

Health Care Ethics Experts in Canadian Courts

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1. Introduction

Sitting in my office one afternoon, I received a telephone call from a lawyer many miles away. Would I consider acting as an ethics expert witness in a civil case raising questions about the ethics of a particular physician's conduct? The question certainly caught me off guard. I had known several individuals who had acted as ethics experts in litigation and had wondered in passing about the nature and appropriateness of that role. However, I had never gone beyond casual reflection. Before responding to the lawyer's request, I felt that I needed to reflect further on the legal and ethical implications of acting as an ethics expert.¹ This paper is a consequence of that reflection.

In this paper, I will first describe the traditional approach to the use of experts in Canadian courts. Then I will consider whether, on this approach, health care ethics experts should be permitted to testify in Canadian courts. I will argue that they should be permitted to testify but caution should be exercised by the courts, the parties, and the experts themselves. The objective of the paper is to highlight the strengths and raise some concerns about the weaknesses of a practice that appears to be growing, so that the potential harmful consequences might be anticipated, problems with the practice might be avoided and the potential benefits might be maximized.

2. The Use of Experts in Canadian Courts

Justice Sopinka of the Supreme Court of Canada set out a four-part test for admission of expert evidence in 1994 in *R. v. Mohan*. For expert evidence to be admissible, it must be relevant, it must be necessary in assisting the trier of fact, there must not be any applicable exclusionary rule and the expert must be properly qualified.² The scrutiny for each of these elements varies insofar as it is stricter for what is

considered to be "novel science." Consider each of these elements in turn.

a. Relevance

There is a two-part test for relevance: 1) the evidence must be relevant; and 2) the potential benefits of admitting the evidence must outweigh the potential harms. Potential benefits include material, strong and reliable evidence being brought before the trier of fact. Potential harms include prejudicial effect, costs such as time delay associated with its introduction, confusion and evidence being accepted uncritically by the trier of fact.

With regard to the latter two harms, the court will ask the following questions when assessing admissibility:

- (1) Is the evidence likely to assist the jury in its fact-finding mission, or is it likely to confuse and confound the jury?
- (2) Is the jury likely to be overwhelmed by the "mystic infallibility" of the evidence, or will the jury be able to keep an open mind and objectively assess the worth of the evidence?³

Justice Sopinka summed up the concern that drives the court's analysis in the area of the "mystic infallibility" question as follows:

There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.⁴

b. Necessity in assisting the trier of fact

The test for necessity is whether the area of proposed testimony is not understood by the average person.⁵ Thus, this test is really more of a helpfulness standard than a true necessity standard; “what is required is that the opinion be necessary in the sense that it provide information ‘which is likely to be outside the experience and knowledge of a judge or jury.’”⁶

c. The absence of any exclusionary rule

Expert evidence must comply with general rules governing admissibility of evidence. Established exclusionary rules include self-serving evidence, illegally obtained evidence, character evidence, and similar fact evidence.⁷

d. A properly qualified expert

The question here is whether the person is properly qualified to serve as an expert witness. It is important to note that this question is to be answered by the judge, who will assess the witness in relation to the following standard:

[T]he evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.⁸

Significantly, the source of the knowledge or skills is not determinative:

[T]he test of expertness so far as the law of evidence is concerned is skill in the field in which the witness’ opinion is sought. The admissibility of such evidence does not depend upon the means by which that skill was acquired. As long as the court is satisfied that the witness is sufficiently experienced with the subject-matter at issue, the court will not be concerned with whether his or her skill was derived from specific studies or by practical training, although that may affect the weight to be given to the evidence.⁹

e. Levels of scrutiny

The test for expert testimony set out in *Mohan* applies across all fields of study and experience. However, the level of scrutiny is heightened for “novel science.” As noted by Justice Sopinka in *Mohan*,

expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is

essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert.¹⁰

Novel science receives heightened scrutiny largely

because it is particularly prone to difficulties with reliability (and reliability, as previously discussed, is a critical element of relevance). Compared to well-established science, novel science is more likely to be the subject of fluctuating and conflicting opinions. Novel science may therefore be less reliable and thus of less potential benefit and greater potential harm than well-established science. Courts still apply the four-part *Mohan* test to novel science but they do so with greater rigour, particularly with respect to reliability.

3. Classification of Testimony Provided by Health Care Ethics Experts

Before applying the preceding general test for expert witnesses to the specific context of health care ethics expert witnesses, I must clarify what I mean by “testimony provided by health care ethics experts.” I find it most helpful to think broadly and in terms of three categories of testimony in this realm: descriptive, conceptual and normative.

a. Descriptive

Testimony in this category consists of descriptions of the ethics of particular people, perspectives, or theories. For example, an ethics expert giving this sort of testimony might discuss whether a sexual relationship between a clinical

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psychologist and his patient breached the ethical standards of professional psychology in place at the time of the relationship.¹¹ An ethics expert giving descriptive testimony might also discuss whether cessation of potentially life-sustaining treatment violates the ethical tenets of orthodox Judaism.

b. Conceptual

Testimony in this category consists in part of clarification of terms, assessment of the logical coherence of an ethical argument, drawing of distinctions and identification of ethical issues. For example, a patient's surrogate may seek an injunction to prevent a physician from writing a Do Not Resuscitate (DNR) order on the patient's chart. The physician may argue that resuscitation would be futile and therefore the physician has the authority to write a DNR order against the wishes of the surrogate. The surrogate might counter that resuscitation would not be futile and therefore the physician does not have such authority. The health care ethics expert might explore the concept of futility as the two parties are using it and draw a distinction between two senses of futile: "not worth it" and "won't work".¹²

Testimony in this category may also include the drawing of conclusions from a particular set of premises. An ethics expert giving conceptual testimony might be asked to take a particular relevant ethical framework, that is, a set of moral principles or values (e.g., respect for autonomy, equality and consistency) as well as the relative weight and the meaning of these principles or values. She might then be asked what conclusions could be drawn out of that framework with respect to particular questions before the trier of fact. For example, an expert might be asked to take the ethical framework of a particular First Nations community and to draw conclusions with respect to the acceptability of somatic cell gene therapy in that community. The difference between this example and the Judaism example of descriptive testimony is that for the Judaism example, the identified group already has an established position on the issue in question and that position is being reported. For the conceptual example, the identified group does not have an established position on the issue in question but does have a framework from which a position can be derived.

c. Normative

Testimony in this category consists of statements as to whether particular conduct *is* ethical or unethical (right or wrong, good or bad). For example, an ethics expert giving this kind of testimony might claim that doctors have an ethical duty to treat a child against the wishes of the child's

parents if, for example, the parents are refusing a life-sustaining blood transfusion on the basis of their faith.¹³ The critical difference between this example and the conceptual and descriptive testimony examples is that the latter goes to what is *considered* ethical within a specified ethical framework, while the former goes to what *is* ethical. Whether one believes that there is any such thing as normative testimony following this categorization depends on whether one believes that there are universal moral truths. For those who do not believe in universal moral truths, then this category will be empty. For those who do, then this category will have content but may still be problematic for the reasons discussed below.

d. Conclusion

It is important to draw these distinctions between the three categories of testimony because as will be seen in the next section, the distinctions have implications for the application of the *Mohan* test to the use of health care ethics experts.

4. Some Reflections on the use of Health Care Ethics Experts in Light of the Mohan Test and Actual Experience to Date

Let us now take Justice Sopinka's test for admission of expert evidence (relevance, necessity in assisting the trier of fact, the absence of any exclusionary rule, a properly qualified expert, and levels of scrutiny) and reflect upon each element¹⁴ as it relates to the use of health care ethics experts in Canadian courts.¹⁵

a. Relevance

Relevance

The first part of the *Mohan* relevance test *can* be well met by descriptive and conceptual testimony. For example, a medical historian's descriptive testimony about the standard of care in existence at the time of an alleged case of negligence can be relevant to the trier of fact's determination of whether there was a breach of a standard of care in the case. A philosopher's elucidation of the concept of futility can be relevant to the trier of fact's determination of who has decision-making authority with respect to DNR orders. A theologian's assessment of what conclusions could be drawn out of an orthodox Jewish ethical framework for the issue of cessation of potentially life-sustaining treatment can be relevant to the trier of fact's determination of whether a

surrogate decision-maker is acting according to an orthodox Jewish patient's prior expressed wishes and values in refusing potentially life-sustaining treatment.

However, it must be noted that the first part of the *Mohan* test is not *always* met by descriptive or conceptual testimony. For example, if a lawyer sought to qualify a health care ethics expert to provide descriptive testimony about whether abortion is considered ethical by the Catholic Church in a case in which a man sought an injunction to prevent his girlfriend from having an abortion, I would argue that the testimony would not be relevant. In such a case, there is no question of fact or law that the descriptive testimony could help the judge to answer. Therefore, descriptive and conceptual testimony should sometimes, but not always, be admitted by the courts.

I would also argue that normative testimony is *never* relevant. It is, quite simply, irrelevant to any determination that the judge and/or jury must make, what any ethics experts opine *is* ethical. Whether a law *is* unethical and whether particular conduct *is* unethical are questions to be answered, if answerable at all, in venues other than the courts.¹⁶ Normative testimony should therefore not be admitted by the courts.

Mystic infallibility

In the context of health care ethics evidence, there is *prima facie* reason to be concerned about one element of the second part of the *Mohan* relevance test. To paraphrase the comments of Justice Sopinka reproduced earlier, dressed up in philosophical language which the jury does not easily understand and submitted through a witness of impressive qualifications, this evidence may be accepted by the jury (or by the judge) as being virtually infallible and as having more weight than it deserves.

Apparently, however, the "mystic infallibility" syndrome has not yet compromised a case. Judges have been able to give the testimony of ethics experts the weight it deserves, often declaring it unhelpful or incorrect. Consider the following illustrative excerpts from cases involving ethics experts:

- The evidence of all of these last named witnesses was interesting, but I regret, not too helpful. I have assigned this evidence as having no weight in the

decision I have to make, even though such information may well be extremely useful to a practising physician.

- As with the testimony of Mary Rowell, I found the testimony of Dr. Gallop in the area of textbooks and current nursing education with respect to social interaction with patients to be unhelpful in this case for two reasons.¹⁸

In the cases to date, the triers of fact appear to have been able to acknowledge expertise without falling victim to the "mystic infallibility" syndrome.

Thus far, there is no reason to believe that the syndrome would be any more pronounced for health care ethics experts than, for example, scientific experts. Caution with respect to this syndrome is required for health care ethics experts as it is for other kinds of experts, but the use of health care ethics experts should not be precluded merely because of the potential for the syndrome to be manifested. That said, however, none of the cases to date involved juries who might be more prone to this syndrome than judges. Therefore, at least until we have more experience with the actual use of health care ethics experts, greater caution should probably be exercised in cases of trial by judge and jury rather than by judge alone.

b. Necessity in assisting the trier of fact

Some would argue that ethics is not an area that is not understood by or is outside the experience and knowledge of the trier of fact. Rick Salutin, for example, expressed the following opinion in the *Toronto Globe and Mail*:

Ethicists, who didn't exist 20 years ago, are the most offensive experts of all, in my opinion. *Maclean's* [a national magazine] headed a story, "Ethicists weigh potential costs and benefits of cloning," as if the rest of us shouldn't ever touch such things on our own. But would you stand around while someone gets beaten, and say, "Sorry, I'm waiting for the ethicist?" Ethics is about being human, it's not a specialty. The point is to have it whatever you do, not call in an expert as you would a plumber – in whose expertise, by the way, (after a recent lift-level mechanism crisis), I believe."¹⁹

...descriptive and conceptual testimony should sometimes, but not always be admitted by the courts. [However] ...normative testimony is never relevant. It is, quite simply, irrelevant to any determination that the judge and/or jury must make, what any ethics experts opine is ethical.



If ethics is as Mr. Salutin describes it, then ethics expert testimony obviously fails the necessity test. However, I would argue that the necessity test would be easily met by many cases involving health care ethics issues. Consider the following questions that could arise in cases before the courts.

- Did a physician breach the standard of care when he failed to disclose the risk of HIV to his patient ten years ago? To answer this question, one needs to know what physicians of similar experience practised with respect to disclosure at the time of the alleged negligence.²⁰
- Do physicians have the legal authority to unilaterally withhold what they have deemed to be futile treatment? To answer this question, one needs to understand the concept of futility.²¹
- Is the current *Criminal Code* prohibition on assisted suicide unconstitutional? To answer this question, one needs to understand whether a sustainable distinction can be drawn between withdrawing potentially life-sustaining treatment and assisting a suicide.²²

The answers to these questions could well depend upon testimony that falls outside the experience and knowledge of a judge or jury. Were they or others like them to arise in a case, I would argue that the testimony of a health care ethics expert would pass the necessity test.

c. A properly qualified expert

There is good reason to be concerned about whether judges are able to determine when someone is skilled and sufficiently experienced to serve as a health care ethics expert. There is enormous debate in the health care ethics community about ethical expertise.²³ There is no accreditation process.²⁴ There is no widespread agreement about what experience is relevant, necessary and sufficient.²⁵ If you ask ten members of the Canadian Bioethics Society what constitutes proper qualification for serving as a health care ethics expert, you might well receive ten different responses. Some might say a Ph.D. in a relevant area of philosophy or theology with at least five years experience working in health care ethics, some might say a degree in a field related to health care ethics (e.g. medicine or nursing), some training in health care ethics (e.g., a two week intensive course at Georgetown University) and some

involvement in the field, while still others might say that no specific educational background is required but rather simply a manifest interest in the field. The range of answers would be extreme. How then are judges to decide who is qualified to testify as an expert? In the face of such uncertainty in the field, there is also less likely to be the same kind of restraint exercised by individuals approached to appear as experts as is exercised in fields for which there is clarity about what constitutes qualification as an expert. This lack of certainty is one of the greatest challenges for the legitimate use of health care ethics experts in court.

Fortunately for those who seek to enter the testimony of health care ethics experts, the standards for qualification are low. In practice, admissibility is determined by whether the proposed expert knows more than the trier of fact. However, fortunately for the administration of justice, the weight of the evidence is then determined during the trial at which point the testimony provided can be subjected to serious scrutiny and, if the expert really is incompetent, completely undermined on cross-examination.

An additional challenge for the legitimate use of health care ethics experts in court comes from the fact that the expertise required can vary quite dramatically according to the category of ethics testimony required. For example, the expert might need qualifications in medical history or cultural anthropology to provide descriptive testimony but in philosophy or theology to provide conceptual testimony. Extreme care should therefore be taken by lawyers and the courts when assessing whether a particular individual is properly qualified. The assessor should carefully consider the category of testimony to be offered and ensure that the potential expert indeed has expertise relevant to that type of testimony.

I would also argue that restraint should be exercised by individuals who are approached to serve as health care ethics experts. They should be very clear about what category of ethics testimony is being sought and ensure that they have the appropriate expertise. If they do not, they should explain the kind of expertise that is required for the category of testimony that is sought and attempt to direct the lawyer seeking the expert testimony to others who might have the required expertise. In the absence of any consensus

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on accreditation and in the face of ambiguity about the nature of health care ethics testimony, this seems to be a means by which the health care ethics community could help the justice system cope with the challenges of qualification for the provision of health care ethics expert testimony.

d. Levels of scrutiny

Is the subject matter of health care ethics testimony akin to a “novel science”? Many health care cases raise new and challenging ethical questions about which the experts disagree. For example, are embryos property? Can anencephalic infants be used as organ donors? What are the limits on access to health information in an era of powerful and sophisticated information technology? Disagreements arise not only about the specific answers to the specific questions but also about the appropriate frameworks and methodologies within which to even consider the questions. At first blush, then, health care ethics might seem akin to a “novel science,” thus requiring higher scrutiny. However, there are several arguments to be made against this conclusion.

First, and most significantly, health care ethics testimony has already been admitted by Canadian courts (with no evidence that a higher level of scrutiny has been applied).²⁶ Second, controversy is not to be confused with novelty. There is considerable disagreement and controversy about many issues in the field of health care ethics. It is unlikely that there will ever be universal agreement on such intractable ethical problems as abortion and euthanasia. However, unlike in the United States, widespread acceptance of a position on an issue or a particular methodology is not required for expert evidence to be considered reliable.²⁷ In Canada, disagreements and controversy go to weight, not admissibility.

Third, while there is considerable disagreement and controversy about many issues in the field of health care ethics, there is also considerable agreement and little controversy about some issues. For example, there is now widespread agreement about the need for a free and informed consent prior to medical treatment. There is widespread agreement about the necessity of ethics review for all research involving human subjects. Fourth, health care ethics testimony will frequently address novel questions but the basis for the answers is not novel. Conceptual testimony is ultimately grounded in ethics and ethics itself has a long and distinguished history. Descriptive testimony may be grounded in different disciplines. As noted before, some subjects of descriptive testimony might be grounded in history and others in cultural anthropology. Each of these fields also has a long and distinguished history.

Finally, health care ethics is a field for which doctorates are awarded by reputable institutions. There is a well-established literature. These are both hallmarks of a field of study that should be taken to have progressed from “novel” to “established.” Therefore, I would conclude that health care ethics testimony both is not and should not be considered “novel science” testimony and should not be subjected to stricter scrutiny than other well-established sciences. However, as with all expert testimony, in every particular instance, it should still be scrutinized for reliability.

5. Conclusions

This review of the law regarding expert testimony and the actual use of health care ethics experts in Canadian courts suggests the following conclusions with respect to descriptive and conceptual testimony:

- lawyers should be aware of the potential usefulness of health care ethics testimony;
- judges should be careful to ensure that the health care ethics testimony will be relevant to questions of fact and/or law that must be answered in the specific case;
- care should be taken to avoid the mystic infallibility syndrome where health care ethics experts are used in jury trials; and
- lawyers, judges, and potential experts should be careful to ensure that the potential expert has sufficient and relevant qualifications for the category of testimony to be offered.

With respect to normative testimony, judges should refuse to admit it and potential ethics experts should refuse to provide it.

I believe that the value and legitimacy of the use of health care ethics experts in Canadian courts will be enhanced by these refinements to current practice.

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1. For discussion of the use of health care ethics experts in American courts, see R. Delgado & P. McAllen, "The Moralists as Expert Witness" (1982) 62 Boston U. L. Rev. 869; P. McAllen & R. Delgado, "Moral Experts in the Courtroom" (1984) 14:1 Hastings Center Rep. 27; M. Yesley, "The Moral Expert Witness: Function or Footnote" (1984) 14:1 Hastings Center Rep. 28; E.D. Pellegrino & V.A. Sharpe, "Medical Ethics in the Courtroom: The Need for Scrutiny" (1989) 32 Perspectives in Biology and Medicine 547; D. Mishkin, "Proffering Bioethicists as Experts" (1997) 36 Judges' J. 50; G. Agich & B. Spielman, "Against the Skeptics: Ethics Expert Testimony" (1997) 22:4 J. Med. & Philosophy 381; K. Kipnis, "Confessions of an Expert Ethics Witness" (1997) 22:4 J. Med. & Philosophy 325; J. Fletcher, "Bioethics in a Legal Forum: Confessions of an 'Expert' Witness" (1997) 22:4 J. Med. & Philosophy 297.
2. *R. v. Mohan*, [1994] 2 S.C.R. 9 at 20 [hereinafter *Mohan*].
3. Moldaver J. in *R. v. Melaragni* (1992), 73 C.C.C. (3d) 348 at 353 (Ont. Gen. Div.) quoted in *Mohan*, *ibid.* at 22.
4. *Mohan*, *supra* note 2 at 21.
5. *Ibid.* at 23. See also Dickson J. (as he then was) in *R. v. Abbey*, [1982] 2 S.C.R. 24.
6. *Ibid.*
7. J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 536-37.
8. *Mohan*, *supra* note 2 at 25.
9. Sopinka, Lederman & Bryant, *supra* note 7 at xvi-xxiv.
10. *Mohan*, *supra* note 2 at 25.
11. *N.C. v. Blank* (1998), O.J. No. 2544 (Gen. Div.), online: QL (OJ).
12. This example is drawn from *Sawatzky v. Riverview Health Centre Inc.* (1998), M.J. No. 506 (Q.B.), online: QL (MJ). In this case, Dr. Francoise Baylis of the Department of Bioethics in the Faculty of Medicine at Dalhousie University was retained as a health care ethics expert for the plaintiff. The case was settled so she did not appear in court. However, she did prepare an expert report, and this report was published in "Expert Testimony by Persons Trained in Ethical Reasoning: The Case of Andrew Sawatzky," (2000) 28:3 J. L. Med. & Ethics 224.
13. This example is drawn from *R.B. v. Children's Aid Society of Metropolitan Toronto* (1989), O.J. No. 205 (Dist. Ct.), online: QL (OJ), aff'd (1992) 96 D.L.R. (4th) 45 (C.A.), aff'd (1995), 122 D.L.R. (4th) 1 (S.C.R.). While this case was appealed to the Court of Appeal and the Supreme Court of Canada, the trial level is the only level at which ethics experts were discussed.
14. I will not discuss the element of an absence of any exclusionary rule in the context of health care ethics testimony because there is nothing special about such testimony as it relates to that element. There might, at first glance, seem to be a potential difficulty for ethics testimony in relation to what is known as the "ultimate issue doctrine" (the rule that witnesses cannot testify to the ultimate issue in the case as that is for the trier of fact and law to determine). The problem would be that, in some cases, the ethical issue is very close to the ultimate issue. However, in fact, the ultimate issue exclusionary rule will not be a problem because the rule has been virtually abandoned. See *The Queen v. Graat*, [1992] 2 S.C.R. 819.
15. The examination of the use of health care ethics experts in Canadian courts was conducted using QuickLaw (the Canadian legal electronic database). Over a thousand cases were checked and six were found that were particularly relevant to the limited purpose of examining the use of health care ethics experts in Canadian courts. See *M. (R.E.D.) v. Director of Child Welfare* (1986), 4 R.F.L. (3d) 363 (Alta. Q.B.); *R.B. v. Children's Aid Society of Metropolitan Toronto* (1995), 122 D.L.R. (4th) 1 (S.C.R.); *Pittman v. Bain* (1994), 112 D.L.R. (4th) 257 (Ont. Gen. Div.); *Harrop v. Markham Stouffville Hospital* (1995), 16 C.C.E.L. (2d) 214 (Ont. Gen. Div.); *Symaniw v. Zajac* (1996), O.J. No. 3123 (Gen. Div.), online: QL (OJ); *N.C. v. Blank*, *supra* note 11. A caveat is required here. This search method would obviously miss cases in which: the ethics expert was not mentioned in the decision; written reasons were not given; people were approached to serve as ethics experts and either refused or agreed but did not ultimately appear before the court. Some of these gaps could be filled by surveying, for example, the membership of the Canadian Bioethics Society. However, I did not do that as the objective of this paper is not to exhaustively catalogue the instances of health care ethics experts being used in Canadian courts but rather to consider the issue of the involvement of health care ethics experts in Canadian courts. The cases found and the methodology used are adequate for such consideration.
16. Indeed, Canadian courts have embraced this position. See, for example, the Supreme Court of Canada in *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 at 553: "The task of classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties -- a matter which falls outside the concerns of scientific classification. In short, this Court's task is a legal one. Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature." This passage was cited approvingly by Justice McLachlin (as she then was) for the majority in *Winnipeg Child and Family Services (Northwest Area) v. G.(D.F.)*, [1997] 3 S.C.R. 925.
17. *R.B. v. Children's Aid Society of Metropolitan Toronto*, *supra* note 15 at 81-83.
18. *Harrop v. Markham Stouffville Hospital*, *supra* note 15 at 223-224.
19. R. Salutin, "Search and reflection give value on the journey" *The Globe and Mail* (21 March 1997) D1.
20. In *Pittman v. Bain*, *supra* note 15 at 395, the court recognized the value of ethics expert testimony -- "Dr. Hebert, an obviously learned expert, was of assistance in providing the court with knowledge of the standards being taught to those in medical school in recent years."
21. This issue arose in *Sawatzky*, *supra* note 12.
22. This issue arose in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, and an ethics expert could have been helpful. In particular, the analysis of the principles

of fundamental justice under s. 7 of the *Charter* at the Supreme Court of Canada could have benefited from a health care ethics expert having laid a richer testimonial base at trial.

23. F. Baylis, "Moral Experts and Moral Expertise: Wherein Lies the Difference?" in B. Hoffmaster, B. Freedman & G. Fraser, eds., *Clinical Ethics: Theory & Practice* (Clifton, New Jersey: Humana, 1989) at 96-97.
24. F. Baylis, ed., *The Health Care Ethics Consultant* (Totowa, New Jersey: Humana Press, Inc., 1994).
25. F. Baylis, "A Profile of the Health Care Ethics Consultant," in Baylis, *ibid.*, 25.

26. See *M. (R.E.D.) v. Director of Child Welfare*, supra note 15, *R.B. v. Children's Aid Society of Metropolitan Toronto*, supra note 15, *Pittman v. Bain*, supra note 15, *Harrop v. Markham Stouffville Hospital*, supra note 15, *Symaniw v. Zajac*, supra note 15, *N.C. v. Blank*, supra note 11.
27. The American test of general acceptance from *Frye v. United States*, 293 F.1013 (D.C. Dist. Ct. 1923) has not been adopted in Canada. See, for example, R. J. Delisle, *Evidence: Principles and Problems*, 5th ed. (Scarborough, Ontario: Carswell, 1999) at 596.

