**The Lawyer’s Guide To The Forensic Sciences**

**Pakosh, Caitlin, Ed., *The Lawyer’s Guide To The Forensic Sciences***

**(Toronto: Irwin Law, 2016)**

**(i-xlvii; 969 pp.)**

**Winner of Walter Owen Book Prize, 2017**

**Reviewed by: DAVID C. DAY, Q.C.**

**Member, Walter Owen Book Prize Jury**

**(23 June 2017)**

**Introduction**

Qualifications for admission as evidence of expert opinion, in legal proceedings, were articulated in 1994 by Mr. Justice John Sopinka for the full bench of Supreme Court of Canada in *R. v. Mohan* (1994 SCC 80). They are: (i) relevance; (ii) necessity in assisting the fact finder (whether judge, or judge sitting with jury); (iii) absence of any exclusionary rule, and (iv) a properly qualified expert. Facilitating the application of *Mohan* is the 2009 judgment of Mr. Justice David Doherty, an Ontario Justice of Appeal, in *R v. Abbey* (2009 ONCA 624; leave to appeal to SCC refused: 2010 CarswellOnt 4827).

Fundamental to considering each of the qualifications are knowledge and appreciation of the testimonial opinion provider’s font of expertise—usually comprising adroitness in a particular science—especially if the involved science is novel.

      Crucial significance of these qualifications is underscored by Doherty J. in *R. v. Abbey* (at paras. 72 and 73):

The increased reliance on expert opinion evidence by both Crown and defence is evident upon even a cursory review of the reported cases. Sometimes it seems that a deluge of experts has descended on the criminal courts ready to offer definitive opinions to explain almost anything. ….

Despite justifiable misgivings, expert opinion evidence is, of necessity, a mainstay in the litigation process. Put bluntly, many cases, including very serious criminal cases, could not be tried without expert opinion evidence.

An opinion provider’s expertise is customarily rooted in formal knowledge of, and practical experience acquired from dedication to, a science. Perhaps the public is acquainted with the science; for example, involving  collection and analysis of bloodstain pattern photos and blood, fingerprints, firearms and ballistics (such as ordnance), fire scene photos and materials, DNA, documents, pathology matter, alcohol and other forms of drugs, and psychiatric data. Less familiar may be sciences involving digital evidence, anthropology (serving to assist identification of anonymous human remains), botany (such as comparison of timber articles or pieces, as in the Lindbergh kidnapping trial), entomology (insects as indicators of time of death), nursing, odontology (examination of dental records), and statistics.

In *Mohan*, a practicing pediatrician sought to call expert evidence to show that he did not fit the profile or characteristics of the limited and unusual class of individuals likely to have perpetrated the sexual assaults with which he had been charged. In *Abbey*, the Crown offered evidence from a person claiming expertise in the culture of Canadian street gangs (e.g., the significance of a teardrop tattoo displayed by an accused).

    Interaction, with administration of justice, of one or another of these science specialities earns the science the imprimatur: forensic science. Essential is that both legal profession and judiciary (whether fact-finders or instruction-providers to jurors tasked to fact-find) acquire working literacy in their respective approaches to a forensic science (or one of its aspects) encountered in litigation (trial or appellate).

   Promising to inestimably inform residents of Bar and Bench in their quests for forensic science fluency is a title published in 2016: *The Lawyer’s Guide To The Forensic Sciences*, inspired, conceived, edited—and, not inconsiderably, authored—by the indefatigable Caitlin Pakosh.

  Incontestably, this text has become the seminal introductory treatment of the principal forensic sciences; invaluably serving those committed to life in the law either above, or in, the well of a court—both criminal and civil.

Curiously, however, its cover page beckons only lawyers. Some of its contents are confined to prosecution and defence of criminal offences.

  Employing the measures which the Walter Owen Jury has been charged to apply in assessing all five candidates for the 2017 Prize, this book excels.

**Candidate: Generally**

  Caselaw current to 21 April 2016, *The Lawyer’s Guide To The Forensic Sciences* structures its 315,350 words of commentary as 23 chapters, authored by 33 contributors (and seven ‘special mentions’). Editor Pakosh—graduated from University of Toronto with a Bachelors of Science *magna cum laude* (major: forensic anthropology; minor: biology), and from University of Calgary with a Juris Doctor degree—wrote chapter 1 and chapter 2, and parts of 12 others. Since 2012, she has been case management counsel at Innocence Canada; appearing in Ontario trial and appellate courts, and Supreme Court of Canada.

    The roster of contributors includes persons qualified and professionally active as biology professor; biological sciences professor; forensic science professor; forensic pathologist, psychiatrist, psychologist, nurse, biologist, anthropologist, odontology, document examiner, or engineer; firearms and ballistics consultant; bloodstain pattern analyst; lay witness report accuracy and content researcher; investigative coroner for homicides and criminally suspicious deaths; digital forensics investigator; consulting forensic toxicologist; stream statistics associate professor; an Ontario Superior Court Justice, and the author of *Wigmore on Alcohol: Forensic Alcohol Toxicology for the Medicolegal Professional*.

     During preparation of the book, its editor nurtured editorial bonding of all contributors, via telephone or e-mail conferencing.

   Comprehension of the book’s content—found, occasionally, to be (albeit, unavoidably) expeditions of excruciating complexity (to wit: chapters on statistics and probability sciences)—is aided: by 67 figures, by 18 tables, and by the instructive medical glossary adopted from the Report of the 2008 Justice Stephen T. Goudge inquiry into pediatric forensic pathology in Ontario.

**Candidate Substantively**

      Especially striking is the book’s approach to its subject.

  Forensic science is introduced by opening chapters (1 to 5) on necessity for scientific literacy in the legal community; the role of forensic experts in criminal justice; the judge as goal-minder for admission of expert forensic evidence; courtroom adduction of forensic science evidence, and (at 69 pages, the book’s longest chapter) critical examination of forensic sciences. The examination incudes extensive explorations of six Canadian reviews and reports; generated by the Ratushny Self Defence Review; the Morin Inquiry; the Thomas Sophonow Inquiry; the Manitoba Forensic Evidence Review Committee; the Driskell Inquiry, and the Goudge Inquiry.

    Following are chapters (6 to 20) on specific areas of forensic science (identified above in the **Introduction** to this review).

Concluding chapters (21 to 23) address memory, probability and statistics.

    Not infrequently, chapters pause to consider issues of legal, ethical and professional responsibility of lawyers—and forensic scientists. Particularly noteworthy, in this respect, is chapter 19: forensic psychiatry. The chapter is co-written by the ubiquitous professional editorial partnership of psychiatrist and barrister Hy Bloom and superior court Justice Richard D. Schneider. (In previous manifestations, Schneider J. was a criminal defence lawyer and a certified clinical psychologist and, more recently, has frequently been sighted on the Bench of the Toronto Mental Health Court.  To Justice Schneider we will return.)

 Each of the chapters treating a particular science concludes with a survey of its legal context.

   Moreover, some chapters acknowledge shortcomings in evidentiary forensic science processes, and include improvement recommendations.

   Citation of international sources of research and litigation pertaining to forensic sciences punctuates the book’s content. In fact, academia—both teachers and researchers—will intellectually profit from recourse to the book.

**Book Prize Criteria**

  To merit the Walter Owen Book Prize, a candidate must

       [a]  be an entirely new work (or a previous title’s complete revision);

      [b]  contributing to Canadian legal literature;

      [c] thereby enhancing the quality of legal research in Canada;

     [d]  substantial in nature;

   [e] containing excellent English language writing;

         [f] published in 2015 or 2016;

        [g]  about a topic of current interest in law practice, and

[h] which is, or is likely to be, highly valued by both law practitioners and academics.

   The current five Jury members—most of whom have been previously sequestered to converse, cogitate, conflict and, ultimately, to choose a Prize recipient—are imbued with subtleties of Prize criteria by John N. Davis. He has served the Jury in a role comparable to High Sheriff for almost as long as a sheriff’s office has existed; tirelessly superintending preparation of long- and short-listings of potential Prize candidates, and conclaves of the Jury.  Formerly a lawyer, he has, most recently (since 2000) at Osgoode Hall (York University), Toronto, been Law Librarian (2000-2005) and taught Intensive Legal Research and Writing. He has been published on topics of legal research (a handbook) and the digital storage, retrieval and transmission of case reports in Canada. This year, he also serves on the Jury.

(Remiss the reviewer would be, were he to overlook mention of a long-standing, dedicated Prize juror: William H. Hulburt, Q.C., a member of the Alberta Bar for 66 years who, at age 89, passed on 01 November 2016. His wife, age 90 years, followed him, three days later.)

**Application Of Book Prize Criteria**

**[a] Entirely new work**

     This book is an entirely new work—a first edition—on forensic sciences for lawyers (*et al*.). It is a book “whose time has come,” writes Justice Stephen T. Goudge in the Foreword.

**[b]    Contributing to Canadian legal literature**

   This book contributes—very substantially—to Canadian legal literature.

      This reviewer concludes that the only previous Canadian forensic science publication approaching the merit of this book was issued by Canada Law Book in 1999 (*Forensic Science in Canada*, 2nd Ed., edited by Gary Chayko and Edward Gulliver).

**[c] Enhancing quality of legal research in Canada**

   The text of this book exudes exhaustive research of frontstall quality.

**[d]  Substantial in nature.**

    This book comprehensively introduces all features germane to competently coping with most forensic science issues in Canadian courts.

**[e] Containing excellent English-language writing.**

  Absent satisfaction of this criteria, any book will labour to be usefully understood. The hallmarks of this book’s writing are exquisite structure, clarity, cogency, and discipline.

     Justice Richard D. Schneider’s chapter 3—Expert Evidence: Judge as Gatekeeper—readily comes to mind as an illustration of stellar legal writing evident in this book. Witness his attention to novel scientific evidence (at p. 34):

                Novelty is an inherently elusive and context-specific concept. A theory or

                technique might be truly novel, or it may be novel to the courts while well-

                known and established within the scientific community. It is likely that

                where the court is unfamiliar with the proposed evidence, it will be treat-

                ed as novel and therefore attract an elevated level of scrutiny regardless

                of its status  within the scientific community.

And (at p. 24), in delineating the constituents of a judge’s ‘gatekeeper’ role for deciding “what opinion evidence will be permitted and what will not”, he writes:

1. Whether to open the gate,
2. When the gate should be opened,
3. For whom the gate should be opened, and
4. How wide the gate should be opened.

(Elsewhere in the chapter (at pp. 26 to 28), Justice Schneider furnishes an excerpt from the 1843 trial of Daniel M’Naghten (who pleaded insanity in defence of a charge of murdering one Edward Drummond, believing him to be Prime Minister Sir Robert Peel). To this subject he dedicated his thesis in partial fulfillment of an Osgoode Hall Master’s degree in law, and his own book—a treasure in any law library—entitled *The Lunatic and the Lords* (Irwin Law, 2009).)

**[f]  Published in 2015 or 2016.**

      This book was published in 2016.

**[g] Topic of current interest in law practice**

  This book’s topic is of both current—and perpetual—interest in law practice. Any practice which accepts retention in a matter engaging forensic science needs resort to the book.

**[h] Is, or is likely to be, highly valued by practitioners and academics**

   This criteria begs the question, whose answer is self-evident: what more reliable introductory Canadian resource on forensic science is available to practitioners and academics?

      On this basis, alone, *The Lawyer’s Guide To The Forensic Sciences* is—among the five candidates—most deserving of the 2017 Walter Owen Book Prize.