FAMLNWS 2026-04

Family Law Newsletters
February 2, 2026

— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

© Thomson Reuters Canada Limited or its Licensors (excluding individual court documents). All rights reserved.

Contents

• Participant Experts — From Treatment to Testimony

Participant Experts — From Treatment to Testimony

***Pike v. Wight* (2025), 20 R.F.L. (9th) 253 (N.L. C.A.) — Hoegg, Goodridge, and O'Brien JJ.A.**

Most family law lawyers are familiar with the concept of a traditional litigation expert: an independent professional engaged by or on behalf of a party to provide opinion evidence for the purpose of the proceeding, typically through a formal report prepared in accordance with the Rules.

However, there remains considerable confusion about a different category of expert evidence that appears far more frequently in family cases: the participant expert.

As the Ontario Court of Appeal explained in *Westerhof v. Gee Estate*, 2015 CarswellOnt 3977 (C.A.), at para. 6, not all witnesses who give opinion evidence are classic litigation experts. In addition to experts specifically retained for the purpose of giving evidence in the proceeding, courts also recognize participant experts — witnesses with specialized expertise who form opinions through their participation in the underlying events. Treating physicians, for example, fall squarely within this category. Their opinions were not generated because they were engaged for litigation, but because they diagnosed, treated, or observed a party in the ordinary course of care, likely before litigation even started.

The distinction matters.

While participant experts are not exempt from admissibility scrutiny, courts also recognize that it would be wholly artificial, and often unworkable, to subject a participant expert to the same procedural and conceptual framework as litigation experts. The evidence of a participant expert will often blend factual observation with professional judgment, particularly in medical contexts. Where, exactly, to draw the line between permissible opinion evidence and impermissible encroachment on the trial judge's fact-finding role remains a difficult and contested question — particularly in family cases.

Pike v. Wight roundly and squarely triangulates this difficulty — geometrically speaking, of course. Although the appeal was dismissed, it is important to understand what was actually at stake. The husband challenged, among other things (or *inter alia*, as Latin aficionados like to say), the trial judge's decision to qualify the wife's family doctor as an expert and to rely on that evidence in finding that the wife was disabled and unable to work.

The dismissal of the appeal confirmed that the trial judge's evidentiary approach was sufficient and that the spousal support award could stand. But the reasons do more than just affirm the result. They expose two live fault lines in family law: **first**, how courts should manage treating-physician evidence where diagnosis, causation, and credibility overlap; and **second**, how disagreements about that evidence can directly shape spousal support outcomes. Writing for the majority, Justice O'Brien adopted a pragmatic approach. Justice Hoegg, dissenting in part, would have drawn firmer boundaries.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Background and the Trial Decision

The parties met in 1999 and began dating in 2000. Much of their early relationship was long-distance. In 2004, the wife left Pasadena (on the west coast of Newfoundland) and moved to Portugal Cove on the east coast to live with the husband (we offer lessons in Canadian geography as an added bonus). The cohabitation was interrupted by a brief separation before they reconciled. They became engaged in 2006, separated again, and then resumed a long-distance relationship. In the fall of 2009, the wife returned to Portugal Cove and moved in with the husband.

The parties married in 2010 and separated in 2016 when the wife was 52 and the husband was 62. They had no children together.

Shortly before the parties married, the husband started his own insurance adjusting firm. Around the same time, the wife, who had recently become unemployed, began working with him in the new business. She provided significant assistance in establishing the business for little or no remuneration and, by April 2010, was its sole provider of administrative support. She continued in that role until several months after separation, when she left the matrimonial home and returned to Pasadena in January 2017.

The trial took place in 2022. A central issue at trial was the wife's post-separation functioning and earning capacity. She alleged that the relationship had been abusive and that she suffered from PTSD, anxiety, depression, and fibromyalgia, all leaving her disabled and unable to work. She sought to rely on her family doctor's evidence in support of those diagnoses.

The husband objected to the family doctor's evidence. He argued that a family physician lacked the expertise to diagnose PTSD and other mental disorders and that any opinion as to causation fell outside the scope of general medical practice. Following a *voir dire*, the trial judge qualified the wife's family doctor as an expert within the general scope of family medicine. The judge found that diagnosing and treating mental health conditions fell within a family physician's ordinary practice, while acknowledging that more complex psychiatric issues may require specialist expertise. Within those limits, the judge was satisfied that the family doctor had the training and experience to diagnose and manage common mental health disorders.

On the totality of the evidence — including the parties' testimony, the wife's medical records, and the opinions of her family doctor — the trial judge found that the husband had subjected the wife to verbal, emotional, and, to a lesser extent, physical abuse throughout the relationship. The judge rejected the husband's suggestion that the wife fabricated or exaggerated her symptoms or manipulated her doctor for litigation purposes, accepted the medical evidence supporting her disability (including her ongoing CPP disability benefits), and concluded that her disability significantly impaired her earning capacity.

Those findings then informed the spousal support analysis. The trial judge held that the wife was entitled to spousal support on both compensatory and non-compensatory bases and awarded lump-sum retroactive spousal support of $54,117, covering the period from separation in 2017 for a total duration of 5 $^{1}/_{4}$ years. The award was calculated using the *Spousal Support Advisory Guidelines*, based on the husband's income from his insurance business and the wife's CPP disability income, producing a range of $736 to $982 per month for a duration of 3 $^{1}/_{2}$ to seven years. The trial judge selected the mid-range amount and converted it into a lump sum.

The Appeal and the Majority's Framework

The husband appealed the trial judge's decision on numerous grounds, but the first — and most significant — was whether the trial judge erred by allowing the wife's family doctor to give opinion evidence as to the wife's mental health and by then relying on that evidence.

Writing for the majority, Justice O'Brien began with a careful review of the governing principles for expert evidence (with supporting authorities canvassed beginning at para. 24, not reproduced here — but we have added some cites of our own), including that:

1. **Threshold admissibility and gatekeeping:** Expert opinion evidence must satisfy the usual threshold requirements: relevance, necessity, the absence of an exclusionary rule, and a properly qualified expert. However, even where those

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

criteria are met, the trial judge retains a residual gatekeeping discretion to exclude the evidence where its prejudicial effect outweighs its probative value.

The court's gatekeeping function continues throughout the expert's evidence — and to abdicate this gatekeeper function is an error of law: *Morrill v. Morrill* (2016), 87 R.F.L. (7th) 1 (Man. C.A.); *Bruff-Murphy v. Gunawardena*, 2017 CarswellOnt 9169 (C.A.); *Parliament v. Conley*, 2021 CarswellOnt 5797 (C.A.).

2. **Independence and impartiality are contextual:** The assessment of independence and impartiality may depend on the type of expert. The majority identified four categories of "witnesses with expertise":

(a) Independent Litigation Experts.

(b) Participant Experts: A witness with expertise who was involved in underlying events that gave rise to the litigation, but was not hired for the purpose of, or in contemplation of, litigation. These experts attest to facts, which they observed or examined by participating in the underlying events, and "opinions" which they formed during their participation based on their expertise. Treating physicians fall into this category.

(c) Non-Party Experts: An expert retained by a non-party to the litigation, such as by a statutory accident benefits insurer, to give an opinion for a purpose other than the litigation.

(d) Litigant Experts: A party, or employee or officer of a party, who has expertise in the job they were hired to perform and may be permitted to give their opinion evidence to explain why they did what they did.

(e) Treating Physicians as Participant Experts: Treating physicians fall within the participant expert category. Their evidence will often blend factual observation with professional judgment, and while formal qualification may not always be strictly required, it is prudent where opinions beyond bare treatment notes are anticipated.

Applying those principles, the majority concluded that the trial judge properly qualified the wife's family doctor within the general scope of family medicine, with explicit recognition of the limits of that expertise, and confined his evidence to diagnoses he made and treatment he provided in the ordinary course of care. The majority also accepted that treating physicians necessarily rely on patient self-reporting — particularly in PTSD cases — and that this does not disqualify them from offering medical opinions. But it is, at least in our view, dangerous, for obvious reasons.

At the same time, the majority agreed that the doctor's belief in the wife's account did not enhance her credibility, and that her statements to him were hearsay, admissible only for limited purposes such as context, corroboration, or to counter allegations of recent fabrication. The majority was satisfied that the trial judge respected those limits and did not misuse the medical evidence to make findings of historical fact. Of course, to suggest that the doctor's belief in the wife's account actually enhanced her credibility would constitute a 2-minute penalty for offending the Rule Against Oath Helping: *R. v. Marquard*, 1993 CarswellOnt 995 (S.C.C.); *R. v. Taylor*, 1986 CarswellOnt 144 (C.A.); *Whitfield v. Whitfield*, 2016 CarswellOnt 12018 (C.A.); *Beyer v. Palacios* (2015), 67 R.F.L. (7th) 46 (Ont. S.C.J.); *E.B.H. v. E.H.*, 2017 CarswellOnt 14004 (S.C.J.) — go to the penalty box and feel shame.

That conclusion was largely determinative of the support appeal. Once the evidentiary foundation for the trial judge's findings on the wife's income and ability to work was upheld, there was no real basis to interfere with the spousal support award, given the significant (or some may say "overwhelming") deference owed to such orders. The use of the *Spousal Support Advisory Guidelines*, the selection of a mid-range outcome, and the decision to order support in a lump sum all fell well within the trial judge's discretion and did not disclose an error in principle, a significant misapprehension of the evidence, or a result that was clearly wrong — the threshold required for appellate intervention: *Hickey v. Hickey* (1999), 46 R.F.L. (4th) 1 (S.C.C.) at para. 12.

The Dissent: Drawing Firmer Boundaries Around Participant Experts

In dissent, Justice Hoegg vigorously disagreed with the majority's approach to the admissibility and use of the wife's family doctor's evidence. In her view, the issue was not merely one of weight, but of admissibility and proper scope. She cautioned that

WESTLAW CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

the majority's approach risked blurring the line between permissible participant-expert opinion and impermissible oath-helping (more penalty box and shame), particularly where diagnosis, causation, and credibility were closely intertwined.

Although framed as opinion arising from treatment, in Justice Hoegg's view, the family doctor's evidence became closely aligned with the wife's narrative of abuse. This created a real risk that medical opinion was being used to corroborate contested historical facts rather than to describe their clinical consequences. That risk was especially acute where the diagnosis of PTSD depended *heavily* on accepting the wife's account of disputed events.

Justice Hoegg took a more restrictive view of the scope of a family physician's expertise in relation to mental health diagnoses such as PTSD. While she did not suggest that family doctors are categorically barred from diagnosing or treating mental health conditions, she emphasized that courts must be careful not to allow the evidence of a treating-physician to substitute for the trial judge's independent fact-finding and gatekeeping role, particularly where causation and credibility are central.

These evidentiary concerns carried through to Justice Hoegg's analysis of spousal support. Having found that the trial judge erred in her treatment of the doctor's evidence, Justice Hoegg concluded that the error infected the spousal support award. In her view, the evidence did not support entitlement to compensatory spousal support. The wife had not made economic sacrifices by entering the relationship, had not lost career opportunities as a result of the marriage, and had not meaningfully enhanced the husband's income or career. While assisting a spouse in establishing or operating a business can potentially ground compensatory entitlement, Justice Hoegg held that the wife's limited period of reduced-pay work here was insufficient to do so.

Justice Hoegg also took serious issue with the trial judge's reliance on longstanding relationship conflict to justify lengthy spousal support years after separation. In her view, attributing the wife's inability to work to the husband's alleged misconduct ran contrary to s. 15.2(5) of the *Divorce Act*, RSC 1985, c 3 (2nd Supp) ("thou shall not consider spousal misconduct in awarding spousal support") and its no-fault philosophy. Even if the conduct was accepted, she concluded it was not of such a grave nature as to override Parliament's express direction. That said, s. 15.2(5) of the *Divorce Act* does not distinguish between "conduct" and "really bad conduct."

Justice Hoegg accepted that the wife was entitled to non-compensatory support based on economic hardship following separation, but emphasized the obligation to pursue self-sufficiency within a reasonable time. She placed significant weight on the wife's substantial property awards, concluding that they mitigated the need for ongoing support. Justice Hoegg would have set aside the lump-sum spousal support order and substituted a modest non-compensatory award of $500 per month for 30 months, which she considered fair when viewed alongside the property division. Recall that the majority approved the trial judge's award of a lump sum of $54,117.

Consequences, Not Causation

We do not disagree with Justice Hoegg's concerns about the potential risks associated with treating-physician evidence, particularly where diagnosis, causation, and credibility intersect. Those risks are very real, and her emphasis on evidentiary discipline is important.

That said, it does not appear to us that the trial judge awarded spousal support because the wife suffered from mental health issues that were caused by the husband. Rather, the award flowed from the trial judge's acceptance that, at separation, the wife was experiencing health issues that materially limited her ability to work and earn more than she was receiving through CPP disability. That finding was then considered alongside familiar support factors: the length of the parties' cohabitation, the economic hardship the wife experienced following the breakdown of the marriage, her needs, and the husband's ability to pay. This is not terribly different from that old chestnut *Leskun v. Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.) — or as my mother used to say, "I'm not upset with you; I'm upset with what you did."

The *cause* of the wife's health issues was not — *and should not have been* — determinative of entitlement. Had the wife been suffering, at separation, from mental health conditions that limited her ability to work for reasons entirely unrelated to the husband — for example, arising from a motor vehicle accident, illness, or some other independent cause — there is little

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

doubt that those limitations would still have been relevant to the spousal support analysis. To the extent health issues affect employability and self-sufficiency, they matter. *Why* they arose generally does not.

It is also important to understand what this case was *not* about. Had the trial turned on whether the husband caused the wife's mental health conditions, we would have agreed with the dissent on the admissibility issue. The wife's family doctor's evidence on causation was based almost entirely on her self-reporting, without independent investigation, corroboration, or testing. In that context, the evidence would have been ill-suited to support a finding of causation. A basic cross-examination would have made that clear: the doctor could not have offered any independent basis to confirm or refute the truth of what the wife told him, nor to rule out other potential causes.

But that was not the question the trial judge was required to answer. The issue was not whether the husband caused the wife's condition, but whether the wife's health issues — whatever their source — limited her ability to work and achieve self-sufficiency in a way that was relevant to spousal support. And that was certainly withing the doctor's bailiwick.

Viewed through that lens, the focus properly remained on *consequences* rather than *fault*. Whether the wife's limitations arose from the relationship, a motor vehicle accident, illness, or some other independent cause, the relevant question was their impact on employability. The resulting award of support for 5 $^{1}/_{4}$ years must also be understood in the context of an on-and-off relationship spanning from 2000 to 2016, including a six-year marriage, during which the wife played a role in helping the husband get his business off the ground.

We also have some difficulty with the dissent's proposed outcome. While Justice Hoegg would have reduced support to $500 per month for 30 months, there is little explanation for why that result is appropriate, particularly where it falls below the low end of the *Spousal Support Advisory Guidelines* on both duration (3.5 to seven years) and quantum ($736 to $982 per month). The dissent does not explain why a departure from the SSAG ranges was warranted, how the proposed amounts were arrived at, or how the substituted award reflects the wife's needs, the length of the relationship, or the husband's ability to pay.

This is not simply a matter of deference. It is a matter of coherence. If spousal support is to be grounded in need, means, and the economic consequences of relationship breakdown, then health-related limits on employability matter regardless of their source. While a different trial judge might reasonably have weighed the evidence and statutory factors differently, that is not a proper basis for appellate intervention, particularly where the alternative outcome is neither anchored in the SSAGs nor accompanied by a clear explanation of how the new figures were derived.

Conclusion

Pike v. Wight returns us to the distinction flagged at the outset of this case comment: while most family lawyers are comfortable navigating traditional litigation experts, uncertainty persists around participant experts, and treating physicians in particular. This decision illustrates both why that uncertainty exists — and how much turns on where courts draw the line.

The majority and dissent did not disagree about first principles. Both accepted that treating physicians are participant experts, that patient self-reporting is unavoidable, and that misconduct must not drive spousal support outcomes. Where they parted ways was in the application of those principles to the facts — specifically, how tightly the scope of the treating doctor's evidence needed to be confined, and how much weight could safely be placed on it without slipping into oath-helping or fault-based reasoning.

Read together, the reasons offer several practical lessons. Treating physicians should be treated clearly as participant experts, with opinions confined to diagnosis, treatment, prognosis, and functional impact. The central issue is not credentials, but scope: family doctors may diagnose and treat common mental health conditions, but courts must vigilantly police the boundary between medical opinion and fact-finding. Patient self-reporting is inevitable, particularly in mental health cases, but hearsay limits and evidentiary controls still matter and must be respected.

Perhaps most importantly, *Pike v. Wight* underscores that in spousal support cases, functional disability matters more than diagnostic labels or contested causation. Where health issues limit employability, their consequences — not their source — will

WESTLAW CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

often do the legal work. Finally, the case serves as a reminder that early and complete disclosure of medical records remains the most effective antidote to notice, fairness, and scope objections.

In short, participant-expert evidence is neither exempt from scrutiny nor inherently suspect. The task, as *Pike v. Wight* makes clear, is to know what it is good for, and what it is not.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.