

PSYCHOLOGICAL AND PSYCHIATRIC EVIDENCE
IN CIVIL LITIGATION
PAPER 5.2

Retaining the Psychological or Psychiatric Expert

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RETAINING THE PSYCHOLOGICAL OR PSYCHIATRIC EXPERT

I.	Introduction	1
II.	Identifying the Correct Expertise	1
	A. Psychological and Psychiatric Expertise	1
	1. Psychiatrists.....	2
	2. Psychologists	2
	3. Neuropsychologists.....	2
	B. Other Expertise to Consider.....	3
III.	Retaining the Expert.....	3
	A. Identify the Purpose	3
	B. Identify the Best Expert	4
	C. The Ongoing Relationship with the Expert	5
	D. What to Send to Your Expert and When	5
	E. Whether to Request a Preliminary Opinion	6
IV.	Conclusion.....	6

I. Introduction

If you are acting for a plaintiff or a defendant in a case which involves issues of head injury or psychological condition, it is likely you will likely need the assistance of an expert. The purpose of this paper is to briefly outline the different types of expertise available to assist counsel and provide some practical tips on how to engage and instruct those experts. Personal injury litigation is often won or lost on the basis of expert evidence so it is critically important to retain and properly instruct the correct expert.

II. Identifying the Correct Expertise

A. Psychological and Psychiatric Expertise

The first step to assemble the expert evidence in a case which involves psychological or psychiatric issues is to locate the appropriate expert. Where do you start? The following is a brief description of the potential experts and some of the considerations that I have in retaining them. Undoubtedly, other lawyers have very different approaches. This underscores how necessary and important it is for junior counsel to seek guidance from more experienced counsel when they are begin to engage experts in this area.

1. Psychiatrists

A psychiatrist is a physician with an expertise in the identification and treatment of mental disorders. As a medical doctor, they have the ability to prescribe medication, which psychologists do not.

My personal preference has always been to retain a psychiatrist any time there are serious psychological issues involved in a case, particularly where there is controversy in either the diagnosis or causation of the condition. I look to retain a forensic psychiatrist which is, in my simple understanding, a psychiatrist who has a subspecialty in the interface between law and psychiatry. For a more in depth understanding, I commend to you Dr. O'Shaughnessy's paper, The Forensic Psychiatric Assessment prepared for the February 2003 CLE, Experts in Personal Injury Cases.

I also believe that a forensic psychiatrist should be considered to assist counsel in any mild traumatic brain injury ("MTBI") case even where a neurologist has opined that there is brain injury. There can be significant interplay between the brain damage and psychological issues in MTBI cases and a psychiatrist can assist in sorting out what symptoms relate to the brain damage versus psychological factors such as depression, anxiety, etc. Accordingly, MTBI cases often require counsel to retain multiple experts (i.e., neurologist, psychiatrist and neuropsychologist).

2. Psychologists

Frankly, my experience with clinical psychologists as experts is somewhat limited, largely because I tend to match expertise with expertise. Thus, if plaintiff's counsel has retained a psychiatrist, that is the expert I want in my corner. I have commissioned helpful and persuasive reports from psychologists in personal injury cases, particularly, in the sexual abuse area where certain psychologist have a wealth of expertise and can devote the necessary time to review volumes of records. Psychologists can also administer tests which have some measure of the level of depression, anxiety, etc. being suffered by a person.

It is important to be aware of the area of practice of the psychologist as there are a number of helpful sub-specialties such as, academic psychologists, vocational psychologists or neuropsychologists.

3. Neuropsychologists

Neuropsychology is a branch of psychology that is the study of the structure and function of the brain related to specific psychological processes and behaviour. It is important to understand that not all psychologists are truly qualified neuropsychologists.

A neuropsychologist is usually retained to identify cognitive difficulties or any kind of diminution of mental functioning through a battery of tests, analysis of medical, academic and vocational records and interviews of the plaintiff, and, typically, other collateral witnesses. The testing can identify specific cognitive weaknesses but it is not definitive as to the cause (i.e., whether it is the result of MTBI or psychological dysfunction).

In my opinion, it is imperative that a neuropsychologist be retained in any case of allegations of MTBI. I retain a neuropsychologist in a MTBI case in addition to a psychiatrist and a neurologist. If you are acting for a plaintiff, that means, retaining the neuropsychologist to examine your client and produce a medical legal report upon which you will rely to prosecute the claim. If you are acting for the defence, that means retaining the neuropsychologist and choosing one of two courses. The first course is to retain the neuropsychologist solely for the purpose of reviewing and analyzing the raw data generated by the testing conducted by the

plaintiff's neuropsychologist. The neuropsychologist can help you understand whether the testing was done accurately, interpreted correctly and ultimately supports the opinions of the plaintiff's expert. They can provide you with ammunition for cross-examination if the matter proceeds to trial. The second course is, in addition to reviewing the raw data, you have the defence neuropsychologist conduct their own neuropsychological examination of the plaintiff. There can be advantages such as the testing may reveal inconsistencies or tests which address effort can be administered. There can be disadvantages in that further testing might merely demonstrate dysfunction without adding further insight into cause. It is always important to seek guidance from your neuropsychologist on whether they believe testing would be insightful or productive.

B. Other Expertise to Consider

There are a number of other experts to consider retaining if acting on a case in which there are issues of a psychological or psychiatric nature. For example, very briefly:

- Neurologist—a physician that specialize in the identification, diagnosis and treatment of neurological disorders including head injuries, etc.
- Neurosurgeon—a physician that specialize in conducting surgery to treat disorders of the central and peripheral nervous system.
- Otolaryngologist—a physician with expertise in, *inter alia*, the vestibular sensory system and often diagnose causes of dizziness.
- Neuroradiologist—a subspecialty of radiology that utilize CTs and MRIs to diagnose abnormalities in the head or spine.
- Psychiatrist—a physician that specializes in the rehabilitation of individuals who have suffered impairment from injury or illness.
- Pharmacologist—expertise in the interaction of medication and brain function, side effects of drugs, etc.
- Vocational consultant—expertise in the assessment of an individual's employability.
- Occupational Therapist—expertise in identifying an individual's needs for care as a result of impairment.

III. Retaining the Expert

A. Identify the Purpose

There are two basic roles that experts, such as psychiatrists or psychologists, can play in litigation. The first is to assist counsel to identify the issues in the case that must be met and to prepare counsel for cross-examination of the opposing side's experts; at times, the expert's role is limited to that capacity. The second is to provide an expert opinion upon which counsel will rely at trial.

It is important for counsel to turn their minds to the purpose for which they retain a psychologist or psychiatrist, albeit that the initial role may evolve over the course of the retainer. Once counsel has in mind the role that they want their expert to play, it is important to communicate that role to the expert. In doing so, counsel should explain the difference between the two roles and instruct the expert to maintain separate files in respect of the two roles. That way, only the file that relates to the opinion upon which they testify at court will be produced at trial.

B. Identify the Best Expert

Once you have identified the particular expertise required, there are a variety of sources to which you may resort to find just the right expert for your case. Those include:

- Other lawyers—senior counsel with expertise in a particular area are a wealth of information and typically happy to share their knowledge. This is always my starting place—in fact, I usually canvass two or three lawyers and see whether there is a consistent top choice.
- Your experts—the treating physicians or the other experts you have already retained on the file can be excellent sources.
- Recent judgments—by searching the latest cases on a particular condition or issue you can identify the experts who testified and whether their opinions were persuasive or not. It can be informative to follow up with the lawyers involved in the case for further information about the experts (i.e., whether they were accessible, whether they withstood cross examination, whether they were unfairly criticized).
- Search the Listservs—both the Trial Lawyers Association of British Columbia (“TLABC”) and the Canadian Defence Lawyers (“CDL”) have Listservs on which you can broadcast a request for information, whether that is to identify experts or for counsel’s experience with an expert you are contemplating retaining.
- Expert banks—TLABC has one.
- The medical literature—search to see who has published in the area of interest to your case.
- The internet—sometimes googling the particular condition can generate information about expertise.
- Continuing legal education seminars—many experts speak at seminars presented by CLE, TLABC, CDL, Insight, etc. If your potential expert is someone who is generous with their time, you will want to know whether they have made a presentation which might be inconsistent with an opinion you expect they will provide. This is one of the first sources I go to when I prepare a cross-examination of an expert.

After a potential candidate has been identified, there is no substitute for picking up the phone and calling that expert to talk to them about whether he or she is, in fact, the right choice. Some experts are happy to chat on the phone. A phone call will allow you a chance to get a feel for them. Will he or she make a good witness? Will he or she be approachable if you need help in preparing your cross-examination of the other experts or any other assistance in conducting the case? You might gain insight into how he or she will approach the particular issues in your case. At the very least, if the expert is not the right person for the job, he or she might be able to steer you in the direction of the right expert.

You should obtain a potential expert’s curriculum vitae. Doing so is as easy as having your assistant call that expert’s office and asking for a copy of his c.v. Once in hand, scrutinize it. The c.v. will help identify whether he or she has the particular experience or whether his or her practice is in some other unrelated area.

It is also important to know what your potential expert does on a day to day basis. Do they have a clinical practice? An expert that is semi-retired and only does medical legal work is someone that you should probably shy away from retaining. You want an expert that has day to day practical real experience in the area, not someone who is going to look like a hired gun.

Most experts will not take offence at being asked about their practice or expertise. Do they keep up with the literature? You might gain insight into this by asking whether he or she can suggest reading you can do to understand the psychological condition or so that you can better instruct them regarding their opinion.

C. The Ongoing Relationship with the Expert

Retaining an expert can be intimidating, particularly if you are starting out in practice and have not had much experience in doing so. I encourage you to use every chance to talk to your expert. It never ceases to amaze me how often I learn something helpful to my case purely by accident because I had a conversation with my expert. The more contact you have with your expert the more opportunity there is for information to be passed to you. I do not suggest badgering your expert with phone calls, but there are logical opportunities for you to have conversations with your experts. When the opportunity arises, call your expert.

The more you speak with your expert the more opportunity there is to develop a rapport. At the end of the day, you may end up in a courtroom having to lead evidence from your expert. It is likely that both of you will do a better job if you are comfortable with each other.

D. What to Send to Your Expert and When

It is particularly important when you retain a psychologist or psychiatrist, that you have an understanding of the information you need to provide so that he or she can properly form their opinions. Accordingly, having a preliminary discussion with the expert can be helpful to identify the documents and facts that will be relevant to a psychologist or psychiatrist. It is not always obvious what is necessary to conduct a psychological or psychiatric assessment in the medical legal setting.

For example, if the matter concerns whether the plaintiff suffered a MTBI, there are a number of records that are vital for counsel to provide to their experts. They can include:

- Ambulance crew report that show the level of consciousness or confusion at the scene.
- Police records, including the attending officer's notes, that might show the level of consciousness or confusion at the scene or later if the plaintiff was interviewed at the hospital.
- Hospital records.
- The plaintiff's statement to ICBC in which the plaintiff often describes his or her level of consciousness or confusion immediately after the accident.
- Before and after academic records.
- Employment records.
- Psychological or psychiatric clinical records.
- MSP and pharmanet records.
- Criminal record search.
- Collateral witness' evidence.
- Portions from the transcripts of the examinations for discovery.
- Any surveillance that has been conducted.
- Any diaries.
- Relevant social networking cites such as Facebook.

Not only is it important to know what to send, but also what not to send. It may be unnecessary for every clinical record detailing the plaintiff's physical injuries be forwarded (e.g., every chiropractic or physiotherapy entry). You don't want to waste your expert's time by having them sift through unhelpful piles of paper. Thus, it is important for you to know what your expert needs so that he or she can properly address the issues in your case.

Different practices have developed amongst both experts and lawyers regarding how information from collateral witnesses is shared. Some psychiatrists or psychologists prefer to conduct interviews of the collateral witnesses themselves; others prefer to receive summaries of that evidence. Some lawyers have strong opinions about whether they identify the collateral witnesses and their evidence for their experts. Some prefer to leave it entirely up to the expert. Whatever your practice, you need to ensure that it is coordinated with the expert.

You should also turn your mind to the timing of when you forward certain information to your expert. If, for example, you are acting for a plaintiff, you may not want to provide your expert with the defence psychiatrist's opinion until after your expert has prepared their opinion. To do so otherwise, runs the risk of your expert relying upon the defence opinion and you having to prove that opinion at trial as part of your case.

Whatever your practice, it is important to ensure that by the time you go to trial your expert has all of the relevant information in their hands, good and bad, so that they are properly prepared to defend their opinion. That means providing your psychologist or psychiatrist with all of the opposing side's expert opinions or any other relevant information or documents that have come to your attention since your expert prepared their opinion.

E. Whether to Request a Preliminary Opinion

You may want to consider providing a psychologist or psychiatrist with some preliminary information and requesting a preliminary report back from the expert. Those preliminary discussions will provide you with a sense of whether this is the expert for you, regardless of whether the opinion is helpful. It can also allow you to determine what documents or facts will be relevant to the expert's opinions.

Once your psychologist or psychiatrist has conducted their examination (or you have requested a report from a treating practitioner) it is, in my opinion, a matter of good practice to speak with the expert before they finalize their medical legal report. There are a number of reasons for doing so. First, it is important to ensure that the expert did, in fact, have all of the relevant information. It is possible for an expert to learn of other relevant records during the examination, and in those circumstances, you should obtain and deliver those to the expert. Second, you may realize that you have other evidence you had not previously realized was helpful. Third, you may be able to narrow or tweak the issues for the expert. Lastly, it may avoid the expense and disappointment of an unhelpful report.

IV. Conclusion

There is a fair bit of detective work necessary on the part of counsel to identify the right expert for a particular case and to ensure that the correct information is forwarded to allow the expert to develop informed opinions. If you make the effort your client will, hopefully, reap the benefit of a well prepared and persuasive expert report. Cases can be won or lost on the expert evidence.