THE ROLE OF THE MENTAL HEALTH EXPERT WITNESS IN FAMILY LAW DISPUTES

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It is with some trepidation that I speak to this gathering, knowing full well that you have all had extensive experience dealing with expert witnesses, and further, that over the years you have developed some pretty strong ideas about their potential. You have seen them at their best; you have seen them at their worst. You have found their contributions to your tasks invaluable; you have found others to be woefully inadequate, or of no help whatsoever to you in rendering your decision.

There are many difficulties confronting mental health experts in the field of family law, or other types of law, for that matter. Many are discussed in Seymour Halleck's excellent recent book, Law in the Practice of Psychiatry. He mentions our reluctance to be questioned, or moreso, to be criticized; and especially, to be vilified. In adversarial situations, many psychiatrists resent having to "defend" their views, to be subjected to cross-examination. They don't want their credentials doubted, their healthy remuneration mocked, and their motivations suspect.

Psychiatric testimony is often replete with quasifactual statements, jargon and conjecture. This is not an inevitable aspect of our writings and presentations, but it is too often the rule rather than the exception. The Expert Witness does not want his "facts" to be questioned; and he certainly may fear that his inferences may be seen as tenuous and based on fragmentary data. Psychiatry theory is still far from being an

exact and hard science, which further serves to undermine the psychiatrist's confidence, and make him or her prey to a critical observer. He does not want to become an apologist or defender of his "faith"; nor does he often feel comfortable having to define terms which are commonplace in his practice, but do not clarify the meaning for the judge or opposing attorneys. Finally, many psychiatrists have a poor understanding of the particular law under which they are operating or testifying. In short, psychiatrists are often seen as "sitting ducks" by lawyers who wish to discredit their findings or their expertise.

But much of this is correctible. An expert witness should be humble, and not afraid of judicious questioning. Arrogance and pomposity will serve no one's cause, least of all the expert's. He needs to do an exhaustive examination of his client(s); he should be familiar with all the facts, such as they are available, and make certain that there is a clear distinction in his report and testimony between what is known absolutely, and what involves bias, intuition, suspicion, conjecture, and personal values and morality. He should not only be aware of but freely admit to the limitations of his expertise, and not be upset when alternative possibilities are put forth.

I say all this to make the point to ourselves, to psychiatrists, and other mental health professionals, that this is a specialized kind of work, and not everyone is comfortable with it, or adept at it. But for those who wish to be engaged in the role as the expert witness, there is ample reward for making a major contribution to the legal process and to the patient's or client's interests. All of the caveats just alluded to can be overcome to a large extent. But the point is also being made to

you, as judges, as "beneficiaries" of our expertise: Know enough about the expert witness to satisfy yourselves that his report to you can be accepted with confidence. This does not of course mean binding acceptance of the expert's communication, nor does it imply that significant and penetrating questioning should not be done. It does mean "Buyer Beware", and that you must examine carefully the report and testimony, and from whence it comes.

There is yet another area which muddies the watters of the expert witness (in this case psychiatrist) and his relationship to the family law process and protagonists. This is the remarkable insensitivity and ignorance prevalent in the two communities (legal and psychiatric) about the nature of the work, the philosophical framework, and the vested but honourable interests of the other group. This was never brought to my attention as blatantly as recently in Toronto, about six months ago. A group of lawyers from the Ontario Ministry of Community and Social Services put forth a discussion document having to do with Child Advocacy as it pertains to certain aspects of Family Law, in this case having to do with the response of the (potential) expert witnesses. The psychiatric reaction was so vehement and vitriolic, that it defied imagination. It impugned the motives, the sensitivity and the intelligence of the writers of the document. It attacked without any due regard to the issues involved (like the rights of the child in treatment, or the rights of his family). The report was seen in almost a conspiratorial light, as if it were designed to specifically undermine the therapeutic work of mental health professionals.

The response of the family lawyers was predictably one of bewilderment and fury. They felt that psychiatrists (especially) infringe upon the civil liberties of their patients, do not serve as objective advocates for the child, be it vis à vis their families, or agencies and institutions. A rebuttal was being prepared by the lawyers -- to refute the formal response of the mental health experts -- and its tone was no less provocative and insulting. Since I knew a couple of the involved individuals from each camp, so to speak, all delightful people by the way, I was able to arrange a meeting between the six principal adversaries.

The result was salutory; each side came away with a much better understanding of the goals of the other. Each recognized that they could work together to accomplish disparate but not mutually exclusive goals. Child advocacy does not by definition become anti-psychiatry; psychiatry does not inherently preclude advocacy; children's rights do not by definition undermine the psychotherapeutic process; psychotherapy does not inherently abrogate the rights of children. Simple, you say? Common sense? I want to tell you that while the level of discourse was lofty and complex, the bottom line concerns were as I have outlined them -- mundane and myopic.

That is to say: until such time that we become much more familiar with each other's work, frame of reference and language, we shall continue to have such imbroglios. Right now the teaching of legal issues in psychiatry is woefully inadequate. It is true that we are gradually moving away from restricting ourselves to the definitions of the Durham and McNaughton rules, and starting to discuss issues like custody and access, but we have a very long way to go. The material is not at all covered

during medical school, and is barely touched on during psychiatric residencies, except in special circumstances. I am not acquainted with the amount of time that law students take to study the work and philosophy of psychiatrists, but I have my doubts. Most of what is learned in both professions occurs after the practice has begun, and what points of view develop depend on the perspicacity, the personality, the interests, and above all, the experiences of the practitioner. What appears to be most beneficial is to have the lawyers work with the mental health professionals on many of their cases. This invariably leads to an empathetic understanding of the other discipline's goals and frames of reference.

I don't have to acquaint this august audience with the inherent difficulties involved in applying the adversary system to cases as sensitive as those involving custody of children. You have all been witness to the phenomenon of children being used as chattel, as pawns in a grotesque and passionate battle between two (even) well-meaning adults who are in pain, who feel that they have been wronged by the other, who genuinely feel that the children would be better off in every way, but especiallyemotionally, under their guardianship, as opposed to their estranged spouse's. Indeed you have often been party to the torment and torture involved, merely by virtue of your ultimate authority in rendering a decision.

And it is not necessary to impugn the motives of the litigants; it is unnecessary to ascribe malevolence or immaturity or incompetence or irresponsibility, or even insanity to the combatants. Certainly, these circumstances do occur more than occasionally. But the court -- and expert witnesses -- can usually ascertain the deviousness, destructiveness,

or illness of one or other of the spouses in these cases. No, the adversary system hits hardest at the "average", non-disturbed, competent, caring individual. For we have our greatest difficulties in assigning preference to one parent over another when they are equally nurturant and responsible and conscientious. It is here that the adversarial system has its greatest limitations -- and liabilities.

Rather than attenuating the conflict, the antiquated system perpetuates and even accentuates the struggle. The lawyers, as progressive and benevolent as they may be, are there exclusively to serve the requirements of their own clients. The mental health professionals they hire for the express and entirely understandable purposes of furthering their own cases, become in fact their expert witnesses co-opted to the cause.

But what about our hallowed profession, Psychiatry? As Goldstein, Freud and Solnit have stated clearly in both their books (Beyond the Best Interests of the Child, and Before the Best Interests of the Child), and as has been shown in many studies, there is phenomenal unpredictability in the lives of the children for whom we provide the court (or others) with assessments and evlauations. Forthermore, our reliability, that is, the degree to which two similarly trained and experienced clinicians agree on the present, and especially on future outcome, is appalling low. That being the case, it is perhaps wise for the court to avoid blind faith in or the wholehearted acceptance of the validity of the reports of expert witnesses.

The Expert Witness

Who is he (she)? Is the expert witness an individual who is dedicated to or at least aware of the principles enunciated in Goldstein's et al book Beyond the Best Interests of the Child? Does s/he feel that continuity of relationships is of paramount importance? Does s/he realize that creating schisms in relationships often has short term and long term deleterious effects? Is s/he aware that a state of ambiguity is one of the most destructive to a child's (or adult's) stability, that decisiveness is far better than procrastination for all concerned? That a child's -- especially a young child's -- sense of time is far different from an adult's? That all deliberate speed, and a sense of urgency should be a motivating force in the deliberations, and that they should take place separate from the contested divorce proceedings? Is he knowledgeable about the different reactions and perceptions inherent at each stage of development and maturation of the child, and that brief and temporary separation can be seen as permanent and devastating to a young child?

Is our expert witness dogmatic? Is he the psychosocial equivalent of the gendarme? Does he see his role as maintaining present social and moral values? Is he aware of the limitations of his science or art? To quote from Beyond the Best Interests of the Child (p. 51):

> "We can predict that the adult most likely suited for this role is the one, if there be one, with whom the child has already had and continues to have an affectionate bond rather than one of otherwise equal potential who is not yet in a primary relationship with the child. Further, we can

> predict that the younger the child and the more extended the period of uncertainty or separation, the more detrimental it will be to the child's well-being and the more urgent it becomes even without perfect knowledge to place the child permanently.
>
> Beyond these, our capacity to predict is limited. No one -- and psychoanalysis creates no exception -- can forecast just what experiences, what events, what changes, a child, or for that matter his adult custodian, will actually encounter. Nor can anyone predict in detail how the unfolding development of a child and his family will be reflected in the long run in the child's personality and character formation."

Does he apply, in his recommendations to the court, or to agencies, the criterion of the "Least Detrimental Alternative"?, taking into account some of these principles, and acknowledging in fact that the "Best Interests of the Child" have long since been denied the particular child in most of the cases. Is s/he cognizant of the inevitability of pain to (usually) more than one individual as a result of his recommendations? That suffering is a sine qua non of schism?

Is he an expert in name only? Is he truly familiar with the voluninous and often conflicting literature? Is he "up" on the latest research findings (of which there is a pathetic dearth), which might force him to reassess his thinking? Is he open to change his mind, not to impose à priori his theory and dogma? Is he aware that what is "factual"

in our field today, is often heresy tomorrow? Is he dedicated to the preservation of the traditional family above all else? Does he know about the growing data on the success of all kinds of alternative families?

Why is he pursuing this line of work? Does he enjoy the fray, the combativeness of litigation? Is he a lawyer in drag, or a mercenary? Does this line of work enable him to exercise his exhibitionistic needs (in court), or afford him an affluent life style, because of its lucrativeness? Is he a social reformer, a do-gooder, a crusader?

What all of these questions are pointing to are the potential limitations of the role of the expert witness in family court proceedings. The court should have confidence, based on satisfactory answers to these questions, that the expert is knowledgeable and skilled, well-read and open, interested and committed to both the welfare of his patients or clients and the cause of justice. The issues are so complex and vital that the Family Court cannot accept anything less than excellence in this type of work. And even with the best of expert witnesses, the judge should have at her (his) disposal, corroboratory or supportive (or conflicting) reports -- from schools, daycare centres, doctors, etc -- in order to render a decision.

Goldstein, Freud and Solnit have made a major contribution to family law with their two cooperative volumes. It is the second one, Before the Best Interests of the Child, which addresses the issue of State Interference in the family unit. Their first book (Beyond the Best Interests of the Child) looked largely at grounds and mechanisms for the placement of children and adolescents in care, without regard to the possible undue role of the court in decimating families. But

even their latest publication, in sequencing the stages of possible court involvement as Invocation, Adjudication and Disposition, would still require litigation in a large number of cases.

There are certain instances of an expert witness being utilized in a case in which no conflict or controversy arises. His task is then straightforward and the judge will make a decision taking into account all information, the expert witness's being only one such document. But many cases are not subject to the agreement of all parties. Many circumstances arise in which the will and needs of one individual are diametrically opposed to those of another. Husbands versus wives, parents versus offspring for the custody of grandchildren, adoptive or foster versus biological parents, children versus parents, the state versus parents -- the permutations and combinations are endless.

In these situations, can litigation be avoided? Or, at the very least, can the children be protected (paradoxically), from the very process which is supposed to provide for their well-being, for their "health and happiness" (as the least detrimental alternative used to be called). I'm afraid that sometimes not. I have seen, as have you, the best intentioned, most psychologically sophisticated individuals who are well aware of the deleterious effects on children of prolonged, bitter custody disputes, enter into negotiations somewhat amicably or at least amenable to mediation, and eventually end up in a no-holds-barred battle. Two cases which are most indelibly stamped in my mind personally involved internationally-known experts in this very field. In these cases, the children are the victims.

The University of Toronto Division of Child Psychiatry, has a Child Custody Project, (for disputed Custody and Access cases), in which trained members of our faculty assess the global domestic situation with the permission of both attorneys, having access to all litigants and children, and make their report directly to the judge. The report is obviously not binding, nor are the psychiatrists in the employ of either side in the dispute. It is interesting that only one-third of the Family Court judges availed themselves of this service. The average time taken to complete the assessment was thirteen weeks. In the Family Court Clinic sample approximately 50% of mothers and fathers had a previous history of contact with a mental health professional (out-patient department). Similarly, the Official Guardian has a staff of social workers who do similar, albeit more descriptive and less exhaustive analytic work, in various communities throughout the province. Whether or not this system "works" is as yet not known. The prospective monitoring and research results are not yet available. We want to believe, but we don't know.....

We don't know if the disputes are settled more quickly or "cleanly"l we don't know if the children suffer less as a result; we don't know if the short term and long term effects on them are any different; we don't know if the judges in these situations are helped or hindered, although most tend to accept the mental health worker's recommendations. Ruth Parry, the Director of the Family Court Clinic has stated that the "best" (brightest, knowledgeable, interested, concerned, fair, etc.) judges have a much lower "acceptance" rate than do those with less "on the ball". Depending on the series, the acceptance rates very from 30 to 95%!

Aside from the personal and professional characteristics of the psychiatric expert witness, there are major clinical conundrums which confront him, especially in disputed custody and access cases. While the judge must make the final decision, s/he will rely heavily on the report of the clinician, who has had an opportunity to intensively assess the problems which led to the family breakdown, and which serve to perpetuate the bitter struggle involving the children.

He will of course be interested in the mental state of all the family members, on a long term basis, as a developmental issue (for the children), and certainly in terms of their response to the most recent potentially devastating stress. He will attempt to evaluate the prior and present quality and intensity of the relationships between the children and each parent, a most difficult task to accomplish. S/he will try to ascertain three types of motivation of adversaries -- the overt, publicly stated, legalistically committed one; the hidden agenda, covert desire for retribution or infliction of a modicum of pain; and the unconscious, the neurotic needs and conflicts being fulfilled by the dispute. The psychiatric expert witness will interview <u>each</u> family member in an attempt to accomplish this goal with the parents and their children. S/he would try to learn about their preferences, their stated (and unstated) reasons, their past experiences and future aspirations, and their level of competence or maturity for making their decisions, and their emotional stability. Essentially, who will be the better parent? How should division of time be accomplished? Most importantly, where will the child be best off? -- physically and emotionally (first and foremost), intellectually, and economically, etc. Issues such as stability, nurturance, limit-setting, stimulation, consistency etc will have to be considered.

These and other questions will be answered to varying degrees of satisfaction of the expert witness and the judge. These two individuals, especially the latter, then have an enormous responsibility to make the "right" decision. It is an onerous task, frought with the possibilities of making a major mistake. While alacrity is of utmost importance, corroboration of one's views supersedes that. The issues and choices are of such momentous significance that humility demands some degree of patience.

In my own experience, most expert witnesses and Family Court Judges take their work extremely seriously. They are usually cognizant of the tremendous responsibility that they carry in offering their opinions on issues as sensitive and crucial as where and how a particular child will live, for example. There is no doubt that the decision will affect that child's life in a major way.

Thus, while I am pleading, as I have heard Family Court Judges do, to use external, unbiased, skilled professional expert witnesses as often as possible in these disputed cases, I am also urging the judiciary to be painfully aware of that witness's limitations. The "State of the Art" is still evolving.

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