

# Defending a Pediatric Death Case: Problems and Solutions

## A Research Paper for the Inquiry into Pediatric Forensic Pathology in Ontario

Christopher Sherrin<sup>\*</sup>

What, if any, obstacles does an accused person in a pediatric death case confront in seeking to test and contest the forensic pathology evidence adduced by the Crown? That is the question that I address in this paper.

Many obstacles may arise in a particular case but the available evidence suggests that, in general, the obstacles are primarily practical rather than legal. In other words, it is not legal rules per se that create obstacles so much as prosaic difficulties relating to money, education, and the like.

---

<sup>\*</sup> Assistant Professor, Faculty of Law, University of Western Ontario. I wish to acknowledge the valuable contribution of my research assistant, Bethany Howell, as well as the helpful guidance of the Inquiry's Research Director, Kent Roach. The opinions expressed are my own and do not necessarily represent those of the Commission or the Commissioner.

Defence counsel are not always well equipped, either by training or inclination, to subject forensic pathology evidence to serious scrutiny. Assistance from relevant experts is often necessary but not always readily available or fully funded. Pathologists assisting the defence are often at a disadvantage, relative to pathologists assisting the Crown, by virtue of not being present at or in control of the original post-mortem examination. None of this is to say that more formal legal rules have no impact; on the contrary, some are in need of revision. It is simply to say that the primary obstacle facing an accused person in a pediatric death is that she<sup>1</sup> may not be assisted by a scientifically well-trained lawyer who is able to draw upon the well-funded expertise of others as required.

This paper is broken down into six parts. Part I discusses the methodology of research and the scope of the analysis. Part II discusses the capacities of defence counsel to test and contest pathology evidence. Part III addresses the extent to which pathologists are available to assist the defence and are adequately funded by Legal Aid. Part IV analyzes the disadvantages faced by “defence” pathologists relative to “Crown” pathologists.<sup>2</sup> Part V

---

<sup>1</sup> In order to avoid cumbersome use of both the masculine and feminine pronouns, and to ensure that both men and women are clearly included in the analysis, I will simply use the feminine pronoun unless the context requires otherwise.

<sup>2</sup> In referring to “Crown” and “defence” pathologists I do not mean to imply that pathologists are aligned with either the defence or the prosecution (although that may sometimes be the case). The terms are simply convenient shorthands to refer to

discusses the challenge of effectively cross-examining pathologists and a few reforms to the trial process that may assist in overcoming that challenge. Part VI contains a brief discussion of the ethical responsibilities of defence counsel faced with an innocent client who, perhaps daunted by the challenge of contesting pathology evidence, wants to plead guilty. At the end of each section proposals for reform are summarized.

## **Part I: Methodology and Scope of Analysis**

### **a) Methodology**

The information contained in this paper was obtained in part from a search and review of the relevant legal and medical literature. Not a lot of literature was located— especially not specifically in relation to pathological evidence in pediatric death cases—but enough was found to allow for meaningful discussion of many of the relevant issues. In situations where I was not able to obtain sufficient information on a particular point I attempted to

---

pathologists who are, in a particular case, assisting one or the other party. In order to ensure that my meaning is understood I will always use quotation marks when using the terms.

supplement the available literature with oral and written communications with knowledgeable individuals. So, for example, I spoke to several forensic pathologists who had experience assisting the defence in criminal cases,<sup>3</sup> representatives of Legal Aid Ontario,<sup>4</sup> and even a few experienced Ontario defence counsel.<sup>5</sup> None of these “interviews” were conducted in a systematic way, and I have been mindful not to rely too much on what any one individual had to say. But where broad consensus was found, interesting patterns emerged, or someone was able to speak on behalf of a relevant organization, I felt justified in relying on or at least mentioning what these individuals had to say. Without question, more systematic and organized survey research, especially of defence counsel, would have been of greater use. However, time and resources did not allow for it for the purposes of this paper.

---

<sup>3</sup> Specifically, I spoke to Drs. Chitra Rao, Peter Markesteyn, Iain Young, William Halliday, David King, Michael Shkrum, David Ramsay, and John Butt. I should point out that all of these individuals were most generous with their time and of immense assistance to me in my task.

<sup>4</sup> My main contacts were with Tom LeRoy, Director of Big Case Management, and Janet Froud, Director of Lawyer Services and Payments. Most of the information I obtained was given by Ms. Froud in an informative letter dated October 9, 2007, delivered in response to a letter I sent to Mr. LeRoy outlining various questions of interest to me. All subsequent references to information from Legal Aid are references to or quotations from Ms. Froud’s letter, unless otherwise indicated.

<sup>5</sup> Specifically, I spoke to Jeanine LeRoy in London, P. Berk Keaney in Sudbury, and B. Lee Baig in Thunder Bay, all of whom were extremely helpful. Attempts to speak with a few other counsel were not successful.

## **b) Scope of Analysis**

This paper focuses on the obstacles faced by the defence in confronting pathological evidence in pediatric death cases, and the potential ways to overcome those obstacles. Unquestionably, one very important obstacle will be any lack of credibility, impartiality, and/or accuracy on the part of pathologists assisting the Crown. Put simply, a bad Crown witness is bad for an accused (at least, for an innocent one). Possibly the best protection against wrongful conviction is honest, careful, and reliable evidence from Crown witnesses. Any reforms that ensure or stimulate such evidence, therefore, are reforms that can help an accused overcome any obstacles she may face in confronting pathological evidence. However, I will not address such reforms in this paper. They may well be advisable, but my task is to examine the situation on the assumption that the pathology evidence tendered by the Crown may not be perfect. What obstacles confront an accused in trying to expose a lack of honesty, carefulness, and/or reliability, or even just a reasonable difference of professional opinion? One can hope there will be nothing to expose, but it would be dangerous to assume that will always be the case, no matter what reforms are instituted.

## **Part II: The Capacities of Defence Counsel**

A person accused in a pediatric death case naturally relies heavily on her counsel to protect her against wrongful conviction. It is counsel's job to scrutinize the prosecution evidence, test it in court, develop the case for the defence, and present it in court. The question is whether defence counsel are up to the task. Unfortunately, there is reason to believe that when it comes to pathology evidence they sometimes are not.

It has been said that nothing guarantees conviction of the innocent more than a bad lawyer.<sup>6</sup> Counsel have varying levels of skill and experience, of course, and some are simply not very good. I have seen no evidence, however, that this is a problem that is unusually acute in pediatric death cases. Indeed, it would be surprising if I had; there is no reason to expect that alleged child killers would be particularly likely to pick incompetent lawyers.<sup>7</sup> Thus, while it may be that some of the problems faced by the accused in pediatric death cases are attributable to bad lawyers,

---

<sup>6</sup> Peter Neufeld, "Preventing the Execution of the Innocent: Testimony Before The House Judiciary Committee" (2000–2001) 29 Hofstra L. Rev. 1155 at 1163.

it seems more likely that they are attributable to ineffective lawyering in the particular case. There are several reasons why even a generally competent lawyer may have difficulties testing and contesting pathology evidence tendered by the Crown.

Lawyers are not always inclined toward science and scientific analysis. Professor Michael Saks once said that “lawyers were smart kids who disliked math and science. So they went to law school.”<sup>8</sup> It is dangerous to generalize, and I know of no statistics on the point, but it seems fair to assume that some (many?) criminal defence lawyers have a limited interest in or aptitude for science or medicine. This may make them less able, or less eager, to understand and confront pathological evidence. This problem is a difficult one to address, but it might be advisable for law schools to specifically encourage applications from people with science or medicine backgrounds (at least, more than they have done so historically).

Counsel have a positive duty to inform themselves about an area of expertise relevant to a case, and most lawyers are probably capable of understanding pathological evidence and issues, but they are not always given much assistance in the task. Counsel could be assisted by formal

---

<sup>7</sup> Indeed, if anything, there is reason to expect that they would be *less* likely to pick an incompetent lawyer, since the seriousness of the charge would be likely to motivate them to locate the better lawyers and to motivate the better lawyers to accept the case.

education about forensic pathology, or even about general scientific concepts and the scientific way of thinking<sup>9</sup> (which is not necessarily the same as the legal way of thinking);<sup>10</sup> general scientific knowledge can be useful for understanding more specific scientific knowledge. Legal education, however, has not historically been linked with scientific education.<sup>11</sup> Currently, there are only a few courses at Ontario law schools that provide instruction on forensic science,<sup>12</sup> and some schools offer no such instruction at all.<sup>13</sup> The training provided for admission to the bar offers no education in science. To a certain extent, counsel are left to rely upon

---

<sup>8</sup> “Merlin and Solomon: Lessons from the Law’s Formative Encounters with Forensic Identification Science” (1997–1998) 49 *Hastings L.J.* 1069 at 1139.

<sup>9</sup> “Because the system can only act through its participants ... it is scientific literacy on the part of lawyers and judges that is crucial to a justice system that does not want to be routinely embarrassed by ... gullibility.... Scientific literacy is essential for justice to be done”: Alan Gold, *Expert Evidence in Criminal Law: The Scientific Approach* (Toronto: Irwin Law, 2003) at 17–18 (emphasis omitted).

<sup>10</sup> See, generally, Peter Schuck, “Multi-Culturalism Redux: Science, Law, and Politics” (1993) 11 *Yale L. & Pol’y Rev.* 1.

<sup>11</sup> Gold, *supra* note 9 at 19.

<sup>12</sup> The law faculty at the University of Ottawa offers a course entitled Forensic Science that includes some instruction specifically on pathology. It appears to be the only course currently offered at an Ontario law school that is specifically devoted to the topic of forensic science. Ottawa also offers a course on wrongful convictions that includes some limited instruction on forensic science issues. A similar course on wrongful convictions is offered at the University of Toronto law faculty. Osgoode Hall Law School offers some limited education on forensic science to students enrolled in the Innocence Project and the Intensive Program in Criminal Law. Professor Alan Young advised me that plans are underway for a new, more complete forensic science course at Osgoode, but he was not sure when it would begin to be offered.

<sup>13</sup> The law faculties at Queen’s University, the University of Windsor, and the University of Western Ontario currently offer no courses relating to forensic science. A forensics course is in development at Western, but I cannot say when or if it will be offered in the future.

continuing education programs. A few programs have offered education about forensic pathology,<sup>14</sup> but as far as I can tell, such programs have not been offered frequently or in all areas of the province.<sup>15</sup> Greater support for relevant education programs *throughout* the province would seem to be in order.<sup>16</sup>

Confronted with pathological evidence, counsel also have the option of trying to engage in self-study. Information about forensic pathology is available from a number of sources, including some that are relatively accessible to defence counsel. Dr. Frederick Jaffe, for example, published several editions of a very helpful book entitled *A Guide to Pathological Evidence for Lawyers and Police Officers*.<sup>17</sup> A less detailed source can be found in chapter five of *The Expert: A Practitioner's Guide*.<sup>18</sup> Unfortunately, the most recent of those books was published eight years ago, and the latter

---

<sup>14</sup> “CSI: Forensic Evidence in the 21st Century,” offered in 2006 through the Ontario Bar Association; “Expert Evidence in Criminal Proceedings—Strategies for Avoiding Wrongful Convictions and Acquittals,” offered in 2005 through the Osgoode Professional Development Program; “Evidence and Advocacy: The Lifeblood of Criminal Defence,” offered in 2004 through the Criminal Lawyers’ Association.

<sup>15</sup> It is always difficult to prove a negative, and it is possible that I simply failed to learn of some education programs that have been offered, but contacts with various organizations and searches on the Internet only uncovered the three programs listed above. All were held in Toronto. Lee Baig informed me that no such program has been offered in Thunder Bay in the last 10 years.

<sup>16</sup> Mr. Baig expressed an interest in attending such programs.

<sup>17</sup> The last (4th) edition was published by Carswell in 1999.

<sup>18</sup> Simon Avis and Charles Hutton, “Forensic Pathology” in Kenneth Matthews et al. eds. *The Expert: A Practitioner's Guide*, looseleaf (Scarborough: Carswell, 1995).

is out of print. There are, of course, other books on forensic pathology<sup>19</sup> but it seems unlikely that most counsel will have the money to purchase them,<sup>20</sup> the time to peruse them, or the expertise to understand them.<sup>21</sup> Counsel will also often need to access information on very specific topics in forensic pathology (that are raised in a particular case) yet there does not appear to be a central resource to which counsel can turn. Coroners' offices do not have libraries accessible to lawyers.<sup>22</sup> The Centre of Forensic Sciences in Toronto has a library accessible by appointment,<sup>23</sup> but its collection does not focus on books and journals related to forensic pathology.<sup>24</sup> Universities sometimes have resources related to forensic pathology, but university libraries and resources (especially electronic resources) are often restricted to students and faculty.

---

<sup>19</sup> Dr. Young mentioned Pekka Saukko and Bernard Knight, *Knight's Forensic Pathology*, 3rd ed. (London: Hodder Arnold, 2004). A recent book published by two Canadian authors is Michael Shkrum and David Ramsay, *Forensic Pathology of Trauma* (New Jersey: Humana Press, 2007).

<sup>20</sup> Ms. Froud advised me that Legal Aid does not pay for such books.

<sup>21</sup> Dr. Shkrum stated that "technical language in [the] main texts requires explanation to the lay person," and that there is a danger that counsel, unassisted by an expert, will take things out of context. Dr. Young was more sanguine, stating that many of the books are not too technical.

<sup>22</sup> Personal communication with Cathy Craig of the Office of the Chief Coroner.

<sup>23</sup> The small collection of books at the northern lab of the CFS in Sault Ste. Marie is not available for use by counsel: personal communication with Mary Ann Brenton, CFS librarian, September 18, 2007.

<sup>24</sup> Letter from Kimberley Johnson of the CFS to my research assistant, Bethany Howell, dated September 18, 2007.

None of this is to suggest that counsel cannot obtain information about forensic pathology. Counsel's primary source of information will usually come from an expert retained to assist the defence (and/or from the materials provided by the expert). However, there are problems related to the availability of such experts and assistance. Those problems will be discussed below but one problem can be a lack of expert funding, and consequently a lack of expert *time*, available to counsel in Legal Aid cases. That very problem can be exacerbated by a lack of scientific education on the part of counsel. In their empirical study on the use of experts in litigation, Saks and Van Duizend observed problems with effective communication between lawyers and experts that were partly attributable to the lawyers' "substantive unfamiliarity with the field of knowledge being drawn upon."<sup>25</sup> Pathologists with whom I spoke generally reported that they were able to make themselves understood by counsel, but that it sometimes took time, sometimes a lot of time.<sup>26</sup> That is time that is not always available (at least not if the pathologist is to be paid).<sup>27</sup> It seems unwise, therefore, to depend

---

<sup>25</sup> Michael Saks and Richard Van Duizend, *The Use of Scientific Evidence in Litigation* (USA: National Centre for State Courts, 1983) at 58.

<sup>26</sup> Drs. Halliday, Rao, and Ramsay all made this point. Dr. Butt said that he has commonly had problems getting information across to defence counsel.

<sup>27</sup> Dr. Ramsay suggested that a pathologist who agrees to assist the defence in a case is ethically obliged to ensure that counsel understands the medical issues. It is hard to disagree, but from a purely practical perspective it seems unrealistic to expect that

too heavily on expert assistance in a particular case to fill in gaps in the scientific education of and information available to defence counsel. Prior education of counsel, in pathology and in science generally, seems necessary to make education in a specific case easier, faster, and as a result more available.

An interesting means of providing such education has been tried in the United States in connection with DNA evidence. The National Institute of Justice funded the development of an interactive electronic training program for lawyers and judges on specific issues related to DNA evidence. The goal was to develop a tool “to establish a minimum level of understanding of the technical, scientific, and legal DNA evidentiary issues that attorneys and judges might encounter in their respective fields of practice.”<sup>28</sup> The program was developed with help from a not-for-profit corporation established by the American Society of Crime Laboratory Directors and was made available free of charge over the Internet.<sup>29</sup> A similar endeavour, perhaps undertaken by the Office of the Chief Coroner with input from the Criminal Lawyers’

---

pathologists will always be able and willing to spend substantial time educating counsel for free.

<sup>28</sup> Kevin Lothridge and Robin Jones, “Principles of Forensic DNA for Officers of the Court: An Interactive, Computer-Based Training Tool for Attorneys and Judges” (2005–2006) 54 Drake L. Rev. 671 at 673.

<sup>29</sup> See online at <http://www.dna.gov/training/otc>.

Association, could be undertaken here in order to provide accessible, user-friendly education about forensic pathology.

Many American states have introduced laws or rules setting standards for competence of defence counsel in capital trials.<sup>30</sup> The goal of such provisions is obviously to ensure that accused persons in serious trials are represented by experienced and knowledgeable lawyers. Of interest is the fact that some states mandate (usually subject to exceptions) that counsel cannot act for the defence unless they have knowledge of and experience with pathological evidence.<sup>31</sup> The idea of imposing minimum standards of knowledge and experience is not unfamiliar in Ontario, although it has yet to take hold and, as far as I am aware, has not usually focused on competence in matters of science or medicine. Debate will undoubtedly continue for some time. But for the near future a more modest (and perhaps realistic) goal might be to include a requirement for basic competence in pathology in the criteria for specialist certification. Lawyers in Ontario are currently able to apply for certification as a specialist in criminal litigation. Certification can obviously be useful to lawyers as a marketing tool, but it can also be useful to accused persons in their selection of counsel, especially in serious matters

---

<sup>30</sup> See Donald Hall, “Effectiveness of Counsel in Death Penalty Cases” (2004) 42 *Brandeis L.J.* 225 at 232–234.

such as homicide cases. It may be wise to include education in pathology as a condition of eligibility for certification (or re-certification).<sup>32</sup> Not only would such education be beneficial for counsel, but it could provide some assurance to accused persons that counsel designated as experts in criminal litigation are equipped to intelligently confront pathological evidence.

**Proposal 1.** Law schools in Ontario should specifically encourage applications for admission from candidates with a background in science and/or medicine.

**Proposal 2.** Law schools in Ontario should enable interested students to obtain education in forensic and medical science, including pathology, either by offering relevant courses as part of the law school curriculum or by allowing students to take, in partial satisfaction of the requirements for a law degree, at least one relevant course offered through another faculty.

**Proposal 3.** The Law Society of Upper Canada, the Office of the Chief Coroner, the government of Ontario, and other related organizations should develop and support, both logistically and financially, continuing education for lawyers on the subject of forensic pathology.

**Proposal 4.** The Office of the Chief Coroner, in conjunction with representatives of the defence bar, should work to develop an online user-friendly introductory training program in the science and practice of forensic

---

<sup>31</sup> Illinois Supreme Court Rule 714, for example, states that counsel must have “substantial familiarity with and extensive experience in the use of expert witnesses, and forensic and medical evidence including, but not limited to, ... pathology.”

<sup>32</sup> It is not currently a condition of eligibility: see the standards for certification, available online at [http://mrc.lsuc.on.ca/pdf/csp/standards\\_criminal.pdf](http://mrc.lsuc.on.ca/pdf/csp/standards_criminal.pdf).

pathology. The program should be made available to all lawyers for free on the Internet. The existence of the program should also be publicized.

**Proposal 5.** Certification or re-certification by the Law Society of Upper Canada as a specialist in criminal litigation should require that lawyers demonstrate, through participation in relevant continuing legal education, completion of formal education in pathology, or, otherwise, a minimum level of competence in the science and practice of forensic pathology.

### **Part III: Forensic Pathologists to Assist the Defence**

As stated above, defence counsel will often rely heavily on assistance from an independent pathologist in order to effectively test and contest the pathology evidence tendered by the Crown. They cannot obtain the needed assistance, of course, if a pathologist is not available (either at all or as much as needed). Two interrelated questions arise in this context: whether there is an adequate number of pathologists willing to assist the defence and whether there is sufficient funding available to pay for their services.

#### **a) Number of Pathologists Available to Assist the Defence**

It is difficult to get a handle on how many “defence” pathologists are available to assist Ontario defence counsel. One cannot simply determine how many pathologists *living in Ontario* are willing to assist. Technically, any qualified pathologist living almost anywhere in the world could assist. On that basis one could say that there are probably a great number of pathologists available to assist the defence. However, practical realities work to substantially narrow the available pool. Language barriers alone presumably preclude the use of a large number of pathologists. More

importantly, cost concerns will usually limit an accused to using geographically proximate pathologists. It can be quite expensive to deal with a pathologist who lives and works hundreds or thousands of kilometres away and who therefore requires, for example, an expensive plane ticket and hotel accommodation to come to trial.<sup>33</sup> Legal Aid exhibits a clear preference for the use of local experts.<sup>34</sup>

Through various enquiries I was able to identify five pathologists living in Ontario who are currently willing (in principle) to assist the defence in criminal matters: David Ramsay and Michael Shkrum in London, Iain Young in Kingston,<sup>35</sup> and William Halliday and Glenn Taylor in Toronto.<sup>36</sup> I cannot guarantee that this is an exhaustive list, but no other names came up in communications with pathologists, defence counsel and Legal Aid

---

<sup>33</sup> Other costs that can come with the use of far-away pathologists include costs for greater travel time, delivery of documents and specimens (usually by courier), and long-distance telephone communications.

<sup>34</sup> See Legal Aid Ontario, *Tariff and Billing Handbook* (Legal Aid Ontario, 2002) at 6–10, available online at <http://www.legalaid.on.ca/en/info/Resources.asp>. Ms. Froud advised me, however, that “[s]ince the disclosure of problems related to Dr. Smith’s reports we have been willing to authorize the services of out of province pathologists more often.”

<sup>35</sup> Dr. Young advised that he had never acted in a criminal case, only civil ones, but that he would be willing to assist in criminal matters.

<sup>36</sup> Chitra Rao in Hamilton told me that she had recently stopped accepting retainers from the defence, but might be willing to assist if the accused was unable to find anyone else who could.

Ontario, or through a review of recent Ontario case law.<sup>37</sup> Pathologists living outside of Ontario willing to assist the defence in Ontario include Peter Markesteyn in Manitoba and John Butt in British Columbia.

I cannot state whether there are, currently, enough forensic pathologists in or near Ontario to satisfy the demand for their services in criminal matters. The conversations I had with defence counsel simply were not sufficiently numerous or random to allow me to draw any confident conclusions.<sup>38</sup> Some archival studies have shown that defence counsel tend to call experts much less frequently than the Crown,<sup>39</sup> perhaps suggesting that relevant experts are not sufficiently available, but the suggestion is only one of several available given the many other reasons why experts may not be called at trial. Commentators sometimes suggest that defence counsel

---

<sup>37</sup> I encountered names of several other pathologists, some of whom had assisted the defence in the past, but only the five listed in the text are, to the best of my knowledge, still available to assist the defence.

<sup>38</sup> To the extent that they indicated anything, they indicated that defence are usually able to find *someone* to assist, although it is not always easy.

<sup>39</sup> Perhaps most relevant in this regard is the study by Robert Poirier that found that in homicide cases defence counsel called an expert about one-fifth as often as the Crown, and in all cases called an expert in medicine or biology about one-twentieth as often as the Crown: “Le déséquilibre des forces entre la défense et la poursuite en matière de ressources scientifiques” (1999) 30 R.D.U.S. 157. Poirier examined a large sample of criminal cases litigated in the Montreal Court of Quebec from 1960–1990. See also Harry Kalven, Jr. and Hans Zeisel, *The American Jury* (Boston: Little Brown and Co., 1966) at 139–143 [finding that the defence in American cases called expert witnesses about one-quarter as often as the prosecution, although about half as often in homicide cases].

have substantial problems obtaining the services of experts,<sup>40</sup> but the suggestion is usually made in the American context and offers no real evidence of the situation in Ontario. The only empirical study to specifically examine the issue found that defence counsel in England usually were able to find an expert (including a pathologist) to assist.<sup>41</sup> I was unable to locate any study speaking directly to experiences in Ontario.

The issue is further complicated by the fact that not all the pathologists listed above are able to assist in all kinds of cases. Dr. Young, for example, advised me that he does not consider his experience and expertise to be sufficient to be able to provide authoritative assistance in pediatric cases. Dr. Shkrum advised me that he would refer cases requiring expertise in neuropathology to Dr. Ramsay. Thus, even if defence counsel are able to obtain pathological assistance of one sort, they may not be able to obtain assistance of the right sort. Again, the available evidence is too sparse to say. A specific study of the issues relating to availability would seem to be in order.

---

<sup>40</sup> See, for example, Paul Giannelli, “‘Junk Science’: The Criminal Cases” (1993) *J. Crim. L. & Crim.* 105 at 118: “... obtaining the services of *any* defense expert in criminal litigation is so difficult.”

<sup>41</sup> Paul Roberts and Chris Willmore, *The Role of Forensic Science Evidence in Criminal Proceedings*, Royal Commission on Criminal Justice Research Study No.11 (London: HMSO, 1993) at 75–78.

The current evidence does raise concerns that it may be more difficult to obtain the services of a pathologist for accused living in some areas of the province than in others.<sup>42</sup> Relevant experts are located in only a few areas of the province. Defence counsel in other regions have been forced at times to rely upon pathologists who live and work many miles away.<sup>43</sup> Counsel with whom I spoke were always able to find a pathologist, but it would be dangerous to assume that all counsel have met with similar success. Several pathologists told me that they would be willing to assist in cases arising in the more remote areas of the province, but the additional costs associated with such assistance may act as a significant impediment.<sup>44</sup> It is hard to say, but given the limited amount of funding available for “defence” pathologists generally (as discussed below), it may be that steps must be taken to ensure that such pathologists are normally available in all major regions of the province. The most obvious step would be to ensure that Legal Aid funds are

---

<sup>42</sup> This problem may also exist in the United States: see Edward Imwinkelreid, “Observations on Access to Expertise” (1984) 101 F.R.D. 635 at 645.

<sup>43</sup> Berk Keaney in Sudbury told me that he used a pathologist in Toronto. Lee Baig in Thunder Bay told me that he used a pathologist in Montreal. Mr. Baig also told me that he had never been able to locate an expert in pediatric pathology in Northern Ontario.

<sup>44</sup> Dr. Rao commented that on a Legal Aid case the costs may be prohibitive. Mr. Baig informed me that he was never able to call the Montreal pathologist at a trial because Legal Aid was never willing to pay for the travel expenses.

specifically allocated and granted to cover the costs associated with using geographically distant experts.<sup>45</sup>

Even if there is *currently* a sufficient number of “defence” pathologists, there is reason to be concerned that there may not always be a sufficient number in the future. Pathologists with whom I spoke expressed a variety of frustrations associated with assisting the defence. Many of the frustrations related to the lack of Legal Aid funding, but they related to other matters as well. Two were of particular interest. Drs. King and Rao both indicated that when they had appeared as witnesses for the defence they had sometimes experienced palpable hostility from the prosecution and police.<sup>46</sup> Drs. King, Rao, and Halliday all expressed frustration over the fact that defence counsel sometimes had not contacted them until the last minute. I cannot say how frequently either of these events occur. None of the other pathologists with whom I spoke specifically mentioned that they had encountered hostility or problems with late retainer, although the latter problem has been identified in the literature.<sup>47</sup> Still, it may be wise to remind those on the prosecution side not to look upon “defence” pathologists as the

---

<sup>45</sup> Legal Aid Ontario currently covers reasonable travel costs, although travel time is only paid at \$43/hour, a relatively low rate for pathologists: Legal Aid Ontario, *supra* note 34 at 6–10.

<sup>46</sup> Dr. King commented that it takes courage to provide evidence for the defence.

<sup>47</sup> Saks and Van Duizend, *supra* note 25 at 58; Randy Hanzlick and Michael Graham, *Forensic Pathology in Criminal Cases*, 2nd ed. (USA: Lexis Publishing, 2000) at 69.

enemy and to remind defence counsel to seek out expert assistance at the earliest reasonable opportunity.

Even if “defence” pathologists are available, they are of no use to the defence if they cannot be found. As far as I am aware, there is no reliable database to which counsel can easily turn for the names of “defence” pathologists. The Ontario Association of Pathologists does not appear to maintain such a database<sup>48</sup> and the list maintained by the Criminal Lawyers’ Association is out-of-date: none of the five pathologists listed above are on it.<sup>49</sup> Counsel can presumably turn to a professional expert-locating agency, but such agencies charge a fee and there is evidence that defence counsel do not always trust them;<sup>50</sup> I also cannot state how useful they are.<sup>51</sup> It would be helpful if the Office of the Chief Coroner, perhaps in association with the Criminal Lawyers’ Association, compiled and maintained a current and readily accessible database of “defence” pathologists.<sup>52</sup>

---

<sup>48</sup> I must qualify the statement because I was not able to get in touch with a representative of the Association. There is no indication on its website that such a database exists, so at the very least the database is not easily accessible if it does exist.

<sup>49</sup> The only Ontario pathologist listed in the CLA database is David King, but Dr. King informed me that he is retired. The only other name on the CLA list is Harry Emson in Saskatchewan. Personal communication with Anthony Laycock, Executive Director of the Criminal Lawyers’ Association, October 3, 2007.

<sup>50</sup> Saks and Van Duizend, *supra* note 25 at 16 and 52.

<sup>51</sup> For what it is worth, I can say that in my personal experience they are not usually that useful, often because they have few Canadian experts in their database. They also tend to be structured more toward providing assistance to civil counsel.

<sup>52</sup> The Commission reviewing the Guy Paul Morin case recommended that the Centre of Forensic Sciences facilitate the preparation of an accessible registry of independent

Before leaving this topic, I should comment on one other issue. Drs. Halliday and Shkrum believed that defence counsel do not sufficiently avail themselves of the opportunity, prior to trial, to meet with and obtain information from the “Crown” pathologist who conducted the original autopsy. Dr. Ramsay and Dr. King agreed that it was uncommon for defence counsel to do so. Dr. Butt said that defence counsel had sometimes approached him but that it was usually only experienced counsel; less experienced counsel sometimes seemed to be intimidated by the idea. I cannot say for certain how often it is that defence counsel seek to meet with “Crown” pathologists, but such meetings can be useful sources of information for counsel and can sometimes provide needed education and assistance; if nothing else, they can be a means of obtaining the name of a “defence” pathologist.<sup>53</sup> Defence counsel should be reminded of this. The Office of the Chief Coroner should also develop guidelines respecting such

---

forensic experts: *The Commission on Proceedings Involving Guy Paul Morin: Report*, Fred Kaufman, Commissioner (Toronto: Queen’s Printer, 1998) at 380 (Recommendation 27(b)) [hereinafter Morin Report].

<sup>53</sup> Earl Levy has commented that experts assisting the prosecution in Ontario, including pathologists, “have always proven to be very receptive to taking the time to speak with defence counsel even though they know the same counsel will be cross-examining them at trial”: *Examination of Witnesses in Criminal Cases*, 5th ed. (Toronto: Thomson Carswell, 2004) at 329. Dr. Butt, however, commented that “Crown” pathologists are very often reluctant to speak to defence counsel. He does not know if that is or has been the case specifically in Ontario, but believes that it is an issue everywhere. I heard no complaints that the prosecution, in recent times, had interfered with defence counsel’s ability to meet with “Crown” pathologists.

meetings.<sup>54</sup> The guidelines should specifically indicate that the “Crown” pathologist should make every effort to communicate during the meeting any limitations on her opinion.<sup>55</sup>

**Proposal 6.** The Office of the Chief Coroner, perhaps in conjunction with the Criminal Lawyers’ Association, should commission a study to ascertain the experiences of Ontario defence counsel in obtaining the services of forensic pathologists.

**Proposal 7.** The Government of Ontario should ensure that accused persons in all the regions of the province have adequate access to the services of forensic pathologists, perhaps by allocating funds specifically for expenses arising out of the necessary use of geographically distant experts.

**Proposal 8.** Crown Attorneys and police officers should be mindful not to create an oppressive or overly hostile atmosphere for pathologists testifying for the defence, while still engaging in full and proper cross-examination. Defence counsel should be mindful that forensic pathologists require adequate time to provide competent assistance and should strive to retain the services of a forensic pathologist in a case at the earliest reasonable opportunity.

**Proposal 9.** The Office of the Chief Coroner, perhaps in association with the Criminal Lawyers’ Association, should compile and maintain a current and readily accessible list of pathologists willing to assist the defence in Ontario criminal cases.

---

<sup>54</sup> Dr. Ramsay in particular expressed a desire for such guidelines.

<sup>55</sup> In a Memorandum dated July 12, 2004, the Chief Coroner advised pathologists, in meetings with Crown counsel, to “make every effort to communicate ... any limitations upon the inferences to the reliability drawn from” the physical scientific evidence in the particular case: Memorandum #04-10 (PFP032438), p.1. A similar guideline would seem appropriate for meetings with defence counsel.

**Proposal 10.** Defence counsel should take full advantage of the opportunity to meet with any pathologists assisting the prosecution in a specific case. The Office of the Chief Coroner should ensure that pathologists are receptive to such meetings, are given guidelines as to how to conduct them, and are specifically advised to make every effort to communicate to defence counsel during such meetings any limitations on their opinions in the particular case.

### **b) Funding for Pathologists to Assist the Defence**

Even if a pathologist is located and willing to assist, an accused person may face an additional obstacle trying to pay for the pathologist's services. One is tempted to assume that problems must arise in this regard, but the information I was able to obtain did not allow me to determine for certain whether they actually do. The discussion below is limited to cases funded by Legal Aid Ontario.<sup>56</sup>

The standard Legal Aid rate for pathologists is \$100/hour.<sup>57</sup> That is significantly lower than the rate usually charged by pathologists to private

---

<sup>56</sup> I was not able to obtain any concrete information on the difficulties, if any, encountered by accused persons not on Legal Aid in paying for the services of a pathologist.

<sup>57</sup> Legal Aid Ontario, *supra* note 34 at 6–17.

clients.<sup>58</sup> Dr. Ramsay does not feel comfortable charging in excess of \$150/hour, but private rates usually range from \$200–\$250/hour,<sup>59</sup> with some pathologists charging more.<sup>60</sup> It seems that the low rate of pay in Legal Aid cases is having an impact on the willingness of pathologists to assist the defence (although several are open to working at the Legal Aid rate).<sup>61</sup> Dr. King, for example, advised me that it was simply not financially worthwhile for him to continue to accept Legal Aid cases at \$100/hour. Dr. Butt advised me that he would not accept less than \$250/hour. Dr. Halliday said that he avoids Legal Aid cases partly because of the low hourly rate.<sup>62</sup> Legal Aid itself has commented that “[I]awyers’ frustration at low tariff rates is exacerbated by the compensation paid to other professionals for their involvement in cases.... The ... rates for medical professionals ... are making it very difficult to find people to come and testify in court.”<sup>63</sup>

---

<sup>58</sup> Ms. Froud advised me that the hourly rate can be and sometimes is increased, although seemingly in narrow circumstances: “Rates may be increased depending upon the specialized area of expertise of the pathologist or existing legal aid rates in the jurisdiction in which the pathologist practices.”

<sup>59</sup> Dr. Halliday, for example, charges about \$250/hour. Drs. Shkrum and Young charge about \$200 hour. The figures are approximates because the rates are sometimes negotiable.

<sup>60</sup> Dr. Butt, for example, charges \$425/hour.

<sup>61</sup> Drs. Ramsay, Shkrum, Young, and Markesteyn all told me that they are willing to do so.

<sup>62</sup> He has accepted work on Legal Aid cases in the past, and has also done some work pro bono.

<sup>63</sup> Legal Aid Ontario, “Legal Aid Tariff Reform: Business Case” (November 2001) at 27–28, available online at [http://www.legalaid.on.ca/en/info/pdf/Tariff\\_Business\\_Case\\_full\\_document.pdf](http://www.legalaid.on.ca/en/info/pdf/Tariff_Business_Case_full_document.pdf).

Also of relevance is the number of hours paid for by Legal Aid for pathological services. Legal Aid currently provides automatic funding in a murder or manslaughter case for up to four hours of work by a pathologist.<sup>64</sup> Additional funding may be granted at the discretion of Legal Aid on application by defence counsel. Such application must list the pathologist's qualifications, a detailed estimate of the services required from the pathologist, the estimated time required for each service, the pathologist's hourly rate, and the total estimated cost. Specific (additional) authorization must be obtained for funding for the pathologist to attend court to testify, to prepare to testify, and/or to attend court to hear the evidence of other witnesses.<sup>65</sup>

I asked many of the pathologists with whom I spoke about the amount of time they required to competently assist the defence. Varying estimates were provided, and numerous factors were involved, but the general consensus was that they usually needed between two to five hours to conduct an initial review of a case and provide a preliminary opinion to defence counsel (although more complicated cases can easily require more time). As stated above, Legal Aid automatically funds up to four hours of work. Thus, *as a general matter*, it seems that the automatic funding

---

<sup>64</sup> Legal Aid Ontario, *supra* note 34 at 6–17.

provided by Legal Aid will often be used up simply by an initial review.<sup>66</sup> In some cases, of course, such a review may end the pathologist's involvement (such as when the review confirms the "Crown" pathologist's evidence). But in other cases more work from the "defence" pathologist will be required.

I asked many of the pathologists with whom I spoke how much time they required to complete their work in a case where the defence seeks more than an initial review. Once again, the answers varied. Different kinds of cases require different amounts of time,<sup>67</sup> and more complex cases require more time. Whether or not the pathologist has to come to court to testify is also an important factor. But, very generally speaking, it seems that something in the range of 20 to 35 total hours of time will often be required. Dr. Ramsay tells counsel in advance to anticipate that amount of time. Dr. Markesteyn stated that it was not really reasonable to expect that a pathologist in a murder case would require less than 20 hours. There will unquestionably be exceptions; Dr. Halliday said that he was able to complete one simple case in about 4 to 6 hours, whereas another case took him about 50 hours. But it seems that, in cases where pathology evidence is in dispute,

---

<sup>65</sup> *Supra* note 34 at 6–10.

<sup>66</sup> This seems consistent with Legal Aid's expectations. Ms. Froud advised me that "[t]he four hour allowance is intended to provide time for the solicitor to consult with a pathologist to formulate a theory of defence and obtain an estimate of the time required for the pathologist."

Legal Aid will often be asked to fund an additional 16 to 31 (or more) hours beyond that automatically granted.

The question, therefore, is whether Legal Aid authorizes funding for that sort of time. The information I obtained was mixed. Drs. Ramsay and Shkrum indicated that they had not usually had problems getting covered for the required time, but Drs. Halliday, Rao, and Markesteyn indicated that Legal Aid did not usually provide adequate funding (at least in complex cases). The few defence counsel I spoke with generally felt similar to the latter pathologists, but their comments tended not to be very specific. Legal Aid indicated that “[i]f it appears that the pathologist will be able to assist the defence, the usual allowance is a further 16 to 36 hours” over and above the four hours automatically granted (although sometimes more may be authorized). On the whole, therefore, there is evidence that Legal Aid does authorize adequate funding and evidence that it does not. Unfortunately, I am in no position to say which evidence is to be preferred. A proper survey of Ontario defence counsel and of past authorizations granted by Legal Aid would be necessary in order to resolve the debate.

Defence counsel Jeanine LeRoy mentioned that she did not always understand the rationale used by Legal Aid to grant or deny funding. Legal

---

<sup>67</sup> Dr. Shkrum mentioned that pediatric cases can sometimes require extra time. Dr. Rao

Aid indicated that the criterion applied is whether the additional work is reasonably necessary to advance the defence case or meet the Crown's case. That appears to be a perfectly appropriate criterion but, as always, what is most important is how the criterion is actually applied across a broad range of actual cases.

Dr. Jaffe in his book commented that often the most important assistance a pathologist can provide to the defence is assistance with cross-examination. He wrote that “[h]aving listened to the prosecution’s medical evidence” the “defence” pathologist can advise where the evidence is on firm ground and where it is subject to criticism.<sup>68</sup> This suggests that it is important for the “defence” pathologist to attend court to hear the testimony of the “Crown” pathologist. Dr. Markesteyn confirmed this suggestion, remarking that in order to do his job properly he needed to watch the “Crown” pathologist testify.<sup>69</sup> Defence counsel Lee Baig advised me that he had never received funding from Legal Aid for his expert pathologist to come listen to the “Crown” pathologist testify. Legal Aid confirmed that it only rarely grants funding for this, explaining that it expects “the pathologist’s assessment to be based on hypotheticals provided through

---

stated that they can sometimes be very complicated and take a long time to review.

<sup>68</sup> *Supra* note 17 at 209.

disclosure and transcripts.” It seems unlikely that in every case the “defence” pathologist really needs to watch the “Crown” pathologist testify at trial, but given the comments of Drs. Jaffe and Markesteyn Legal Aid should probably be open to paying for it in compelling circumstances, such as when pathology evidence is critical to a case and seriously in dispute, the pathology issues are especially complex, or a preliminary inquiry transcript of the “Crown” pathologist’s testimony is not available. Legal Aid, of course, operates under severe costs pressures, but as Justice Kaufman said in his report on the Guy Paul Morin case, “[t]he Government of Ontario bears the heavy responsibility of ensuring that the Ontario Legal Aid Plan ... [is] adequately resourced to prevent miscarriages of justice.”<sup>70</sup>

A few of the pathologists with whom I spoke expressed frustration over the amount of time it took to get paid in Legal Aid cases.<sup>71</sup> A few also related that they had been “stiffed” in a few cases, never receiving any

---

<sup>69</sup> Dr. Halliday advised that, when assisting the Crown, he had found it very enlightening and beneficial to watch the “defence” pathologist testify, but he could not say whether the same was true from the perspective of a pathologist assisting the defence.

<sup>70</sup> Morin Report, *supra* note 52 at 1235 (Recommendation 116).

<sup>71</sup> Drs. Rao, King, Butt, and Markesteyn mentioned this. On the other hand, Dr. Shkrum told me that he usually gets paid reasonably quickly. It is possible that, to some extent, problems with delayed payment are a thing of the past, given that Legal Aid has now instituted requirements for submission of periodic interim accounts and procedures for paying accounts (especially disbursement accounts) quickly: Legal Aid Ontario, *supra* note 34 at 2–6, 2–19 and 6–3 to 6–4.

payment at all.<sup>72</sup> The causes of these problems were not entirely clear. The pathologists sometimes blamed defence counsel but were usually quick to emphasize that counsel in the particular case was just a “bad apple.”<sup>73</sup> Legal Aid advised me that difficulties in paying experts’ accounts arise for a variety of reasons, including defence counsel’s failure to communicate adequately to the expert the requirements and terms of a funding authorization and Legal Aid’s failure to communicate clearly what has been authorized. Whatever the cause of prior problems, defence counsel would be wise to ensure that experts are fully informed of the terms of any funding authorization and that experts’ accounts are submitted promptly and paid out as soon as money is received. Legal Aid should also ensure that any and all terms of funding are communicated clearly to defence counsel, preferably in writing in a format that counsel can easily pass on to the retained expert. As Dr. Shkrum commented, if there are too many “bad apples” in the criminal justice system, experts will become disinclined to get involved in it.

**Proposal 11.** Legal Aid Ontario should increase the hourly rate paid to pathologists to a rate closer to the rates commonly charged by pathologists

---

<sup>72</sup> Drs. King, Ramsay, and Shkrum said they had had this experience.

<sup>73</sup> Dr. Ramsay heaped some of the blame onto himself, stating that in the case where he did not get paid he did not follow up with defence counsel and did not obtain confirmation at the start that Legal Aid would cover his time.

to private clients. The Government of Ontario should provide Legal Aid with funding for this purpose.

**Proposal 12.** In compelling circumstances, such as where pathology evidence is critical to a case and seriously in dispute, the pathology issues are especially complex, or a preliminary inquiry transcript of the “Crown” pathologist’s testimony is not available, Legal Aid Ontario should be open to providing funding for the “defence” pathologist to attend court and assist defence counsel during the time when a pathologist is testifying for the Crown. The Government of Ontario should provide Legal Aid with funding for this purpose.

**Proposal 13.** Defence counsel should ensure that retained pathologists are fully informed of the terms of any Legal Aid funding authorization and that pathologists’ accounts are submitted and paid out promptly. Legal Aid should ensure that all funding terms are communicated clearly to defence counsel in a format that counsel can easily pass on to the retained expert.

**Proposal 14.** Legal Aid Ontario, perhaps in conjunction with the Criminal Lawyers’ Association, should commission a study to ascertain the experiences of defence counsel in obtaining funding for the services of pathologists and the actual practices of Legal Aid officials in responding to requests for such funding.

## **Part IV: Disadvantages of the Defence Pathologist**

The literature suggests that a pathologist assisting the defence is almost inevitably at a disadvantage relative to the pathologist who is assisting the Crown. The disadvantages were summarized by Dr Jaffe in his book:

It is the pathologist who acts on behalf of the prosecution, who visits the scene of the death, who performs the autopsy (and on that occasion is usually the only pathologist present), who decides what laboratory tests should be done and who has access to other forensic scientists.

This clearly puts the defence at a great initial disadvantage as it depends on the medical information provided by the prosecution. By the time defence counsel becomes involved in a case the body is generally no longer available for examination and only rarely will some organs have been retained which could be studied independently.

The defence pathologist, therefore, must rely on secondary sources such as autopsy reports and laboratory reports, photographs, x-rays and, occasionally, microscopic sections. Omissions committed at the time of autopsy cannot be remedied and the effect of such omissions is invariably to the detriment of the defence because it closes lines of inquiry which the defence might like to have pursued....

[T]here can be no adequate substitute for having seen the body and having observed the autopsy.<sup>74</sup>

Dr. Jaffe published those comments in 1999. I asked the pathologists with whom I spoke whether they thought that they were at a disadvantage relative to the “Crown” pathologist. Views were somewhat mixed, but the

general consensus was that the “defence” pathologist is at some disadvantage although not always a large disadvantage. In the words of Dr. Young, it depends most critically on the “quality of data capture.” It is generally better to see the body first hand and to control the examinations and tests performed, but good quality reports, diagrams, photographs, specimens, and slides can go a long way toward putting the “defence” pathologist in an equivalent position to the “Crown” pathologist. The positions may never be completely equivalent (although Dr. Ramsay suggested that they might be in respect of the more obvious pathological observations) but they can be fairly close.<sup>75</sup>

In theory, one way of overcoming this disadvantage might be to have a “defence” pathologist attend the original autopsy. I asked some of the pathologists about this idea. They were generally supportive but pointed out that there can be practical problems, such as finding a pathologist who can drop everything on short notice to watch an autopsy. Another problem that would often arise, of course, is that a defendant or suspect might not have

---

<sup>74</sup> Jaffe, *supra* note 17 at 205–207. See also Alan Usher, “The Contribution of the Defence Pathologist” (1980) 20 Med. Sci. Law. 246.

<sup>75</sup> In this, the pathologists appeared to share the view of their colleagues in New Zealand. See New Zealand Law Commission, *Report 62: Coroners* (Wellington: Law Commission, 2000) at 70, 78–79. Arguably, the positions can be completely equivalent in respect of some *issues*—e.g., the conclusions to be drawn from observed injuries and other pathological findings—but that would only alleviate the disadvantage entirely in

been identified at the time of the autopsy. In many cases, therefore, the quality of data capture would remain an important issue.

The Office of the Chief Coroner has prepared guidelines for the conduct of autopsies in criminally suspicious cases.<sup>76</sup> Those guidelines refer to the need to document, retain, and disclose pathological findings and specimens. The guidelines are obviously well intentioned and I see little to criticize. I am also simply not competent to comment on whether or not they recommend examination and retention of an adequate number and variety of bodily tissues. I would note, however, that at least some of the guidelines are not entirely clear as to their applicability and force. The “Guidelines on Autopsy Practice for Forensic Pathologists: Criminally Suspicious Cases and Homicides,” for example, state that “[i]t is ultimately for [the] individual forensic pathologist to determine how the guidelines are to be applied in a specific case” and that the guidelines were devised for use by the Toronto Forensic Pathology Unit, simply allowing that “[o]ther forensic pathologists may wish to use the document to guide performance of their own

---

cases where the defence has no reason to question the accuracy and completeness of the findings.

<sup>76</sup> See “Guidelines on Autopsy Practice for Forensic Pathologists: Criminally Suspicious Cases and Homicides,” 1st ed., July 2005 (PFP033986) and “Autopsy Guidelines for Homicidal and Criminally Suspicious Deaths in Infants and Children,” 1st ed., April 2007 (PFP034041). Additional memoranda seemingly supplement the guidelines: e.g., Memorandum #04-12, July 12, 2004 (PFP032446); Memorandum #04-10, July 12, 2004 (PFP032438).

medicolegal autopsies.”<sup>77</sup> Such statements might leave the impression that the guidelines respecting documentation, retention, and disclosure of pathological findings and specimens are discretionary. Other language in the Guidelines (and other documents) could certainly leave the opposite impression,<sup>78</sup> but it should be made entirely clear that wherever a post-mortem examination is conducted, and however it is conducted from a medical perspective, it *must* be adequately and properly documented.

I asked the pathologists with whom I spoke whether, in their experience, the policy of properly documenting and preserving the results of post-mortem examinations is being adequately operationalized. The general consensus was that it is (at least in recent times)<sup>79</sup> but that there are exceptions. The exceptions are seemingly attributable to mistakes and happenstance; no one suggested that they were attributable to a deliberate failure to record or preserve information. Unintentional failures can never be entirely avoided, of course, but it may be wise to adopt an institutional policy of redundancy, wherein a specific effort is made to document all the

---

<sup>77</sup> *Ibid.* at ss.1.4 and 8.1.

<sup>78</sup> See, for example, ss.12.5, 18.6, and 20.3 of the Guidelines, which indicate that, at a minimum, photographs of specified areas of the body should be obtained in all cases. See also “Autopsy Guidelines for Homicidal and Criminally Suspicious Deaths in Infants and Children,” *supra* note 76 at s.12.2.

<sup>79</sup> Dr. Young told me that the pathology unit in Kingston retains specimens as long as they might possibly be needed: at least until the case has been disposed of from a legal standpoint and sometimes for years and years.

relevant findings on multiple (at least two) occasions. This would probably be most easily accomplished through highly extensive and repetitious photography.<sup>80</sup> I asked several pathologists what they thought of the idea of videotaping autopsies. Some supported the idea, but concerns were expressed over cost, the need for additional personnel, the length of the resulting recording (and the time required to review it), and the effect that taping might have on the atmosphere of the autopsy.<sup>81</sup> Drs. Young and Halliday also were not sure if videotaping would add anything to high-quality photography. Dr. Markesteyn, however, indicated that he had always videotaped autopsies in cases where a police shooting was involved. I cannot, on the present record, suggest whether or not videotaping should be instituted, but it may be advisable to investigate further the value and practicality of the idea.

Documenting and preserving the results of a post-mortem examination, of course, will be of little benefit to the defence if the documentation and results cannot be accessed in a timely manner. Defence counsel and pathologists generally reported that they can be. Delays were sometimes experienced, but in the end access to all relevant material was

---

<sup>80</sup> It is possible that this is already occurring. Dr. Halliday commented that in recent times items are photographed very extensively.

granted. The only real problems seem to arise in relation to the examination of slides of tissue samples taken during the autopsy. Drs. Ramsay and Shkrum both reported that “Crown” pathologists and/or the hospitals in which they work can be reluctant to release the slides for fear that they will be lost or damaged. The “defence” pathologist must therefore examine the original at the “Crown” pathologist’s institution or ask that duplicate slides be prepared. Neither option is ideal. Examinations conducted away from the “defence” pathologist’s home base, at a unfamiliar institution, are not conducive to relaxed, measured analysis. Duplication of slides takes time and can produce a specimen that is slightly different from the original.<sup>82</sup> Furthermore, some “defence” pathologists (especially, it seems, those retired from full-time practice) do not have the necessary equipment to examine duplicate slides. The issue is a difficult one to confront. The Crown (and everyone else) has an understandable interest in preserving the integrity and safety of pathological slides, but this interest cannot set up unreasonable obstacles to defence access to the slides. A policy of granting access to original slides at the defence expert’s home site, on terms that promise

---

<sup>81</sup> Dr. Markesteyn, for example, noted that a video would record banter that occurred during the autopsy and Dr. King was worried that such comments could be misconstrued.

<sup>82</sup> I was advised of this last piece of information by Dr. Ramsay.

reasonable safeguard of the slides, seems appropriate.<sup>83</sup> If the “defence” pathologist prefers to conduct the examination at the institution where the slide is being stored, he or she should be given full access to all necessary equipment.<sup>84</sup> In addition, pathologists assisting the Crown should be receptive to any reasonable defence requests for *them* to conduct additional examinations.

An interesting legal issue arises in this context. Accepting that the “defence” pathologist will at least sometimes be at a disadvantage relative to the “Crown” pathologist, should this affect the weight given to the former’s evidence? It is commonly suggested to “defence” pathologists at trial that they were not in as good a position as the “Crown” pathologist to observe the body and other relevant items and consequently to make conclusions as to the cause of death, and so on. The prosecution then argues before the jury that, as a result, the evidence of the “defence” pathologist should be given less weight and the evidence of the “Crown” pathologist preferred. Several of the pathologists with whom I spoke remarked that they had been subjected to such cross-examination, and advocacy texts recommend

---

<sup>83</sup> This would appear to be the current policy of the Office of the Chief Coroner, although the written policy does seem to express some preference for “defence” pathologists to attend at the originating institution. See Memorandum #04-10, July 12, 2004 (PFP032438) at 3–4.

<sup>84</sup> According to Drs. Markesteyn, Butt, and Young, full access is currently being granted in Ontario.

employing it.<sup>85</sup> The courts have also accepted that the basic argument is legitimate: the inferior position of the “defence” pathologist (when relevant to an issue in dispute)<sup>86</sup> can affect the weight given to her evidence and the jury can be instructed accordingly.<sup>87</sup>

It is impossible to know how a jury in a given case will respond to such an argument, but we must consider whether the jury should hear it. Even if it is true as a factual matter that second-hand observation of the body and other relevant items is (or can be) worse than first-hand observation, the argument that this should affect the weight to be given to the opinions of the second-hand observer places the accused in an impossible situation not of her own making. Unless circumstances are such that the accused was lucky enough to have a “defence” pathologist present for the original autopsy (a rare event), the accused will be forced to rely upon second-hand observation

---

<sup>85</sup> See, for example, Levy, *supra* note 53 at 330.

<sup>86</sup> It would not be relevant, for example, when the issue in dispute is solely the conclusions to be drawn from the injuries as observed by the “Crown” pathologist.

<sup>87</sup> *R. v. Parnell* (1983), 9 C.C.C. (3d) 353 at 363-364 (Ont. C.A.): “The forensic pathologist conducting the post-mortem examination obviously had a better opportunity to make direct observations, but that was only a factor in weighing the conflicting opinions.... In cases of competing expert evidence, it is not proper to limit the jury by asking whose evidence is preferred or who had the better opportunity to observe. It is correct to point to the latter, as a factor only, to be considered in resolving the question whether the Crown has proved guilt beyond a reasonable doubt”; *R. v. Vieira*, [2005] O.J. No.4805 at para.3 (C.A.) (QL), leave refused 354 N.R. 197: “... the fact that the defence expert did not visit the scene of the fire and that he was not present in court for the eyewitness evidence are relevant considerations in evaluating the expert’s testimony.” As in *Parnell*, the Court in *Vieira* suggested that the inferior position of the “defence” expert should not be overemphasized.

simply because of how criminal and medical investigations proceed (and, indeed, probably must proceed given the need to conduct an autopsy as soon as possible). The accused's ability to test and contest Crown pathology evidence, therefore, will be hampered by an obstacle *for which the accused is not responsible and which she cannot possibly overcome*. In a system devoted to the presumption of innocence and a preference for the acquittal of the guilty over the conviction of the innocent, it seems rather unfair that this obstacle should be used against the accused at trial as a means of devaluing the only expert evidence that she has the ability to adduce. It may not always be unfair. There may be situations where the accused *is* responsible, at least in part, for the inferior position of her expert. She may have failed to take advantage of opportunities that were reasonably available for the "defence" pathologist to make the best observations possible, such as where the accused never provides the pathologist with the available photographs. In those sorts of cases, it may be fair to argue that the Crown evidence should be preferred because it came from superior sources of information. But in cases where the accused and the "defence" pathologist were duly diligent, courts should consider prohibiting that line of argument (and the cross-examination that underlies it).

**Proposal 15.** The Office of the Chief Coroner should clarify its guidelines to leave no doubt that *all* post-mortem examinations in criminal cases must be thoroughly and properly documented.

**Proposal 16.** The Office of the Chief Coroner should adopt an explicit policy of redundancy in the documentation of post-mortem examinations.

**Proposal 17.** The Office of the Chief Coroner should commission a study to investigate the value and practicality of videotaping autopsies in criminal cases.

**Proposal 18.** The Office of the Chief Coroner should ensure that provincial pathology units do not oppose the release of relevant pathological slides to properly qualified experts retained by the defence on terms that promise reasonable safeguard of the slides. The Office should develop and publish standard acceptable terms for such releases. The Office should also ensure that provincial pathology units are accommodating of the needs of visiting “defence” pathologists and receptive to reasonable requests from the defence for additional examinations to be conducted by pathologists assisting the Crown.

**Proposal 19.** In cases where the accused and the “defence” pathologist have been duly diligent, trial judges should prohibit the prosecutor from arguing that the evidence of the “defence” pathologist should be given less weight because she did not have as good an opportunity as the “Crown” pathologist to observe the items of pathological interest.

## **Part V: Trial Obstacles**

Even if defence counsel can educate herself on the subject of forensic pathology, locate and retain the services of an expert pathologist, and provide the expert with the best information on the case that can possibly be obtained, counsel still must be able to effectively bring out at trial the evidence favourable to her client. One means of doing that is by having the “defence” expert testify. Another is by effectively cross-examining the “Crown” pathologist (along with other witnesses). Counsel obviously have varying levels of skill in cross-examination, but they may also face some systemic obstacles to successful completion of the task.

It is difficult to speak in generalities, but there is at least some evidence to suggest that cross-examination of experts is often not that effective. In *R. v. D.(D.)*, Justice Major commented that “expert evidence is highly resistant to effective cross-examination by counsel who are not experts in that field. In cases where there is no competing expert evidence, this will have the effect of depriving the jury of an effective framework within which to evaluate the merit of the evidence.”<sup>88</sup> Professor David Paciocco has observed that with regard to expert evidence “lawyers may be hard-pressed to perform effectively their function of probing and testing and

---

<sup>88</sup> [2000] 2 S.C.R. 275 at 300. Major J. also noted at 300–301 that “[a]dditional dangers are created by the fact that expert opinions are usually derived from academic literature

challenging evidence because its subject matter will often pull them beyond their competence, let alone their expertise.”<sup>89</sup> A survey of Australian judges found that many were unhappy with the quality of advocacy in their courtrooms (insofar as it related to expert evidence) and were concerned that the courtroom process was not adequately separating the spurious from the sound expert opinions.<sup>90</sup> Some preliminary psychological research has indicated that “cross-examination may not be an effective safeguard against junk science in the courtroom,” failing in one experiment to sensitize jurors to testimony based on methodologically flawed research.<sup>91</sup>

It has been suggested that, faced with the difficulties of conducting an effective cross-examination of an expert, counsel are apt to focus more on

---

and out-of-court interviews, which material is unsworn and not available for cross-examination.”

<sup>89</sup> “Expert Evidence: Where Are We Now? Where Are We Going?” Unpublished paper presented at the 1998 Institute of Continuing Legal Education, Canadian Bar Association (Ontario), January 31, 1998 [quoted in *D.(D.)*, *ibid.* at 301].

<sup>90</sup> Ian Freckelton, Prasuna Reddy, and Hugh Selby, *Australian Judicial Perspectives On Expert Evidence: An Empirical Study: Summary of Key Findings and Outcomes* (Melbourne: Australian Institute of Judicial Administration, 1999) at 5, available online at <http://www.aija.org.au/expsumm.doc>. See also Ian Freckelton, “Judicial Attitudes Toward Scientific Evidence: The Antipodean Experience” (1997) 30 U.C. Davis L. Rev. 1137 at 1215–1216.

<sup>91</sup> Margaret Kovera et al., “Assessment of the Commonsense Psychology Underlying *Daubert*” (2002) 8 Psych. Pub. Pol. and L. 180 at 193 [referring to Margaret Kovera et al., “Reasoning about Scientific Evidence: The Effects of Juror Gender and Evidence Quality on Juror Decisions in a Hostile Work Environment Case” (1999) 84 J. Applied Psychology 362].

the credibility and bias of the expert rather the reliability of her opinions.<sup>92</sup> It has also been suggested that, faced with the difficulty of assessing reliability, juries will tend to resolve disputes over scientific evidence based on perceptions of credibility more than accuracy.<sup>93</sup>

All of these suggestions (especially the last) are controversial and I am in no position to resolve the debates. But given that concerns do exist, and have long existed, over the effectiveness of cross-examination as a safeguard against unreliable expert evidence, it seems sensible to consider means of increasing the likelihood that the true value of such evidence is clearly communicated to and understood by the trier of fact. I will discuss three here: (1) imposing an obligation on Crown counsel to elicit the limitations of pathological evidence up front, (2) allowing jurors to take notes and ask questions of pathologists in order to better understand their evidence, and (3) requiring the early exchange of pathology reports so as to better identify and perhaps narrow the areas of expert disagreement.

---

<sup>92</sup> E.g., Marilee Kapsa and Carl Meyer, “Scientific Experts: Making Their Testimony More Reliable” (1999) 35 Cal. W.L. Rev. 313 at 317–318; Joseph Sanders, “From Science to Evidence: The Testimony on Causation in the Bendectin Cases” (1993) 46 Stan. L. Rev. 1 at 47-51 [analyzing the cross-examinations that occurred during the many American trials over the allegedly harmful effects of an anti-nausea medication]; Kovera et al. (2002), *ibid.* at 192.

<sup>93</sup> E.g., Ontario Law Reform Commission, *Report on the Law of Evidence* (Toronto: Ministry of the Attorney General, 1976) at 159 [citing Howard Spellman, *Direct Examination of Witnesses* (Englewood Cliffs, N.J.: Prentice-Hall, 1968)]; Kapsa and Meyer, *ibid.* at 318; Joel Cooper et al., “Complex Scientific Testimony: How Do Jurors

### **a) Examination-in-Chief by Crown Counsel**

In a traditional adversarial process each party will bring out from a witness favourable evidence and will leave it to opposing counsel to bring out any unfavourable evidence the witness may have to give. In the context of expert evidence, this process has been criticized:

This process both fragments the presentation of significant scientific information and prolongs and raises the cost of proceedings by promoting lengthy cross-examination. The role of the cross-examiner then involves probing at length into every nook and cranny of the evidence-in-chief to ‘pry out’ of the witness what has been left unsaid. The success of this process in providing accurate and complete scientific evidence to the tribunal depends on many factors, including the skill and experience of the cross-examiner, his or her access to other experts to assist in preparing the cross-examination, and the responsiveness or agility of the witness. This is a process which scientists complain is inefficient, unscientific, and unduly adversarial, even to the point of being abusive on occasion.<sup>94</sup>

The authors of this criticism recommended a procedure whereby the party offering expert evidence would be obliged to draw out from the witness all the strengths *and* weaknesses of the expert opinion (as well as the facts and

---

Make Decisions?” (1996) 20 Law & Hum. Behav. 379 [indicating that jurors sometimes focus on an expert’s credentials].

<sup>94</sup> John Swaigen and Alan Levy, “The Expert’s Duty to the Tribunal: A Tool for Reducing Contradictions Between Scientific Process and Legal Process” (1997) 11 C.J.A.L.P. 277 at 291. This article discusses guidelines adopted by the Ontario

assumptions on which it is based).<sup>95</sup> The recommendation was made in connection with proceedings before an administrative tribunal, but it commends itself to criminal proceedings. As the authors noted, drawing out a complete picture of an expert opinion before cross-examination takes place may “improve the efficiency of communication, and increase the clarity and reliability of the information that is communicated.”<sup>96</sup> Cross-examination can then focus on weaknesses of the expert opinion that the expert either did not recognize or did not accept.

A pathologist testifying in an Ontario criminal trial is currently under a duty, pursuant to a directive issued by the Office of the Chief Coroner,<sup>97</sup> to notify Crown counsel of any concerns that her testimony may have left misleading or inaccurate impressions with the trier of fact. A proposal that Crown counsel elicit pathological testimony in a way that seeks to avoid such concerns at the start is consistent with that duty. It is also consistent with the general duty of Crown counsel to act in a manner to ensure that justice is done rather than a conviction obtained.<sup>98</sup> In the eyewitness evidence context, the Ontario Court of Appeal has stated that “it is

---

Environmental Appeal Board. See also Joe Cecil et al., “Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials” (1991) 40 Am. U. L. Rev. 727 at 758.

<sup>95</sup> *Ibid.* at 291–293.

<sup>96</sup> *Supra* note 94 at 292. Swaigen and Levy actually suggested that drawing out a complete picture *will* have those effects, but I am a little more cautious.

<sup>97</sup> Memorandum #04-10, July 12, 2004 (PFP032438) at 6.

incumbent upon Crown counsel to ensure that all relevant circumstances surrounding pretrial eyewitness identification procedures be ... made available for scrutiny by the trier of fact.”<sup>99</sup> A similar (although perhaps stronger) obligation should exist in connection with the elicitation of pathological evidence.<sup>100</sup>

**Proposal 20.** Crown counsel should be under an obligation to elicit in examination-in-chief *all* the details of any pathology evidence introduced, including any details unfavourable to the Crown’s case.

## b) Note-Taking and Questioning by Jurors

Two trial reforms have often been mentioned as ways of improving juror comprehension of evidence generally<sup>101</sup> and expert evidence in particular:<sup>102</sup>

---

<sup>98</sup> See *R. v. Boucher*, [1955] S.C.R. 16.

<sup>99</sup> *R. v. Miaponoose* (1996), 110 C.C.C. (3d) 445 at 457 (Ont. C.A.) The Court criticized Crown counsel in the case for refusing to call the investigating officer as part of his case, thereby forcing defence counsel to call the officer with the resulting restricted scope of examination.

<sup>100</sup> In saying this, I appreciate that I have no concrete information on the current practices of Crown counsel, but I am making the assumption that prosecutors do not always bring out all the bad with all the good.

<sup>101</sup> E.g., Law Reform Commission of Canada, Working Paper No. 27, *The Jury in Criminal Trials* (Ottawa: Minister of Supply and Services Canada, 1980) at 115–120; Law Reform Commission of Canada, Report 16, *The Jury* (Ottawa: Minister of Supply and Services Canada, 1982) at 54; David Watt, *Helping Jurors Understand* (Toronto: Thomson Canada, 2007) at 37–43 and 52–58.

jury note-taking and jury questioning.<sup>103</sup> In brief, the argument in favour of both is essentially this. The subject matter and details of expert evidence will often be foreign and complex to jurors. In the context of pathology, for example, jurors may be confronted with unfamiliar medical terminology, sophisticated information about biological processes, and difficult and often subtle analyses of cause and effect. Tools to allow jurors to better understand and recall such evidence therefore seem crucial, especially when reliability is at issue. Note-taking and questioning are not the only tools available,<sup>104</sup> but they are practical and useful ones. Just as they do for judges and lawyers, note-taking can enable jurors to better recollect and organize evidence and questioning can allow them to better understand it (even if only by highlighting areas of confusion that the parties can then clear up).<sup>105</sup>

---

<sup>102</sup> E.g., Kapsa and Meyer, *supra* note 92 at 318 and 327; J. Herbie DiFonzo and Ruth Stern, “Devil in a White Coat: The Temptation of Forensic Science in the Age of *CSI*” (2007) 41 *New. Eng. L. Rev.* 503 at 528; Robert Myers et al., “Complex Scientific Evidence and the Jury” (1999) 83 *Judicature* 150; Cecil, *supra* note 94 at 768–769.

<sup>103</sup> These reforms obviously have no relevance to cases tried by judge alone, as judges currently can and do take notes and ask questions.

<sup>104</sup> Trial courts could also, for example, provide jurors with an agreed-upon glossary of relevant medical terms.

<sup>105</sup> Watt, *supra* note 101 at 54, argued that a “natural consequence of one-way communication is that, except in the case of messages of surpassing simplicity, the information, as received, is bound to be distorted. Gaps in the evidence, whether by omission or commission, however material, cannot be remedied through one-way communications. And then there is at least the prospect that the absence of any authority to seek corrective or supplementary information will encourage impermissible speculation.”

The arguments against juror note-taking and questioning are manifold.<sup>106</sup> They include, for example, the fears that note-takers will unduly influence other jurors who did not take notes and who may assume they do not have as accurate a recollection of the evidence, that note-takers will not be able to keep pace with the trial, and that note-taking may favour the prosecution because jurors will become tired of making notes by the time the defence begins to present its case. Insofar as juror questioning is concerned, the concerns include the fears that jurors will ask inappropriate questions, will be embarrassed or angry if counsel objects to their questions, and will overemphasize the answers to their own questions at the expense of other evidence in the trial. There are also basic due process concerns about removing control of the litigation from the hands of the parties and turning jurors from neutral fact-finders into active inquisitors (or, worse, advocates for one side).

Trial judges in Ontario currently have the discretion to allow jurors to take notes and/or ask questions. In *R. v. Codina*, the Ontario Court of Appeal held that a trial judge has “a discretion to allow or disallow a jury to take

---

<sup>106</sup> They are nicely summarized in Larry Heuer and Steven Penrod, “Juror Note-Taking and Question Asking During Trials: A National Field Experiment” (1994) 18 *Law & Hum. Behav.* 121.

notes depending on the circumstances of the individual case.”<sup>107</sup> In *R. v. Andrade*, the Court held that “[t]here seems to be no doubt that the trial judge may, in his discretion, permit questions to be put to a witness by a juror, although, of course, the judge should not permit a question which, if answered, would elicit evidence that is inadmissible.”<sup>108</sup> I have no solid information as to how often note-taking or questioning is permitted in Ontario, but it is probably not permitted (or even considered) very often.<sup>109</sup>

It is difficult to say whether or not trial judges should generally allow jurors to take notes and ask questions in cases in which disputed pathology evidence is adduced. There is a great deal of empirical research on the question and it is not perfectly consistent.<sup>110</sup> Furthermore, to an important extent the answer requires a judgment call about the most appropriate way of

---

<sup>107</sup> (1995), 95 C.C.C. (3d) 311 at 331.

<sup>108</sup> (1985), 18 C.C.C. (3d) 41 at 59.

<sup>109</sup> The Court in *Codina*, for example, stated that “[t]he vast majority of jury trials proceed without notes being taken by jurors”: *supra* note 107 at 331. See also Watt, *supra* note 101 at 37 and 52.

<sup>110</sup> See, for example, Heuer and Penrod, *supra* note 106; Steven Penrod and Larry Heuer, “Tweaking Commonsense: Assessing Aids to Jury Decision Making” (1997) 3 Psych. Pub. Pol. & Law 259; David Rosenhan et al., “Notetaking Can Aid Juror Recall” (1994) 18 Law & Hum. Behav 53; Nicole Mott, “The Current Debate on Juror Questions: ‘To Ask or Not to Ask, That is the Question’” (2003) 78 Chi. Kent L. Rev. 1099; Shari Diamond et al., “Juror Questions During Trial: A Window into Juror Thinking” (2006) 59 Vand. L. Rev. 1927; Lynne Forsterlee et al., “The Cognitive Effects of Jury Aids on Decision-Making in Complex Civil Litigation” (2005) 19 Applied Cognitive Psychology 867; *Final Report of the Committees of the Jury Trial Project* (New York State Unified Court System, 2005) at chs..5–6, available online at [http://www.nyjuryinnovations.org/materials/Final\\_Report\\_of\\_the\\_Committees\\_of\\_the\\_Jury\\_Trial\\_Project.pdf](http://www.nyjuryinnovations.org/materials/Final_Report_of_the_Committees_of_the_Jury_Trial_Project.pdf).

structuring and operating the adversary system.<sup>111</sup> But given the difficulties that expert evidence causes for that system, it is probably time to experiment with greater use of jury note-taking and questioning. Many American states are experimenting with them and the participants seem generally happy with the results.<sup>112</sup> Empirical research indicates that the concerns over note-taking and questioning are generally not well founded.<sup>113</sup> The same research also indicates that the alleged benefits may be modest—note-taking and questioning may only increase comprehension and recollection to a moderate degree—but any benefit seems better than none.<sup>114</sup> Clearly, there are procedural issues that need to be addressed. For example, note-taking

---

<sup>111</sup> See Kirsten DeBarba, “Maintaining the Adversarial System: The Practice of Allowing Jurors to Question Witnesses During Trial” (2002) 55 Vand. L. Rev. 1521.

<sup>112</sup> For a quick summary of recent American experiences, see Michael Dann and Valerie Hans, “Recent Evaluative Research on Jury Trial Innovations” (Spring 2004) Court Review 12. See also Myers et al., *supra* note 102. England apparently has experienced “no major problems” with allowing jurors to ask questions: Eugene Sullivan and Akhil Amar, “Jury Reform in America—A Return to the Old Country Debate” (1996) 33 Am. Crim. L. Rev. 1141 at 1143.

<sup>113</sup> The bottom line of the research is summarized in Penrod and Heuer, *supra* note 110 at 271 and 280. It was found, *inter alia*, that note-takers can keep pace with the trial, do not have an undue influence over non-note-takers, and juror note-taking does not favour either the prosecution or the defence. It was also found, *inter alia*, that counsel are not reluctant to object to inappropriate juror questions, jurors do not draw inappropriate inferences from unanswered questions, jurors do not become advocates, and jurors do not overemphasize their own questions and answers at the expense of other evidence presented during the trial. The Penrod and Heuer article is 10 years old, and *somewhat* out of date, but still generally valid. Arguably, more current research has simply documented more positive impacts.

<sup>114</sup> Of particular interest may be the finding of Diamond et al., *supra* note 110 at 1963, that jurors in the civil trials they examined generally questioned experts in an attempt to “understand and evaluate the content of the testimony” rather than the credentials or experience of the expert.

probably should not be limited to any one portion of the trial.<sup>115</sup> Questioning should probably be limited to clarification questions, tendered in writing, and pre-screened by the trial judge after hearing submissions from counsel.<sup>116</sup> But, done properly,<sup>117</sup> jury note-taking and questioning may enhance the likelihood that pathology evidence will be better understood and used in homicide cases.

**Proposal 21.** Trial judges in cases involving disputed pathology evidence should seriously and actively consider allowing jurors to take notes and ask questions during the trial, in accordance with proper procedures that safeguard the rights of the parties.

### c) Pretrial Defence Disclosure

It has been frequently suggested over the years that there should be mandatory pretrial disclosure by the defence of proposed expert testimony.<sup>118</sup> There is currently some obligation on the defence to make

---

<sup>115</sup> See *Codina*, *supra* note 107 at 332.

<sup>116</sup> See *R. v. Druken* (2002), 164 C.C.C. (3d) 115 at 136–138 (Nfld. C.A.).

<sup>117</sup> For suggested procedures, see Watt, *supra* note 101 at 40–42 and 55–58; DeBarba, *supra* note 111 at 1546–1548.

<sup>118</sup> E.g., Morin Report, *supra* note 52 at 375 (Recommendation 17); *Report of the Criminal Justice Review Committee*, Hugh Locke, John Evans and Murray Segal, Co-Chairs (Toronto: Ontario Ministry of the Attorney General, 1999) at 87; Law Reform Commission of Canada, *Report on Evidence* (Ottawa: Law Reform Commission, 1979) at

disclosure in respect of expert evidence. *Criminal Code* s.657.3 mandates that defence counsel who intends to call an expert witness give at least 30 days notice of the intention, along with a statement of the name, qualifications, and area of expertise of the proposed witness.<sup>119</sup> However, the recommendation of many is to require disclosure of the *content* of the defence expert's opinion in advance of trial. Currently, the defence need only disclose that information by the close of the Crown's case at trial.<sup>120</sup>

Interestingly, the call for defence disclosure of expert evidence is almost never made on the ground that it will help the defence.<sup>121</sup> The suggestion is usually motivated by the desire to increase the order and efficiency of criminal trials by avoiding unnecessary delay resulting from the Crown's need for time to prepare for cross-examination of the defence expert. However, intuitively it would seem that disclosure *could* be beneficial for the defence *if* it led to pretrial discussions between the opposing experts that clarified and perhaps narrowed the areas of disagreement. This could help defence counsel not only understand the

---

99; *Report of the Ontario Courts Inquiry*, T.G. Zuber, Chair (Toronto: Ontario Ministry of the Attorney General, 1987) at 228–229.

<sup>119</sup> Arguably, this only requires that notice be given in cases where counsel has a settled intention to call the witness and is not waiting to see how other evidence goes in: S. Casey Hill et al., *McWilliams' Canadian Criminal Evidence*, 4th ed., looseleaf (Aurora: Canada Law Book, 2007) at 12–101.

<sup>120</sup> *Criminal Code*, s.657.3(3)(c).

issues in dispute but also focus her cross-examination and the time and resources spent preparing for it.<sup>122</sup> Mandatory pretrial discussions between experts has been proposed in civil matters<sup>123</sup> and endorsed by some pathologists<sup>124</sup> and courts<sup>125</sup> in criminal matters.

It is probably safe to assume, however, that a great many defence counsel are against *mandatory* pretrial disclosure of the content of proposed defence expert evidence<sup>126</sup> (and thus, presumably, mandatory pretrial expert meetings). The primary reason is undoubtedly that pretrial disclosure removes the opportunity to surprise the “Crown” expert in cross-examination at trial. Granting the defence such an opportunity is hard to justify if it simply allows counsel to confound the witness and *artificially*

---

<sup>121</sup> It is not clear, but the Morin Report may be an exception: see *supra* note 52 at 360–361.

<sup>122</sup> It might also, in exceptional cases, lead to the withdrawal of charges if the Crown no longer felt that there was a reasonable prospect of conviction or if the “Crown” pathologist ultimately came to agree with the “defence” pathologist.

<sup>123</sup> Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1996) at 50–51. See also Australian Law Reform Commission, Report 89, *Managing Justice: A Review Of The Federal Civil Justice System* (2000) at recs.62–63, available online at <http://www.austlii.edu.au/au/other/alrc/publications/reports/89/ch6.html#Heading14>.

<sup>124</sup> See, for example, Usher, *supra* note 74 at 248–249. Several of the pathologists with whom I spoke felt similarly.

<sup>125</sup> E.g., *R. v. Harris*, [2005] EWCA Crim 1980 at paras.272–273 (C.C.A.) [suggesting that case management judges should consider directing experts to consult together and, if possible, prepare a summary of the points of agreement and disagreement].

<sup>126</sup> All three of the counsel with whom I spoke were against it. See also the views of four defence practitioners found in Charles Davison, “Putting Ghosts to Rest: A Reply to the ‘Modest Proposal’ for Defence Disclosure of Tanovich and Crocker” (1996), 43 C.R. (4th) 105; Michael Tochor and Keith Kilback, “Defence Disclosure: Is it Written in

create the impression that the witness has been caught in a lie, mistake, or omission (which, given adequate time, the witness could adequately explain away).<sup>127</sup> But it is easier to justify if it prevents the Crown expert from artificially *covering up* a lie, mistake or omission—a possibility that cannot be entirely discounted. There are additional concerns with mandatory pretrial disclosure. It may be unconstitutional, violative of (among other things) the right of the accused to stand mute until a case to meet has been presented.<sup>128</sup> It may also be impractical, easily avoided by the defence waiting until the last minute to obtain an expert report<sup>129</sup> (raising anew the problem, mentioned by some of the pathologists with whom I spoke, about late retainer).<sup>130</sup>

There may be benefits to the Crown and to the trial system from mandatory pretrial defence disclosure of expert pathological evidence, but in this paper I am considering solutions to the obstacles confronting an *accused* in her attempt to test and contest pathology evidence tendered by the Crown.

---

Stone?” (2000) 43 C.L.Q. 393; Suzanne Costom, “Disclosure by the Defence: Why Should I Tell You?” (1996) 1 Can. Crim. L. Rev. 73.

<sup>127</sup> See Law Reform Commission of Canada, *supra* note 118 at 35: “The only advantage lost to the defendant under the proposal [for pretrial disclosure] will be the advantage of surprise and the Evidence Project concluded that such was not a value to be promoted in a system designed to produce a fair, orderly ascertainment of truth.”

<sup>128</sup> See *R. v. Rose*, [1998] 3 S.C.R. 262 at 318–319 (emphasis omitted): “One aspect [of the right to make full answer and defence] is the right of the accused to have before him or her the full ‘case to meet’ before answering the Crown’s case by adducing defence evidence”; Costom, *supra* note 126 at 83–87.

In that context, mandatory disclosure is hard to recommend. The potential benefits to the defence are possible to imagine but largely speculative. I know of no study that has sought to establish if such benefits actually accrue. Even in theory benefits will only accrue if mandatory disclosure is accompanied by mandatory (or at least frequent) pretrial discussions between pathologists that might clarify and narrow the areas of disagreement. It may not be realistic to expect such discussions to occur, given that criminal litigation sometimes proceeds in a rush (especially if the accused is detained) and given that funding for such discussions might not be easily available from Legal Aid. It does seem sensible, however, to encourage defence counsel to voluntarily engage in pretrial disclosure and pursue pretrial discussions between experts in appropriate cases. An advantage to the defence *may* be obtained and defence counsel should be encouraged to try to obtain it.

**Proposal 22.** Defence counsel should be encouraged to make pretrial disclosure of pathological evidence and to set up pretrial meetings between pathologists acting in a case, with a view to clarifying and narrowing the issues in dispute.

---

<sup>129</sup> This possibility was mentioned by Lee Baig.

## Part VI: Pleading Guilty

Faced with difficulties in countering the Crown's evidence, an innocent accused may choose to negotiate a plea to a lesser offence as a way of cutting her losses. There have in fact been many documented cases of persons pleading guilty to offences that they did not commit.<sup>131</sup> Clearly, a wide variety of reasons prompted such pleas, not all of which related to the difficulties in countering the prosecution's case. But it is reasonable to assume, given the obstacles described above to responding to pathological evidence tendered by the Crown, that some accused in pediatric death cases may have chosen, or may in the future choose, to "solve" their problem by way of a plea bargain. The choice may seem especially attractive to an accused charged with murder, facing a mandatory life sentence on conviction, who is offered the opportunity to plead guilty to something like manslaughter that usually carries no minimum punishment.<sup>132</sup> It may be difficult to stop accused persons from making that choice. The question

---

<sup>130</sup> See, *supra*, text accompanying notes 46–47.

<sup>131</sup> Rodney Uphoff, "Convicting the Innocent: Aberration or Systemic Problem?" [2006] Wis. L. Rev. 739 at 796–802; Steven Drizin and Richard Leo, "The Problem of False Confessions in the Post-DNA World" (2004) N.C.L. Rev. 891 at 953. For a Canadian example, see Tu Thanh Ha, "Quebec man spent five years in jail" *Globe and Mail* (24 September 2005) A4.

<sup>132</sup> *Criminal Code*, s.236. The exception is where a firearm is used in the commission of the offence, in which case the sentence cannot be less than four years in prison.

addressed here is whether it would be ethical for defence counsel to assist them in the endeavour.<sup>133</sup>

The bulk of opinion in Canada is that it would be unethical.<sup>134</sup> The Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions, for example, stated that

[i]t is improper ... for counsel to facilitate a guilty plea to proceed where an accused maintains his or her innocence, by withholding from the Court the fact that an accused does not acknowledge guilt. Withholding such a crucial fact prevents the court from apprehending the true state of affairs, namely, that an apparent acknowledgment of guilt by the accused is illusory. In the Committee's view, there can be no ulterior motive of an accused person ... that justifies such a course of action. In this regard, counsel must adhere to the overriding responsibilities as officers of the Court, and prevent the integrity of the court processes from being undermined in pursuit of the interests of individual accused persons.<sup>135</sup>

Other esteemed authorities have expressed a similar view.<sup>136</sup>

---

<sup>133</sup> It seems highly unlikely that it would be illegal for counsel to assist, although I suppose one could make the argument that counsel would be assisting in an obstruction of justice or fabrication of evidence. The issue, however, is normally considered in the context of counsel's ethical obligations.

<sup>134</sup> Michel Proulx and David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at 450.

<sup>135</sup> *Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions: Recommendations and Opinions* (Toronto: Ontario Ministry of the Attorney General, 1993) at 295.

<sup>136</sup> See, for example, G. Arthur Martin and Joseph Irving, *G. Arthur Martin: Essays on Aspects of Criminal Practice* (Scarborough: Carswell, 1997) at 174 [reporting on the views of Mr. Martin, Lloyd Graburn, and Joseph Sedgwick]; Law Reform Commission of Canada, Working Paper 60, *Plea Discussion and Agreements* (Ottawa: Law Reform Commission of Canada, 1989) at 48.

The Ontario Rules of Professional Conduct do not explicitly prohibit counsel from assisting an innocent accused with a guilty plea. Rule 4.01(9) dictates that a lawyer may only enter into an agreement with the Crown regarding a guilty plea when the accused “voluntarily is prepared to admit the necessary factual and mental elements of the offence charged.” But, even assuming that the Rule applies to in-court proceedings, it would not necessarily be breached in the situation where an accused willingly but dishonestly makes the necessary admissions. Rule 4.01(2) may be more relevant. It dictates that counsel shall not “knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable” or “knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts ..., suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime or illegal conduct.” The Ontario Court of Appeal has suggested that a guilty plea is supposed to be an authentic acceptance of guilt and that a court has been misled when an accused admits to culpable facts while simultaneously denying responsibility to counsel.<sup>137</sup> Assisting the accused with the plea,

---

<sup>137</sup> See *R. v. K.(S.)* (1995), 99 C.C.C. (3d) 376 at 382 [where the Court was asked to review a guilty plea entered by an accused who consistently maintained his innocence]: “This case presents a graphic example of why it is essential to the plea bargaining process that the accused person is prepared to admit to the facts that support the conviction. The court should not be in the position of convicting and sentencing individuals, who fall short of admitting the facts to support the conviction unless that guilt is proved beyond a

therefore, would seem to violate counsel’s duties not to deceive a tribunal or permit the accused to do something dishonest.

The matter is complicated, however, by the fact that counsel may not be *knowingly* deceiving a court. Some guilty accused will seek to save face by falsely maintaining innocence and portraying their guilty plea as a choice made purely for practical reasons. In situations where this appears to be the case (presumably when the evidence of guilt is strong and the explanations offered by the accused unreasonable) counsel may legitimately believe in guilt and thus not *knowingly* deceive a court through participation in a plea. Counsel may, in other words, honestly and reasonably believe that they are not participating in a fraud on the court—even if their belief is actually wrong. Some have suggested that in that situation counsel is not acting unethically.<sup>138</sup>

**Proposal 23.** Defence counsel should be reminded of their ethical obligation not to assist in a guilty plea by any accused person who plausibly maintains

---

reasonable doubt. Nor should sentencing proceed on the false assumption of contrition. That did not happen here, but worse, the sentence became impossible to perform. Plea bargaining is an accepted and integral part of our criminal justice system but must be conducted with sensitivity to its vulnerabilities. A court that is misled, or allows itself to be misled, cannot serve the interests of justice.”

<sup>138</sup> Proulx and Layton, *supra* note 134 at 453–457; David Tanovich, “*Taillefer: Disclosure, Guilty Pleas and Ethics*” (2004) 17 C.R. (6th) 149 at 154.

factual innocence. The Law Society of Upper Canada should develop specific guidelines to assist counsel in such cases.

## **Conclusion**

Innocent persons accused in pediatric death cases can find themselves in a difficult predicament. The Crown may be relying upon the evidence of an expert pathologist whose testimony, even if erroneous, will be difficult to contest. Defence counsel are not always well equipped to understand and confront pathological evidence. Assistance from an independent pathologist may not be readily available and/or fully funded. Even when assistance is available, the “defence” pathologist will often be operating at a disadvantage relative to the pathologist assisting the Crown, a disadvantage that may be used to discount the defence evidence at trial. It is difficult to make generalizations, and the evidence supporting these observations is unquestionably incomplete, but there is reason to be concerned that the playing field in pediatric death cases will often be uneven as between the accused and the Crown. Reform in a variety of areas seems necessary. Hopefully, the proposals made in this paper will be of assistance.