finding that the defendant was not liable for the plaintiff's damages. In fact, in 83% (10 out of 12) of cases that criticized an expert's objectivity and impartiality, the defendant was not liable for medical malpractice. The process of coding for biased or partisan expert evidence consisted of identifying the markers (i.e. demeanor, previous instances that they have worked as an expert witness) of bias or partisan expert evidence that appeared repeatedly across cases.[133]

[133] See Appendix 1 for the words and phrases that caused me to place sentences and paragraphs into thematic codes.

Discourse theme #2: Relative expertise

The second discourse theme that was evident across the medical malpractice decisions examined was that judges frequently analyzed the relative expertise of the expert witnesses and based their decisions to rely on a certain expert's evidence because one expert was determined to have greater relative expertise. Expertise, as defined in chapter 1, is the quality of possessing "great skill or knowledge in a particular field."[134] The discourse theme of relative expertise encompassed situations in which judges specifically commented on qualifications and/or clinical experience of one expert, as compared to another, and, in doing so, concluded that one expert possessed more relevant expertise than the other. In 38% of the cases studied (13 out of 34), judges constructed the discourse of relative expertise as between opposing experts. Table 4 identifies the party that retained experts who were identified as lacking in expertise (one case identified that one of the plaintiff's experts had less expertise in assessing one of the defendants care while identifying that one of the defendant's experts has less expertise in assessing a different defendants care) and the outcome of cases in which judges explicitly contrasted the relative expertise of the experts.

Table 4

Party that retained the expert with 'lesser expertise'	**Number of cases**	**Findings in favour of the party in cases where relative expertise was analyzed (i.e. a finding of liability in favour of the**

[134] *Medical Expertise*, *supra* note 12 at 105.

		plaintiff or a dismissal of the case in favour of the defendant)
Plaintiff	13	1
Defendant	1	12

In each case that judges explicitly discussed the relative expertise of the respective experts, the party that retained the expert with lesser expertise was the plaintiff. In 92% of cases where one expert was determined to have lesser relative expertise compared to another expert, the judge found in favour of the party who retained the expert with the higher level of expertise. Coding for assessments of relative expertise proceeded by identifying specific comparisons drawn between opposing experts' credentials, qualifications, or clinical experience. It was necessary for the judge to directly compare and distinguish between experts' credentials, qualifications, or clinical experience for a sentence or paragraph to fit within this discourse theme.

Qualitative Analysis

1) Bias, Advocacy, and Partisanship

The Supreme Court of Canada, in the seminal expert evidence cases *White Burgess* and *Mohan*, has made it abundantly clear that expert witnesses owe a duty to the court to ensure their opinions are objective and independent.[135] Provincial Rules of Court across Canada affirm this common law expectation.[136] The expectation that expert

[135] *White Burgess*, *supra* note 67 at para 10. See also *Mohan*, *supra* note 13 at para 23.
[136] See, for example, *Rules of Civil Procedure*, *supra* note 70 at r 53.03.

witnesses discharge their role in a lawsuit objectively and independently may be well known, however, it should not be assumed that experts will comport themselves with these expectations.[137] For that reason, judges are instructed to critically assess an expert's evidence to evaluate it is objective and independent.[138]

It is unsurprising, then, particularly in light of the way that experts are retained and instructed by a party to the dispute, that a recurrent discourse theme that characterizes judges' evaluations of medical expert evidence in medical malpractice decisions is whether a particular expert displays bias or partisanship. As outlined in the quantitative analysis section, above, when judges find that an expert is biased or partisan, there is a strong likelihood that the judge will reach a decision commiserate with the biased expert's opinion. While an expert whose evidence has been characterized as biased or partisan in some respect is correlated with judges not relying on their evidence, bias and partisanship does not, necessarily, render an expert's evidence entirely unhelpful to the judge.[139]

Nonetheless, judges' decisions on whether or not to rely upon an expert's evidence are frequently determined based on whether or not an expert was objective, independent, and impartial or biased and partisan. In classifying certain experts as biased and partisan, judges identify markers of bias or partisanship. This is necessary because whether an expert is biased or not is not self-evident in the abstract. The general requirement that experts should be objective and independent is just that, a general

[137] On the structural realities of how experts are retained by parties in a lawsuit and the complications that may cause to their objectivity and independence, see generally *Uncertain Duty of Expert Witnesses*, *supra* note 35, and *Jukebox Testimony*, *supra* note 64.
[138] *Science Manual*, *supra* note 48 at 142. See also *Limits of Cross-Examination*, *supra* note 46 at 904.
[139] See, for example *Boutcher v Cha*, 2020 ONSC 7694 at paras 30, 39 [*Boutcher*]. Justice Gans notes that, despite criticizing the experts' partiality, he still benefited from their evidence.

requirement. As H.L.A. Hart describes in *The Concept of Law*, "In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide."[140] By elucidating markers of bias and partisanship in their decisions, judges diffuse potential criticism that their assessments of expert evidence were arbitrary. Timothy Endicott defines arbitrariness as "a lack of reason."[141] Arbitrariness is anathema to the rule of law, which requires that laws be known if they are to generate expectations.[142] Therefore, by giving the notions of biased and partisan expert evidence content and meaning, judges affirm that there are rules and reason behind their determinations of whether or not to adopt an expert's opinion when they arrive at their decisions.[143]

The cases in which judges identified an expert as biased or partisan revealed three sub-themes. First, bias and partisanship are associated with experts' dismissing and vigorously contesting other perspectives on the matters at issue. Second, bias and partisanship can also emanate from changes to an expert's opinion during the course of a lawsuit. Third, bias and partisanship are frequently constituted by reference to an objective and independent expert involved in the same case. I will begin this sub-section by outlining the specific language that judges used in their decisions to mark experts as biased according to each of the three sub-themes associated with bias. Finally, with the sub-themes in mind, I will analyze the implications of the sub-themes associated with bias and partisanship and discuss possible explanations for the way in which these sub-themes have been constructed and reinforced.

---

[140] Herbert Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) at 123 [*Concept of Law*].
[141] Timothy Endicott, "Arbitrariness" (2014) XXVII:1 Can JL & Jur 49 at 49 [*Arbitrariness*].
[142] *Ibid* at 53. See also Lon Fuller, *The Morality of Law*, 2nd ed (New York: Yale University Press, 1969) at 49, 50-51, 64.
[143] *Concept of Law*, *supra* note 140 at 138-139.

Dismissing and Contesting Other Perspectives

One sub-theme within the broader discourse of expert bias and partisanship in medical malpractice cases is that bias and partisanship is associated with an expert holding particularly strong or rigid views of the case, therefore dismissing other perspectives, as well as vigorously contesting other perspectives. Dogmatism and rigidity have been identified in the past, for example by David Paciocco,[144] as characteristics that are indicative of expert bias and partisanship. However, such pronouncements do not explicate what types of specific behaviour or conduct demonstrates sufficient rigidity to infer that an expert has abandoned objectivity and independence.

Justice Gans, in *Smith v Kane,*[145] characterized Dr. Osborne (the plaintiff's expert) as biased and partisan because of her rigidity and argumentativeness. In doing so, he emphasized that Dr. Osborne was obligated to act objectively and neutrally. Justice Gans used Dr. Osborne's choice not to accept assumptions posed to her by opposing counsel during cross-examination, which he described as a 'routine' practice, as evidence of her rigidity.[146] Justice Gans stated "I found that Dr. Osborne did not fully appreciate her duties as a Rule 53 expert. She was too argumentative, was not prepared to yield or concede ground when she should have, was reluctant to accept assumptions, which is part of the routine for experts under cross-examination and was, herself, a little wedded to her own thesis."[147] Even Dr. Osborne's clinical skills and expertise which, in Justice Gans'

---

[144] See *Jukebox Testimony*, *supra* note 64 at 608. Paciocco, in support for his assertion that dogmatism and rigidity is associated with bias and partisan expert opinions, cites *R v Truscott*, 2007 ONCA 575 and *Khan v College of Physicians and Surgeons* (1992), 9 OR (3d) 641, 94 DLR (4th) 193 (CA). Paciocco, however, does not identify what types of behaviour or conduct equates with sufficient rigidity to undermine the objectivity and independence of an expert.
[145] *Smith*, *supra* note 17.
[146] *Ibid* at para 50.
[147] *Ibid* at para 50.

words, meant she was a "first rate practitioner" was insufficient to overcome the effect of her rigidity and argumentativeness on the persuasive value of her evidence.[148]

The correlation between an expert conveying a rigid opinion or view on a particular matter and bias was also evident in *Tahir v Mitoff*.[149] In *Tahir*, Dr. Humen's rigidity was the product of his refusal to acknowledge errors and mistakes that he made in arriving at his expert opinion.[150] For example, Dr. Humen opined that the defendant should have taken further steps to investigate and treat the patient for a pulmonary embolism because he stated that the patient's right ventricle was enlarged.[151] An enlarged right ventricle is a classic indicator of a pulmonary embolism and, therefore, Dr. Humen felt that in light of this classic indicator of a pulmonary embolism, the defendant physician should have taken further steps to investigate and treat the patient.[152] However, the medical records, including an echocardiogram, demonstrated that the patient's right ventricle was a normal size.[153] Justice Wilson criticized Dr. Humen, one of the plaintiff's experts, for "doggedly" maintaining that the defendant physician fell below the standard of care even when presented with various facts he misstated in arriving at his opinion.[154]

The consequences of Dr. Humen's failure to acknowledge the factual errors he made had dire consequences on the authority of his expert opinion. Justice Wilson determined that Dr. Humen did not meet the behavioural expectation that experts be candid and impartial.[155] His unrelenting views on this case ran contrary to the expectation that "expert witnesses ought to acknowledge the error and candidly state whether or not it

[148] *Ibid* at para 49.
[149] *Tahir*, *supra* note 16.
[150] *Ibid* at para 113.
[151] *Ibid*.
[152] *Ibid*.
[153] *Ibid*.
[154] *Ibid* at para 115.
[155] *Ibid* at para 116.

effects the reliability of the opinion that has been offered. Dr. Humen did not do this. Instead, he attempted to minimize the effect of his errors and he simply refused to acknowledge that the likelihood of Ms. Chaudhry having pulmonary embolus was probably low."[156] Dr. Humen's decision to rigidly maintain his opinion even when confronted with his misapprehensions of the facts of the case revealed that he lacked an objective and open-mind during his assessment of the case.[157] Instead of recognizing that his misapprehension of facts impacted his opinion to at least some extent, Dr. Humen, in essence, assumed the role of an advocate for his opinion by attempting to minimize his errors.

A similarly rigid opinion was delivered in *Jones-Carter v Warwaruk.*[158] Unlike *Smith* and *Tahir*, the expert who held a strong and unyielding opinion in *Jones-Carter,* Dr. Menticoglou, one of the plaintiff experts, explained clearly why he held his particularly strong opinion. The central issue in *Jones-Carter* was whether the defendant obstetrician used excessive traction (i.e. pulling on an infant during delivery) that caused the plaintiff's brachial plexus injury.[159] Dr. Menticoglou's opinion was coloured by his view that obstetricians should not use traction at all, no matter how gentle, during delivery.[160] In fact, Dr. Menticoglou wrote several pieces of professional literature advocating for the prohibition of the use of any traction during child delivery.[161]

---

[156] *Ibid* at para 116.
[157] Compounding matters further, Justice Wilson, at para 126, indicated he believed that Dr. Humen's opinion was reliant on working backwards from the patient's outcome and stated why the patient's presentation was consistent with the eventual diagnosis instead of analyzing assessing what the defendant should have considered at the time of the care.
[158] 2019 ONSC 1965 [*Jones-Carter*].
[159] *Ibid* at para 60.
[160] *Ibid* at paras 85, 96. Dr. Menticoglou also, as indicated at para 255, worked backwards from the plaintiff's known brachial plexus injury to define whether the defendant used excessive traction. Experts are not supposed to use hindsight or work backwards from a known result to arrive at their opinions. On this point see, *Armstrong v Ward*, 2019 ONCA 963 at paras 137-138. The reasons of Justice Van Rensburg,

Obstetrical practice guidelines and recommendations from various authoritative medical organizations, such as the Society of Obstetricians and Gynecologists of Canada (SOGC), were presented during the course of trial, which indicated that it is acceptable for obstetricians to use traction during delivery so long as the traction is not excessive.[162] Dr. Menticoglou, however, disagreed with the "standard that has been promulgated by authoritative bodies."[163] In fact, another authoritative medical organization, the American College of Obstetricians and Gynecology, published scientific literature that demonstrated a significant proportion of brachial plexus injuries occurred *in utero* rather than because of an obstetrician using traction, a fact that supported the appropriateness of the use of traction during delivery.[164] In response, Dr. Menticoglou explained that the American College of Obstetricians and Gynecology also acts to try to "defend obstetricians and gynecologists from things that might lead to, to litigation, so that they play not just an advocacy role for practicing the best medicine but perhaps to protect physicians."[165]

The rigidity of Dr. Menticoglou's opinion was made plain in his steadfast refusal to accept that standards and guidelines governing obstetrical care in North America had merit and application when assessing the defendant's conduct. In fact, Dr. Menticoglou

---

the dissenting judge in the Ontario Court of Appeal decision, were adopted by the Supreme Court of Canada, *Karen Armstrong v Colin Ward*, 2021 SCC 1. The need to analyze whether a defendant was negligent for a plaintiff's damages, rather than assuming that negligence led to a plaintiff's damages was emphasized in *Fontaine v British Columbia (Official Administrator)*, [1998] 1 SCR 424, 156 DLR (4th) 577. In *Fontaine*, Justice Major explained, at paras 26-27, that the doctrine of *res ipsa loquitur* (the thing speaks for itself), which operated to allow trier of fact to make an inference of negligence when there was no other reasonable explanation for the accident was an expired doctrine and the plaintiff must establish their case by adducing evidence.

[161] *Ibid* at para 86.

[162] *Ibid* at para 79. Justice Quigley also noted that, in addition to protocols of the SOGC, there is an industry practice that doctors also use gentle traction during various maneuvers that are used during delivery.

[163] *Ibid* at para 92.

[164] *Ibid* at para 98.

[165] *Ibid* at para 101.

asserted that the standards and guidelines from the SOGC and American College of Obstetricians and Gynecology were developed out of the self-interest of the profession, rather than reflecting scientific literature on best practices in obstetrical care.[166] Dr. Menticoglou's dogmatic view, one not shared by most obstetricians, of what the standard of care required and the efforts he made to discredit opposing viewpoints led Justice Quigley to identify his view was formed in a partisan manner rather than an open-minded, neutral, assessment of the facts of the case.[167]

Advocating for a particular viewpoint, and thereby dismissing alternative viewpoints, is not the only way that experts demonstrate their bias when they present their opinions in court. For example, vigorously contesting viewpoints of others during trial can also reflect that an expert has assumed the role of an advocate rather than an objective and open-minded individual attempting to assist the court. In *The Estate of Carlo DeMarco v Dr. Martin*,[168] a plaintiff expert, Dr. Myers, delivered his opinion evidence to the court in a manner that the presiding judge found to be jarring. Justice Mitchell indicated, "the language he used to express his contrary views and opinions to those of the defendant's experts was intended simply to underscore the strength with which he holds those views and opinions."[169]

Justice Mitchell found Dr. Myers' language "unhelpful to the court."[170] Dr. Myers' strong language was excerpted from various written reports that he authored, wherein he criticized the opinions of the defendant experts. For example, "In my opinion,

[166] It would be naïve to think that professions do not, at times, take actions that serve their own self-interests. No evidence to substantiate Dr. Menticoglou's assertion, however, was identified during the court of the trial.
[167] *Ibid* at paras 257-258, 260.
[168] 2019 ONSC 2788 [*The Estate of Carlo Demarco*].
[169] *Ibid* at para 144.
[170] *Ibid*.

Dr. Jablonsky's discussion about stress testing and the likely results of a stress test in Mr. DeMarco is nonsensical … Remarkably, he [*Dr. Jablonsky*] speculates that Mr. DeMarco's 'right ankle issues as well as back pain' may have resulted in an inability to complete the test… Inexplicably, Dr. Jablonsky believes that an abnormal stress test result was uncertain … The intent of Dr. Jablonsky appears to be the use of all potential delays to justify his conclusion that Mr. Demarco's death was inevitable. A reasonable physician would realize that more likely than not, Mr. Demarco would have been reviewed by a cardiologist earlier."[171] Dr. Myers' pointed criticisms of the opinion of Dr. Jablonsky and the language he used to convey those criticisms demonstrated the partisan nature of his opinion by virtue of the lengths he went to undermine and contest opposing perspectives.[172]

The discourse of experts failing to demonstrate behaviour that satisfies a judge that the expert was objective and independent was repeated in *Hacopian-Armen v Mahmoud*.[173] Justice Brown stated that each of the defendant's experts, Drs. Vilos, Leyland, and Dodge conducted themselves during cross-examination in a fashion that diminished the weight of their evidence and undermined their objectivity and independence. The chief symptoms of partisanship that Justice Brown diagnosed during the course of the trial were threefold. First, they contradicted themselves during direct examination.[174] Second, they were "less than forthright in cross-examination."[175] Third,

[171] *Ibid* at para 142.
[172] *Ibid* at para 144. Justice Mitchell did allow Dr. Myers to opine on a number of issues and indicated he was not biased to such an extent that he should be disqualified from providing expert evidence. However, it is notable that Justice Mitchell did not conclude that Dr. Myers was *not* biased, but rather not biased to the extent that his testimony should be disqualified.
[173] 2020 ONSC 4946 [*Hacopian*].
[174] *Ibid* at para 89.
[175] *Ibid*.

they tended "to be argumentative or jousting with the plaintiffs' counsel."[176] Justice Brown chose not to rely on the defendant's expert evidence because they were 'advocates' for the defence.[177] Notably, no specific examples of the experts' conduct that led Justice Brown to label them in such a manner were provided in the written decision. Nonetheless, the defendant experts' failure to be forthright demonstrated an avoidance of addressing or acknowledging questions, facts, or opinions that may challenge their own opinions. Experts who fail to act in accordance with the legal norms and expectations that govern how experts are to present their evidence in court, such as being forthright and not arguing with the opposing lawyer, do so at their own peril.

In *Anderson v Harari,*[178] Justice C.S. Anderson afforded no weight to the evidence of Dr. Gootnick (the plaintiff's expert). Dr. Gootnick was described as "argumentative and combative during cross-examination, and at times did not answer questions from defence counsel. At one point during her testimony, I had to direct her to answer a question… she was evasive in answering questions … she unsatisfactorily dismissed or evaded questions about a website advertising her as an expert witness in medical malpractice lawsuits."[179] Dr. Gootnick's argumentativeness, combativeness, and failure to answer questions during her cross-examination "was at odds with a witness whose task is to be neutral, objective, and impartial in assisting and providing evidence to the court."[180]

The implication of Justice Anderson's reasons reinforce that expert witnesses are expected to distinguish themselves from the intense partisanship that characterizes the

[176] *Ibid*.
[177] *Ibid* at para 90.
[178] 2019 ABQB 745 [*Harari*].
[179] *Ibid* at para 45.
[180] *Ibid*.

conduct of the lawyers they are being examined by at a trial. Bias and partisanship was not unique to Dr. Gootnick, however, during the course of the *Harari* trial. Rather, another of the plaintiff's experts, Dr. Dyck, also demonstrated bias and partisanship. The maladies of his testimony were similar to those of Dr. Gootnick. His opinion was delivered in an argumentative and evasive manner. Justice Anderson highlighted, "even when something was charted, Dr. Dyck was reluctant to accept that it happened… his reluctance to accept or argumentative stance over whether steps, which were clearly charted, were actually performed was, in my opinion, an indication of his partisan approach to the evidence."[181] Justice Anderson proceeded to identify numerous examples of Dr. Dyck's refusal to accept facts contained in Dr. Harari's contemporaneously created medical chart. For example, despite the medical chart indicating that Dr. Harari examined the patient for 10 minutes, Dr. Dyck refused to accept that fact.[182]

The conduct of both Drs. Gootnick and Dyck was characterized as inconsistent with the objectivity and candour that experts are expected to demonstrate. Dr. Gootnick's evasiveness regarding questions, one can assume, she believed had the capacity to impugn her objectivity (i.e. her website advertising her services as a medical-legal expert) ironically amplified Justice Anderson's concerns that she was a partisan expert. Simply put, evading questions can lead one to suspect that the choice not to answer certain questions means there is something that the expert is trying to hide because it may diminish their opinion in the eyes of the judge. Similarly, Dr. Dyck's refusal and reluctance to accept facts that challenged his opinion evidence, despite those facts being

[181] *Ibid* at para 118. Interestingly, to buttress Justice Anderson's decision to prefer the Defendant's expert evidence to that of Dr. Dyck, he emphasized that Dr. Dyck's independence and impartiality had been criticized by the judge in *Neelands v Kelly*, 2014 ABQB 617.
[182] *Ibid* at para 119.

documented in the medical records, reflected an active attempt maintain his opinion based on only select facts and contest the validity of those facts.

Explicit refusals to accept facts that gave rise to a particular lawsuit are not the only reason an expert can be criticized for lacking objectivity because they misapprehended certain facts. In *Sivell v Sherghin*,[183] Justice Howard was gravely concerned by the manner in which the plaintiff's retained their expert, Dr. Incze, was retained.[184] The case turned on whether the plaintiff's incontinence was the result of a negligently performed procedure called a trans-urethral resection of the prostate.[185] Dr. Incze received an initial letter of instruction from the plaintiff's lawyer that stated, "Kevin underwent a radical prostatectomy at the hands of Dr. Sherghin. He was rendered incontinent immediately following the surgery … Mr. Sivell then consulted with urologist Dr. Radomski for a second opinion, and was advised that his sphincter had been irreversibly damaged."[186] The letter "misstated certain critical facts and suggested conclusions to Dr. Incze consistent with the lawyer's theory of negligence."[187] Despite the fact that the plaintiff ultimately retained new counsel subsequent to the initial lawyer's retaining letter to Dr. Incze, the 'damage' to Dr. Incze's credibility and independence could not be undone. Dr. Incze had been prevented from conducting an objective review of the case because the information that was provided to him led him to a particular conclusion from the outset.

The discourse of dismissing and vigorously contesting facts and viewpoints as indicators of biased and partisan expert evidence manifested most prominently in rigidly

[183] 2017 ONSC 1368 [*Sivell*].
[184] *Ibid* at para 142.
[185] *Ibid* at para 2.
[186] *Ibid* at para 143.
[187] *Ibid*.

maintaining one's opinion, argumentative conduct during cross-examination, and evading issues, facts, and questions that may challenge one's opinion. It may be assumed, therefore, that an antidote to bias and partisanship takes the form of experts changing their opinions during the course of a lawsuit. This leads to the second prominent discourse sub-theme relating to expert bias and partisanship: changes of experts' opinions.

Changing opinions

It is clear that judges believe rigidly maintaining a particular opinion, and therefore unduly dismissing opposing views and perspectives, is a symptom of a biased or partisan expert. The rationale underlying this particular discourse in judicial decisions is the appreciation that an unyielding opinion is one that may not have considered all the relevant facts and assumptions posed during the course of the litigation in a fair and open-minded manner. Emma Cunliffe suggests that when "uncertainty is a core element of a case, expressions of certainty serve to mislead rather than assist, the court."[188] Instead, Emma Cunliffe posits that an expert's change in opinion reflects the expert's objectivity and impartiality and that the expert is open to alternative viewpoints or conclusions.[189]

In spite of judges' frequent correlations between an expert's rigidly held opinions and the expert acting in a partisan fashion, changes to an expert's opinion is also characterized by judges as evidence of the expert's partisanship. For example, Justice Fregeau, in *Skead v Chin*,[190] expressed concerns about the changes Dr. Berger, one of the

[188] Emma Cunliffe, "Independence, reliability and expert evidence in criminal trials" (2013) 45:3 Aust'l J of Forensic Sciences 284 at 292 [*Expert evidence in criminal trials*].
[189] *Ibid*.
[190] 2020 ONSC 1283 [*Skead*].

plaintiff's experts, made to his opinion during the course of the lawsuit. Specifically, Justice Fregeau in *Skead* wrote, "At trial, Dr. Berger testified that Dr. Chin did not meet the standard of care, while in his initial report of April 22, 2014, he opined that Dr. Chin had done so. He was unable to explain why or when he had changed his opinion."[191] Dr. Berger changed his opinion on other matters that directly impacted on whether or not the defendant, Dr. Chin, met the standard of care. Specifically, "In his [*Dr. Berger's*] initial reports, he opined that this window [*the window of time when Ms. Skead's eye was amenable to treatment to maintain viable vision*] of opportunity was open until June 10, 2008. In his January 14, 2019 report and at trial, he had reconsidered this opinion and changed it to May 31, 2008."[192] The substantial change to Dr. Berger's opinion, and Dr. Berger's inability to explain why or when he changed his opinion, gave Justice Fregeau "concerns as to the reliability of Dr. Berger's opinions."[193]

Similarly, Dr. Humen, in *Tahir v Mitoff*, changed his evidence during the course to the lawsuit. His opinion prior to trial was that he disagreed with the defendant physician's diagnosis of pulmonary edema and, instead, believed that the plaintiff had the classic symptoms of pulmonary embolism, which ought to have, in his view, led to the use of anti-coagulant medication.[194] At trial, after he had reviewed the defendant's expert reports,[195] Dr. Humen, changed his opinion initial opinion that the defendant's diagnosis of pulmonary edema was untenable with her symptoms and presentation to determining that the plaintiff did have pulmonary edema, but that it was caused by a pulmonary embolism not from heart failure, which is what the defendant physician believed to have

[191] *Ibid* at para 566.
[192] *Ibid*.
[193] *Ibid*.
[194] *Tahir*, *supra* note 16 at paras 104, 108.
[195] *Ibid* at para 52.

been the cause of the edema.[196] Nonetheless, Dr. Humen maintained his opinion that the defendant physician breached the standard of care irrespective of his agreement with the defendant's diagnosis.

The fact that Dr. Humen altered his opinion on an issue of fundamental importance to the care that would be expected by a reasonable physician in the defendant's circumstances during cross-examination surprised Justice Wilson. In fact, the change in Dr. Humen's opinion at trial demonstrated a lack of objectivity and independence, "I would have expected to have seen such an opinion expressed in his written reports, as the Rules require. The fact that he stated his view of this critical issue during cross examination does not comply with his obligations as an expert pursuant to Rule 53."[197] The bias and partisanship evident in Dr. Humen's change to his expert opinion at trial was the fact that his opinion changed after he reviewed the defendant's expert reports. Justice Wilson warned, "counsel must be vigilant throughout the case to ensure that the expert chosen has the expertise to offer opinion evidence at trial and remains firm in their opinion, particularly after reviewing the opposing party's expert opinions."[198]

The rationale underlying Justice Wilson's concerns that Dr. Humen's evidence was neither candid nor impartial is that if an expert changes their opinion evidence at trial, after reviewing an opposing expert report, they may be tailoring their evidence to counter assertions in the opposing expert's report. However, as indicated at the outset of this sub-section, changes to an expert's evidence, even after reviewing an opposing expert's report, can be seen as a demonstration that the expert is maintaining an open-

[196] *Ibid* at para 108.
[197] *Ibid* at para 109.
[198] *Ibid* at para 52.

mind while reviewing the case, rather than dogmatically holding a particular view. The issue, it seems, with the changes to Dr. Humen's evidence at trial was that his evidence changed without a clear rationale as to why it changed. He did not uncover new facts in the intervening time between his written reports and the time of trial.[199] Further, despite his new opinion at trial, which agreed with the defendant's diagnosis of pulmonary edema, Dr. Humen maintained that the defendant breached the standard of care. It is reasonable to consider that if a fundamental change to an expert's opinion that, on its face, appears to support the defendant's care, fails to change the expert's ultimate conclusion, the expert can be seen as an advocate that is intent on criticizing the defendant, come what may.

The implications that certain types of behaviour is associated with bias and partisanship is frequently buttressed by direct comparisons between experts who exhibit markers of bias and partisanship with their objective and independent counterparts. The comparisons between partisan experts and objective ones make it more understandable why a judge decided not to rely on the partisan expert's evidence.

Comparison to Objective Experts

The most common rhetorical device that judges deployed to entrench their findings that experts were biased or partisan, thereby amplifying the persuasive value of their choice not to adopt the biased expert's opinion evidence, was direct comparison. A comparison between two opposing expert opinions can simultaneously reinforce the deficiencies of a biased expert's evidence while also elevating the authority of an opposing expert who is not biased.[200] An expert's partisan evidence is singled out as

[199] *Ibid* at para 51.
[200] *Order of Things*, *supra* note 96 at 58.

unreasonable when comparisons to other experts, who are labeled as fair and objective, are drawn. Comparison establishes an order between different experts[201] by identifying which experts best satisfy the ideals of objectivity and independence, virtues that the law expects experts to fulfill. Direct comparison also reflects the fact that, as noted by Timothy Endicott, "Judges act in an artificial decision-making framework; what they have to go on is what the parties and their lawyers give them."[202] Comparison, therefore, allows judges to convey to people who read their decisions the two opposing sets of expert evidence they had at their disposal when they arrived at their decisions. Outlining the two opposing expert opinions that they are presented during trial allows a judge to draw a stark contrast between the opposing experts. Doing so allows judges to reinforce their decisions by identifying that, given the two options they were presented, there was only one reasonable choice to make.

In *Hacopian-Armen v Mahmoud*, Justice Brown lauded the objectivity and independence of the plaintiff's experts. One marker of objectivity and independence was the fact that one of the plaintiff's experts commonly did medical-legal work for the CMPA.[203] The fact that Dr. Browning performed the majority of his medical-legal work for the CMPA meant that he was "not known as a plaintiff's expert."[204] The implication appears that, in Justice Brown's view, an expert's objectivity and independence is enhanced if they testify on behalf of the party (i.e. plaintiff or defendant) for whom they

---

[201] *Ibid* at 60.
[202] *Arbitrariness*, *supra* note 141 at 68.
[203] *Hacopian*, *supra* note 173 at para 87.
[204] *Ibid* at para 87. An expert's medical legal work can also negatively affect their opinion. In *Skead*, *supra* note 190, Justice Fregeau, at para 446, suggested that Dr. Brankston's experience reviewing approximately 50 legal cases each year for the past 25-30 years influenced his opinion and also his reasoning process, which Justice Fregeau believed utilized the benefit of hindsight to reach an opinion. Justice Fregeau does not provide much by way of reasoning for his conclusion in this regard, nonetheless, past medical legal work can both support and impede the persuasive value of an expert's opinion.

less regularly provide medical-legal services. Justice Brown identified additional markers of Dr. Browning's objectivity, explaining that she "found his [*Dr. Browning*] evidence throughout to be forthright, impartial and consistent, in both examination in chief and in cross-examination."[205]

The impartiality of Dr. Browning's evidence was preferred to the evidence of the defendant's experts, Drs. Vilos, Leyland, and Dodge. While the defendant expert's 'jousted' with opposing counsel during cross examination, Dr. Browning, and the other plaintiff experts, did not 'joust' with opposing counsel, nor were they argumentative.[206] Distinguishing Dr. Browning from the defendant experts further, Justice Brown emphasized that Dr. Browning did not "assume the role of the advocate."[207] Given the direct comparisons drawn between the experts in *Hacopian*, Justice Brown's decision to specifically indicate that Dr. Browning was not an advocate invites the inference that the defendant experts did act like advocates. The behaviours that, it would seem, support Justice Brown's determination that the defendant experts acted like advocates are those that Justice Brown specifically criticized, namely that they 'jousted' with counsel and were argumentative.

The long-list of biased and partisan conduct on the part of Dr. Gootnick and Dr. Dyck during the *Anderson v Harari* trial was similarly compared to the objectivity and independence of the defendant's experts. Recall that Justice Anderson criticized Drs. Gootnick and Dyck for their argumentative and partisan evidence.[208] Entrenching those characterizations of Drs. Gootnick and Dyck, Justice Anderson wrote, "I accept the

[205] *Ibid* at para 87.
[206] *Ibid* at para 89.
[207] *Ibid* at paras 89-90.
[208] *Harari*, *supra* note 178 at paras 45, 219.

evidence of Dr. Ackerman. He presented his opinion in a professional, balanced and impartial manner and answered or attempted to answer the questions of both parties in a candid and straightforward manner."[209] Justice Anderson also commented on a second of the defendant's experts, noting, "Dr. Lee presented as professional, impartial and balanced. He relied upon his own experiences in practicing emergency medicine in Edmonton, Alberta. He also relies upon Dr. Harari's evidence and notes, which I have accepted."[210] The binary distinction drawn between the qualities of the respective experts imparts a sense that, based on the evidence Justice Anderson was presented, the defendant's expert opinions were the only opinions that could justifiably relied upon, as the plaintiff's opinion evidence was not credible, impartial, or persuasive.[211]

In *Tahir v Mitoff*, Dr. Humen's refusal to acknowledge factual errors he made in arriving at his opinion on the case, and his 'dogged' refusal to change his opinion in the face of the factual errors that he made, was contrary to the opinions of the plaintiff's treating physicians and the defendant's experts.[212] In fact, "None of the other doctors or the experts agreed with Dr. Humen's views."[213] Not only were Dr. Humen's views on causation provided to the patient different than each of the other physicians who testified during the trial, his evidence, shrouded with indications that he was biased, was contrasted with the "fair" opinions of the defendant's experts, Dr. Wilkins and Dr. Raco.[214] Describing the opinions of Drs. Wilkins and Raco as fair, particularly in the context of a trial in which Dr. Humen was criticized as failing to meet the court's

[209] *Ibid* at para 60.
[210] *Ibid* at para 142.
[211] *Ibid* at paras 45, 127.
[212] *Tahir*, *supra* note 16 at paras 115, 116.
[213] *Ibid* at para 157.
[214] *Ibid*.

expectations that experts be candid and impartial,[215] conveys, by implication, that their opinions were consistent with what courts expect of experts, including candour and impartiality.

In *Smith v Kane*, Dr. Osborne was described as "too argumentative, was not prepared to yield or concede ground when she should have … and was herself a little wedded to her own thesis."[216] Conversely, all of the defendant experts acted far differently than Dr. Osborne during the trial. Justice Gans wrote "All three doctors discharged their respective obligations as Rule 53 witnesses in a first rate fashion. Each of the three was fair, understandable, and of equal importance, patient with the court."[217] Singling Dr. Osborne's evidence out by characterizing it as distinguishable from the other experts involved in the case stabilizes Justice Gans' ultimate conclusion not to rely on Dr. Osborne's opinion. *Tahir* and *Smith* both highlight and emphasize the ways in which markers of bias, like those displayed by Drs. Humen and Osborne, can be extenuated and heightened by the absence of such markers in the other experts involved in the case.

The above is not to suggest that positive comments about an expert's objectivity and independence only occurred in contrast to biased or partisan evidence. Rather, in two cases, *Stevenhaagen (Estate) v Kingston General Hospital*[218] and *Medina v Wong*,[219] judges praised experts' objectivity in spite of the fact they did not identify any biased and partisan experts in the cases. Nonetheless, generally, when positive comments are made about an expert's objectivity and independence, they are made in the context of an opposing expert's bias and partisanship.

---

[215] *Ibid* at para 116.
[216] *Smith*, *supra* note 17 at para 50.
[217] *Ibid* at para 83.
[218] 2020 ONSC 5020 at para 197.
[219] 2018 BCSC 292 at para 271 [*Medina*].

Judges frequent invocation of direct comparisons of the relative objectivity and independence of experts is a persuasive rhetorical device. However, judges' general failure to regularly employ additional rhetorical techniques seems to be a missed opportunity to further enhance the persuasive value of their assessments of expert evidence. For example, the single use of analogy in the cases examined occurred in *Boutcher v Cha*, when Justice Gans wrote, "while some might suggest a leopard doesn't change its spots, I ruled at the outset without citing authority, that I would not permit this line of questioning, in the trial proper."[220] Despite the vivid impression Justice Gans' analogy imparts, judges did not otherwise use analogy to describe medical expert evidence.

In addition, foreshadowing is another rhetorical technique commonly used by judges because it makes the their ultimate decisions more palatable and persuasive to readers.[221] Foreshadowing plays on humans' cognitive capacity to recall information, which is greater when they are asked to recall information from the beginning of a written text or verbal discussion or from the end of a list of information.[222] Psychology literature refers to these cognitive processes as the *primacy effect* and the *recency effect*, respectively.[223] In other words, individuals who are presented with information, such as those who read judges' written decisions, are most likely to remember information presented at the beginning and end of the decision.

---

[220] *Boutcher*, *supra* note 139 at para 31.
[221] Michael Higdon, "Something Judicious This Way Comes … The Use of Foreshadowing as a Persuasive Device in Judicial Narrative" (2010) 44(4) U Rich L Rev 1213 at 1217.
[222] Cathleen Mack et al, "Serial position, output order, and list length effects for words presented on smartphones over very long intervals" (2017) 97 J of Memory and Language 61 at 63-64.
[223] *Ibid*. See also Leah Christensen, "The Paradox of Legal Expertise: A Study of Experts and Novices Reading the Law" (2008) BYU Educ & LJ 53 at 57-60, and Debra Curtis & Judith Karp, "In a Case, in a Book, They Will Not Take a Second Look!: Critical Reading in the Legal Writing Classroom" (2005) 41 Williamette L Rev 293 at 299.

It is, therefore, surprising that only in *Boutcher* did a judge utilize foreshadowing in relation to their assessments of expert evidence. Justice Gans foreshadowed his overall assessment of expert evidence by noting that "as a precursor to my comments, I would observe, yet again, that triers of fact would benefit from … hearing from a member of a panel of experts in medical cases, rather than those routinely 'hired' to espouse the theories consonant with those of their retaining counsel."[224] He foreshadowed his findings that both experts lacked objectivity by calling for systemic changes to how expert evidence is utilized by courts. Comparison appears to be the rhetorical device of choice for judges when assessing expert evidence, however distinct opportunities exist for the use of further rhetorical techniques to further amplify the persuasiveness of their decisions.

Discourse conclusion

Approaching half, 35%, of the medical malpractice cases analyzed for this thesis contained the discourse theme that one of the experts was biased or partisan. The regularity of the discourse of bias and partisanship may, on its face, be unsurprising. A long accepted legal norm stipulates that expert opinion evidence should be objective and independent.[225] This behavioural norm and expectation is one that physicians are expected to satisfy in their work as physicians as well.[226] Thus, physicians are, or ought to be, innately aware of the importance of arriving at medical opinions objectively and

---

[224] *Boutcher*, *supra* note 139 at para 28. Justice Gans use of analogy and foreshadowing may be the consequence of his impending retirement, as noted at para 38, which may have resulted in him feeling at greater liberty to express himself.

[225] *Role of medical expert witnesses*, *supra* note 81. See also *Expert evidence in criminal trials*, *supra* note 188 at 285.

[226] See, for example, Canadian Medical Association, "Code of Ethics and Professionalism" (2018), online: < https://policybase.cma.ca/en/permalink/policy13937#_ga=2.208046737.2062707718.1627842623-205138996.1627842623> [*CMA Code of Ethics*]. The *CMA Code of Ethics* outlines a common ethical framework for physicians in Canada that emphasizes that physicians ought to be, amongst other things, honest and demonstrate integrity.

independently, irrespective of whether they are acting as an expert in a lawsuit. The fact that expert bias and partisanship was specifically discussed in nearly half of the cases examined, therefore, is encouraging, if unsurprising. It is encouraging that the development of expert witness codes of conduct and specific provincial Rules of Court reinforcing the need for experts to be independent and objective are not aimed at solving an imaginary or illusory problem.

Bias and partisanship, however, are hollow terms if the specific reasons that experts are labeled as biased or partisan are not identified. The need to identify why, and how, experts are labeled as biased and partisan is evident because bias and partisanship, as David Paciocco noted, "can wear many faces in expert testimony."[227] Accordingly, when judges develop knowledge of what constitutes biased and partisan evidence by establishing differences between experts' conduct, they establish and reinforce the order of experts' authority and ability to assist the court.[228]

The foremost indicator of bias and partisanship is when experts dismiss or argumentatively contest opposing opinions or facts that challenge their opinions. Dismissing opposing opinions or facts that call their opinions into question chiefly took the form of rigidly maintaining an opinion and refusing to acknowledge the legitimacy of opposing views on the issues in question or accepting that certain facts may affect their opinions. Two additional characteristics associated with experts' bias was argumentativeness, dismissing and contesting opposing points of view while also demonstrating advocacy for one's position rather than an objective search for the truth, and evasiveness, dismissing opposing viewpoints and potential weaknesses to one's own

[227] *Jukebox Testimony*, *supra* note 64 at 572.
[228] *Order of Things*, *supra* note 96 at 372-374.

opinion by not addressing those weaknesses or minimizing their effect. Judges, for example in *Harari* and *Tahir*, constructed expert rigidity and argumentativeness in relation to experts' refusal to acknowledge factual errors that they made in arriving at their opinions.[229]

The discursive power effect of identifying an expert as rigid, argumentative, and/or evasive is to diminish the authority of their evidence. Dr. Menticoglou's rigid and partisan opinion was the result of his advocacy for his idiosyncratic perspective on what maneuvers obstetricians should perform during childbirth. In fact, Dr. Menticoglou attempted to undermine the independence and objectivity of various national organizations, such as the SOGC and American College of Obstetricians and Gynecologists, arguing that the standards of care recommended by those bodies were based on self-interest, to minimize the risk of obstetricians being sued, rather than to protect patients from harm.[230] The lengths to which Dr. Menticoglou went to discredit viewpoints that opposed his own, therefore, was constructed by Justice Quigley to exemplify Dr. Menticoglou's bias and partisanship, by virtue of failure to acknowledge that there are legitimate alternative views on obstetrical care beyond his own.

In *Skead* and *Tahir*, Drs. Berger and Humen, respectively, changed their opinions on issues that were fundamental to the outcome of the case at trial.[231] In both situations, the experts were unable to explain why they changed their opinions from the time they submitted their written reports to the time they provided their oral testimony at trial. Justices Fregeau and Wilson each, as previously outlined, criticized the experts' changes to their expert opinions. Justice Wilson, for example, explained that Dr. Humen's new

[229] See *Harari*, *supra* note 178 at para 119. See also *Tahir*, *supra* note 16 at paras 113, 116.
[230] *Jones-Carter*, *supra* note 158 at paras 86-93, 101.
[231] *Skead*, *supra* note 190 at para 566, and *Tahir*, *supra* note 16 at para 109.

opinion at trial, which contradicted the opinions in his written reports, was contrary to his obligations as an expert, namely to objectively and independently arrive at an opinion.[232]

The implication of invoking changes to an expert's opinion as indicative of bias and partisanship is that the changes to the expert's opinion may have been in response to an opposing expert's report in an attempt to challenge that evidence or to respond to strong points in that opinion, rather than reflecting an objective assessment of the facts.[233] The reasoning behind connecting changes to an expert's opinion and bias appears to be that the changes to the expert's opinion may have been the result of wanting to respond to an opposing opinion, and its underlying assumptions, rather than merely assessing whether the defendant should be liable for the plaintiff's losses. Returning to Dr. Humen's example, the change to his evidence about what condition afflicted the plaintiff at the time the defendant saw her was not accompanied by an explanation for the change, nor did he ultimately change the conclusion to his opinion. Whereas Dr. Humen previously criticized the defendant for arriving at the wrong diagnosis, Dr. Humen proffered a new criticism of the defendant, indicating that while the correct diagnosis had been made, that diagnosis should have alerted the defendant to the underlying condition that he opined caused the plaintiff's condition.[234] Changes to an expert's opinion can be seen as an attempt to raise multiple justifications for the expert's ultimate conclusion on whether, or not, the defendant provided appropriate medical care to the plaintiff.

Unquestionably, there is tension between competing discourses pertaining to expert bias and partisanship. On one hand, experts are expected to not hold their opinions too rigidly. On the other, if an expert changes their opinion during the course of the

[232] *Tahir*, *supra* note 16 at para 109.
[233] *Ibid* at para 52.
[234] *Ibid* at paras 106-108.

lawsuit, that too can be held against them. The guidance from judges, therefore, is unclear, as to how an expert should best deliver their evidence, by firmly maintaining their opinion or changing their opinion. However, the apparent conflict between these sub-themes that characterize discourse about expert bias and partisanship can be reconciled.

There is a distinction between accepting the possibility that there may be a range of views on how to, for example, treat a particular medical condition and changing fundamental aspects of one's opinion at trial. The former may, as Emma Cunliffe suggests, demonstrate that the expert is fair minded and independent.[235] The latter, on the other hand, arguably demonstrates a last minute attempt to bolster the ultimate conclusion as to whether the defendant's care was negligent, or not. The relationship between rigidity and bias, on one hand, and changes of opinions and bias, on the other, also demonstrates what links these apparently discordant discourses.[236] Chiefly, in each situation, the expert who has either been rigid or changed their opinion has acted in a manner incongruent with judges' expectations of experts. The differences between judges' expectations of how experts ought to act during a trial and how a biased and partisan expert did act during trial is extenuated through judges comparisons of biased and partisan experts to objective and independent ones. Comparison is used to devalue biased and partisan expert evidence that competes with the evidence that judges choose to rely upon.[237]

It is clear, from the cases analyzed in this thesis, that judges identify numerous reasons why experts have been biased and partisan. The reasons why experts are labeled

[235] *Expert evidence in criminal trials*, *supra* note 88 at 292.
[236] *Doing Discourse Research*, *supra* note 28 at 74.
[237] *Ibid* at 78.

as biased and partisan, as noted, involve dismissing and criticizing opposing opinions or facts that may challenge their opinions. However, in order for judges' decisions to prove their worth against future objections and satisfy the public that justice has been done,[238] judges must go beyond identifying *why* a certain expert is biased and explain *how* that determination was made. The failure to explain how, for example, an expert displayed such an argumentative disposition during trial that the judge's ultimate conclusion was that the expert was biased and partisan renders specific markers of bias and partisanship, like argumentativeness, as amorphous concepts devoid of specific meaning.

Some of the decisions from the last five years, for example *Boutcher*, *Smith*, and *Hacopian* identified expert witnesses as biased and partisan without providing specific examples as to *how* the respective judges arrived at their determinations.[239] This is troubling because there is no clear and obvious 'bright red line' between firmly standing one's ground during cross-examination and becoming an argumentative advocate. In order to satisfy Dworkin's notion of integrity in adjudication, judges ought to explain *how* experts acted to warrant judges' labeling them as biased and partisan in order to help develop a coherent set of principles as to what conduct equates with biased expert evidence.[240]

Providing details and examples of *how* certain conduct manifested during a trial that resulted in a determination the expert was biased and partisan assists in developing the law in a stable and consistent manner. Simultaneously, clearly elucidating *how*

---

[238] On the importance of judges' reasons, see *McDougall*, *supra* note 60 at para 98, and *Between Facts and Norms*, *supra* note 7 at 35.
[239] See *Boutcher*, *supra* note 139 at para 38, *Smith*, *supra* note 17 at paras 50-51, and *Hacopian*, *supra* note 173 at paras 88-89. In each case, expert witnesses were criticized for failing to provide their evidence in an objective and independent manner without specific examples as to how the experts acted in, for example, an argumentative fashion during the trial.
[240] *Law's Empire*, *supra* note 22 at 217, 225.

experts act in biased ways promotes greater efficacy in the way that courts utilize expert evidence by providing a clear roadmap for lawyers and prospective experts to avoid certain conduct that is inconsistent with experts' role as independent advisors to the court. Some judges' decisions from the last five years do an excellent job identifying *how* an expert was biased and partisan. These cases include *The Estate of Carlo Demarco*,[241] *Harari*,[242] and *Jones-Carter*.[243] The judges in each case provide specific examples that they believe demonstrate expert bias and partisanship. The aforementioned cases should be used as exemplars to judges in the future as to how to explain not only *why* they determine that an expert is biased but also to explain *how* they made that determination, therefore providing the public accountability judicial reasons are supposed deliver.[244]

Moreover, in addition to identifying what the *indicia* of bias and partisanship are, and how they manifest during a trial, it is equally important to identify what the impact of bias and partisanship has on the outcome of cases. The empirical finding that in 92% of cases when a judge identifies an expert as biased and partisan it was the plaintiff who had retained one of the biased experts can be explained by the structural realities of medical malpractice law in Canada. The plaintiff bears the burden of proving that the defendant physician's conduct breached the standard of care and caused the plaintiff's damages. In order to do so, plaintiffs must provide the judge with sufficient evidence to find that the defendant's care was negligent. Justice Gans, in *Smith*, characterized the process of

---

[241] *The Estate of Carlo Demarco*, *supra* note 168 at para 142. Justice Mitchell outlines specific excerpts of the language that Dr. Myers used in his written reports that suggested he was acting in a partisan manner.
[242] *Harari*, *supra* note 178 at para 45. Justice Anderson explains that Dr. Gootnick evaded questions during cross-examination about a website that advertised her services as an expert witness.
[243] *Jones-Carter*, *supra* note 158 at paras 94, 101, 257 which provide specific examples of Dr. Menticoglou advocating for his personal view of what the standard of care requires and criticizing the standards of care identified by authoritative medical organizations.
[244] *McDougall*, *supra* note 60 at para 98.

plaintiffs adducing evidence to prove their case as a process that permits the trier of fact to "cross the evidentiary chasm."[245]

Without expert evidence that is sufficiently persuasive to prove the plaintiff's case, the trier of fact cannot find in favour of the plaintiff.[246] Accordingly, when a judge is faced with competing expert evidence at a medical malpractice trial, they must be satisfied that the defendant's care and treatment fell outside what would be reasonable in the circumstances. If a defendant's experts provide opinions that the defendant did not breach the standard of care that represent an 'accepted school of thought,' the plaintiff's claim will not succeed.[247] In that regard, Justice Hinkson in *O'Connor v Wambera*, determined that the defendant's expert opinions that the defendant met the standard of care were the product of 'accepted' schools of thought and, thus, the plaintiff's case was dismissed.[248] Put differently, if opposing experts espouse relatively equally compelling theories of what the requisite standard of care requires the plaintiff has failed to discharge their onus to prove their case.[249]

Bearing these structural realities in mind, the propensity for judges to find that plaintiff experts were biased and partisan is unsurprising. For a plaintiff's expert, accepting that a wide variety of conduct would meet the standard of care, rather than insisting on a narrow view of what the standard of care requires, runs considerable risk that the defendant's conduct will fall within the standard of care. Therefore, the plaintiff would fail to prove their case. Insisting on a highly particular standard of care that does

---

[245] *Smith*, *supra* note 17 at para 71.
[246] *Ibid* at paras 42, 58. See also *ter Neuzen*, *supra* note 15 at paras 44, 51.
[247] *O'Connor v Wambera*, 2018 BCSC 886 at paras 120, 141, 147 [*O'Connor*]. When judges are faced with competing, accepted, schools of thought, they are not to weigh those competing schools of thought and assess their relative merit. On this point see *Medina*, *supra* note 219 at para 98 citing *Liability of Doctors and Hospitals in Canada*, *supra* note 19 at 364.
[248] *Ibid*.
[249] *Zarubiak v Luce*, 2017 ONSC 1627 at paras 127, 148 [*Zarubiak*].

not accept that certain types of action meet that standard is part and parcel with how plaintiffs win medical malpractice cases.

A plausible response to the argument that findings of bias that disproportionately fall on plaintiff's experts is a consequence of the burden that plaintiff's must prove in order to win their cases is to return to the fact that experts are supposed to be independent advisors to the court.[250] It should, therefore, be irrelevant to an expert that a plaintiff, generally speaking, must insist on a standard of care in the circumstances that accommodates fewer courses of action than the defendant may suggest is reasonable. However, humans, generally, have a "desire to please."[251] Experts may simply seek to be helpful to the party that retained them by providing them with an opinion that is useful for their case. The desire to please may lead experts to, consciously or subconsciously, disregard various ways that a physician can meet the expected standard of care and, instead, insist that far fewer actions would meet the requisite standard of care.

A defendant's expert has far more latitude to accept that there may be many ways for a physician to meet the standard of care. Defendants in medical malpractice lawsuits need only demonstrate that they acted as a reasonable practitioner in the circumstances. Faced with the same patient, one reasonable physician's diagnosis may differ from another reasonable physician.[252] Contrasted with the narrow and highly specific views of plaintiff witnesses on what the standard of care requires in a particular situation, a defendant expert's evidence that accommodates many different types of conduct may seem less partisan by comparison. Simply put, the constraints of what the law requires for

[250] *Limits of Cross-Examination*, *supra* note 46 at 905.
[251] *Jukebox Testimony*, *supra* note 64 at 580. See also *Uncertain duty of expert witnesses*, *supra* note 35 at 647 which notes that experts often want to please their clients and assist their "side" in winning a lawsuit.
[252] *O'Connor*, *supra* note 247 at para 50.

a finding of professional negligence encourages plaintiff witnesses to adopt narrow and steadfast opinions as to what constitutes appropriate medical care.

Beyond the consequences to the outcome of the specific case in which the expert is identified as biased or partisan, a finding that an expert has been biased in one case can have consequences on their perceived bias and partisanship in future cases. In *Harari*, the numerous factors that Justice Anderson identified as evidence of Dr. Dyck's lack of objectivity and independence was reinforced by the fact that he had been characterized as a partisan witness in a previous trial as well.[253] The effect of a prior judicial finding that an expert was biased or partisan can have on a judge's perception of the expert at a subsequent trial is mirrored by consequences of specific actions taken during the early steps in the litigation process.

The theme of expert bias and partisanship, and the role it plays in justifying a judge's decision in a medical malpractice lawsuit, provides a roadmap to future expert witnesses, lawyers, and judges as to the specific markers of bias and partisanship that ought to lead to concern about an expert's objectivity and independence. It also serves to give content and meaning to what types of conduct are associated with biased and partisan testimony means and how judges use bias and partisanship to justify their assessments of expert medical evidence. The use of direct comparison was often deployed as a rhetorical strategy to justify judges' decisions to adopt, or reject, an expert's opinion.

[253] *Harari*, *supra* note 178 at para 127. For the other case that Justice Anderson was referring to, see *Neelands v Kelly*, 2014 ABQB 617.

2) Relative Expertise

Nearly half of the cases examined contained explicit judicial assessments of the relative expertise of the expert witnesses involved in the lawsuit. Expertise, as defined in Chapter 1, means possessing "great skill or knowledge in a particular field."[254] The assessment of relative expertise correlated with a 92% likelihood that when a judge determines that one expert has greater relative expertise relating to the matters at issue (in other words, whether an expert has more skill and knowledge than another expert in a particular area of medicine), they will find in favour of the party that retained the expert with greater relative expertise.

Three sub-themes within the broader discourse of judicial assessments of relative expertise were identified. First, relative expertise is assessed with reference to geography and resources. Second, judges identify relative expertise by comparing specific credentials, qualifications, and clinical experience. Third, relative expertise can be identified through imprecise and vague testimony. The rhetorical strategies that judges employ to justify their decisions relating to relative expertise are, as one might assume, direct comparison and fact-based arguments. After setting out the three sub-themes, I will proceed to analyze the discursive consequences of the ways in which judges identify and construct relative expertise.

Before proceeding to outline the three sub-themes identified in the cases examined for this thesis, it is useful to identify, and question, the persuasiveness of the lone decision that explicitly analyzed the relative expertise of the respective experts and nonetheless found in favour of the party that retained the expert with 'lesser' relative expertise. Determining that one expert has more skill and knowledge than another expert,

[254] *Medical Expertise*, *supra* note 12 at 105.

as it relates to the particular area of medicine at issue in the lawsuit, enhances the persuasive value of a judge's choice to adopt the opinion of the expert who possesses greater expertise. A judge's decision in that regard can better withstand any future objections, for example by way of an appeal, because the decision has been based on the opinion of the individual with the most skill and knowledge amongst the expert witnesses involved in the case.[255] The capacity for relative expertise assessments to enhance the cogency of judges' decisions is brought into sharp focus by assessing, at the outset of this sub-section, the outlier case of *DD v Wong Estate*,[256] in which Justice Renke relied upon the evidence of an expert with lesser expertise and found in favour of the plaintiff.

Wong Estate involved allegations of negligence against an obstetrician during child delivery. Justice Renke drew numerous direct comparisons between the parties' respective experts (Dr. Doersam for the plaintiff and Dr. Dansereau for the defendant). Initially, Justice Renke listed Dr. Doersam's extensive list of qualifications, certifications, and his clinical academic teaching Professorship at the University of British Columbia's Faculty of Medicine as markers of his expertise.[257] However, shortly after listing Dr. Doersam's many accomplishments, Justice Renke proceeded to identify shortcomings in Dr. Doersam's capability to assist the court in resolving the matters at issue. The deficiencies in his expertise, in Justice Renke's view, included that he ceased practice as an obstetrician in 2008, had not published academic literature, and much of his clinical experience took place in the United States, rather than in Canada.[258] Dr. Doersam's cessation of obstetrical work and the fact much of his clinical experience occurred in the

[255] *Between Facts and Norms*, *supra* note 7 at 35-35.
[256] 2019 ABQB 171 [*Wong Estate*].
[257] *Ibid* at paras 270, 272.
[258] *Ibid* at para 273.

United States both, logically, impacted his expertise in assessing the defendant's care in the case. His experience in the United States may not be translatable to the practice of obstetrics in Alberta, as expectations and access to resources can differ from place to place.[259] Equally, by the time of the trial, Dr. Doersam had not practiced regularly as an obstetrician for over 10 years. Having not practiced as an obstetrician for 10 years, clinical expectations for obstetricians may have changed and, even if Dr. Doersam continued to maintain his knowledge about obstetrics generally, there may be practical realities that he would fail to appreciate by virtue of no longer being involved in clinical obstetrical practice.

Dr. Doersam's experience and expertise were brought into clearer focus when they were contrasted to the experience and expertise of Dr. Dansereau. Justice Renke wrote, "Unlike Dr. Dansereau, Dr. Doersam is not a perinatologist or a fetal maternal specialty. Dr. Doersam is not a trained ultrasound specialist."[260] Justice Renke contextualized what it took for Dr. Dansereau to achieve his specialized qualifications, explaining that in order to become a subspecialist in maternal-fetal medicine, Dr. Dansereau completed four years of additional training as compared to Dr. Doersam.[261] Further, his clinical experience, unlike Dr. Doersam, was exclusively in Canada.[262] Dr. Dansereau's distinguished academic research career was praised or, to use Justice Renke's pointed remarks, "Dr. Dansereau has published but Dr. Doersam has not."[263] Buttressing Justice Renke's direct comparison between the experts was the fact that even

[259] *Legal Liability of Doctors and Hospitals*, *supra* note 19 at 249-251 outlines the rationale for retaining experts with experience practicing in similar communities to the defendant physician.
[260] *Wong Estate*, *supra* note 256 at para 273.
[261] *Ibid* at para 275.
[262] *Ibid* at para 284.
[263] *Ibid* at para 285. I pause to question whether or not research acumen is truly indicative of greater expertise in judging clinical decisions made by defendant doctors in medical malpractice cases.

Dr. Doersam acknowledged, during cross-examination, that Dr. Dansereau had more training in high-risk obstetrics than he did.[264] A plain reading of Justice Renke's decision leads to the conclusion that Dr. Dansereau possessed more skill and knowledge of the high-risk obstetrical care that formed the basis of the lawsuit than Dr. Doersam.

Interestingly, despite explicitly portraying Dr. Dansereau as the expert with greater expertise as compared to Dr. Doersam, Justice Renke found that the defendant physician breached the standard of care and his negligence caused the plaintiff's harm.[265] Justice Renke's decision to identify that Dr. Doersam lacked expertise relative to Dr. Dansereau, without a particularly cogent explanation of why he relied on Dr. Doersam's evidence, diminishes the persuasiveness of his ultimate decision. With this outlier, and the capacity of relative expertise assessments to impact upon the persuasiveness of judges' decisions, in mind, I now turn to the first discourse sub-theme, geography and resources.

Geography and Resources

The geographic location in which a physician practices affects the medical care they are able to provide their patients. Historically in Canada and the United States, considerable importance rested on where a defendant physician practiced and whether an expert practiced in the same geographical area. This so-called 'locality rule' was frequently invoked by judges to determine whether an expert had the requisite expertise to identify the standard of care in the particular geographical area that the defendant

[264] *Ibid* at para 283.
[265] *Ibid* at paras 532, 536, 612-613. Justice Renke does not provide a great deal of explanation as to why he accepted Dr. Doersam's opinions on certain issues in the case. For example, it is noted, at paras 408-409 that Justice Renke accepted Dr. Doersam's opinion that the importance of the ultrasound ought to have been conveyed to another physician, an opinion that was 'buttressed' by a similar legal case in the past, *Thibert v Zaw-Tun*, 2006 ABQB 423.

physician practiced.[266] The logic underpinning the 'locality rule' is that when a patient presents with the same condition in, say, Toronto and Blind River, Ontario, the resources available to a physician in Toronto are far more plentiful than in Blind River. With greater access to resources, the Toronto based physician can send the patient to more quickly undergo a greater variety of investigatory tests. The physician from Blind River, on the other hand, might be unable to send the patient to undergo, for example, an urgent CT scan without sending the patient to another community. The inequity of available resources would make it unrealistic to expect the same standard of care from the respective physicians in situations when access to resources has a bearing on what a physician can be reasonably expected to do for a patient.

However, over time, the medical profession has developed more national and provincial standards of practice, in essence diminishing the discrepant expectations between, for example, rural and urban physicians.[267] Accordingly, the 'locality rule' has fallen out of favour in Canada.[268] The vestiges of the 'locality rule', nonetheless, remain prominent in judicial assessments of expert evidence.[269] National standards of practice do not serve to obviate the relevance of geography and different clinical settings in their entirety. Disparities in access to resources remain evident between rural and urban settings.[270] All things being equal, it is preferable to have an expert who practices in a similar geographic setting and in a similar clinical context, assess the care of a defendant physician.

---

[266] See *Legal Liability of Doctors and Hospitals in Canada*, *supra* note 19 at 248-249.
[267] *Ibid* at 251.
[268] *Ibid*.
[269] *Wong Estate*, *supra* note 256 at para 210.
[270] *MacWilliams*, *supra* note 130 at paras 35, 81.

In *LR v Semenjuk*,[271] the Alberta based defendants were a family physician and a pediatrician.[272] Justice Burns' analysis of the respective expert evidence did not contain a lengthy or in-depth assessment of the respective experts' evidence. Therefore, it was particularly notable that Justice Burns specifically highlighted the fact that both of the defendants' experts practiced in Alberta, and thus were familiar with the standards and resources available in Alberta.[273] In fact, Justice Burns asserted that because Dr. Kelly, one of the defendants' experts, was a pediatrician in Alberta she was, therefore, "familiar with the standards, needs, and resources facing pediatricians on a daily basis."[274] Omitting a similar geographical comment about the plaintiffs' experts, by implication, reveals that they lacked knowledge about the standards expected of pediatricians and family physicians in Alberta as well as the resources available to them. Local experience was associated with a greater capacity to knowledgeably assess the defendants' care in light of local expectations and practical realities.

Similarly, in another Alberta case, *Kain v Davey*,[275] the plaintiff's expert on the standard of care was Dr. Viljoen, an obstetrician and gynecologist and the regional chief of obstetrics and gynecology for the Niagara Health System in St. Catharines, Ontario.[276] Dr. Viljoen, by the time of trial, had practiced in Ontario for nearly thirty years.[277] On the other hand, the defendant's standard of care expert, Dr. Skorenki was a practicing obstetrician gynecologist in Edmonton, Alberta who completed all of her training in

[271] 2020 ABQB 350 [*Semenjuk*].
[272] *Ibid* at para 74.
[273] *Ibid* at paras 41, 74.
[274] *Ibid* at para 74.
[275] 2021 ABQB 190 [*Kain*].
[276] *Ibid* at para 101.
[277] *Ibid* at para 102.

Alberta.[278] Dr. Skorenki's evidence was preferred to Dr. Viljoen's evidence, as Dr. Skorenki had greater knowledge of, for example, the resources that a gynecologist in practice in Alberta would utilize.[279] Dr. Skorenki's greater relative expertise as compared to Dr. Viljoen, by virtue of her Alberta-based training and clinical experience, demonstrates that 'local' experience elevates an expert's relative expertise to opine on the issues at the heart of a lawsuit even when an opposing expert has considerable experience in another jurisdiction.

Conversely, when an expert's clinical practice and experience is noticeably different than that of the defendant physician whose medical care they are assessing, the authority of that expert's evidence is diluted. Such an expert may, obviously, lack knowledge about 'local' resources available to the defendant physician. In *The Estate of Carlo DeMarco*, the issue of causation turned on whether a referral made by the defendant physician to a cardiologist would have resulted in a different health outcome for the plaintiff.[280] The plaintiff received medical care and treatment from the defendant physician in London, Ontario. Therefore, whether or not a referral would have made a difference to the plaintiff's outcome was contingent on how quickly a cardiologist would have been able to see the plaintiff after the referral was made.

Dr. Myers was one of the plaintiffs' experts. He practiced in Toronto, not London, Ontario.[281] Clearly, local experience and knowledge as to how long it would take a cardiologist to see the deceased plaintiff was highly relevant to the issue of causation. Justice Mitchell recognized this and wrote, "prior to testifying at this trial, Dr. Myers had

[278] *Ibid* at para 110.
[279] *Ibid* at para 156.
[280] *The Estate of Carlo DeMarco*, *supra* note 168 at paras 6- 7.
[281] *Ibid* at para 152.

not previously visited the City of London. Suffice to say, Dr. Myers has never practiced cardiology in the City of London. This case involves the wait time for a stress test based on a referral to Dr. Wong … therefore evidence of average wait times for a stress test and/or angiogram in the City of Toronto is irrelevant."[282] Distilling the issues to the local realities of patient wait times in London, Ontario made Justice Mitchell's decision to reject Dr. Myers' evidence on the issue of wait times logical and persuasive. Dr. Myers' lack of direct knowledge about how long it would have taken a cardiologist in London, Ontario to see the plaintiff exposed his lack of expertise to opine on that particular issue.

The effect of where an expert has developed their clinical expertise on the persuasiveness and value of their evidence to the judge was also highlighted in *Sit v Trillium Health Centre*.[283] The case involved medical care provided in Ontario. The plaintiff's experts both acknowledged that they had no experience in Ontario at the time of the medical care at issue.[284] Despite arguing that the practice of emergency medicine in Canada is governed by a "national standard of care,"[285] the defendant experts' specific experience practicing in Ontario afforded them more "germane" expertise relating to the case at hand.[286] The more "germane" expertise that the defendant's experts possessed included the fact that, in Dr. Foote's case, he had practiced for twenty years as an emergency physician in Ontario by the time of the medical care giving rise to the litigation.[287] Similarly, Dr. Brock had practiced for decades, in Ontario, by the time of the care at issue.[288] Conversely, the plaintiff's causation expert had not even obtained his

[282] *Ibid*.
[283] *Sit*, *supra* note 78.
[284] *Ibid* at paras 132, 183.
[285] *Ibid* at para 131.
[286] *Ibid* at paras 136, 185.
[287] *Ibid* at para 133.
[288] *Ibid* at paras 184-185.

medical degree by the time that the defendant physician provided treatment to the plaintiff.[289] The defendant's experts were deemed to have more skill and knowledge as it relates to emergency medicine in Ontario because of their many years of 'local' experience practicing in Ontario.

It is, of course, not always possible to retain an expert from the same locality as the defendant physician. There are only so many physicians in every city. Within that group, there are a limited number who are willing and able to act as an expert witness. Further, physicians from the same city may belong to the same social and professional organizations, leading to conflicts of interest that may preclude prospective experts from opining on a case. Physicians from the same geographical area may also be reluctant to testify against other members of the medical profession.[290] Sometimes it is a practical reality that an expert from a different community to that of the defendant physician must be retained. However, the discourse of experts lacking expertise because of their lack of familiarity with the resources and standards expected of defendant physician does not relate, solely, to the fact that expert and defendant practiced in different cities. Rather, whether or not an expert has a similar practice to that of the defendant physician also influences their relative expertise and capacity to assess the defendant physician's care.

In *MacWilliams v Connors*,[291] Dr. Gilmour was the plaintiff's expert on the standard of care. The care at issue took place on Prince Edward Island. The experts in the case all hailed from other provinces. However, the specific nature of Dr. Gilmour's practice adversely impacted the authority of her evidence. Dr. Gilmour's practice was

[289] *Ibid* at para 183.
[290] On the difficulty that plaintiffs face in obtaining expert witnesses see *Legal Liability of Doctors and Hospitals*, *supra* note 19 at 405-406.
[291] *MacWilliams*, *supra* note 130.

split equally between conducting research and practicing in a tertiary care facility.[292] Tertiary care facilities have, "personnel and facilities for advanced medical investigation and treatment."[293] The defendant provided the plaintiff with medical care at Queen Elizabeth Hospital, which was "acknowledged to be a secondary care facility."[294] Dr. Gilmour's practice in a tertiary care facility and her role as a Faculty member in Dalhousie University's department of obstetrics and gynecology had the effect of making her accustomed to practicing at a higher standard of care than would be expected in rural secondary care facilities.[295]

In fact, Justice Campbell wrote that Dr. Gilmour, in cross-examination, "acknowledged that in her own personal practice she often exceeds the normal standard of care because of her position as a faculty member in a tertiary care, teaching hospital."[296] Despite Dr. Gilmour's numerous qualifications and notable expertise in obstetrics and gynecology care, Justice Campbell did not find her evidence was particularly helpful. This was because not all physicians within a particular discipline of medicine are held to the same standard of care. In this case, "Dr. Connors' conduct and treatment decisions are to be assessed in respect of the standard of care of a reasonably competent obstetrician and gynecologist practicing in Charlottetown, Prince Edward Island in 2003."[297]

Justice Campbell's reasoning reveals, as was the case in *Wong Estate*, an expert's considerable expertise in a particular area of medicine is not, necessarily, sufficient to

[292] *Ibid* at para 34.
[293] *Ibid* at para 35.
[294] *Ibid*.
[295] *Ibid* at para 81.
[296] *Ibid*.
[297] *Ibid*.

lead a judge into accepting their expert evidence. Dr. Gilmour's lack of experience practicing in a secondary care facility meant that she attempted to hold Dr. Connors to the standard that would be expected in a tertiary care facility because that is the type of facility that she had experience working in.[298] In other words, her lack of experience and knowledge regarding what would be expected of a rural physician, with less resources available to them, reflected a lack of relative expertise as compared to the defendant's expert, Dr. Campbell, who had a practicing license in Prince Edward Island and offered preceptorships (the teaching of techniques and procedures) in Prince Edward Island.[299]

The importance of an expert having experience practicing in a similar geographic and clinical setting similar to the defendant physician on the expert's relative expertise also prevents standards of care from being set too low. If the roles in *MacWilliams* were reversed, with Dr. Gilmour being the defendant and Dr. Connors the expert witness, Dr. Connors' lack of familiarity with the breadth of resources available to Dr. Gilmour would equally equate with a lack of expertise to opine on her medical care. Dr. Gilmour's greater access to resources may mean that the failure to order a type of investigation not available in Dr. Connors' rural hospital would be in breach of the standard expected of Dr. Gilmour. Dr. Connors, however, may not believe that Dr. Gilmour breached the standard of care because that type of investigation is not something Dr. Connors has available to her. Local experience and expertise ensures that standards of care are set in a manner that is commiserate with the actual resources and expectations in the defendant's particular circumstances.

[298] *Ibid* at paras 81, 157.
[299] *Ibid* at para 38.

In *Harari*, the capacity of Dr. Gootnick to assess radiology medical care provided in Alberta was, by her own admission, highly questionable. Dr. Gootnick was a radiologist who practiced medicine in California.[300] She had never practiced medicine in Canada, let alone Alberta.[301] In fact, Justice Anderson highlighted Dr. Gootnick, "acknowledged under cross-examination that in providing her opinion she had not consulted with or made inquiries of Alberta radiologists as to the standard of care expected of them nor was she familiar with the standards set by the College of Physicians and Surgeons of Alberta."[302] Dr. Gootnick's testimony emphasizes the relevance of 'local' experience to the weight that an expert's evidence should be afforded. In fact, Dr. Gootnick ultimately, "acknowledged that she did not know the standard of care expected of radiologists in Alberta."[303] Justice Anderson explained "at a minimum, Dr. Gootnick ought to have been able to speak to the equipment and technological requirements in Alberta, and the standard practices in Alberta relating to the requirements of radiologists to magnify x-rays. She could have informed herself of these requirements or standards. She did not."[304]

Rarely is an expert's lack relevant local experience and knowledge as evident as it was in *Harari* and *The Estate of Carlo Demarco*. Nonetheless, judges' assessments of experts' relative expertise to one another, and therefore the capacity of a particular expert to assist the court by virtue of their expertise, is regularly related to whether an expert possesses 'local' experience and knowledge. The legacy of the 'locality rule', therefore, persists in the judicial analyses of experts' relative expertise.

---

[300] *Harari*, *supra* note 178 at para 31.
[301] *Ibid*.
[302] *Ibid*.
[303] *Ibid*.
[304] *Ibid* at para 37.

Credentials, qualifications, and clinical experience

As previously alluded to, it is not always possible for litigants to retain experts from the same, or similar, geographical locations and clinical settings as the defendant physician who has been sued. Moreover, relative expertise does not relate solely to geography. Instead, judges also assess relative expertise by identifying the comparative credentials and qualifications that the respective experts possess. Further, the specific patients that make up experts' clinical practices also guides judges' analyses of relative expertise.

One expert's admission that an opposing expert has considerable expertise and is eminently qualified to provide their opinion on the matters at issue has also been constructed as, in essence, a tacit admission of that expert's lack of relative expertise. In *Jaques v Francis,*[305] the plaintiff's expert, Dr. Drummond, stated, during cross-examination, that Dr. Dreyer, the defendant's expert was a "wonderful physician who had, without question, all of the credentials, credibility and ability to tell the court what the proper standard of emergency medicine was in 2010."[306] Dr. Drummond's comments in cross-examination are noteworthy because they reflect his candour and objectivity, attributes rules of court require and judges frequently praise. However, Dr. Drummond's candour and objectivity did not result in Justice Shaw adopting his perspective on the standard of care the defendant was expected to meet. In fact, Dr. Drummond's positive comments about Dr. Dreyer were, in effect, used against him as Justice Shaw explicitly cited that portion of the cross-examination transcript in order to justify her decision to rely on Dr. Dreyer's expert evidence.[307]

[305] *Jaques*, *supra* note 130.
[306] *Ibid* at para 250.
[307] *Ibid* at paras 251, 252, and 255.

When the margins between the relative expertise of opposing experts is thin, as was the case in *Jaques* as both Dr. Drummond and Dr. Dreyer had similar experience and credentials,[308] a judge's finding as to which expert has greater expertise can be decided by things that may, at the time, seem innocuous, such as complimenting the opposing party's expert. In other words, experts must choose their words and deliver their opinions with great caution or care because a single 'misstep' can result in a judge choosing to adopt the opinion of another expert. This reflects Ronald Dworkin's observation that "the difference between dignity and ruin may turn on a single argument that might not have struck another judge so forcefully or even the same judge on a different day."[309] For example, a simple compliment by Dr. Drummond praising Dr. Dreyer had a noticeable effect on the presiding judge and further justified her determination that Dr. Dreyer had the expertise on the matters at issue that was necessary to assist her in adjudicating the case.

The question of which expert has more relevant skill and knowledge can, in some cases, depend on a single qualification or an extremely specialized practice. In *Harling v Lauf*,[310] Justice Little's decision to rely upon the defendant expert's evidence on the standard of care was chiefly the result of one specific credential and consequent area of expertise. The central issue in the case was whether or not prophylactic antibiotics ought to have been administered to the plaintiff. Dr. Wuerz, the defendant's standard of care expert, held an M.Sc in Epidemiology from the University of London, in addition to his M.D. degree.[311] Dr. Wuerz's post-graduate studies in epidemiology was highly relevant

[308] *Ibid* at paras 116, 133.
[309] *Law's Empire*, *supra* note 33 at 1.
[310] 2021 ABQB 235 [*Harling*].
[311] *Ibid* at para 105.

to the central issue in the case because the efficacy of antibiotics, based on scientific studies and data, influenced whether, or not, the defendant's failure to provide the patient with antibiotics was permissible.

The utility of prophylactic antibiotics to patients undergoing liver surgery was debated at length during trial with frequent reference to recommendations from scientific literature.[312] The plaintiff's standard of care expert, Dr. Chow, interpreted one particular study (referred to in the decision as the Venkatesan Report) as recommending the use of prophylactic antibiotics in all liver and biliary interventions.[313] Therefore, his opinion was that the defendant physician's failure to administer antibiotics before the biliary surgery breached the standard of care.

However, Justice Little drew on Dr. Wuerz's specific epidemiology expertise to debunk Dr. Chow's interpretation of the relevant scientific literature. Justice Little noted, "Dr. Wuerz pointed out that this recommendation was based on low quality evidence. … Given his post-graduate degree in Epidemiology … Dr. Wuerz's opinion respecting the data and science behind the Venkatesan Report is entitled to considerable weight."[314] In fact, Dr. Wuerz's expertise interpreting scientific literature and data demonstrated that literature was inconsistent as to whether antibiotics should be administered prior to liver surgery. Justice Little, therefore, concluded that there was "no consensus among radiologists at the time that the standard of care for biliary tube replacements required the use of prophylactic antibiotics."[315] Justice Little constructed Dr. Wuerz's specific expertise in epidemiology as sufficient to resolve the conflicting scientific studies that

[312] *Ibid* at paras 106-108.
[313] *Ibid* at para 109.
[314] *Ibid* at para 110.
[315] *Ibid* at para 117.

were presented to the court during the course of the trial. Dr. Wuerz's explanations about the different quality of scientific evidence based on factors like the design of the study and the number of participants, led Justice Little to determine that Dr. Chow's opinion, based on, in part, the Venkatesan Report was far from authoritative. Rather, there were many differing, and reasonable, views of whether or not antibiotics were required for biliary procedures. Therefore, the case against the defendant physician was dismissed.[316]

Just as one specific qualification can have significant influence on the authority of an expert's opinion and knowledge at trial, so too can a highly specialized medical practice. In *Skead v Chin,*[317] the plaintiff experienced eye symptoms, including blurriness, decreased vision and a headache.[318] The plaintiff was eventually found to have developed an extremely rare ophthalmological condition called Vogt-Koyanagi-Harada Disease (VKH). The allegations of negligence against the defendants were that the plaintiff's condition should have been diagnosed earlier and that an earlier diagnosis would have prompted a referral to a uveitis specialist. The specialist, in turn, would have been able to treat her eye sand prevented her vision loss.

The plaintiff's ophthalmology expert was Dr. Berger.[319] Dr. Berger estimated that he diagnosed 6-8 patients in his career with VKH and admitted he no longer managed patients with VKH, instead referring them to uveitis specialists.[320] In brief, Dr. Berger's opinion was that once VKH was on the differential diagnosis (i.e. a possible diagnosis that had been identified by the treating physicians as a possible reason for the plaintiff's

[316] *Ibid* at paras 117, 118, 159.
[317] *Skead*, *supra* note 190.
[318] *Ibid* at paras 2-5.
[319] *Ibid* at para 190.
[320] *Ibid*.

symptoms), the defendant physicians were obligated to act with considerable haste to arrange urgent ophthalmological care and treatment.[321]

The management of such a rare condition, one that generally requires the care of an ophthalmology sub-specialist in uveitis, meant that very specific training and practice expertise would be necessary to determine whether particular treatment and management would have saved the plaintiff's eye sight. It was therefore notable that Justice Fregeau noted that, during cross-examination, "Dr. Berger agreed that he is not a specialist in uveitis or neuro-ophthalmologist."[322] Constructing a direct comparison to the defendant's ophthalmology expert, Justice Fregeau noted that Dr. Hodge completed uveitis subspecialty training and held a PhD in epidemiology and biostatistics.[323] Dr. Hodge's superior relative expertise, as compared with Dr. Berger, was furthered by the highly specific nature of his practice. Specifically, Dr. Hodge was the "only uveitis specialist serving the Ottawa / Gatineau regions between 1995 and 2008 … as the only uveitis specialist he diagnosed, treated and managed all VKH patients within this catchment area."[324]

Dr. Hodge's uveitis subspecialty and the consequent highly specialized practice gave him greater relative expertise to assess whether, or not, the plaintiff's VKH was treated appropriately. In fact, the rarity of VKH caused Dr. Berger, by his own admission during cross-examination, conducting significant research into VKH to expand his knowledge of VKH in preparation for trial.[325] Dr. Hodge's specific expertise assessing and treating VKH and Dr. Berger's corresponding lack of knowledge of expertise and

[321] *Ibid* at paras 419-420, 437, 442.
[322] *Ibid* at para 191.
[323] *Ibid* at para 269.
[324] *Ibid* at para 270.
[325] *Ibid* at para 475.

knowledge assessing and treating VKH resulted in Dr. Hodge's evidence on the standard of care being preferred to that of Dr. Berger.[326] The defendants were not VKH specialists, raising the question of whether it was appropriate for Justice Fregeau to rely on the opinion evidence of Dr. Hodge, given his subspecialty training in VKH and, thus, greater skill and knowledge relating to the condition that the defendants. However, the case turned whether VKH should have been diagnosed earlier and, thus prompted a referral to a subspecialist. This is where Dr. Hodge's knowledge about VKH and how it should be treated became highly instructive to Justice Fregeau.

Dr. Berger's evidence was that when VKH was a possible diagnosis, the plaintiff's condition should have been treated as an ophthalmological emergency.[327] Because Dr. Berger lacked clinical experience treating and managing uveitis, his opinion as to how quickly VKH ought to be treated and the capacity of treatment to prevent vision loss in VKH patients placed, "undue weight on the scientific literature and on his discussions with his uveitis colleagues."[328] Justice Fregeau determined that Dr. Hodge's opinion that VKH, based on his regular treatment and management of this rare condition, when diagnosed, is not an ophthalmological emergency meant that, in effect, Dr. Berger's lack of knowledge about VKH resulted in him misapprehending the steps that should be

[326] *Ibid* at paras 453, 481. Justice Fregeau concluded that two of the three defendant physicians were determined to have met the standard of care. The third defendant physician, Dr. Johnston, was found, at para 501, to have breached the standard of care because her office did not take sufficient steps to contact the plaintiff. In arriving at his conclusion that Dr. Johnston breached the standard of care, Justice Fregeau did not adopt Dr. Berger's opinion, which stipulated that Dr. Johnson was required to make daily calls to the plaintiff once she received a referral letter from the emergency room physician, see para 496. It appears that Justice Fregeau acted on his own accord and made a finding based on common sense, which was that Dr. Johnston's single call to the plaintiff did not demonstrate adequate urgency to reach the plaintiff. The case against Dr. Johnston was ultimately dismissed, however, as Justice Fregeau determined, at para 562, that further efforts made by Dr. Johnston to contact the plaintiff would not have prevented her vision loss.
[327] *Ibid* at paras 465, 467, 469.
[328] *Ibid* at para 565.

taken to treat it.[329] Therefore, Dr. Berger's perception of what standard of care required in the case was not commiserate with the realities of the condition that the plaintiff suffered. Dr. Hodge, on the other hand, by virtue of his specific knowledge of how to treat VKH and whether VKH constitutes an ophthalmological emergency, was able to, in essence, correct Dr. Berger's misapprehension about the condition and satisfy Justice Fregeau that it was appropriate to rely on Dr. Hodge's evidence.

Dr. Berger's undue reliance on scientific literature on the treatment and prognosis of VKH patients invited a further direct comparison with Dr. Hodge. Unfortunately for Dr. Berger, Dr. Hodge's expertise in assessing scientific data exceeded his own. Justice Fregeau reemphasized that Dr. Hodge has a PhD in epidemiology and biostatistics, which gave him a distinct relative advantage in the interpretation of scientific literature.[330] In fact, Justice Fregeau stated, "Dr. Hodge's expertise makes him uniquely qualified to assess the weight to be given to statements and opinions expressed in the literature referenced."[331]

In a similar manner as Justice Fregeau, Justice Trimble, in the Ontario case of *Sit v Trillium Health Centre*, assessed the relative expertise of the various experts with reference to their credentials, qualifications, and experience. He described the defence experts' credentials, qualifications, and experience as more "impressive" than the plaintiff experts.[332] The plaintiffs' experts, Drs. Berringer and Samaraskera, both practiced in British Columbia rather than Ontario, but also had lesser qualifications, in Justice Trimble's view, when compared with the defendants' experts. Amongst the

[329] *Ibid* at para 478.
[330] *Ibid* at para 569.
[331] *Ibid* at para 572.
[332] *Sit*, *supra* note 78 at para 136.

credentials and qualifications that Justice Trimble identified as indicators of Dr. Foote, the defence emergency medicine expert, possessing greater relative expertise than the plaintiffs' experts due to the fact that he had been a peer reviewer for the Canadian Journal of Emergency Medicine, held the chair of the Emergency Medicine Committee of the College of Family Physicians of Canada, and a certificate of special competence in emergency medicine.[333] Further, Dr. Brock, the defendant's causation expert, possessed specific credentials and experience that impressed Justice Trimble more than those possessed by the plaintiff expert, Dr. Samaraskera. This is evident by the fact that Justice Trimble describes the credentials and experience of the respective experts one after the other before, ultimately, preferring Dr. Brock's evidence.[334]

Dr. Brock had 30 years of practice experience as an urologist and was a sub-specialist in neuro-urology.[335] Beyond Dr. Brock's many years of urology experience, which was contrasted to Dr. Samaraskera who received his medical degree after the defendant urologist cared for the plaintiff,[336] Dr. Brock also regularly saw patients in his practice that presented with testicular torsion, the condition that afflicted the plaintiff.[337] Further, Dr. Brock was a Professor at Western University and had held prominent roles, such as serving as President of the Canadian Urological Association.[338] Furthermore, Dr. Brock was a prolific academic, which appears to have impressed Justice Trimble who specifically referenced his more than 200 peer-reviewed scientific papers and more than 20 national and international research prizes.[339] Conversely, Justice Trimble identified

[333] *Ibid* at paras 135, 136, 184.
[334] *Ibid* at paras 183-195.
[335] *Ibid* at para 184.
[336] *Ibid* at para 183.
[337] *Ibid* at para 184.
[338] *Ibid* at paras 184-186.
[339] *Ibid* at para 184.

that Dr. Samaraskera's *Curriculum Vitae* listed 35 publications and stated that he was "well-published."[340] Nonetheless, the disparate descriptions of the relative credentials and experience of Dr. Brock and Dr. Samaraskera supports Justice Trimble's determination that Dr. Brock's qualifications, credentials, and experience warranted that his evidence be preferred to Dr. Samaraskera's evidence.[341]

An expert's highly specialized practice and training can, as set out in both *Sit* and *Skead*, dictate judges' determinations of which expert has more relevant skill and knowledge when comparisons between experts are made. However, highly specific expertise does not, always, serve to amplify the authority of an expert's evidence at trial. In fact, highly specific expertise can also serve to diminish the authority of an expert's evidence, as occurred *MacWilliams* because Dr. Gilmour's specialized expertise diminished her ability to assess the medical care of a physician with less specialized training and expertise than her. This is inherently logical, as an individual's expertise in one specific area may be the result of that individual devoting all, or a large amount, of their time and energy towards one specific aspect of medicine at the expense of other areas. Therefore, when presented with issues that implicate areas of medicine that extend beyond their narrow area of expertise, the expert may lack expertise to opine on the issue.

The issue of standard of care in *Kain v Davey* centered on whether or not pharmacological anticoagulation (medicine that prevents blood clots) should have been administered to the plaintiff. The plaintiff in the case had received mechanical prophylaxis (compression stockings) to prevent blood clots.[342] The question was whether doing so was reasonable or whether the standard of care mandated the use of

[340] *Ibid* at para 182. Justice Trimble did, nonetheless, describe Dr. Samaraskera as 'well-published.'
[341] *Ibid* at para 195.
[342] *Kain*, *supra* note 275 at paras 25, 27.

pharmacological prophylaxis. Dr. Turpie, the plaintiff's causation expert, ceased practice in 2012 and, since that time, his work "has been largely focused on development of pharmacological prophylaxis as opposed to mechanical prophylaxis."[343]

Dr. Turpie, therefore, had a greater appreciation for the efficacy of pharmacological anticoagulation than the ordinary practitioner and, likely, had, by virtue of his highly focused professional activities, far less expertise relating to the efficacy of mechanical prophylaxis.[344] Moreover, Dr. Turpie's specific expertise relating to pharmacological anticoagulation was confounded by the fact he had a vested interest in promoting the efficacy of pharmacological anticoagulation by virtue of his work for pharmaceutical companies.[345]

Relative expertise is often determined with specific reference to an expert's possession of specific credentials, qualifications, or experience. These specific credentials, qualifications, or experience are believed to impart additional knowledge and skill on the experts who possess them, thus enhancing their capacity to assist judges in resolving medical malpractice disputes. An expert's lack of specific credentials, qualifications, or experience that an opposing expert holds, conversely, diminishes their relative expertise and authority to assist the court. The third discourse sub-theme, misapprehension of facts and vague or imprecise testimony fulfills a similar function to that of an expert lacking specific credentials, qualifications, or experience. Namely, misapprehending facts in a case or giving vague, imprecise, testimony reveals a lack of relative expertise.

[343] *Ibid* at para 124.
[344] *Ibid* at para 192.
[345] *Ibid* at para 192.

Misapprehension of Facts and Vague or Imprecise Testimony

Though an expert may, *prima facie*, possess relevant experience, qualifications, and credentials to assist the court, the way in which experts deliver their evidence during trial significantly influences the power and authority of their opinion. Misapprehending facts, or not identifying relevant facts altogether, can result in experts, as it relates to the specific medical care the expert is assessing, failing to apply their skill and knowledge to the appropriate clinical situation. Similarly, the failure to deliver clear and cogent evidence at trial may be taken by a judge to be evidence of a lack of relative expertise, or, construed differently, that the expert failed to demonstrate to the court that they possessed sufficient skill and knowledge, when compared to other experts, to warrant that their opinion evidence be adopted by the court.

In *Tahir v Mitoff*, Dr. Humen, one of the plaintiffs' experts, had an impressive *Curriculum Vitae* and appropriate experience to opine on the cardiology care in the case.[346] Medical expertise, however, is not merely the accumulation of credentials and designations on one's *Curriculum Vitae*. Rather, it remains an expert's duty to assist the court in adjudicating a medical malpractice trial by translating their expertise to the particular circumstances giving rise to the action.[347] Dr. Humen did not apprise himself of all of the relevant facts prior to arriving at his opinion of the defendant's care, instead solely relying on the written medical records.[348] Therefore, Dr. Humen failed to glean "insight from the treating physicians as to what they were thinking at the time they were providing care to Ms. Chaudhry and why they did not believe she had a pulmonary

[346] *Tahir*, *supra* note 16.
[347] *Ibid* at para 88.
[348] *Ibid* at para 51.

embolism."[349] Accordingly, Dr. Humen's failure to understand and appreciate all of the relevant facts in the case, including the rationale behind the clinical decisions the physicians made in the case, was indicative of him applying his expertise to a set of facts that did not accurately reflect the circumstances of the case. Dr. Humen, therefore, applied his expertise to a different clinical situation than the one at issue. When it comes to the clinical situation at issue, Dr. Humen demonstrated a lack of relative expertise because he did not apply his skill and knowledge to that clinical situation, whereas other experts did apply their expertise to the clinical scenario at issue.

In *Skead*, Dr. Berger did not fail to consider all relevant facts before arriving at his opinion. Rather, he misstated key facts. For example, Dr. Berger mischaracterized the extent of the plaintiff's family history of VKH and mistook the time at which the plaintiff presented with symptoms consistent with VKH as the time at which the plaintiff was diagnosed with VKH.[350] Justice Fregeau determined that Dr. Berger's failure to accurately set out facts directly relating to how the plaintiff's eye symptoms of blurriness and loss of vision ought to have been managed meant that his evidence was unreliable, particularly when compared with Dr. Hodge who made no such errors.[351] Dr. Berger not only lacked relative knowledge and experience in assessing and managing VKH, he also misapprehended facts, thereby indicating that he misapplied the expertise he did possess as an ophthalmologist to facts not entirely reflective of the patient's clinical situation.

The plaintiff experts in *Sit*, Drs. Berringer and Samaraskera, also misapprehended numerous facts and relied on those incorrect facts to base their opinions. Justice Trimble

---

[349] *Ibid*.
[350] *Skead*, *supra* note 190 at paras 471-474. Specifically, Dr. Berger thought that the plaintiff had a 'strong' history of VKH which was not borne out in the evidence.
[351] *Ibid* at para 471.

noted that, in addition to Dr. Foote's more impressive credentials and experience, "The second reason for preferring the evidence of Dr. Foote over Dr. Berringer is that the facts underlying Dr. Berringer's opinion have not been proved."[352] For example, Dr. Berringer opined that a repeat ultrasound and referral to an urologist was required on October 9 because the plaintiff's clinical condition was worse on that date than it was on October 5.[353] Justice Trimble noted, however, that he had "already found that Mr. Sit's condition was not significantly worsening on October 9."[354] Conversely, Dr. Foote, one of the defendant experts, arrived at an opinion supported, as Justice Trimble remarked, "by the facts as I have found them."[355]

The plaintiff causation expert, Dr. Samaraskera, misapprehended the same facts as Dr. Berringer. Specifically, "his opinion is based on an incorrect assumption or reading of the documents, namely that when Mr. Sit went to the emergency department on October 9, he was suffering from a significant increase in pain or had suffered a significant increase in pain shortly before arising. The nurses note of October 9 notes a pain level of three out of ten."[356] An opinion that is predicated on a misunderstanding of the facts of the case fails to provide a judge with a perspective they can rely on. The expert's opinion, in such a situation, does not correspond with the underlying factual circumstances of the case. Equally unhelpful to a judge is an expert opinion that is delivered in a vague or imprecise manner. Judges are unable to effectively utilize an expert opinion that is unclear to them.

---

[352] *Sit*, *supra* note 78 at paras 136-137.
[353] *Ibid* at para 137.
[354] *Ibid* at para 138.
[355] *Ibid* at para 144.
[356] *Ibid* at para 195.

Returning to *Tahir v Mitoff*,[357] as noted above, Dr. Humen had credentials and experience that made him well qualified to opine on the standard of care expected of the defendant cardiologist. Physicians often practice in team settings with other physicians and health professionals and, consequently, they may believe the poor patient outcomes should be attributed to the entire team that provided medical care to the patient, rather than one physician specifically.[358] Perhaps reflecting team based care that permeates the practice of medicine across Canada, Dr. Humen's testimony consisted of making "broad statements that 'the doctors' did not meet the standard of care. He did not identify in what way each defendant physician was negligent."[359]

Justice Wilson described judges' expectations of the language that experts ought to use to discharge their duty to assist judges in resolving medical malpractice lawsuits. Specifically, Justice Wilson noted, "an expert is required to identify what the standard of care is in a specific situation and then explain his or her opinion as to whether the standard was breached and if so, in what way."[360] Accordingly, Justice Wilson affirmed that "It is not helpful to the court to make sweeping statements that all of the doctors fell below the standard because none of them recognized that Ms. Chaudhry had a pulmonary embolism."[361] By identifying what judges expect of experts, specifically to identify what the standard of care is and conclude whether or not each defendant physician who provided the plaintiff with care at a specific time met the standard of care, Dr. Humen's

[357] *Tahir*, *supra* note 16.
[358] Calls for tort law reform in Canada to better reflect the 'team' based nature of medical care in Canada have been made. See for example *Patient Safety*, *supra* note 4 at 30-31. See also *Government Tort Liability*, *supra* note 4 at 573-574, and Elaine Gibson, "Is It Time to Adopt a No-Fault Scheme to Compensate Injured Patients?" (2016) 47:2 Ottawa L Rev 307.
[359] *Tahir*, *supra* note 16 at para 86.
[360] *Ibid* at para 88.
[361] *Ibid*.

evidence demonstrably failed to satisfy that expectation.[362] Making broad, sweeping, statements about the "doctors" failing to meet the standard of care, without being able to pinpoint specific reasons why each individual doctor failed to meet the standard of care, can also be interpreted as evidence of an expert's lack of expertise to opine on the matters at issue. If an expert possesses sufficient expertise to opine on the matters at issue, it stands to reason that they should be able to identify why specific actions taken by individual physicians meet, or fail to meet, the relevant standard of care.

An expert's use of imprecise language when opining on the issue of causation is also associated with a lack of relative expertise. In *Harling v Lauf*,[363] Justice Little identified that the plaintiff's causation expert, Dr. Chow, used language in his written report such as "broad-spectrum antibiotics prior to and during her biliary tube exchange procedure might have mitigated the extent of injury."[364] Dr. Chow's use of words did not comport with the language used to describe the legal issue of causation in much the same way that Dr. Humen's sweeping statements about 'the doctors' failing to meet the standard of care was not helpful to Justice Trimble. In *Harling*, Justice Little noted, "the use of terms such as 'might have mitigated' and 'perhaps averted' do not come close to the standard necessary to prove causation."[365] Dr. Chow's imprecise language can be interpreted to reflect a lack of certainty as to whether antibiotics would, or would not, have prevented the plaintiff's outcome, thus demonstrating a lack of expertise. However, a more nuanced assessment of the implications of Dr. Chow's imprecise language is that he failed to demonstrate to Justice Little that he possessed skill and knowledge of the

[362] *Ibid*.
[363] *Harling*, *supra* note 310.
[364] *Ibid* at para 143.
[365] *Ibid* at para 144.

efficacy of antibiotics because his opinion was discordant with the level of certainty expected of a plaintiff witness on causation.

Similarly, in *Smith v Kane*,[366] Justice Gans explained that one of the plaintiff's experts, Dr. Osborne, did not "say that it [*the defendant's medical care*] fell below acceptable standards not to contemporaneously repeat or alter foot imaging by mid-September."[367] Dr. Osborne's failure to use the specific language judges expect to be used to describe a standard of care breach was used to justify Justice Gans' conclusion that the plaintiff's expert evidence "was just too vague and imprecise to permit me to cross the evidentiary chasm."[368] Dr. Osborne and Dr. Chow both failed to convince Justices Gans and Little that they had the skill and knowledge of the matters at issue when compared with the other experts who opined in the case because, at least to some extent, they were unable to convey their expertise in a clear and direct manner. Their respective use of language also reveals that they, perhaps, did not fully comprehend and appreciate their roles as experts and the specific language that judges expect to hear when expert opinions are presented in court.

Finally, in *Brenenstuhl v Caldwell*,[369] Justice Shelley placed little weight on the expert evidence of Dr. Shepherd (one of the plaintiff's experts). She rationalized her decision due to the fact, "Dr. Shepherd had difficulty answering many questions, seemed to confuse events, often had difficulty remembering the contents of his written expert report, and often recounted stories that had no relevance to the questions asked."[370] Moreover, Dr. Shepherd's evidence was characterized as "confusing and contradictory in

[366] *Smith*, *supra* note 17.
[367] *Ibid* at para 55.
[368] *Ibid* at para 70.
[369] 2020 ABQB 315.
[370] *Ibid* at para 125.

several respects."[371] Furthermore, Justice Shelley wrote that when Dr. Overgaard, another of the plaintiff's experts, was asked who bore responsibility for the plaintiff's adverse health outcome, he responded "I'm not trying to single-out individual names" because the care for the plaintiff was a "team effort."[372] Dr. Overgaard's evidence on what the standard of care required of the various physicians involved in the plaintiff's care was ultimately "confusing" to Justice Shelley.[373] While both Drs. Shepherd and Overgaard made poor witnesses, irrespective of whether they possessed the necessary expertise to assist the court, the manner that they delivered their evidence did not convince Justice Shelley that they possessed such great skill and knowledge relating to the medical issues in the lawsuit that their opinions ought to be accepted.

An expert's failure to base their opinion on the actual facts giving rise to the case or their inability to provide a clear and cogent opinion on the matters at hand is a recurrent factor that judges rely upon to make determinations of the relative expertise as between opposing experts. Misapprehending facts can result in an expert applying their expertise to a set of facts that do not, entirely, correspond with all of the relevant facts in a given lawsuit. Therefore, the misapprehending expert has effectively applied their expertise to a different situation entirely. In addition, an expert's failure to cogently convey their opinion relating to a particular medical issue or question fails to demonstrate to the judge that the expert possesses the great skill and knowledge about the particular medical issues in the trial to justify that the judge adopt that opinion.

[371] *Ibid* at para 163.
[372] *Ibid* at para 150.
[373] *Ibid*.

Discourse conclusion

The discourse theme of judges performing assessments of experts' relative expertise in order to justify their decisions to rely on one expert opinion rather than another is pervasive in judges' medical malpractice decisions. Overwhelmingly, in 92% of cases, when judges determine that one expert has lesser relative expertise than an opposing expert they do not adopt the opinion of the expert with lesser relative expertise. However, as noted at the outset of this section, the relationship between relative expertise assessments and judges choosing not to rely on the evidence from the expert with lesser relative expertise is not an absolute relationship.

Wong Estate, as discussed at the outset of this sub-section, is an outlier. Justice Renke relied upon the expert with lower relative expertise and clinical experience in a different jurisdiction than the one in which the case arose. *Wong Estate* reminds experts, lawyers, the judiciary, and the public that a medical malpractice decision is not predicated, solely, on following the expert with the highest expertise. This reflects the fact that an individual with higher expertise than another is susceptible of making mistakes, and a party cannot rest on their laurels that they have the expert with higher expertise and, therefore, they are destined to achieve the outcome they desire at trial. Nonetheless, judges were far more likely to align themselves with the opinion evidence from the expert that they determined had more relevant skill and knowledge, by virtue of their credentials, qualifications, experience, local knowledge of resource issues and expectations, and ability to convey their opinion to the court in a clear and cogent manner.

The discursive effect of an expert not possessing experience practicing in a similar geographical area or clinical setting to that of the defendant physician is that it

directly diminishes their authority to opine on issues of a highly 'local' nature. The relationship between 'local' experience and the authority of an expert's opinion in a trial demonstrates that an expert's expertise does not exist in the abstract. Rather, judges' assessments of the skill and knowledge of different experts is highly context-dependent. Accordingly, it is possible that an expert that has been retained may have 'too much' expertise or, put differently, expertise and experience that is not translatable to the circumstances at issue.[374]

The implication of possessing, or lacking, local knowledge and experience on an expert's authority to assist the court is echoed by comparisons of experts' credentials, qualifications, and clinical practice. For example, the post-graduate qualifications in epidemiology that Drs. Wuerz and Hodge possessed, in *Harling* and *Skead*, respectively, resulted in the presiding judges relying on their interpretations of scientific literature and data.[375] The difference that a single credential or qualification can have on a judge's perception of the relative expertise of the experts in the lawsuit can have profound implications on the ultimate outcome of the case.

Given the implications that a finding that one expert has greater relative expertise than another expert on the outcome of a case, candour can serve as a disadvantage to an expert's relative authority in a lawsuit. In *Jaques*, Dr. Drummond complimented Dr. Dreyer's expertise and capacity to assist the court in adjudicating the medical issues in dispute.[376] In fact, Dr. Drummond complimented Dr. Dreyer's credentials and credibility and indicated that Dr. Dreyer "without question" had the ability to tell the court what the

[374] On this point, see *MacWilliams*, *supra* note 130 at para 157 wherein Dr. Gilmour's expectations of the standard of care were not translatable to the rural area in which the defendant practiced.
[375] *Harling*, *supra* note 310 at para 110, and *Skead*, *supra* note 190 at paras 568-569.
[376] *Jaques*, *supra* note 130 at para 250.

proper standard of emergency medicine was in 2010.[377] Ultimately, Justice Shaw agreed with Dr. Dreyer's opinion that the defendant physician met the relevant standard of care. The paramount importance of relative assessments of expertise on the outcome of medical malpractice cases means that a proverbial 'knock-on' effect of the *Jaques* decision is that experts and their retaining lawyers could, in the future, refrain from commenting favourably on an opposing expert's high level of relevant expertise because doing so could help justify a judge relying on that expert's evidence. The relative expertise discourse constructed in *Jaques* may act as a *disincentive* to an expert's candour during cross-examination, potentially increasing the number of findings that an expert is biased or partisan.

Indicative of the fine margins that define judicial assessments of experts' relative expertise, if there are no *indicia* of bias or partisanship, nor any discrepancy in the relative expertise of the opposing experts, judges may simply conclude that they are, as a relative novice in their knowledge of medicine and medical care as compared to the experts, unable to prefer one theory of the case to the other. In *Zarubiak (Estate) v Luce*, Justice Grace did not distinguish between the opposing experts' relative expertise. He did not identify any concerns about the experts' objectivity and independence. In fact, Justice Grace deferred to the experts evidence, which was "equally plausible."[378] Justice Grace expanded on the equally persuasive, and plausible, expert evidence noting that the defendant "made a reasoned and well-supported decision. Another physician may have

[377] *Ibid*.
[378] *Zarubiak*, *supra* note 249 at para 126.

reached the opposite … on the particular facts of this case both would have been equally right - or wrong - depending on your point of view."[379]

For an expert to fare favourably in a judicial assessment of relative expertise between opposing experts, they must also ensure their opinions are clear and cogent, rather than vague and imprecise. The decisions of *Smith*, *Tahir*, and *Harling* each consisted of judges criticizing experts for using vague and imprecise language when conveying their opinions to the presiding judge.[380] The discursive implication is that the expert who provides vague and imprecise evidence has failed to persuade the judge that they possess such a degree of expertise relating to the matters at issue that the judge ought to adopt their opinion. The deleterious consequence of vagueness and imprecision on an expert's authority to assist the court stems from underlying legal norms. Legal norms must be comprehensible, consistent, and precise.[381] For that reason, specific legal tests and analytical frameworks are devised that allows judges to analyze issues in a way that is comprehensible, consistent, and precise. Therefore, when experts use vague, broad and/or imprecise language to convey their opinions, they run contrary to legal norms that place a premium on precision, which, in turn, allows for consistent and comprehensible decisions.

It should be noted that judges' assessments of relative expertise provided numerous examples of why, specifically, one expert possessed more skill and knowledge related to the matters at issue than another expert. Expressing that one set of experts possessed more relative expertise because they practiced in the same province as the

[379] *Ibid* at paras 126, 127, and 148.
[380] *Smith*, *supra* note 17 at para 71, *Tahir*, *supra* note 16 at para 88, and *Harling*, *supra* note 310 at para 143.
[381] *Between Facts and Norms*, *supra* note 7 at 143.

defendant physician, as was the case in *Sit* and *Kain*, provides someone who reads those decisions with a clear understanding of *how* the judge made that determination. Similarly, outlining specific qualifications and credentials that one expert possessed and explaining why those specific qualifications and credentials were relevant to the issues in the case, as occurred in *Skead* and *Harling*, conveys a cogent rationale for the judges assessments of the relative expertise of the respective experts. When compared to judges' explanations of why particular characteristics were associated with bias and partisanship, judges were effective in not only identifying *why* one expert had more expertise than another but also explaining *how* particular experience or qualifications led the judge to make that determination.

From an empirical perspective, it is not clear why in each case that contained an assessment of relative expertise it was the plaintiff who retained the expert with 'lesser' relative expertise. The inequality of resources between counsel for the CMPA, a large and well-funded organization, and plaintiffs may impact on plaintiffs' ability to obtain expert reports for reputable sources.[382] However, the David and Goliath contest medical malpractice lawsuits are sometimes portrayed as,[383] with respect to the inequality of resources between the CMPA and plaintiff law firms, likely does not impact plaintiffs' ability to obtain expert opinions in many cases. If the plaintiff lawyers in the cases examined were unable to incur the considerable costs associated with retaining an expert

[382] On the unequal access to expert witnesses, see *Jukebox Testimony*, *supra* note 64 at 576, and Emma Cunliffe, "Without fear or favour? Trends and possibilities in the Canadian approach to expert human behavior evidence" (2006) 10 Int'l J of Evidence & Proof 280 at 304.
[383] See for example, Mallory Hendry, "Plaintiffs' odds improving in 'David v. Goliath' medical malpractice cases", *Law Times* (9 March, 2020), online: <https://www.lawtimesnews.com/practice-areas/medical-malpractice/plaintiffs-odds-improving-in-david-v-goliath-medical-malpractice-cases/327186>.

witness,[384] they would not, one would suspect, have been able to retain and pay for the services of experts from far afield, as occurred in *Harari* and *Sit*.

[384] On the expense associated with expert evidence, see generally *Role of expert medical witnesses*, *supra* note 81 at 54 which notes that the high cost of retaining experts impedes equal access to justice. See also Ontario, Ministry of the Attorney General, *Civil Justice Reform Project: Summary of Findings and Recommendations*, by the Honourable Coulter Osborne, online: <www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp>, (2007).

Chapter 5 - Conclusion

It is a trite observation to state that the success of a case of alleged malpractice often depends on which expert opinion is accepted by the Court.[385]

Medical malpractice cases rise and fall depending on the evidence of medical expert witnesses. Judges must not only contend with subject matter and concepts that are not within their expertise, but they must also assess competing expert opinions, each pointing towards a different outcome. In order to determine which expert's evidence to rely on, judges engage in multi-factorial assessments of expert evidence. For example, Justice Trimble, in *Sit v Trillium Health Centre*[386] outlined the labyrinth of factors and considerations that judges must wade through when assessing expert evidence. Specifically, the judge should, 1) assess the expert's qualifications, training, and experience; 2) consider the expert's impartiality; 3) examine the facts and assumptions relied upon to form the opinion; 4) evaluate the expert's opinion as a whole and give it appropriate emphasis in reaching a conclusion in the case.[387] Assessing medical expert evidence is also complicated by medical experts' lack of familiarity with the process of testifying during a trial.[388]

Results

The assessments of medical expertise evidence by judges in medical malpractice trials over the last five years were characterized by two overarching discourses. First, there was a recurrent discourse theme of expert bias and partisanship. This theme arose in nearly half, 35%, of the cases studied. Of the cases where judges identified one or more of the expert witnesses as biased or partisan, 92% of the time one of the plaintiff's

[385] *Tahir*, *supra* note 16 at para 46.
[386] *Sit*, *supra* note 78 at para 79.
[387] *Ibid* at paras 121-124.
[388] *Legal Alchemy*, *supra* note 26 at 51.

experts were labeled biased or partisan. Conversely, in only 17% of the cases when a judge labeled expert witnesses as biased or partisan was there a finding that the defendant's expert was biased or partisan. The theme of bias and partisanship was strongly correlated with the judge ultimately finding that the defendant physician was not liable. In fact, 83% of cases where an expert's objectivity or impartiality were questioned resulted in a finding that the defendant physician was not liable for the plaintiff's losses.

The most common markers of an expert's bias or partisanship was dismissing or vigorously contesting opposing opinions or facts that may challenge the expert's opinion. Notably, however, changing one's opinion during the lawsuit without a cogent explanation was also associated with bias and partisanship. Specific types of conduct during cross-examination were also regularly labeled as indicative of bias or partisanship, including argumentativeness, vagueness, and being non-responsive to certain questions. The legal norms underlying the theme of bias and partisanship include the court's need for expert witnesses to be independent and objective in order to fulfill their role, to assist the judge, in arriving at an outcome in a case that involves technical matters outside their expertise. More subtly, however, are the legal norms that in discharging their duty independently and objectively, experts must be able to rise above the intensely partisan conduct that characterizes a trial, for example opposing counsel trying to goad a witness to undermine their credibility during cross examination must not be negatively reacted to by an expert.

The second discourse theme, identified in 38% of the cases studied, was a judge's finding depending on which of the opposing experts had a higher degree of relative expertise. Inevitably, one of the experts was labeled as having 'lesser' comparative

expertise and judges justified their decisions to rely on an opposing expert's evidence instead by contrasting the experts' relative expertise. Every case where a judge specifically made a finding that one expert has lesser expertise than an opposing expert, it was the plaintiff who had retained the expert with lesser expertise. In 92% of the cases where one expert's expertise was considered deficient, when compared with the expertise of another expert, the outcome of the case was that the defendant physician was not liable for the plaintiff's losses. Expertise was constructed to emanate from highly specific qualifications that were relevant to the specific medical care at issue, specific clinical experience, and geographically where the expert practiced as compared to the defendant physician.

The findings of this research demonstrate that a judge's use of expert evidence at trial is dictated by two things: 1) the independence and objectivity of the witness, and 2) the capacity of the witness to assist the court adjudicate the dispute, borne out through the judicial assessment of the relative expertise of the witnesses. This study also identifies common themes as to why an expert will, or will not, be found to be biased or partisan as well as when an expert will, or will not, be likely to have their relative expertise criticized.

Future Research

There are many potential avenues for future research assessing judicial narratives about medical expert evidence in medical malpractice lawsuits. This thesis sought to identify how trial judges used expert medical evidence in medical malpractice trials. Therefore, this research provides an empirical foundation for proposals to alter the ways that Canadian legal institutions use medical expert evidence. Evidently, future research may focus on the shortcomings of the current ways in which Canadian common law

jurisdictions utilize medical expert evidence in order to propose solutions to facilitate a more harmonious relationship between the law and medical expert evidence.

As noted in Chapter 3, my inability to read French and consequent decision not to assess Quebec case law for the purposes of this thesis is a limitation of my research. Quebec's evidentiary law is consistent with Canadian common law jurisdictions in that factual causation, as outlined by the Supreme Court of Canada in *Benhaim v St-Germain*, is a matter for "the trier of fact, not for the expert witnesses, to decide."[389] Further, physicians in Quebec are also expected to act as a prudent and diligent physicians.[390] It would thus be interesting to determine whether Quebec medical malpractice decisions contain the same themes as those identified in this thesis. Similarly, future research comparing the expert evidence discourses and themes identified in this thesis with case law from other common law jurisdictions around the world, such as the United States, United Kingdom, or Australia, would highlight the extent to which the narratives and themes uncovered in my research are unique to Canada.

Future research analyzing the use of expert medical evidence during medical malpractice trials in Quebec will be particularly interesting because the reformed *Code of Civil Procedure* creates a default rule that parties obtain joint expert opinions.[391] In theory, joint expert opinions may ease the task that judges face when they are presented with

[389] *Benhaim*, *supra* note 20 at para 47. See also *Laferriere v Lawson*, [1991] 1 SCR 541, 78 DLR (4th) 609 at 607-608.
[390] *Lapointe v Hopital Le Gardeur*, [1992] 1 SCR 351, 90 DLR (4th) 7 at 361.
[391] *Code of Civil Procedure*, *supra* note 86 at para 148(4). If parties are unable, or unwilling, to agree on joint expert evidence, they must provide reasons to justify a departure from the expectation that parties obtain joint expert opinions. Judges retain the discretion to analyze the merits of the reasons provided for parties not obtaining joint expert opinions and can impose joint expert evidence if doing so promotes the efficient resolution of the dispute, see para 158(2).

conflicting expert opinions by the respective parties to a lawsuit.[392] At present, the extent to which the parties involved in Quebec medical malpractice lawsuits obtain joint expert opinions is unclear. Future empirical research would be needed to determine whether parties are, in fact, obtaining joint expert opinions or if judges are allowing parties to retain their own medical experts.[393]

Given the temporal limits of my study, additional research regarding medical malpractice lawsuits more than five years ago can serve to identify to what extent narratives and discourses about medical expert evidence have changed over time. Alternatively, historical research may hold insights into why the specific discourses and themes that were apparent in decisions written in the last five years have become entrenched based on earlier discourse on the same issues. In addition, fruitful insights into the competing discourses and narratives that exist in medical malpractice trials may be adduced by examining documents beyond judges' written decisions, such as expert reports, counsels' facta and legal memoranda, and transcripts from the trial.[394] Similarly, observing trials in order to analyze how particular conduct, non-verbal communication and cues, and demeanor can serve to influence the ultimate disposition of the case could be a fruitful line of inquiry.[395]

---

[392] For example, judges would not need to make assessments of the relative expertise of experts retained by each party.

[393] Comparing the utility of having parties obtain joint expert opinions with allowing parties to obtain their own expert opinions is beyond the scope of this thesis, which was focused on the way in which judges resolve conflicts between expert evidence. Relatedly, analyzing the potential of court appointed experts, a phenomenon common in many civil law jurisdictions (eg, Code de procédure civile (Quebec), s. 234), to alleviate the difficulties that judges experience when faced with competing expert opinions is outside the scope of this thesis. Nonetheless, both joint expert opinions and court appointed experts have the potential to assist judges in resolving medical malpractice lawsuits by removing the task of judges determining which of the competing expert opinions to rely upon.

[394] *Once Upon a Time in Law*, *supra* note 128.

[395] *Painted Drum and Handwritten Treaty*, *supra* note 128.

Bibliography

Legislation

Judicature Act, RSNS 1989, c 240.

British Columbia, *Supreme Court Rules*.

Saskatchewan, *Queen's Bench Rules*.

Ontario, *Rules of Civil Procedure*.

Regulated Health Professions Act, SO 1991, c 18.

Quebec, *Code of Civil Procedure*.

Jurisprudence

A(LL) v B(A), [1995] 4 SCR 536, 130 DLR (4th) 422.

Anderson v Harari, 2019 ABQB 745.

Armstrong v Ward, 2019 ONCA 963.

Baglot v Fourie, 2019 BCSC 122.

Barbe v Evans, 2020 ABQB 599.

Benhaim v St-Germain, 2016 SCC 48.

Botiuk v Toronto Free Press Publications Ltd, [1995] 3 SCR 3, 126 DLR (4th) 609.

Boutcher v Cha, 2020 ONSC 7694.

Brenenstuhl v Caldwell, 2020 ABQB 315.

Champoux v Jefremova, 2021 ONCA 92.

Crits v Sylvester, [1956] SCR 991, 5 DLR (2d) 601.

Crits v Sylvester, [1956] OR 132, 1 DLR (2d) 502 (CA).

DD v Wong Estate, 2019 ABQB 171.

FH McDougall, 2008 SCC 53.

Fontaine v British Columbia (Official Adminstrator), [1998] 1 SCR 424, 156 DLR (4th) 577.

Hacopian-Armen v Mahmoud, 2020 ONSC 4946.

Harling v Lauf, 2021 ABQB 235.

Homes v Gibson, 2020 ABQB 322.

Jaques et al v Francis, 2018 ONSC 1120.

Jones-Carter v Warwaruk, 2019 ONSC 1965.

Kain v Davey, 2021 ABQB 190.

Karen Armstrong v Colin Ward, 2021 SCC 1.

Khan v College of Physicians and Surgeons (1992), 9 OR (3d) 641, 94 DLR (4th) 193 (CA).

Laferriere v Lawson, [1991] 1 SCR 541, 78 DLR (4th) 609.

Lantin (Litigation Guardian Of) v Sokolies, 2017 MBQB 40.

Lapointe v Hopital Le Gardeur, [1992] 1 SCR 351, 90 DLR (4th) 7.

LR v Semenjuk, 2020 ABQB 350.

MacWilliams v Connors, 2017 PESC 2.

Medina v Wong, 2018 BCSC 292.

Miller Estate v Dow, 2017 NBQB 35.

Neelands v Kelly, 2014 ABQB 617.

Platnick v Bent, 2020 SCC 23.

Peppler Estate v Lee, 2019 ABQB 144.

O'Connor v Wambera, 2018 BCSC 886.

R v Find, 2001 SCC 32.

R v Mohan, [1992] 2 SCR 9, 114 DLR (4th) 419.

R v Pan, 2001 SCC 42.

R v S(RD), [1997] 3 SCR 484, 151 DLR (4th) 193.

R v Sheppard, 2002 SCC 26.

R v Truscott, 2007 ONCA 575.

Rutherford v Wiens, 2020 MBQB 35.

Rycroft v Gilas, 2017 ONSC 1397.

Saadati v Moorhead, 2017 SCC 28.

Schwartz v Canada, [1996] 1 SCR 254, 133 DLR (4th) 289.

Shannon v Canadian Medical Protective Association, 2016 NBQB 4.

Sit v Trillium Health Centre, 2020 ONSC 2458.

Sivell v Sherghin, 2017 ONSC 1368.

Skead v Chin, 2020 ONSC 1283.

Skillings v Colquhoun, 2018 ONSC 1125.

Smith v Kane, 2020 ONSC 329.

Snell v Farrell, [1990] 2 SCR 311, 72 DLR (4th) 289.

St. Jean v Mercier, 2002 SCC 15.

Stevenhaagen (Estate) v Kingston General Hospital, 2020 ONSC 5020.

Suzanski v Turner, 2019 MBQB 19.

Tahir v Mitoff, 2019 ONSC 7298.

ter Neuzen v Korn, [1995] 3 SCR 674, 127 DLR (4th) 577.

The Estate of Carlo DeMarco v Dr Martin, 2019 ONSC 2788.

Thibert v Zaw-Tun, 2006 ABQB 423.

Watson v Dr Shawn Soon, 2018 ONSC 3809.

White v Gerhicke, 2013 BCSC 377.

White Burgess, Langille, Inman v Abott and Haliburton Co, 2015 SCC 23.

Wawrzyniak v Livingstone, 2019 ONSC 4900.

Young v Bandyayera, 2021 NBQB 29.

Zarubiak v Luce, 2017 ONSC 1627.

Secondary Material: Articles

Binnie, Ian. "Science in the Courtroom: The Mouse that Roared" (2007) 56 UNBLJ 307.

Bond, Charles & DePaulo, Bella. "Accuracy of Deception Judgments" (2006) 10 Personality and Social Psychology Rev 21.

Bubela, Tania. "Expert Evidence: The Ethical Responsibility of the Legal Profession" (2004) 41 Alta L Rev 853.

Buchanan, Ruth & Hewitt, Jeffrey. "Encountering settler colonialism through legal objects: a painted drum and handwritten treaty from Manitoulin Island" (2017) 68:3 N Ir Leg Q 291.

Carson, John. "Every expression is watched: Mind, medical expertise and display in the nineteenth-century English courtroom" (2018) 48(6) Social Studies of Science 891.

Chin, Jason et al. "The Biases of Experts: An Empirical Analysis of Expert Witness Challenges" (2019) 42:4 Man LJ 21.

Christensen, Leah. "The Paradox of Legal Expertise: A Study of Experts and Novices Reading the Law" (2008) BYU Educ & LJ 53.

Cunliffe, Emma. "Judging, fast and slow: using decision-making theory to explore judicial fact determination" (2014) 18 Int'l J of Evidence & Proof 139.

---. "Independence, reliability and expert evidence in criminal trials" (2013) 45:3 Aust'l J of Forensic Sciences 284.

---. "(This is Not A) Story: Using Court Records to Explore Judicial Narratives in R v Kathleen Folbigg" (2007) 27:1 Aust'l Feminist LJ 71.

---. "Without fear or favour? Trends and possibilities in the Canadian approach to expert human behavior evidence" (2006) 10 Int'l J of Evidence & Proof 280.

Curtis, Debra & Karp, Judith. "In a Case, in a Book, They Will Not Take a Second Look!: Critical Reading in the Legal Writing Classroom" (2005) 41 Williamette L Rev 293.

DePaulo, Bella et al. "Cues to Deception" (2003) 129 Psychological Bull 74.

Edmond, Gary et al. "Forensic Science Evidence and the Limits of Cross-Examination" (2019) 42:3 Melbourne UL Rev 858.

Edmond, Gary & Roach, Kent. "A Contextual Approach to the Admissibility of the State's Forensic Science and Medical Evidence" (2011) 61 UTLJ 343.

Edwards, Linda. "Once upon a Time in Law: Myth, Metaphor, and Authority" (2010) 77:4 Tenn L Rev 883.

Endicott, Timothy. "Arbitrariness" (2014) XXVII:1 Can JL & Jur 49.

Ericsson, Anders. "Acquisition and Maintenance of Medical Expertise: A Perspective From the Expert-Performance Approach With Deliberate Practice" (2015) 90:11 Academic Medicine 1471.

Faigman, David; Monahan, John & Slobogin, Christopher. "Group to Individual (G2i) Inference in Scientific Expert Testimony" (2014) 81(2) U of Chicago L Rev 417.

Foster, William. "Expert Testimony Prevalent Complaints and Proposed Remedies" (1897-1898) 11:3 Harv L Rev 169.

Gibson, Elaine. "Is It Time to Adopt a No-Fault Scheme to Compensate Injured Patients?" (2016) 47:2 Ottawa L Rev 307.

Hardcastle, Lorian. "Legal Mechanisms to Improve Quality of Care in Canadian Hospitals" (2017) 54:3 Alta L Rev 681.

---. "*"*Government Tort Liability for Negligence in the Health Sector: A Critique of the Canadian Jurisprudence" (2012) 37 Queen's LJ 525.

Hendry, Mallory. "Plaintiffs' odds improving in 'David v. Goliath' medical malpractice cases", *Law Times* (9 March, 2020), online: <https://www.lawtimesnews.com/practice-areas/medical-malpractice/plaintiffs odds-improving-in-david-v-goliath-medical-malpractice-cases/327186>.

Higdon, Michael. "Something Judicious This Way Comes … The Use of Foreshadowing as a Persuasive Device in Judicial Narrative" (2010) 44(4) U Rich L Rev 1213.

Hogart, Robin. “On the learning of intuition,” in Henning Plessner, Cornelia Betsch, & Tilmann Betsch, eds, *Intuition In Judgment and Decision Making* (Mahwah, USA: Lawrence Erlbaum Associates, 2008) 91.

Iacobucci, Frank & Hamilton, Graeme. “The Goudge Inquiry and the role of medical expert witnesses,” (2010) 182(1) Canadian Medical Assoc J 53.

Kilback, Keith & Tochor, Michael. “Searching for Truth but Missing the Point” (2002) 40:2 Alta L Rev 333.

Kristjanson, Freya. “Hot-Tubs’ and Concurrent Evidence: Improving Administrative Proceedings” (2012) 25 Can J of Admin L & Prac 79.

Levey, Noam. “Medical Professionalism and the Future of Public Trust in Physicians” (2015) 313:18 American Medical Assoc 18.

Mack, Cathleen et al. “Serial position, output order, and list length effects for words presented on smartphones over very long intervals” (2017) 97 J of Memory and Language 61.

MacLean et al. “Experts on Trial: Unearthing Bias in Scientific Evidence” (2020) 53:1 UBC L Rev 101.

Michell, Paul & Mandhane, Renu. “Uncertain Duty of the Expert Witness” (2005) 42:3 Alta L Rev 635.

Paciocco, David. “Taking a ‘Goudge’ Out of Bluster and Blarney: An ‘Evidence-Based Approach’ to Expert Testimony” (2009) 13 Can Crim L Rev 135.

---. “Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune of Partial Experts” (2009) 43 Queen’s LJ 565.

---. “Evaluating Expert Opinion Evidence for the Purpose of Determining Admissibility: Lessons from the Law of Evidence” (1994) 27 CR 302.

Pennington, Nancy & Hastie, Reid. “Evidence Evaluation in Complex Decision Making” (1986) 51 J of Personality & Social Psychology 242.

Smith, Lynn. “The Ring of Truth, the Clang of Lies: Assessing Credibility in the Courtroom” (2012) 63 UNBLJ 10.

Varelius, Jukka. “Medical expertise, existential suffering and ending life” (2014) 40:2 J Medical Ethics 104.

Secondary Material: Monographs

Anderson, Glenn. *Expert Evidence*, 3rd ed (Toronto: LexisNexis Canada, 2014).

Corbin, Juliet & Strauss, Anselm. *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory,* 4th ed (Thousand Oaks: SAGE Publications, 2015).

Downie, Jocelyn; Caulfield, Timothy & Flood, Colleen. *Canadian Health Law and Policy*, 4th ed (Markham: LexisNexis Canada, 2011).

Dworkin, Ronald. *Law's Empire* (Cambridge, USA: Harvard University Press, 1986).

Faigman, David. *Legal Alchemy: The Use and Misuse of Science in the Law* (New York: WH Freeman, 2000).

Finnis, John. *Natural Law and Natural Rights*, 2nd ed (Oxford: Oxford University Press, 2011).

Foucault, Michel. *The Archaeology of Knowledge* (New York: Tavistock Publishing, 1972).

---. *The Order of Things: An Archaeology of the Human Sciences* (New York: Routledge Classics, 1970).

Fuller, Lon. *The Morality of Law*, 2nd ed (New York: Yale University Press, 1969).

Golan, Tal. *Laws of Men and Laws of Nature: The History of Scientific Expert Testimony in England and America* (Cambridge, USA: Harvard University Press, 2004).

Habermas, Jurgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge: MIT Press, 1996).

Hart, Herbert. *The Concept of Law* (Oxford: Oxford University Press, 1961).

Kahneman, Daniel. *Thinking, Fast and Slow* (Toronto: Doubleday, 2011).

Keller, Reiner. *Doing Discourse Research: An Introduction for Social Scientists*, translated by Bryan Jenner (London, UK: SAGE, 2013).

Klar, Lewis. *Tort Law*, 3rd ed (Toronto: Thomson, 2003).

Kohn, Linda; Corrigan, Janet & Donaldson, Molla. *To Err Is Human: Building a Safer Health System* (Washington: National Academy Press, 2000).

Lederman, Sidney; Byrant, Alan & Fuerst, Michelle. *The Law of Evidence in Canada* 5th ed (Toronto: LexisNexis Canada, 2018).

Picard, Ellen & Robertson, Gerald. *Legal Liability of Doctors and Hospitals in* Canada, 4th ed (Toronto: ThomsonCarswell, 2007).

Titscher, Stefan et al. *Methods of Text and Discourse Analysis*, 4th ed (Thousand Oaks: SAGE Publications, 2000).

Other Materials

Canadian Medical Association. "Code of Ethics and Professionalism" (2018), online: <https://policybase.cma.ca/en/permalink/policy13937#_ga=2.208046737.2062777718.1627842623-205138996.1627842623>.

Canadian Medical Protective Association. "About the CMPA" online: <https://www.cmpa-acpm.ca/en/about>.

---. "2020 Annual Report" online: <https://www.cmpa-acpm.ca/en/about/annual-report>.

College of Physicians and Surgeons of Ontario. "Medical Expert: Reports and Testimony" (June 2021) online: < https://www.cpso.on.ca/Physicians/Policies Guidance/Policies/Third-Party-Medical-Reports>.

Gilmour, Joan. Health Policy Research Program, *Patient Safety, Medical Error and Tort Law: An International Comparison*" (Health Canada, 2006).

McLachlin, Beverley. "Judging in a Democratic State" (Lecture delivered at the Sixth Templeton Lecture on Democracy, University of Manitoba, 3 June 2004), online: <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2004-06-03-eng.aspx>.

National Judicial Institute. "Science Manual for Canadian Judges" (last updated 1 July 2018) online: < https://www.nji-inm.ca/index.cfm/publications/science-manual for-canadian-judges/>.

Ontario. Ministry of the Attorney General, *Inquiry into Pediatric Forensic Pathology in Ontario*, by the Honourable Stephen Goudge (Toronto: Ontario Ministry of the Attorney General, 2008).

---. Ministry of the Attorney General, *Civil Justice Reform Project: Summary of Findings and Recommendations*, by the Honourable Coulter Osborne online: <www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp>, (2007).

---. Ministry of Health and Long Term Care, *Report to Ontario Ministry of Health and Long Term Care Re: Medical Liability Review*, by the Honourable Stephen Goudge online: <http://www.health.gov.on.ca/en/common/ministry/publications/reports/medical liability/>, (2018).

Appendix 1: Identifying Codes

Indicators of Bias and Partisanship

Words / phrases to describe an expert's evidence
Bias
Partisan / partisanship
Advocate
Lacking / questioning objectivity
Lacking / questioning independence
Lacking / questioning impartiality
Lacking / questioning credibility
Lacking / questioning reliability

Indicators of greater or lesser relative expertise

Words / phrases to describe experts' relative expertise
Greater / lesser experience
Possessing specialized / advanced credentials or qualifications
Applicable/translatable experience / credentials / qualifications to the matters at issue
Acknowledgments that an expert is, or is not, well-qualified to opine on the issues
Knowledge of resources / expectations in the practice area / geographical area in question