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Developing Best Practices For Dealing With Experts

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Discussion Points

1. Classification of expert evidence in light of Rule 53.03 and the decisions in *Beasley, Slaight, Anand and Gutbir.*

2. Do the changes to Rule 53.03 enhance a party's rights to pre-trial disclosure having regard to Rule 31.06.

3. Educating the Expert.

4. Bringing pre-January 2010 reports into compliance with Rule 53.03.

The Requirements under Rule 53.03

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

The Requirements under Rule 53.03

6. The expert's reasons for his or her opinion, including,

   i. a description of the factual assumptions on which the opinion is based,

   ii. a description of any research conducted by the expert that led him or her to form the opinion, and

   iii. a list of every document, if any, relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 53) signed by the expert.

Classification of Experts

1. Litigation Experts
2. Treating Experts
3. Third Party Experts
4. Third Party / Treating Experts

Result: A sliding scale approach may be taken to the application of R. 53.03 depending on what classification your expert is in.

Beasley v. Scott & Barrand

Issue: Whether 3 IME doctors who examined the Plaintiff in the context of his SABS claim could testify on behalf of the Defendant in the tort action.

Facts*:* Plaintiff was examined in 2002/2003; Proposed experts were retained by and reported to the SABS insurer; Purpose of the examinations were to determine a diagnosis & prognosis, make treatment recommendations and determine eligibility for certain accident benefits.

Ruling*:* Proposed experts could not testify at trial as they did not meet the criteria of an expert as defined by Rule 53.03.

Beasely v. Scott & Barrand

"Surely, ***one of the important reasons for the rule change was to eliminate the practice of tendering opinion evidence of questionable value in a trial*** *particularly where, as is the case here, the evidence was created in another proceeding, at the instance of a party who is not before this court and to address matters that are beyond the scope of this trial".*

……

We are not dealing here with the ***treatment related opinions*** *formed in the course of providing primary care to the plaintiff nor is the opinion of any of the three* ***experts here so central to the outcome of the litigation*** *as might be the opinion of an origin and cause expert, an assistant fire chief in a case where negligence causing a building fire is alleged*

Beasley v. Scott & Barrand

"I see ***no reason to require a high standard be met by consulting medical experts retained by the parties and a different, lower standard from consulting medical experts who just happened to have been retained by a non-party but whose opinions might be read to assist*** *one of the parties at this trial.*

I am not to be heard to state that experts retained by accident benefits actions cannot give opinion evidence in a tort action; rather I say that ***such experts should first comply with Rule 53.03. I say "should" for there may be cases where that is not possible and then the court might consider relieving against non-compliance to ensure a fair adjudication of the issues upon their merits but this is not one of those cases****."*

Anand v. State Farm

Issue: Whether 3 IME assessors who examined the Plaintiff in the context of his SABS claim could testify on behalf of the Defendant in the tort action.

Facts: Plaintiff was examined by 2 orthopeadic specialists and OT as part of the SABS claim – once in 2003/2004/2005.

Ruling: IME assessors are permitted to testify as fact witnesses only.

Anand v. State Farm

*The **admissibility of that information** at trial of the tort action at which the plaintiff's physical condition is directly in issue, **would be consistent with the truth-seeking function of the trial**. To **prohibit those who obtained the information from testifying about their personal observations** during their examination of the plaintiff, would be to **extend some form of privilege to the insured's accident claims assessor that has so far not been recognized**.*

*In my view, **it is not improper for persons who have direct knowledge of the plaintiffs condition even when that knowledge may have been gleaned through an accident benefits claim based examination from testifying about these facts at trial**.*

Slaght v Phillips et al

Issue: Whether the vocational rehabilitation counsellor retained by the SABS insurer could give expert opinion evidence on behalf of the Plaintiff at trial.

Facts: Ms. Malacaria was involved with the Plaintiff for the three years leading up to trial; initial involvement was a voc assessment for the SABS insurer; subsequently recommended and undertook role of vocational counsellor and in doing so prepared a number of reports reporting back to insurer.

Ruling: Ms. Malacara was permitted to testify and provide opinion evidence despite her non-compliance with R. 53.03 as her evidence is related to treatment opinions and not a litigation opinion.

Slaght v Phillips et al

"However, I think it is important, in considering these matters, to recognize that ***there are classification of experts*** *which come before our court. For instance* ***as in this case****, we have* ***treating*** *physicians, counsellors, psychologists, physiotherapists and other treating specialists…….. Secondly;* ***there are experts who are retained by a party to an action to express opinions*** *but who are not treating specialists……..****In my view, Rule 53.03 clearly applies to them and it should be strictly applied to those professionals except in exceptional cases****……Thirdly, there are* ***experts who are retained by third parties****……..****In those cases, depending on the nature of the litigation, Rule 53.03 should be strictly applied****……But then fourth, there are* ***experts who are paid by third parties****, as in this case,* ***but*** *the expert* ***was working with the plaintiff*** *to that person in his or her needs. In that type of case* ***an expert who is retained****, such as Ms. Malacaria,* ***who produces reports expressing opinions with respect to the need for treatment, the recommended courts of treatment and the next step to be taken fall within a different status of experts*** *in my view.*

Slaght v. Phillips et al

Ferguson J. in *Burgess v. Wu* (2003) 68 O.R. (3d) 710:

> *The qualification I have added to the previous rulings is to take account of the fact that when a physician attends on a patient the process typically involves making a diagnosis, formulating a treatment plan and making a prognosis.* ***All three involve forming opinions. Those are different from the opinions an expert is asked to provide at trial as the latter usually involve a consideration of much more information from various sources and are formed for the purpose of assisting the court at trial and not for the purpose of treatment****. I shall call* ***opinions formed at the time of treatment "treatment opinions" and those formed for the purpose of litigation "litigation opinions***.

Gutbir v. University Health Network

Issue: whether the Plaintiff's treating neonatologist, Dr. Perlman would be permitted to give expert opinion evidence on the issue of causation.

Facts: Dr. Perlman treated the infant Plaintiff following her birth. Dr. Perlman delivered 2 reports dealing with causation and disability.

Ruling: Dr. Perlman is a treating expert who is permitted to give fact evidence only.

Gutbir v. University Health Network

The situation in the case before me is ***quite different from that encountered in a personal injury case*** *where, for example, a treating orthopaedic surgeon is asked to provide an expert opinion at trial on the future prognosis for the plaintiff in terms of treatment and disability. That opinion is, arguably, of great assistance to the trier of fact precisely because the treating orthopaedic surgeon, with his or her familiarity with the Plaintiff's injury and treatment, may be in the best position to opine on what the future holds for the patient. That is not* ***what is being asked of Dr. Perlman in the case at hand. Rather, he has been asked to review the very limited records available and provide an opinion as to*** **when** ***the brain damage occurred to Zmora.***

Gutbir v. University Health Network

This last comment, in my view, strikes me as somewhat defensive, and the others I have referred to are ***statements of an advocate as opposed to an objective expert****, although the treatment of Dr. Perlman is not under scrutiny. Perhaps this is not surprising.* ***In his role as a treatment provider to Zmora immediately following her birth, Dr. Perlman was trying to determine the cause of the baby's apparent deficits*** *and to render the appropriate treatment. The* ***comments contained in Dr. Perlman's second report suggest that he has an interest in the court finding that his conclusion reached in 1984 was indeed the correct one*** *and as such, Dr. Perlman lacks the necessary objectivity and impartiality which are essential from an expert testifying in court.*

Gutbir v. University Health Network

"I am not to be taken as being critical of Dr. Perlman for the manner in which he has articulated his views on the case; to the contrary, ***given that he was Zmora's treating neonatologist immediately following her birth when it was determined that she had suffered brain damage, it would be difficult if not impossible in my view for Dr. Perlman to be completely objective about the opinion he has been asked to provide to this Court, given the facts of the case and the nature of the expert opinion sought****. One of the central issues in this case is that of causation, which is one of the issues Dr. Perlman was trying to determine in January of 1984 when Zmora came under his care."*

Conclusion

1. The Court will require strict compliance with R. 53.03 if your expert falls into the classification of a:
    - *litigation expert*

2. A less stringent level of compliance with R. 53.03 may be available where your expert is:
    - *treating expert*
    - *treating expert who has been retained by a third party*

3. An expert will be limited to giving fact evidence only where he/she falls into the classification of an:
    - *IME assessors retained in a SABS or disability claim*
    - *treating experts who have been found to be bias or lack objectivity*

4. Certain experts will be relieved from complying with R. 53.03:
    - *third party expert who has no connection to the litigation but has provided an opinion on key issues in the action (ie. Police Officer, Fire Investigator)*

Disclosure obligations under R. 53.03

Does Rule 53.03(2.1) enhance a party's right to pre-Trial disclosure having regard to Rule 31.06(3)?

aka

The narrowing of the zone of privacy

Disclosure obligations under R. 53.03

1. Rule 31.06(3)

- Rule 31.06(3) provides for disclosure of “findings, opinions and conclusions” of the expert engaged by or on behalf of the party being examined that are relevant…

Disclosure obligations under R. 53.03

2. What information in the expert's file requires disclosure?

- Foundational information i.e. information relied on by the expert, but not necessarily production of the documents.

- Litigation privilege is usually claimed for communications between counsel and the experts. These communications are said to fall within a zone of privacy. *General Accident v. Chrusz* (1999) 45 OR (3d) 321 (C.A).

The "zone of privacy" may be narrowed even further by the introduction of Rule 53.03(2.1).

Disclosure obligations under R. 53.03

3. The requirements under Rule 53.03 are said to promote transparency, fairness and objectivity of the expert thereby assisting the court in its consideration of the expert's opinion.

- Form 53 reminds the expert that his/her primary duty is to the court.

- The focus of the expert's duty to the court requires even further scrutiny of the "fundamental information" relied upon by the expert.

Disclosure obligations under R. 53.03

4. Rule 53.03(2.1) 3 requires the report to set out the instructions provided to the expert in relation to the proceeding.

   - In *Ikea Properties Ltd. v. 6038212 Canada Inc.* [2010] O.J. No. 3449, Master Roger considered a motion by the plaintiff for foundational material in the context of a broader motion for summary judgment under Rule 20.
   - At paragraph 17 of his ruling, Master Roger opines that Rule 53.03(2.1) provides useful guidance as to what is <u>not</u> within the zone of privacy, i.e. all of the information enumerated within the rule.

Disclosure obligations under R. 53.03

5. If Rule 53 sets out the "foundational information" which must be disclosed, arguably the instructions provided to the expert are discoverable under rule 31.06(3)

- What is a "finding"?.
- the various cases clearly indicate that the word "finding" should be given a broad interpretation to include information and data obtained by the expert contained in documents through interviews which form the basis of the opinion formulated.
- findings can also include field notes, raw data and all factual data relied on by the expert.
- could a "finding" include information or instructions provided by counsel?
- what if information provided by counsel is not relied upon, is this discoverable either under Rule 31.06(3) or Rule 53.02(2.1)?

Disclosure obligations under R. 53.03

6. In *Bookman v. Loeb*, 72 R.F.L.(6th) 388, Justice Mesbur considered the production of foundational material in the context of a matrimonial matter and the production of a report that was not brought to the attention of her respondent/husband's counsel through inadvertence.

   Justice Mesbur held that the applicant/spouse should be permitted to file a fourth report and rely on it, but that her husband, was entitled to "foundational information" used by the expert. Justice Mesbur ruled that the parties would be entitled to broader disclosure than what is simply contained in the report.

Disclosure obligations under R. 53.03

- Justice Mesbur stated at paragraph 26 that, the respondent in this case, needed to be able to respond in a meaningful fashion to the expert reports and to do so they must know among other things what the expert was retained to provide an opinion on, whether those instructions changed over time, whether the expert's opinions changed over time and what instructions or assumptions the expert was told to make in formulating his opinion.

Disclosure obligations under R. 53.03

7. These words sound very much like Rule 53.03(2.1) yet to be proclaimed.

- In *Bookman*, counsel asked for production of copies of any letters given to the expert by the applicant's lawyers, including all emails, letters and other correspondence passing between counsel and the expert.

- Justice Mesbur refers to a decision of the Court of Appeal, *Conceicao Farms Inc. v. Zeneca Corp* (2006 CarswellOnt 5672 (Ont. C.A.)) which addressed the scope of information generally described as foundational.

Disclosure obligations under R. 53.03

- The *Conceicao* court held that the rule encompasses not only the expert's opinion, but the facts on which the opinion was based and the instructions upon which the expert proceeded.

- In *Brown v. Lavery* (2002), 58 O.R. (3d) 49 (Ont. S.C.J.), Justice Ferguson offered a "tentative view" in obiter that our system of civil litigation would function more fairly and effectively if parties were required to produce all communications which take place between counsel and an expert before the completion of a report of an expert whose opinion is going to be used at trial.

- Justice Mesbur found after having reviewed *Brown* and *Conceicao*, that the scope of what must be produced lies somewhere between the foundational information for the expert's opinion and everything that has passed between the expert and the instructing solicitor.

Disclosure obligations under R. 53.03

- Importantly, she found that the foundational information is not a "limitless entitlement" and that the proper approach would entitle the party to maintain privilege of the expert's file until trial.

- Notwithstanding that finding, Justice Mesbur ruled that the respondent was clearly entitled to receive letters of instruction to each of the experts and if no such letters exist, the experts or counsel should provide particulars of the instructions that were provided.

Conclusion

- The *Conceicao Farms* case and *Bookman* were decided before the Rule 53.03(2.1) came into force clearly suggest that letters of instruction may well be discoverable, pursuant to a request made under Rule 31.06(3) for the findings, opinion and conclusions of the expert and that we need not wait until the eve of trial to make such a request.

- Foundational material is a phrase that will be interpreted broadly and it would be wise for us to treat all communication that we have with our experts as potentially discoverable.

Educating the Expert

The responsibility of educating the expert with respect to his/her obligations under Rule 53.03 lies on the shoulders of the party calling that witness……

in this case, the defendants have simply not made reasonable efforts to assist the three doctors to an understanding of the requirements of Rule 53.03 and to enlist their help to assist the court by properly reporting on their opinion evidence in advance of the trial.

Beasely v. Barrand 2010 ONSC 2095 (CanLII)

Educating the Expert

Simply cutting and pasting Rule 53.03 into the body of our medical legal report request letter is insufficient to meet counsel's obligation to educate the expert as to their duties under Rule 53.03

Educating the Expert

There are key requirements under R. 53 that require explanation when the expert is being requested

- *The instructions provided to the expert in relation to the proceeding*
  - more than the original instructions
  - Includes any instructions that are contained in follow up calls, emails, meetings with the experts to review draft reports

Educating the Expert

•*a description of the factual assumptions on which the opinion is based on*

- Rule 53.03 does not say whether the expert is required to disclose the source of the assumption.
- Nor does it specify whether this applies to written assumptions, verbal assumptions or both.

•*a list of every document, if any, relied on by the expert in forming the opinion*

- What documents fall under the rubric "relied on"?
- More than just the medical brief provided – any documents that the expert has used in some way to come to his/ her opinion.
- What about documents reviewed but not relied on?

Educating the Expert

- *The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range*
  - Rule 53.03 does not indicate what circumstances give rise to a "range of opinions"
  - Assume this is triggered when the expert has reached a contested diagnosis (ie. Chronic pain)
  - Assume "range of opinions" is triggered when the expert is responding to the opposing party's expert report which will require the expertof the responding report to justify his/her opinion when faced with an opposing opinion
  - Risk: Perlman –type report where the expert is seen as "defending" his/her opinion and is disqualified from testifying

Educating the Expert

Combined of the informational/documentary disclosure requirements under Rule 31.06 and 53.03 open the door to earlier production of expert's files

- Expectation that a "seasoned" expert will be conscious of the fact that production of his/her file includes clinical notes, emails, meeting notes, memo's etc. and will not keep these types of documents in their file.
  - *Alfano v. (Trustee of) Piersanti* [2009] CanLII 9462 (S.C.J)
  - *Alfano v. (Trustee of) Piersanti* [2009] CanLII 12799 (S.C.J.)

Educating the Expert

Consider the expert retained prior to discovery to assist with recommending investigations that should be done or developing discovery questions

- Assumption that there will be a flow of information between counsel and the “pre-discovery” expert that falls into the category of litigation privilege

What happens to the information exchanged and documents created during this consultation if that expert is later retained to prepare a report?

Educating the Expert

Best Practices:

- Draft a precedent retainer letter that explains the expert's obligations under the Rules
- Consider who in the office should be speaking to experts – lawyer or law clerk
- Caution the client regarding communicating with experts
- What is the best way to communicate with experts
- When meeting with experts to review draft reports confirm with the expert that your comments have not changed the substantive opinions in their report

Bringing pre-January 1, 2010 expert reports into compliance

1. What classification does your proposed expert fall into?
2. Review reports early on to make sure that they comply with the Rule 53.03
    - Consider drafting a checklist to use when the reports come in
    - There are circumstances where you may not be able to get an Acknowledgement of Expert's Duty
3. Make best efforts to bring the report into compliance as soon as possible.

- Obtaining supplementary reports.

4. Be prepared for the reality that you will not know whether your expert's evidence will be challenged until the Trial.
5. When to raise the issue of non-compliance – can this be done before trial

- Using a Request to Admit for the purpose of getting counsel to agree on the classification of your expert, where it is not a true litigation expert and not able to comply with all of the requirements of R. 53.03.

6. Section 35 and 52 of the *Evidence Act* and the filing of non-compliant reports

Thank-you

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