W A R N I N G

The court hearing this matter directs that the following notice should be attached to the file:

This is a case under Part III of the *Child and Family Services Act* and is subject to subsections 45(8) of the Act. This subsection and subsection 85(3) of the *Child and Family Services Act*, which deals with the consequences of failure to comply with subsection 45(8), read as follows:

> **45.—**(8) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.
>
> . . .
>
> **85.—**(3) A person who contravenes subsection 45(8) (publication of identifying information) or an order prohibiting publication made under clause 45(7)(*c*) or subsection 45(9), and a director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation, is guilty of an offence and on conviction is liable to a fine of not more than $10,000 or to imprisonment for a term of not more than three years, or to both.

Toronto Registry No. C4243/99
DATE: 2004·II·17
CITATION: *Children's Aid Society of Toronto v. O.(K.)*

ONTARIO COURT OF JUSTICE

B E T W E E N :

CHILDREN'S AID SOCIETY OF TORONTO,
Applicant,

— AND —

K.O. and B.L.,
Respondents.

Before Justice Robert J. Spence
Voir dire argued on 30 January 2004 and 9 February 2004
Reasons for Judgment released on 17 February 2004

EVIDENCE — Opinion evidence — Expert opinion — Admissibility criteria — Necessity in assisting judge — Information likely to be outside judge's experience and knowledge — Mother in child protection case wanted to call expert whose proposed opinion would be general critique of how one assessor administered psychometric tests and how that assessor reached clinical conclusions that were allegedly devoid of cultural and racial sensitivities — Children's aid society had already filed 2 parenting capacity assessments with different conclusions by different psychologists who gave evidence in court and each of whom had chance to raise any perceived weaknesses in other's assessment, all of which rendered proposed evidence of mother's expert of marginal utility — Moreover, mother (who had yet to testify) could raise explanations dealing with issue of racial and cultural sensitivity that would be much more helpful and far more "necessary" than speculative opinion of proposed expert who had not witnessed interaction between children and their mother on which assessor drew his clinical conclusions — In addition, judges have made decisions based on basic common-sense understanding of human nature and of how people interact with one another long before behavioural experts existed and long before it was in vogue to call them to give expert opinions at trial — In particular, issues of racial and cultural sensitivity in culturally diverse city like Toronto are not so "technical" in nature that they require expert opinion to "enable the trier of fact to appreciate" them.

EVIDENCE — Opinion evidence — Expert opinion — Admissibility criteria — Proper qualification of expert — Deficiencies in information base — Witness claiming general expertise in cultural and racial issues proposed to give expert opinion on how local children's aid society delivered services in cross-cultural context — At

***voir dire*, witness testified that he was once president of society's board of directors and was very familiar with how society operated, how it delivered its services and how society's own statistics at that time revealed disproportionate number of African-Canadian children under society care — Regrettably, his association with society ended almost 20 years ago and he had no first-hand knowledge of society's current programs, its initiatives or delivery of its services — Moreover, he had absolutely no first-hand knowledge how society delivered its services in this particular case — Court ruled that these factual deficiencies disqualified him from expressing opinion on society's delivery of services in cross-cultural context.**

EVIDENCE — Opinion evidence — Expert opinion — Admissibility criteria — Proper qualification of expert — Solidly grounded scientific knowledge — Mother's lawyer gave notice of intention to adduce evidence of proposed expert who would critique report of parenting capacity assessment for its deficiencies of cultural and racial sensitivity and would argue that assessor had relied too much on psychometric tests but, on date of this notice, proposed expert had not yet seen report and had not met mother who had been subject of assessment — Proposed expert's blind willingness to advance his opinions regardless of how well-grounded they were in facts of case was indicator that he would appear in court more as partisan advocate rather than as dispassionate scientist.

EVIDENCE — Opinion evidence — Expert opinion — Admissibility criteria — Relevance — Probative value against prejudicial impact — Because notice of intention to adduce opinion of proposed expert came only after society closed its case, society would be entitled to call reply evidence on issue, including re-calling assessor and other witnesses — That could require court to find 5 more trial days, creating further delay of 3 to 4 months waiting for those 5 days to become available, all at children's expense — At best, proposed opinion would be general critique of how assessor administered psychometric tests and how assessor reached clinical conclusions that were allegedly devoid of cultural and racial sensitivities — Benefits of proposed opinion fell significantly short of point where they would outweigh prejudice to children in further 3-to-4 months in limbo.

EVIDENCE — Opinion evidence — Expert opinion — Admissibility criteria — Relevance — Threshold test of reliability (field of expertise) — Behavioural differences between races and cultures — In course of parenting capacity assessment of mother who seemed unable to attend to high medical needs of twin daughters, psychologist retained by children's aid society administered various psychometric tests — Assessor confirmed society's fears and noted "stiffness and coolness" between mother and children that he interpreted as lack of bonding, attachment or affection between her and children — Mother sought to call witness claiming general expertise in cultural and racial issues to give expert opinion that would critique assessment and psychometric tests for lack of cultural and racial sensitivity and that would offer other explanation for "stiffness and coolness" and why African-Canadians react and respond differently than Caucasian-Canadians to similar situations — *Voir dire* revealed that proposed expert was not psychologist but had degrees in education and some experience in racial and cultural issues — Mother's lawyer failed, however, to present evidence at *voir dire* that proposed expert's opinions were generally recognized or accepted as valid by scientific community within which he worked — Proposed evidence failed to meet requirement

of threshold reliability.

CASES CITED

The Queen v. J.J., [2000] 2 S.C.R. 600, 2000 SCC 51, 261 N.R. 111, 192 D.L.R. (4th) 416, 148 C.C.C. (3d) 487, 37 C.R. (5th) 203, [2000] S.C.J. No. 52, 2000 CarswellQue 2310.

The Queen v. K.(A.) (1999), 45 O.R. (3d) 641, 125 O.A.C. 1, 176 D.L.R. (4th) 665, 67 C.R.R. (2d) 189, 137 C.C.C. (3d) 225, 27 C.R. (5th) 226, 1999 CanLII 3793, [1999] O.J. No. 3280, 1999 CarswellOnt 2806 (Ont. C.A.).

The Queen v. Mohan, [1994] 2 S.C.R. 9, 166 N.R. 245, 71 O.A.C. 241, 114 D.L.R. (4th) 419, 89 C.C.C. (3d) 402, 29 C.R. (4th) 243, 1994 CanLII 80, [1994] S.C.J. No. 36, 1994 CarswellOnt 6.

The Queen v. Morin, [1988] 2 S.C.R. 345, 88 N.R. 161, 30 O.A.C. 81, 44 C.C.C. (3d) 193, 66 C.R. (3d) 1, 1988 CanLII 8, [1988] S.C.J. No. 80, 1988 CarswellOnt 82.

The Queen v. T. (J.E.) (1994), 25 W.C.B. (2d) 490, [1994] O.J. No. 3067, 1994 CarswellOnt 3370 (Ont. Gen. Div.).

The Queen v. Turner, [1975] Q.B. 834, [1975] All E.R. 70. [1975] 2 W.L.R. 56, 60 Cr. App. Rep. 80 (C.A.).

Peter D. Marshall ..... for the applicant society
Roger O.R. Rowe ..... for the respondent mother K.O.
R. Sam Ramlall ..... for the respondent father B.L.
Alawi K. Mohideen ..... for the Office of the Children's Lawyer, legal representative for the child

For previous proceedings, see *Children's Aid Society of Toronto v. K.O. and B.L.* (2003), 127 A.C.W.S. (3d) 474, 17.O.F.L.R. 194, 2003 CanLII 52785, [2003] O.J. No. 5090, 2003 CarswellOnt 5005 (Ont. C.J.), *per* Justice Robert J. Spence.

JUSTICE R.J. SPENCE:—

1: NATURE OF THIS PROCEEDING

[1] Ms. K.O.'s counsel is seeking to qualify Dr. Ralph Agard as an expert in order that he may be permitted to express an opinion on certain issues that are alleged to be relevant to facts in issue in this trial. Both the Children's Aid Society of Toronto (the "society") as well as the Office of the Children's Lawyer oppose the admission of this evidence. A *voir dire* was held over a two-day period. At the conclusion of the *voir dire*, I reserved my decision. On 16 February 2004 I advised counsel of my decision but, at that time, I had not quite finalized my reasons. I have now done so, and the following are the reasons for my decision.

2: BACKGROUND AND CONTEXT

[2] The trial before me is a status review proceeding in respect of To. O. and Ty. O. They are twins girls who were born on […] 1998. On 27 October 1999, the society apprehended the children who were then in the care of their maternal grandmother. The

society's concern at the time of apprehension was the perceived inability by the twins' family to care for their needs. Specifically, the children suffer from "sickle cell" disorder.

[3] On 13 February 2002, the children were found to be in need of protection. This finding was made pursuant to a statement of agreed facts that the parties signed in December 2001. The children were made wards of the society for twelve months. On the basis of a further statement of agreed facts, that twelve-month wardship order was extended for a further six months in April 2002. As at the commencement of this trial — which, shockingly, has been stumbling along off-and-on since early October 2003 (due entirely to systemic inadequacies) — the children had been in the same foster home for about two years. (The children were recently removed from that foster home and placed in a different home for reasons that have nothing to do with this decision.)

[4] Both children, as well as their mother and their father, are African-Canadians. The evidence to date suggests that Black persons are, as a group, most prone to sickle cell disorder.

[5] It was, and remains the view of the society, that, although the mother is capable of caring for the twins during the weekend access visits in her home, she is not capable of providing the intense care and supervision that is required for two young children who suffer from this disorder.

[6] Part of the society's case rests on the allegation that the mother has demonstrated an inability to get to the children's many medical appointments, or to get to those appointments on time. I note that Ms. K.O. currently has one older child in her care, a child who has not been the subject of any protection proceedings.

[7] Additionally, the society has tendered evidence that, the society submits, supports its position that the mother has demonstrated a pattern of defiant behaviour, as well as opposition and unco-operativeness in response to the recommendations that have been made to her, from time to time, by the health care professionals as to how to care for the twins.

[8] In or around July 2002, Dr. Daniel Fitzgerald, a psychologist retained by the society, conducted a parenting capacity assessment of Ms. K.O. The society retained Dr. Fitzgerald because it was "in a quandary" whether it could safely recommend the return of the children to their mother.

[9] Dr. Fitzgerald administered a number of psychological tests and, additionally, he formed certain clinical impressions of Ms. K.O. In the end, he concluded that it would not be in the best interests of the children to return them to the full-time care of their mother. In summary, Dr. Fitzgerald concluded that the children should be made Crown wards because of Ms. K.O.'s "cognitive limitations and personality traits [that] could interfere with her ability to maintain the level of vigilance and manage the persistent stress involved in parenting the [twins]."

[10] As part of his assessment, Dr. Fitzgerald administered the Wechsler Adult

Intelligence test (the "Wechsler") in order to determine the mother's level of cognitive functioning. The test revealed that Ms. K.O. was functioning at the 5th percentile — a level that Dr. Fitzgerald described as "borderline." His clinical impression was that Ms. K.O. demonstrated some signs of "narcissistic personality features." Dr. Fitzgerald did point out that there was not enough evidence to conclude that a narcissistic disorder existed, merely that Ms. K.O. demonstrated traits of narcissism.

[11] A second parenting capacity assessment was performed by another psychologist, Dr. Nitza Perlman. Her assessment was conducted about one year after Dr. Fitzgerald's assessment and about one month prior to the commencement of this trial. Although Dr. Perlman did conclude that parenting the twins would be a "major challenge" to Ms. K.O., she testified that it would be in the best interests of the children to be parented by Ms. K.O. Dr. Perlman's evidence was elicited following Dr. Fitzgerald's testimony and, as a result, Dr. Perlman had the opportunity — which she took — to comment on the assessment that Dr. Fitzgerald had conducted.

[12] Against this backdrop, mother's counsel called Dr. Ralph Agard as one of his witness. He submitted that Dr. Agard ought to be qualified as an expert in two areas, and that he be permitted to express two opinions.

3: THE PROPOSED OPINION EVIDENCE

[13] The first alleged area of expertise is in "psychometrics." If Dr. Agard were qualified as an expert in psychometrics, mother's counsel would then seek to elicit an opinion from Dr. Agard as to the unreliability of the Wechsler — as well as other psychometric tests administered by Dr. Fitzgerald in his assessment process — when one factors race and culture into the overall equation. Specifically, mother's counsel would elicit the opinion that the parenting capacity assessment conducted by Dr. Fitzgerald was not reliable because of his failure to take into consideration the related racial and cultural issues that, it is alleged, are crucial in formulating a parenting capacity recommendation.

[14] The second alleged area of expertise was in "human behaviour" and, more specifically, the importance of cultural and racial sensitivity in interpreting human behaviour. Mother's counsel sought to elicit an opinion from Dr. Agard on "culturally and racially sensitive child and family service delivery by child welfare institutions" and, in particular, "how the society delivers its services in a cross-culture context."

[15] I am able to dispense with the second area of the proposed evidence quickly. In the 1980s, Dr. Agard was the president of the board of directors of the Children's Aid Society of Metropolitan Toronto. In that capacity, he was doubtless very familiar with how the society operated and how it delivered its services. He testified that, in the 1980s, the society kept statistics on the racial background of the children who were in the society's care. He also stated that those statistics revealed an over-representation of African-Canadian children in foster care or in group homes.

[16] However, Dr. Agard has had no association with the society since the 1980s —

approximately 20 years. He has no direct knowledge of the society as it currently stands nor any knowledge of the society's current programs, its initiatives or the delivery of its services. His sole source of information regarding the present-day society is through discussions that he has had with students who have been placed there, as well as through articles he has read. Furthermore, he has absolutely no first-hand knowledge as to how the society delivered its services in the case before me.

[17] Accordingly, at the end of the first day of the *voir dire*, I ruled that all of these factual deficiencies in Dr. Agard's knowledge-base disqualified him — even if he did have some general expertise in cultural and racial issues (an issue that I had yet to decide) — from expressing an opinion on the delivery of services by the society in a cross-cultural context.

[18] That issue having been disposed of, the issue that then remained was whether Dr. Agard ought to be qualified as an expert to express an opinion on the parenting capacity assessment conducted by Dr. Fitzgerald.

4: DR. AGARD'S QUALIFICATIONS

[19] Dr. Agard's *curriculum vitae* discloses that he was awarded a degree of bachelor of education from the University of Winnipeg in 1978 (elementary education), a degree of bachelor of education from Brandon University in 1979 (special education and psycho-assessments), a degree of master of education from the University of Toronto (OISE) in 1980 and a degree of doctor of education from the University of Toronto (OISE) in 1982. It should be noted that Dr. Agard is not a psychologist.

[20] I will not delve deeply into his experience but will summarize some aspects of his various endeavours. He was, as I noted earlier, the past president of the board of directors of the Toronto children's aid society in the 1980s; he is currently running a clinical psycho-social and psycho-educational practice primarily within racial and minority communities; he has provided individual and family counselling with particular emphasis on culturally different and minority communities; he has conducted family and parenting assessments; he has considerable experience in the area of employment equity; from 1994 to 1998 he was the director of human rights and equity at the University of Guelph; from 1986 to 1993 he was the executive director of Harambee Centres Canada; from 1991 to 1998 he was an adjunct professor in the faculty of social work, University of Toronto; from 1983 to 1986 he was a psycho-educational consultant for the North York Board of Education in Toronto. These are only a few of Dr. Agard's many experiences and accomplishments that pertain to the issue of race and minorities.

5: THE LAW

[21] The leading case on the admissibility of expert evidence is *The Queen v. Mohan*, [1994] 2 S.C.R. 9, 166 N.R. 245, 71 O.A.C. 241, 114 D.L.R. (4th) 419, 89 C.C.C. (3d) 402, 29 C.R. (4th) 243, 1994 CanLII 80, [1994] S.C.J. No. 36, 1994 CarswellOnt 6. *The Queen v. Mohan* held that there are four criteria that must be applied for the admission of expert evidence. Should any of these four criteria not be satisfied, the proposed evidence is not

admissible. The threshold criterion is whether the proposed evidence is relevant.

5.1: Relevance

[22] According to *The Queen v. Mohan*, relevance has at least two aspects. First, the evidence must be ***logically relevant*** in that it is so related to a fact in issue that it tends to establish that fact. Second, the court must engage in a "cost-benefit" analysis. Specifically, the court must decide whether the benefit that would flow from the admission of the evidence — notwithstanding its logical relevance — would be outweighed by its cost. By "cost" the court meant any prejudicial impact that might result from the admission of that evidence. For example, if the admission of the evidence would require such an inordinate amount of time, an amount of time that is not commensurate with the benefit to be obtained, the court should not allow the evidence to be adduced; see page 21 [S.C.R.].

[23] *The Queen v. Mohan* also discussed the danger that the evidence could be misleading, in the sense that is could seem to be more impressive than it really is. The Ontario Court of Appeal in *The Queen v. A.K.* (1999), 45 O.R. (3d) 641, 125 O.A.C. 1, 176 D.L.R. (4th) 665, 67 C.R.R. (2d) 189, 137 C.C.C. (3d) 225, 27 C.R. (5th) 226, 1999 CanLII 3793, [1999] O.J. No. 3280, 1999 CarswellOnt 2806 (Ont. C.A.), expanded on this concern, referring to it as "threshold reliability." What is meant by "threshold reliability" is whether the evidence has a sufficiently sound scientific basis upon which the trier of fact can properly make the necessary assessment. This is of particular importance when the consideration is with respect to the "soft" sciences, that is, the behavioural sciences — the proposed area of expertise in this case. At paragraph [87], the Court of Appeal quoted with approval a passage from paragraph [75] of *The Queen v. J.E.T.* (1994), 25 W.C.B. (2d) 490, [1994] O.J. No. 3067, 1994 CarswellOnt 3370 (Ont. Gen. Div.), *per* Justice S. Casey Hill:

> **[75]** Needless to say there is a continuum of reliability in matters of science from near certainty in physical sciences to the far end of the spectrum inhabited by junk science and opinion akin to sorcery or magic. Whether the technique can be demonstrably tested, the existence of peer review for the theory or technique, the existence of publication, the testing or validation employing control and error measurement, and some recognition or acceptance in the relevant scientific field all contribute to an assessment of the reliability of the opinion and hence its capacity to outweigh the prejudicial impact of imposing on the jury highly suspect opinion evidence masquerading as science.

See also *The Queen v. J.J.*, [2000] 2 S.C.R. 600, 2000 SCC 51, 261 N.R. 111, 192 D.L.R. (4th) 416, 148 C.C.C. (3d) 487, 37 C.R. (5th) 203, [2000] S.C.J. No. 52, 2000 CarswellQue 2310.

5.2: Necessity

[24] Before the proposed evidence can be admitted, it must also be shown that the trier of fact "needs" the evidence. By that, the Supreme Court of Canada in *The Queen v. Mohan* meant: Is the evidence to be adduced and the opinion to be expressed likely to be outside the experience and knowledge of a judge or jury? As the Supreme Court of Canada in *The Queen v. Mohan* stated (at page 24 [S.C.R.]):

> As in the case of relevance . . . the need for the evidence is assessed in light of its potential to distort the fact-finding process.

And quoting from *The Queen v. Turner*, [1975] Q.B. 834, [1975] All E.R. 70. [1975] 2 W.L.R. 56, 60 Cr. App. Rep. 80 (C.A.), (at page 841 [Q.B.]), the Supreme Court of Canada in *The Queen v. Mohan* stated (at page 24 [S.C.R.]) [my emphasis]:

> An expert's opinion is admissible to furnish the court with scientific information which is ***likely to be outside the experience and knowledge of a judge or jury***. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary.

5.3: The Absence of Any Exclusionary Rule

[25] If there exists some exclusionary rule, otherwise admissible evidence will not be permitted. The example given by the Supreme Court of Canada in *The Queen v. Mohan* was found in the case of *The Queen v. Morin*, [1988] 2 S.C.R. 345, 88 N.R. 161, 30 O.A.C. 81, 44 C.C.C. (3d) 193, 66 C.R. (3d) 1, 1988 CanLII 8, [1988] S.C.J. No. 80, 1988 CarswellOnt 82. In that case, the court refused to admit evidence elicited by the Crown in the cross-examination of a psychiatric expert tending to show that the accused was predisposed to committing the offence for which he had been charged. The accused had not put his own character into issue and, accordingly, the purported evidence was not admissible, notwithstanding that the psychiatrist was an otherwise qualified expert.

5.4: A Properly Qualified Expert

[26] As the court in *The Queen v. Mohan* stated (at page 25 [S.C.R.]):

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

6: ANALYSIS AND APPLICATION TO THIS CASE

6.1: Relevance

[27] The evidence sought to be elicited from Dr. Agard is directed to critiquing and undermining the report prepared by Dr. Fitzgerald and the conclusions which Dr. Fitzgerald reached. The society obviously relies on that report and on its conclusions in support of its overall position that the mother is incapable of parenting the twins and, accordingly, that the twins ought to be made Crown wards. Because of that, I am satisfied there is logical relevance in the evidence that Dr. Agard proposes to give, in that it is directed to a fact in issue in this trial.

[28] I am not satisfied, however, that the evidence sought is "worth" what it will cost to acquire it. Initially, one of the pieces of evidence that mother's counsel sought to adduce from Dr. Agard was that the Wechsler will typically result in a score that is 10 to 15 points lower for Blacks than for Caucasians. On the second day of the *voir dire*, however, society counsel conceded that there is reliable scientific evidence — which he provided to me — that

confirms the existence of such a gap. What then remained of the opinion that mother's counsel intended to seek from Dr. Agard? The proposed opinion would consist of a general critiquing of the way in which the psychometric tests were administered and the manner in which Dr. Fitzgerald arrived at his clinical opinions that, mother's counsel would argue, were devoid of the cultural and racial sensitivities necessary to give weight to Dr. Fitzgerald's conclusions.

[29] There is a serious logistical difficulty with the introduction of the proposed evidence. Mother's counsel failed to give notice to society counsel of his intention to adduce the evidence until after the society's case was concluded. Mother's counsel candidly admitted in his submissions that, were I to admit Dr. Agard's evidence, the society would be entitled to call reply evidence on the issue, including re-calling Dr. Fitzgerald and other witnesses as well. He acknowledged this could extend the trial by as much as another week. What are the implications of this?

[30] The trial commenced on 7 October 2003 and ran for four consecutive days. The fifth day of trial (the first day of the *voir dire*) was 30 January 2004 and the sixth day of trial was 9 February 2004. The seventh day was set for 16 February 2004, but because of the illness of mother's counsel, that day did could not proceed. There are currently five more days scheduled for trial, taking us to May 2004. As the parties well know, if an additional week of trial is required, those days will not likely be available until possibly the latter part of this summer. Thus, the delay necessitated by the admission of this evidence would not simply be the extra five days of trial — in itself a not inconsequential consideration — but, rather, a further delay of about ***three to four months*** waiting for those five days to become available.

[31] As I stated at the outset of these reasons, it is appalling that it has taken four months to complete six days of trial. It is difficult to imagine any reasonable person concluding that a system that functions in this manner is either fair or reasonable. I know full well that my brother and sister judges strive mightily to ensure they are able to reach just decisions in the face of such systemic deficiencies. However, I expect that my simple statement to this effect will not act as a balm to those who view the process from the outside, particularly the litigants themselves. And, in my view, they are entitled to be sceptical. It has long been said that "justice delayed is justice denied", and the case before me well exemplifies that maxim. It follows from what I have stated, therefore, that I would have to be convinced the proposed opinion evidence is likely to be of such a significantly beneficial nature that it would outweigh the cost of a further three or four-month delay — a delay during which the fate of these five-year-old girls would continue to hang in limbo. The proposed evidence falls far short of that requirement. I will have more to say about the would-be beneficial aspects of the proposed evidence this later on.

[32] As I noted earlier, the court must also be satisfied that the proposed opinion evidence has a threshold reliability. On the basis of the evidence adduced during the *voir dire,* I have concluded that this threshold reliability has not been established. Mother's counsel wishes to adduce opinion evidence from Dr. Agard regarding cultural and racial issues. During the *voir dire,* Dr. Agard talked considerably about the apparent lack of racial

and cultural sensitivity that is highlighted when a "traditional" parenting capacity assessment is conducted — such as the one conducted by Dr. Fitzgerald. For example, in his report, Dr. Fitzgerald makes reference to the "stiffness and coolness" between the children and their mother. It is argued that Dr. Fitzgerald's interpretation of that behaviour comes from the perspective of a white Anglo Saxon. And, says Dr. Agard, because of this lack of cultural and racial sensitivity, Dr. Fitzgerald has failed to consider that there may be other explanations possible for the "stiffness and coolness," apart from a lack of bonding, attachment or affection between the children and their mother.

[33] Dr. Agard stated that Dr. Fitzgerald should also have taken into account such things as the artificial office environment in which these interactions were being scrutinized, as well as the fact that Dr. Fitzgerald's observations were very limited in time — about one and one-half hours. And, furthermore, it is suggested, Dr. Fitzgerald ought to have enhanced his knowledge by doing a series of collaborative interviews with extended family members and "significant others" in order to obtain a clearer overall picture.

[34] Dr. Agard, the argument goes, would be able to offer alternative explanations for interpreting much of what went on in Dr. Fitzgerald's office. He would be able to discuss why African-Canadians react and respond differently than Caucasian-Canadians to similar situations. In short, Dr. Agard would provide an opinion based on his acquired knowledge of racial and cultural issues — and especially on the behaviour of African-Canadians — an opinion that would allegedly undermine the efficacy of Dr. Fitzgerald's report and the conclusions he reached.

[35] Dr. Agard has some very strong beliefs. These beliefs have an attractive, possibly even an intuitive appeal to them. (I will say more about this at the conclusion of these reasons.) Notwithstanding his experience and his education, however, his opinions, as expressed on the *voir dire*, remain only ***his*** opinions. Although Dr. Agard's opinions ***may*** be valid, there was no evidence on the *voir dire* that those opinions are generally recognized or accepted as ***in fact*** valid by the scientific community within which Dr. Agard works. Accordingly, for this reason, the proposed evidence fails to satisfy the requirement of threshold reliability.

[36] There is another, perhaps even more compelling, reason for my conclusion that the proposed evidence fails to meet the threshold reliability test. On 23 October 2003 — after the society's evidence was concluded — mother's counsel wrote to society counsel (this is the letter to which I referred earlier in my reasons), advising of his intention to elicit this evidence from Dr. Agard. The letter contained a summary of the evidence that he intended to adduce, including the opinion that Dr. Fitzgerald's report was deficient, for the reasons discussed above. However, when mother's counsel wrote that letter, Dr. Agard had not yet seen Dr. Fitzgerald's report. Notwithstanding this omission, Dr. Agard reviewed a draft of the letter of 23 October 2003 and approved it (with one or two "minor changes") and then sent it back to mother's counsel acknowledging that the contents of the letter were correct, including the opinion that he was prepared to express at trial. In other words, Dr. Agard, without ever having seen Dr. Fitzgerald's report, took the position that the assessment was deficient and that it ought to be critiqued from a cultural and racial sensitivity perspective.

[37] Furthermore, in the letter of 23 October 2003, mother's counsel stated that Dr. Agard would express the opinion that Dr. Fitzgerald "over-relied" on the results of the Wechsler. I am compelled to ask the following: On what facts and on what basis could Dr. Agard express this opinion, given that he had never so much as read Dr. Fitzgerald's report? How could Dr. Agard possibly know whether the results of the Wechsler were "over", "under" or "just enough" relied upon by Dr. Fitzgerald, without having read Dr. Fitzgerald's report?

[38] Furthermore, not only had Dr. Agard not read the report of Dr. Fitzgerald but, as well, he had not even met Ms. K.O., the very person who was the subject of that report.

[39] These are very serious red flags — so serious in fact, that they tend to create the impression that Dr. Agard is appearing in court more as an advocate rather than as a scientist. A scientist would have examined all of the facts and, only when that had been done, would he then bring his own, solidly-grounded scientific knowledge to bear on the conclusion for which he intended to then offer an opinion. An advocate, on the other hand, advances a position, meritorious or otherwise, well-grounded in fact or otherwise, all in the interest of achieving a particular outcome. For these additional reasons, I am forced to conclude that the proposed opinion evidence does not meet the test of "threshold reliability."

[40] Having disposed of the issue in this *voir dire* on the grounds of relevance, it is not strictly necessary for me to move on to the other criteria. However, in the event I am wrong on the question of relevance, I do intend to address the issue of necessity as well.

6.2: Necessity

[41] The court in *The Queen v. Mohan* stated that "necessity" encompasses the following (at page 23 [S.C.R.]) [my emphasis]:

> What is required is that the opinion be necessary in the sense that it provide information "which is likely to be ***outside the experience and knowledge of a judge or jury***": as quoted by Dickson J. in *R. v. Abbey*, *supra*. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their ***technical nature***. In *Kelliher (Village of) v. Smith*, [1931] S.C.R. 672, at p. 684, this court, quoting from *Beven on Negligence* (4th ed. 1928), at p. 141, stated that in order for expert evidence to be admissible, "[t]he subject-matter of the inquiry must be such that ordinary people are ***unlikely to form a correct judgment about it***, if unassisted by persons with special knowledge?.

[42] As the Ontario Court of Appeal stated in *The Queen v. A.K.* [my emphasis]:

> **[93]** Where the subject-matter of the opinion evidence is ***technical in nature,*** it is usually easy to meet the criterion of necessity. No one would dispute that the trier of fact is likely to need expert assistance in understanding the engineering principles involved in the construction of a bridge. . . . However . . . where the proposed opinion evidence is about ***human behaviour***, it is much more difficult to decide whether the opinion will provide information which is likely to be outside the experience of the trier of fact, or whether the trier of fact is unlikely to form a correct judgment about the matter in issue."

[43] In the present case, we have the evidence that is contained in two different parenting capacity assessments — one by Dr. Fitzgerald, a psychologist whose expertise was admitted on consent and a second assessment by Dr. Perlman, also a psychologist, whose expertise was similarly admitted on consent. Both psychologists were able to give evidence about their respective assessments and both had the opportunity to raise whatever weaknesses they may have perceived in the assessment conducted by the other. These facts alone go a long way toward rendering the proposed evidence of Dr. Agard of marginal utility.

[44] However, in addition, Ms. K.O. — who has yet to testify — will be able to provide whatever explanations she wishes in order to deal with the issue of racial and cultural sensitivity — albeit not necessarily in the jargon used by Dr. Agard and the lawyers. For example, although Dr. Agard said he could offer an alternative explanation for the "stiffness and coolness" noted by Dr. Fitzgerald in reference to the interaction between the children and their mother, the simple fact is that any such explanation would be, at best, speculative because Dr. Agard was not himself present to witness that interaction. Nor, indeed, was he present to witness any of the other things discussed by Dr. Fitzgerald in his report. The person who is much better able to comment on such things is Ms. K.O. herself. Her evidence will be much more helpful to me and is far more "necessary" than any opinion evidence that might be elicited from Dr. Agard.

[45] As I noted earlier, another criticism that would have been elicited from Dr. Agard was Dr. Fitzgerald's alleged failure to investigate collaterals before reaching his conclusion and recommendations. However, Ms. K.O. has the opportunity to call those persons to give evidence at this trial. It is much more helpful to hear directly from the collaterals themselves than to hear second or third-hand what such persons might have said had they been part of the original assessment by Dr. Fitzgerald. Those persons will also have the opportunity to testify as to their willingness or availability to co-operate in the assessment process had Dr. Fitzgerald seen fit to contact them. And Ms. K.O. will also have the opportunity to explain why she did not provide the names of those persons to Dr. Fitzgerald (notwithstanding Dr. Fitzgerald's earlier testimony in this trial that he in fact asked her for the names of any collaterals who might have been able to assist him in formulating his opinion). Again, all of this evidence is available to me in a ***direct*** form, a form that I consider to be more helpful than the opinion of a witness who has had no involvement whatsoever with Ms. K.O. or any of her family members or collaterals, including the twins.

[46] Judges and juries do not come to the trial process as "blank slates." Rather, they bring to that process an accumulation of life experiences, as well as at least a basic understanding of how people interact with one another. Although this understanding of human nature may not be technical or scientific in nature, it is, nevertheless, an understanding that permits triers of fact to make decisions based on common sense and, what has often been referred to as an "air of reality." Because of this, judges and juries have managed to hear evidence and make decisions regarding issues of human behaviour long before experts in human behaviour existed and long before it was in vogue to call them to give expert opinions at trial.

[47] The answers to such questions as why someone may have acted "stiffly" or

"cooly," why a person may have felt uncomfortable in an office setting, why family or friends may or may not have been available to assist in parenting, and general questions dealing with race and culture — all of these are matters that are likely to be within the experience and knowledge of most judges and juries. In particular, issues of racial and cultural sensitivity are more likely to be within the experience of triers of fact who live in such a diverse place as the city of Toronto, a city that is surely one of the most racially and culturally diverse in North America. Simply put, it does not require an expert to inform a trier of fact that different races and cultures respond differently in similar situations, particularly when that evidence is available from the witnesses who were directly involved in those situations. Nor is an expert necessary to validate the testimony given by an individual from an ethnic minority regarding her behaviour in specific situations. The trier of fact is well capable of hearing and weighing such evidence in the overall trial context.

[48] Accordingly, I conclude that the proposed opinion evidence is not necessary in the sense that it would provide information "which is likely to be outside the experience and knowledge of a judge or jury." It follows from what I have said, that I also conclude the matters are not so "technical" in nature that they require an expert opinion to "enable the trier of fact to appreciate" them. And, finally, for all the reasons I have stated, I have concluded that "ordinary people" are not unlikely to form a correct judgment without the assistance of the proposed opinion. Therefore, the opinion evidence that mother's counsel seeks to elicit also fails to meet the second criterion in *The Queen v. Mohan*, namely, necessity.

[49] My analysis precludes the admissibility of the proposed evidence on the grounds of both relevance as well as necessity. Having arrived at this conclusion, I do not find it necessary to consider whether the third and fourth criteria, namely, the absence of any exclusionary rule and a properly qualified expert, would be an impediment to the admissibility of the proposed opinion evidence. Accordingly, I make no comment whatsoever on these criteria, as they apply to the facts of this case.

[50] I do wish, however, to make certain comments about Dr. Agard himself. Dr. Agard is obviously a highly educated, well-respected and erudite individual. He has spent many years of his life devoted to issues that are important to all Canadians, whether they live in an ethnically diverse city such as Toronto, or in an environment that is ethnically monolithic. Doubtless, the kind of work that Dr. Agard has performed, and in particular, his focused involvement in the African-Canadian community, has helped to raise the awareness and sensitivity of the community at large to significant and disturbing problems that are woven into the fabric of our daily lives. I make these comments because I wish to ensure that nothing that I have stated in these reasons is interpreted in any way as derogating from Dr. Agard's accomplishments, or the importance of his work. Our society cannot help but be a better place as a result of his endeavours.

[51] Ms. K.O.'s request to admit the opinion evidence of Dr. Ralph Agard is denied.