The Canadian Press/Frank Gunn

DR. CHARLES SMITH

Foolish pride or malevolent evil?

The former Dr. Charles Randal Smith wreaked havoc in Ontario's criminal justice system: He destroyed many lives; he turned innocent parents and caregivers into killers.

How did we let this happen?

Harold Levy

The former Dr. Charles Randal Smith wreaked havoc in Ontario's criminal justice system: He destroyed many lives; he turned innocent parents and caregivers into killers; he had a propensity for finding murder where it did not exist. He believed his role as pathologist was to support the Crown attorney, make the case look good and refute the defence counsel. And he single-handedly was probably responsible for more miscarriages of justice in the province than any other individual.

After investigating him for almost a decade, I have no doubt that Charles Smith was able to do so much harm because the very people who were supposed to protect the public from fraudulent experts such as Smith—the province's prosecutors, defence lawyers and judges—were skillfully manipulated by him into believing that he was a brilliant, experienced, impartial and infallible forensic pathologist (when he was nothing of the sort) and dropped their guard.

My opinion is shared by Ontario Court of Appeal Justice Stephen Goudge, who in his report on the independent public inquiry he conducted into many of Smith's cases, stated that the Bar must share responsibility for the harm caused.

Justice Goudge said that Smith, as the pathologist giving expert evidence, must bear "primary responsibility" for the tragic outcomes of his cases, and that "those charged with overseeing his performance [an apparent reference to his superiors in the chief coroner's office] cannot evade responsibility."

But Justice Goudge went on to conclude that, "Indeed, neither can other participants in the criminal justice system - Crown, defence and the court. Each had an important role to play in ensuring so far as possible, that results in the criminal justice system were not affected by flawed expert testimony, including that of forensic pathologists."

Some of the most agonizing testimony at the Goudge Inquiry came from Patrick LeSage, former Chief Justice of the Superior Court of Justice of Ontario, who rhetorically asked, "Did I question the expertise sufficiently?"

"Did defence counsel or Crown counsel as the case may be, question the expertise, the basis, the underpinnings of it, as we ought to have?" Justice LeSage continued. "In many cases, no, we didn't."

Justice LeSage explained that as a judge working in an adversarial system he tended to sit back and leave determination of these questions to counsel, "and if counsel didn't raise it, I probably said, well it's the adversary system, I'm not the advocate for either the Crown or the defence."

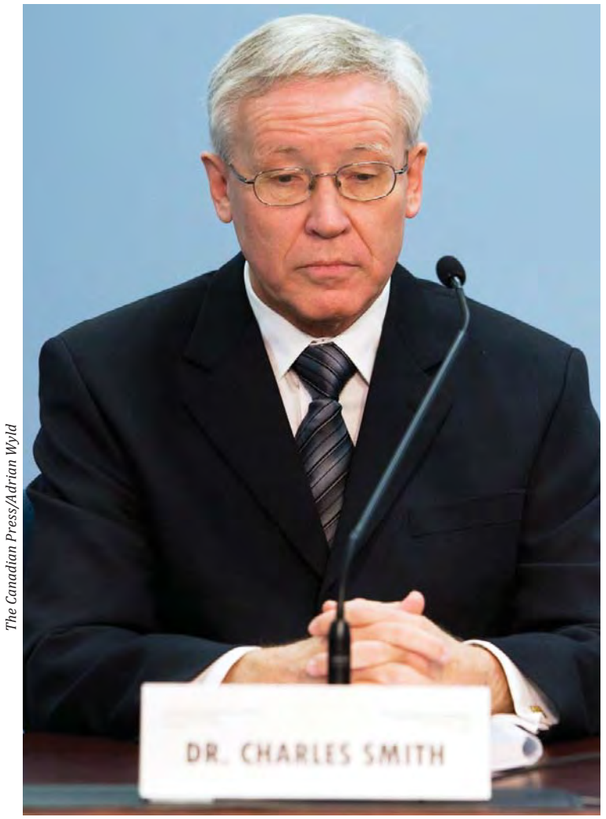
"Fair, Objective and Non-Partisan"

Rules of Civil Procedure Amended

James Morton

At Common Law, an expert witness is expected to provide an objective, unbiased opinion with respect to the matters within his or her expertise: Beasley v. Barrand, 2010 ONSC 2095. There is no doubt that the duty of an expert witness extends across all areas of law - civil, criminal, family and administrative.

Nevertheless, largely as a result of the Charles Smith affair, where a prominent and repeated expert witness acknowledged seeing his duty as towards the party hiring him, the Rules of Civil Procedure have been amended. The Rules now expressly state that an expert must provide evidence that is "fair, objective and non-partisan" (R. 4.1.01). Further, each expert report must now be accompanied by an acknowledgement signed by the expert of that duty to be fair, objective and impartial (Form 53). The duty, long established at Common Law, is now codified.



The Canadian Press/Adrian Wyld

Discredited pathologist Dr. Charles Smith waits to deliver testimony at the Goudge Inquiry, Jan. 28, 2008

"I think it's fair to say, however," he added, "that there is a, well, it's already been said, that there's a great responsibility for the adjudicator to make an informed decision, and how do you make an informed decision if the evidence has not been adduced before you?"

While I empathize with the problems judges face in an adversary system of criminal justice, my own view is that Justice LeSage's explanation covers only one half of the story.

The other half is that some judges, like some of the other actors in the system—including journalists who abandoned their "watchdog" function by uncritically idolizing Smith and helping him secure his god-like public image—bought into the myth of the great forensic pathologist and failed to do their job.

One of the worst consequences of the canonization of Smith was that several persons pleaded guilty to lesser offences they had not committed in connection with the death of their children for a perverse reason—to avoid almost certain life-imprisonment for murder, at the hands of the renowned Dr. Charles Randal Smith.

Sherry Sherret, for one, pleaded not guilty on January 4, 1999, to murdering her 4-month old son Joshua but was convicted of infanticide on the basis of an American-style *nolo contendere* plea, which did not require her to admit that she had intentionally killed her child (which she fervently denied).

The rarely used plea was based on Smith's opinion that the cause of death was asphyxia; his claim that he had discovered a microscopic skull fracture two months after the post mortem, and his finding of marks indicating hemorrhages in Joshua's neck.

We now know from independent analysis by a panel of experts and from the Goudge Inquiry that there was utterly no evidence of asphyxiation—and that the remaining injuries he identified as signs of injuries inflicted by Sherret were caused by none other than Smith himself during dissection.

> *"Charles Smith's assault on Ontario's criminal justice system should haunt every member of the bar, including prosecutors, defence lawyers and judges"*

Ms. Sherret was defended by Bruce Hillyer, an experienced, conscientious criminal lawyer who found himself facing an enormous dilemma as he approached trial.

Hillyer realized that the Crown's case rested primarily on the opinion of Smith, "who at the time had a very high reputation in his field," and according to others he talked to, including a judge and a forensic pathologist, was "a great witness."

But Sherret fervently protested her innocence and Hillyer did not believe that the Crown could establish that Joshua had died as a result of an unlawful act if the matter went to trial.

Not having a crystal ball, he could not know that years later the Ontario Court of Appeal would quash the conviction and acquit Sherret after accepting fresh evidence which disproved every aspect of Smith's opinion—and after finding that Joshua had likely suffocated after being placed in an unsafe sleeping environment.

Ultimately, Sherret instructed him to accept the Crown's eleventh hour offer to drop the murder charge and accept a nolo contendere plea to infanticide on the basis that she had been suffering from post-partum depression at the time of Joshua's death. Although there was no agreement on sentence, Hillyer would push for a non-custodial disposition and the risk of a life-sentence was avoided.

Hillyer told this writer that even though he had a top pathologist in his corner to counter Smith's evidence, "Smith's reputation was still such that a *nolo contendere* was a no-brainer."

Hillyer would later explain in a letter to child welfare authorities that "the compromise was seen as a way out for both sides. The Crown fearing they couldn't get a conviction of any kind, and the defence fearing a conviction for murder, while not justified, would result in a lengthy period of incarceration."

CP Photo/Toronto Star/ Tara Walton

Sherry Sherrett, convicted in 1999 of killing her infant son, Joshua

Superior Court Justice R.G. Byers lashed out at Sherret as he sentenced her to one year in prison followed by two years probation, saying:

"At the end of the day, only she knows why she did it – and she is not telling," he said. "Instead, she denies her guilt and shows no remorse. "Who speaks for Joshua? Is his life so unimportant that his mother—who killed him without explanation; without apparent remorse—should go free without punishment? What signal does this send to the accused; to this community? Well, I speak for him now. He was important. He was a human being. He was only four months old. And, madam, you killed him. In my book, that means you go to jail."

Byers was not the only judge to be put in the unfortunate position of having to sentence someone who turned out years later to be utterly innocent but had handed themselves over to the Court on a lesser offence to avoid the risk of almost certainly being convicted of a murder they did not commit based on the opinion of the revered Dr. Smith.

Bruce Hillyer did not try to disguise the personal agony he had experienced in this case—where it was ultimately established that Joshua had died a natural death—when he added in the letter that, "Some cases come back to haunt you, and this is one of them."

Charles Smith's assault on Ontario's criminal justice system should haunt every member of the bar, including prosecutors, defence lawyers and judges.

Never again should we fail to accept that there may be so-called "expert witnesses" like Smith, who see themselves as members of the prosecution team and set out to subvert the criminal process in order to ensure convictions.

Our eyes have indeed been opened.

Harold Levy is an Ontario lawyer who received a Michener Certificate of Merit in 2005 for his Toronto Star exposés on Charles Smith. He is writing a book on the Smith case and Ontario's criminal justice system.

The Association in Defence of the Wrongly Convicted

Sherry Sherrett-Robinson contacted The Association in Defence of the Wrongly Convicted (AIDWYC) in January 2006, after reading about the now disgraced and discredited Dr. Charles Smith. Dr. Smith had played a substantial role in Ms. Sherrett-Robinson's 1999 conviction for infanticide. At her preliminary hearing Smith speculated that her son Joshua's death had been non-accidental. She was initially charged with first-degree murder and her surviving son, Austin, was removed from her care.

With the consent of the Crown, Ms. Sherrett-Robinson sought an extension of time for leave to appeal her conviction. She was formally acquitted by a three-judge panel of the Ontario Court of Appeal on December 7, 2009. Despite her acquittal, Ms. Sherrett-Robinson does not have custody of Austin.

AIDWYC has also been active in the cases of William Mullins-Johnson, Tammy Marquardt and Dinesh Kumar, all of whom were convicted of homicide under the expert witness of Dr. Charles Smith.

In 2008, the Ontario Bar Association presented AIDWYC with the OBA President's Award, which recognizes the achievements of an individual Canadian or Canadian organization that has made a significant contribution to the advancement of justice.

The AIDWYC is a non-profit organization dedicated to identifying, advocating for, and exonerating individuals convicted of a crime that they did not commit and to preventing such injustices in the future through education and reform.

AIDWYC needs support to continue the work of reviewing and litigating claims of wrongful convictions. For more information about membership and supporting AIDWYC please visit www.aidwyc.org.