

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Nova Scotia (Community Services) v. J.M.*, 2018 NSSC 31

Date: 2018-02-14

Docket: *Sydney* No. 105311

Registry: Sydney

Between:

Minister of Community Services

Applicant

v.

JM and RR

Respondents

Judge: The Honourable Justice Theresa M. Forgeron

Heard: November 23, 2017; December 11, 18, 19, 2017; January 15, 16, 2018; and February 14, 2018 in Sydney, Nova Scotia

Oral Decision: February 14, 2018

Written Decision: February 16, 2018

Counsel: Adam Neal, Counsel for the Applicant, the Minister of
Community Services
Coline Morrow, Counsel for the Respondent, JM
Rejean Aucoin QC, Counsel for the Respondent, RR

Sec. 94(1) of the *Children and Family Services Act* applies and may require editing of this judgment or its heading before publication. S. 94(1) provides:

No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.

Introduction

[1] Child welfare authorities often use drug testing to monitor substance abuse and assess child protection risk. Until the Lang Report¹, the Nova Scotia Department of Community Services regularly used hair strand analysis and contracted the now discredited Motherisk Lab of the Toronto Hospital for Sick Children for that purpose. Since 2016, in place of hair strand testing, the Department of Community Services often monitors parental substance use through the testing of urine samples. To conduct the testing, the Department engages the Halifax toxicology lab of the Nova Scotia Health Authority – Central Division under the direction of Dr. Nassar. Like Motherisk, the Halifax lab is not certified as a forensic lab.

[2] In this decision, I must determine whether Dr. Nassar is qualified to provide reliable opinion evidence in the field of forensic and analytical toxicology. The Department of Community Services wants Dr. Nassar to give expert opinion on test results involving the respondent father, RR. The father disputes this request. He states that the tests are not reliable and thus questions the qualifications of Dr. Nassar. The respondent mother, JM, supports the Department's position.

Issue

[3] Has the Department of Community Services established that Dr. Nassar, the Director of the Toxicology Section of the Division of Clinical Chemistry, Nova Scotia Health Authority- Central Zone, is qualified to provide reliable opinion evidence in the field of forensic and analytical toxicology?

Contextual Background Information

[4] This case involves a nine-year-old girl and her parents. The parents are separated and have a conflictual relationship.

[5] At various intervals since 2006, the Minister was involved with this family because of protection concerns involving substance abuse and domestic violence. In May 2017, a child protection application was filed. Domestic violence, drug and

¹ Report of the Motherisk Hair Analysis Independent Review; December 15, 2015; www.attorneygeneral.jus.gov.on.ca

alcohol use, criminal activity and inappropriate parenting were cited as the major presenting problems.

[6] Interim orders issued on May 10, May 31 and June 26, 2017. After the May 31 order, the child was placed in the care of her maternal grandfather. The father and mother exercised supervised access and were subject to conditions, including participating in drug testing.

[7] The protection finding was entered on August 2, 2017. The child continued to live in the care of her grandfather until November 3, 2017 when she was placed in the care of her mother. The father's access remained unchanged as did the conditions upon him.

[8] The father sought unsupervised access. The Department disagreed because protection authorities were primarily concerned that the father was using cocaine based on test results arising from three urine samples taken in April and July 2017. The father disputes the test results.

[9] A contested hearing was scheduled to resolve the issue. The hearing commenced on November 23, 2017 and continued on December 11, 18 and 19, 2017 and January 15 and 16, 2018. At times the hearing was adjourned because of disclosure issues. Although the hearing is ongoing, the evidence and submissions relating to the qualifications of Dr. Nassar were concluded.

[10] In its submissions, the Department asks that Dr. Nassar be designated as an expert in clinical, forensic and analytical toxicology. The mother supports this request. The father vehemently disagrees.

[11] Before providing my decision on the merits, I first dismiss the request to have Dr. Nassar qualified as an expert in clinical toxicology. Such a request is not relevant and would not assist the court. If Dr. Nassar was qualified as an expert in clinical toxicology, he could provide an opinion in a therapeutic setting. Child protection proceedings are legal, not therapeutic proceedings. Therefore, qualifying Dr. Nassar as an expert in clinical toxicology is neither relevant nor helpful.

[12] What the Department actually seeks is for Dr. Nassar to give opinion evidence about toxicology test results in this legal proceeding. Dr. Nassar stated that if a test is carried out for a legal purpose, it is a forensic test. Therefore, Dr. Nassar must be qualified as an expert in the field of forensic and analytical

toxicology to provide opinion evidence of the test results. Thus, this aspect of the Department's request will be the focus of my decision.

Analysis

[13] Has the Department of Community Services established that Dr. Nassar, the Director of the Toxicology Section of the Division of Clinical Chemistry, Nova Scotia Health Authority- Central Zone, is qualified to provide reliable opinion evidence in the field of forensic and analytical toxicology?

Position of the Department of Community Services and Mother

[14] The Department and the Mother state that the evidence confirms that Dr. Nassar is qualified as an expert in forensic and analytical toxicology for several reasons, including the following:

- A review of Dr. Nassar's CV and evidence confirms that he is "one of the top "experts" in the field of toxicology when dealing with the testing of urine to detect drugs."²
- Dr. Nassar's "expertise has come from years of study, practice and a continuing pursuit of knowledge and innovation in this field."³
- Dr. Nassar provided toxicology opinion evidence in child protection proceedings in the past, such as in **Nova Scotia (Minister of Community Services) v CP**, 2016 NSSC 46.
- The fact that the Halifax lab is not designated as a forensic lab does not detract from Dr. Nassar's knowledge base, nor does it compromise his ability to provide opinion evidence.
- Questions concerning the accuracy of the testing should not be considered at the qualification stage. Rather, such concerns relate to reliability and are properly addressed when assessing weight: **R v Mehl**, 2017 BCSC 1845.

² Page 7 of the Department's brief dated January 10, 2018.

³ Ibid; Page 7.

Position of the Father

[15] The father challenges the reliability of the test results and thus the qualifications of Dr. Nassar. The father argues that Dr. Nassar and the lab cannot be divorced from each other. He states that Dr. Nassar should not be qualified as an expert because of issues surrounding the reliability of the lab, which include the following deficiencies:

- The lab is not designated as forensic.
- The lab made no application to seek forensic status.
- The lab is not subject to external assurance monitoring.
- The lab is self-reporting and self-monitoring.
- Dr. Nassar admitted that his lab does not follow all international standards because, in his opinion, not all standards are relevant given the type and volume of work performed at his lab.
- Dr. Nassar was not qualified as an expert in forensic toxicology in **Nova Scotia (Community Services) v CP**, supra. To the contrary, Justice MacLeod-Archer specifically stated that Dr. Nassar had no training in forensic toxicology at para 60:

[60] The Minister began urine collections and testing in December, 2013. Eighty samples from C.P. were collected and tested by the Q.E.II lab up to October 27, 2015. Dr. Nassar, the Chief of Service for the Division of Clinical Chemistry at the Capital Health Authority was qualified as an expert in clinical and analytical toxicology by consent. He is a clinical toxicologist with extensive experience as a clinician. His C.V. reveals that he has taken special training in toxicology and therapeutic drug monitoring, tandem mass spectrometry, toxicology methodology, and addiction medicine, toxicology and therapeutic drug monitoring. He has no training in forensic toxicology and the Q.E.II lab is not certified as a forensic lab.

Law

[16] I disagree with the Department's position on the issue of reliability. The Department said that the reliability of the lab's testing should not be considered at the qualification stage of the analysis. I find to the contrary. Case law confirms that the reliability of proposed expert evidence is a pivotal question at the qualification stage. I will now explain my ruling.

[17] Admissibility of expert evidence involves a two-stage analysis. At the first stage, the court determines whether the four criteria set out in **R v Mohan**, [1994] 2 SCR 9 are present. At the second or gatekeeper stage, reliability is examined from two perspectives. First, reliability is germane when assessing the legal relevance of evidence: **R v Abbey**, 2009 ONCA 624, at paras 76 – 87 (Abbey No 1); **R v Abbey**, 2017 ONCA 640, at para 48 and endnote 4 (Abbey No 2). Second, reliability is a specific and distinct consideration in and of itself: **White Burgess Langille Inman v Abbott and Haliburton Co**, 2015 SCC 23, at para 24. Current law trends toward an emphasis on the gatekeeper stage of the analysis and a general tendency to tighten admissibility requirements: **White Burgess** at para 20; **Abbey No 2** at para 53.

[18] The **White Burgess** two-stage admissibility framework was summarized as follows in **R v Abbey** (No 2), *supra*, at para 48:

48 The test may be summarized as follows: Expert evidence is admissible when:

(1) It meets the threshold requirements of admissibility, which are:

- a. The evidence must be logically relevant;
- b. The evidence must be necessary to assist the trier of fact;
- c. The evidence must not be subject to any other exclusionary rule;
- d. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is:
 - i. Impartial,
 - ii. Independent, and
 - iii. Unbiased.
- e. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose,

and

(2) The trial judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as:

- a. Legal relevance,
- b. Necessity,
- c. Reliability, and
- d. Absence of bias.

49 In short, if the proposed expert evidence does not meet the threshold requirements for admissibility it is excluded. If it does meet the threshold requirements, the trial judge then has a gatekeeper function. The trial judge must be satisfied that the benefits of admitting the evidence outweigh the costs of its admission. If the trial judge is so satisfied then the expert evidence may be admitted; if the trial judge is not so satisfied the evidence will be excluded even though it has met the threshold requirements.

[19] In **Abbey No 2**, supra, the Crown attempted to adduce expert evidence respecting the meaning of certain tattoos worn by gang members. The unreliability of the expert evidence ultimately led the Ontario Court of Appeal to find the evidence inadmissible. In reviewing the significance of reliability at the gatekeeper stage, Laskin JA explained as follows at paras 112, 114 and 115:

112 A trial judge's gatekeeper role is crucial in ensuring that expert evidence is sufficiently reliable to be admitted into evidence. Under the test in *White Burgess* for the admissibility of expert evidence, "reliability" is an express factor the trial judge must consider at the gatekeeper stage; and reliability is a key component of the evidence's probative value and thus of another express factor, "legal relevance".

...

114 The trial judge as gatekeeper is engaged in a cost-benefit analysis. That analysis is applied to many areas of the law of evidence, not just the law governing the admissibility of expert evidence. For expert evidence, the trial judge must decide whether opinion evidence that meets the threshold requirements of admissibility should still be ruled inadmissible because the potential harms to the trial process from admitting it outweigh its potential benefits. Put the other way around and in familiar terms, the trial judge must decide whether the probative value of the expert evidence outweighs its potential prejudice: see *R. v. Bingley*, 2017 SCC 12, 345 C.C.C. (3d) 306 (S.C.C.), at para. 6, and *Abbey #1*, at paras. 76-79.

115 Expert evidence of dubious or questionable reliability has little probative value, and offers little benefit to the trial process. At the same time, evidence of questionable reliability risks distorting and prejudicing the fact-finding process: see Mohan, at p. 21.

[20] Criteria to be balanced when assessing reliability is varied and should involve factors applicable to the circumstances of the case and similar to those expressed by Doherty JA in **Abbey (No 1)** at para 119. Measures related to quality assurance and independent review are within the list of enumerated factors.

[21] In **Catholic Children’s Aid Society of Toronto v RM**, 2017 ONCJ 661, Sherr, J raised concerns about the admissibility of toxicology test results respecting urine samples taken from a father in a child protection proceeding. Sherr, J correctly noted that “judges should be vigilant gatekeepers at all stages of a protection case ...”: para 26. A decision on the admissibility of the test results was avoided because the Director withdrew the request to rely on the urine screen test results as reported in **Catholic Children’s Aid Society of Toronto v RM**, 2017 ONCJ 762, para 7.

[22] I will now address the decision of **R v Mehl**, supra, which was referenced by the Department to support its position. **R v Mehl** is distinguishable from this case. At para 51 of her decision, DeWitt-Van Osten, J specifically notes that she was not asked to exercise her discretion under the second stage of the analysis, that is the gatekeeper stage. Rather, her decision only focused on the **Mohan** criteria. In this case, the reliability dispute does not specifically target the **Mohan** criteria.

[23] After reviewing the law and the submissions, I conclude that the reliability issues identified in the present case must be considered at the qualification stage. If reliability has not been established, then Dr. Nassar’s opinion evidence has little probative value and must be excluded.

Decision

[24] I have carefully reviewed the law, the evidence and the submissions of the parties. I conclude that the Department did not establish that the proposed evidence of Dr. Nassar is reliable. Such evidence therefore must be excluded at the gatekeeper stage of the analysis. I reach this conclusion for the following reasons:

- I cannot assess Dr. Nassar’s credentials independently of the Capital Health Authority’s toxicology lab. Dr. Nassar’s opinion is based on the reliability of the lab’s testing process and test results. The results from

the toxicology lab are the foundation of Dr. Nassar's opinion. The lab's test results and Dr. Nassar's opinion are intertwined – indeed they are as one. Dr. Nassar's qualifications must therefore be assessed in conjunction with the toxicology lab that he directs and from which the toxicology results were garnered.

- The Capital Health Authority's toxicology lab is not designated or certified as a forensic lab. It is a clinical lab. Although not necessarily fatal, the lack of a forensic designation or certification is nonetheless a factor to be considered when determining reliability.
- While Dr. Nassar appreciates the value of a forensic designation, the Capital Health Authority has not filed an application to have its toxicology lab certified as a forensic lab. Indeed, I am left with the unfortunate impression that such an application is little more than a dream or desire on the part of Dr. Nassar.
- The Capital Health Authority's toxicology lab is not subject to external proficiency testing or outside agency oversight. External proficiency testing and oversight would provide independent assurance that the toxicology lab is free from either random or systemic error that can lead to flawed test results.
- External proficiency testing is analogous to peer review. Its absence causes the court to tread cautiously.
- Little comfort is drawn from the fact that the Capital Health Authority's toxicology lab is subject to Accreditation Canada. When pressed, Dr. Nassar could not recall anyone from Accreditation Canada ever inspecting the toxicology lab. There is no oversight from that body.
- Little comfort is drawn from the fact that the Capital Health Authority's toxicology lab participates in quarterly survey testing arranged through the College of American Pathologists for two reasons. First, the following caution is found in each of its reports: "The College of American Pathologists recommends that the result of this interim laboratory comparison not be used as a sole criterion for judging the performance of any individual clinical laboratory." Second, the Capital Health Authority's toxicology lab made errors when completing the surveys. For example, in 2015, two of the four surveys resulted in an

unacceptable rating. In 2016, one of the four surveys resulted in an unacceptable rating. In 2017, one of the four surveys resulted in an unacceptable rating.

- Little comfort is gleaned from the fact that the Capital Health Authority's toxicology lab employs internal quality controls with each testing. Internal quality control, although an important check, is not a substitute for external proficiency testing.
- Dr. Nassar's self-serving statement that the Capital Health Authority's toxicology lab is following international standards is insufficient evidence of compliance for three reasons. First, Dr. Nassar cannot provide an objective or independent assessment about his own lab. Second, Dr. Nassar has not actively or recently investigated the status of the international standards, including whether they were recently updated or modified. Third, Dr. Nassar admitted that the Capital Health Authority's toxicology lab adapted certain standards to suit the needs of the lab based on the volume and type of work that the lab performs. Having made such adaptations, Dr. Nassar is not in a position to objectively and independently determine if such adaptations meet international standards.

Conclusion

[25] Dr. Nassar presented as an intelligent and well-intentioned professional. Intelligence and good intentions do not, however, necessarily yield reliable expert opinion evidence. Reliability of opinion evidence can only be established after a thorough assessment of the witness' credentials and in keeping with expressed legal principles. Such an assessment is especially critical in the context of a protection proceeding where a child's best interests, including her physical, psychological and emotional well-being, are being ascertained.

[26] In this case, after carefully assessing the evidence, I find that Dr. Nassar's opinion, respecting the toxicology lab results, is not reliable where the lab is not designated as a forensic lab, where the lab is not subject to external proficiency testing or oversight, and where the lab's adherence to international standards is uncertain. Dr. Nassar is not qualified as an expert in forensic and analytical toxicology; his opinion evidence must therefore be excluded.

[27] Mr. AuCoin is to draft and circulate the order. It is to be prepared by February 21.

Forgeron, J.