Expert Reports: Recent Issues

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Introduction

A great deal has been written about expert reports as a result of the implementation of Rule 53.03 of the *Rules of Civil Procedure* and subsequently Rule 20.1 of the *Family Law Rules*. The amendments to the rules in relation to experts was a codification of the existing common law and a reminder to the expert that his or her duty is to the court which arises from the time the expert is engaged and prior to taking the stand to testify. The Acknowledgement of the Expert's Duty Form assures that experts are aware of their responsibilities to the court. As stated by Justice Lederman in *Henderson v. Risi* "the new rule amendments…impose no higher duties than already existed at common law on an expert to provide opinion evidence that is fair, objective and non-partisan…the purpose to the reform was to remind experts of their already existing obligations."[1]

However, as evidenced by the appeal heard on October 7, 2014 by the Supreme Court of Canada with judgment reserved in *White Burgess Langille Inman v. Abbott and Haliburton Company Limited et al.*[2] ("*Abbott*") and the appeals heard by the Ontario Court of Appeal in *Westerof v. Gee*[3] *("Westerof")* and *Moore v. Getahun*[4] *("Moore")* during the week of September 22, 2014 with the decisions also reserved, the problem remains for counsel to apply the principles with respect to the opinion evidence rule, the extent of litigation privilege in relation to

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[1] *Henderson v. Risi*, 2012 O.J. No. 2935 (Ont. S.C.J.) at par. 19.
[2] *WBLI Chartered Accountants et al. v. Abbott and Haliburton Company Limited et al*., [2013] NSJ No. 259 (CA)
[3] *Westerof v. Gee*, 2013 ONSC 2093 (Ont. Div. Ct)
[4] *Moore v. Getahun*, [2014] ONSC 237 (Ont. S.C.J.)

expert's files, the boundaries of advocacy by counsel in relation to experts, and the admission and/or weight of expert evidence in the context of a motion and trial.

Although the appeals in *Westerof* and *Moore* arose in the context of personal injury actions, the appeal decisions will be of fundamental importance to the family law bar and bench whom rely heavily on the assistance of expert witnesses. In short, a clear understanding is required of the conditions precedent required for a court to permit an expert to provide opinion evidence. The ability of counsel to understand these issues on the basis of first principles is critical to effective advocacy concerning the use of expert evidence.

Summary of pending decisions

The Divisional Court held in *Westerof* that where a party seeks to adduce opinion evidence from a physician, regardless of whether the physician was retained as an expert by a party to the litigation, the witness must comply with Rule 53.03 and by analogy Rule 20.1. In a family law case, a party may wish to have a treatment provider tender evidence of the party's medical or psychological condition which affects their employability. If a treating physician is to give opinion evidence, which would include providing a diagnosis and/or prognosis of a patient, according to *Westerof* that physician must comply strictly with Rule 53.03. Justice Lederer stated "[i]t is when the witness seeks to offer opinions as to the cause of the injury, it's pathology or prognosis that the evidence enters into the area of expert opinion requiring compliance with Rule 53.03."[5] The treating physician by *viva voce* testimony or by medical report with notice under Section 52 of the Ontario *Evidence Act* is able to provide factual evidence regarding his or her clinical observations, examinations and particulars of treatment.

[5] Supra, note 3 at para. 23.

Would a treating physician's evidence about a diagnosis run afoul of the decision in *Westerof*? Justice Lederer in *Westerof* held that because an opinion is "an inference from observed facts", for the purposes of evidence, a diagnosis is an opinion.[6] It was recognized, however, that in certain instances, a diagnosis may be treated as a fact and admissible for purposes of understanding why a treatment was selected. It is submitted that while a treating practitioner may not be qualified to opine on a patient's employability, a diagnosis of a patient at the time of treatment which is relevant to the treatment prescribed should be admitted as a fact without the applicability of Rule 53.03. If the opposing side, however, challenges the correctness of the diagnosis made by the treating practitioner, it must be queried whether that diagnosis will be admitted without a Rule 53.03 report.

The amendments to Rule 53.03 were implemented after the enactment of the Ontario *Evidence Act* with respect to medical reports, which intended to make medical evidence admissible by way of a report to avoid the medical practitioner from being required to testify. However, if a medical report contains an opinion including in relation to a diagnosis and/or prognosis, according to *Westerof,* the portions of that report will not be admissible absent a Rule 53.03 compliant report. While not specifically commenting on the Ontario *Evidence Act*, implicit from the decision of *Westerof* is that Rule 53.03 takes precedence over Section 52 of the Ontario *Evidence Act*. In *Westerof,* opinions set out in two MRI reports were redacted. Justice Lederer noted that had the authors of the MRI reports been called to give *viva voce* evidence, they would not have been permitted to provide opinions without complying with Rule 53.03.

This decision is further problematic as treating physicians would not reasonably consider an obligation to the Court as superseding an obligation to the patient which subverts the therapeutic relationship. As a result of the decision, expert evidence is required in many cases

[6] Supra, note 3 at para. 24.

which have been previously considered to be unnecessary, which will undoubtedly increase the cost of litigation and which runs counter to the caution expressed by Justice L'Heureux-Dubé in *Moge v. Moge* that expert evidence is not necessary in many family law cases.

The language of Rule 53.03 and Rule 20.1 does not codify the scope of permissible interaction between counsel and their proposed expert witness, which the cases on appeal will hopefully clarify. In *Moore,* Justice Wilson concluded that the new Rule 53.03 means that counsel's prior practice of reviewing draft reports "should stop" in order to ensure that the expert witness remains "neutral." Justice Wilson stated, in part:

> …the purpose of Rule 53.03 is to ensure the expert witness' independence and integrity. The expert's primary duty is to assist the court. In light of this change in the role of the expert witness, I conclude that counsel's prior practice of reviewing draft reports should stop.
> …
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> I do not accept the suggestion in the 2002 Nova Scotia decision, *Flinn v. McFarland*, 2002 NSSC 272, 211 NSR (2d) 201, that discussions with counsel of a draft report go to merely weight. The practice of discussing draft reports with counsel is improper and undermines both the purpose of Rule 53.03 as well as the expert's credibility and neutrality.

Justice Wilson held that if counsel seeks clarification or amplification after receipt of an expert's final report, all communication should be in writing, and any communication should be disclosed to the opposing party. In *Moore*, there was an admission by the expert witness that he had reviewed his draft report with counsel and made corrections as a result.

The Supreme Court of Canada in the appeal of the Nova Scotia Court of Appeal decision in *Abbott* is dealing with the issues of when to challenge an expert report as inadmissible and when an expert's opinion is inadmissible due to bias. The Court of Appeal in *Abbott* described the issue on appeal as follows:

> Typically, an expert's objectivity is tested by way of cross-examination by the opposing party. This then allows the judge to calibrate the weight, if any, to

> accord the proffered opinion. However, in exceptional circumstances, a proposed expert's independence or impartiality may appear to be so suspect that he or she will be prevented from testifying from the outset. In this appeal, we explore what it would take to justify such a measure.

In *Abbott*, the respondents brought an action in professional negligence against the applicant accountants, who brought a summary judgment motion. To defend the motion, the respondents commissioned an expert in forensic accounting whose report was filed with the Court by way of an affidavit. The applicants brought a motion to have the expert report expunged from the record which was granted on the basis that the affidavit fell short of the requirement that expert evidence must be "seen to be independent." The proposed expert was a partner of the same accounting firm that the party had retained in relation to the underlying issues in dispute in the lawsuit. The Court of Appeal allowed the appeal and concluded that the motion judge erred in excluding the affidavit. The Nova Scotia Court of Appeal held that more than an apprehension of bias is needed to exclude expert testimony. The Court held that a higher threshold of actual bias must be demonstrated to not admit the expert evidence rather than going to weight.

Type of evidence vs. role of witness

Although the common reference to the admissibility of expert evidence is the Supreme Court of Canada's four-part test set out in *R. v. Mohan,* a foundational understanding of the first principles of the Opinion Evidence Rule ought to be considered. The Opinion Evidence Rule does not cover all opinion testimony. As Wigmore stated:

> The so-called opinion rule is in its scope much narrower than the term "opinion"; it deals with opinion in a special sense only.[7]

[7] John Henry *Wigmore, Evidence in Trials at Common Law*, Vol 7 (Toronto: Little, Brown and Company, 1978) at page 3.

It has been recognized by Wigmore that skilled strangers to the dispute should be permitted to provide their opinions to the trier of fact where their special skills can assist the trier of fact. Wigmore further stated:

> This, then is the second notable feature, namely, the general recognition, by the end of the 1700s, that there was a class of persons, i.e. those skilled in matters of science, who, though they personally knew nothing about the circumstances of the particular case, might yet, perhaps by way of exception, give their opinion on the matter.[8]

Based on a first principle analysis by Wigmore, it would seem that Rule 53.03 should be applied to the Opinion Evidence Rule which should be restricted to opinion evidence proffered by experts retained for the purpose of litigation only. It would seem that *Westerof* might have been incorrectly decided.

It is critical that a distinction be drawn between experts retained for the purpose of providing opinions for the purposes of the litigation and those engaged in treatment who will express opinions (including treating physicians, counsellors, and psychologists). The distinction is based on the role or involvement of the witness in the litigation. It would seem that categorizing witnesses as either one giving fact or opinion evidence does not clarify the issues. As stated by Justice Lax in Andersen:

> …there is no clear line between fact and opinion evidence, and no value in artificially forcing such a line…
>
> Except for the sake of convenience there is little, if any, virtue, in any distinction resting on the tenuous, and frequently false, antithesis between fact and opinion. The line between "fact" and "opinion" is not clear…[9]

[8] *Ibid* at page 5.
[9] *Anderson v. St. Jude Medical Inc.*, 2010 ONS 3712 at para. 12.

The Ontario Court of Appeal in *Marchand v. Public General Hospital Society of Chatham* stated:

> The respondents called Dr. Tithecott, a treating physician as a witness…Counsel for the appellants objected on the grounds that (a) Dr. Tithecott was being asked to give opinion evidence…The trial judge allowed the examination to proceed…Dr. Tithecott was called as a witness of fact, not as an expert witness. Thus, in so far as Dr. Tithecott was testifying about the facts of his own involvement, or the opinions that went to the exercise of his judgment, rule 53.03 was not engaged.[10]

On this analysis, litigation expert witnesses fall into the class of witnesses that are retained by a party to provide opinion evidence to assist the trier of fact and are strangers to the circumstances giving rise to the dispute. Litigation expert witnesses ought to be required to comply with Rule 53.03.

Witnesses who are acquainted with the circumstances of the case, such as a treating physician or a police officer, perform a different role although they may provide what amounts to opinions and are typically referred to as "fact witnesses". The Supreme Court of Canada in *R. v. Graat*[11] noted that it may be helpful for the trial judge to accept opinion evidence from a fact witness who, unlike the judge, made first hand observations. In *R. v. Graat*, the police officer at trial gave his opinion as to the accused's ability to drive. The police officer's evidence was "I formed the opinion that the accused's ability was impaired…by alcohol." The opinion was accepted by the trial judge.

Police records often contain mixed facts and opinions based on the police officer's personal observations, including reference to the speed in which a vehicle was travelling, and in domestic violence cases, an opinion as to whether a party was intoxicated. Records of the Children's Aid Society may also contain "opinions" following an assessment. *Westerof* appears

[10] *Marchand v. Public General Hospital Society of Chatham*, [2000] O.J. No. 4428 (C.A.) pars. 119-120.
[11] *Graat v. The Queen*, [1982] 2 SCR 819.

to ignore the implications of the decision on other witnesses with expertise and first hand observations that may assist the court.

As submitted by the Ontario Trial Lawyers Association during the appeals of *Westerof* and *Moore*, Rule 53.03 ought not to apply to witnesses who are involved with the circumstances of the case and they ought not to be considered "experts".

Litigation Privilege and Production of the Expert's file

It is critical that counsel be aware of the extent of an expert's disclosures obligations and what parts of an expert's file are producible prior to trial on a motion or at a Conference. Rule 17 of the *Family Law Rules* requires the identification of any issues relating to any expert evidence or reports on which the parties intend to rely at trial at the initial Case Conference, Settlement Conference and Trial Management Conference.

Rule 31.06 and Rule 53.03(2.1) of the *Rules of Civil Procedure* contemplate what is not within the 'zone of privacy' required to protect the adversarial system. However, the privilege associated with an expert is to some degree preserved.

Service of the expert report constitutes a waiver of litigation privilege over portions of the expert's file. Although the case law does not go so far as to require production of the expert's entire file, the foundational information for the expert's report must be produced which is specifically codified in Rule 53.03.

In *Browne (Litigation Guardian of) v. Lavery*,[12] the Court suggested 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." The Ontario Court of Appeal in

[12] 58 O.R. (3d) 49

Conceicao Farms Inc. v. Zeneca Corp[13]did not agree that the scope of production extended as far as suggested in *Brown*e.

The matrimonial case of *Bookman v. Loeb*, [2009] O.J. No. 2741 was decided just before Rule 53.03 came into force and discussed disclosure obligations in relation to expert reports. Justice Mesbur concluded 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, including the expert's entire file." Justice Mesbur noted that "while an opposing party is entitled to foundational information, this is not a "limitless entitlement". While Justice Mesbur ruled that the files of the experts remained privileged until trial, she found that the following documents were producible after the completion of the report by the proffered expert:

i. Draft reports;

ii. An outline from each expert as to any assumptions he was advised to make, together with particulars of any texts, articles or case law he relied on in reaching his opinion;

iii. Notes of meetings made by either counsel or the expert prior to the preparation of the final expert report and if no notes exist, a summary of what was discussed; however, solicitor's notes taken in the role as solicitor would be protected;

iv. Copies of letters of instruction to each of the experts, whether from previous or current counsel and particulars of the instructions if no letters exist; and

v. The expert's accounts.

Justice Mesbur refused to order production of correspondence between counsel and the expert which was protected by litigation privilege and production of any retainer agreement with

[13] 2006 O.J. No. 3716 (C.A.)

the expert on the ground it did not go to the foundation of the expert's opinion. This "foundational information" is now reflected in Rule 53.03.

The approach taken in *Moore* in relation to draft reports can be contrasted with a recent case[14] in which the British Columbia Supreme Court took a more lenient stance and stated:

> The Province suggests that if counsel choose to assist experts with their reports, they should be required to retain records to demonstrate the extent of their involvement. In my view, such a requirement risks creating an undue financial burden for litigants. While it may be wise in some situations to retain such records, as I see it, the law does not require counsel or experts to maintain such records in case they might be called upon to dispel allegations of bias at some point in the future. Nor should it raise a suspicion of improper involvement if counsel do not retain such records.[15]

This case would not seem to support the memorialization of discussions between expert and counsel in meetings as required by Justice Mesbur in *Bookman v. Loeb.* The British Columbia Supreme Court also stated "[w]ith respect to the involvement of counsel for the CSF in the preparation of the Martel Report, in my view, it is quire proper for counsel to provide some feedback on the form of an expert report to ensure that the evidence is useful to the court." This begs the question of whether it is proper for counsel to make suggestions as to the content of the report.

In *Mendlowitz v. Chiang,*[16] the Court held that it was appropriate for counsel to make suggestions to the expert in the preparation of the expert report. It was the Court's further view that it was not necessary for an expert to retain all previous drafts of their report.

The case of *Flinn v. McFarland,* referred to by Justice Wilson in *Moore,* held that disclosure to the opposing side must include "whatever information and materials were provided to the expert." In regards to discussions with counsel, the Court held that "it is, may be, or

[14] *Conseil scloaire francophone de la Colmbie-Britannique v British Columbia (Minister of Education)* [2014] BCJ No. 956 at para. 53.
[15] Ibid at par. 54.
[16] 2011 ONSC 2341 at pars. 20 – 24.

perhaps should have been, part of the informational basis used by the expert in reaching his conclusions, and must be disclosed."

In *Ebrahim v. Continental Precious Minerals Inc.*[17] Justice Brown addressed the circumstances when production beyond the basic foundational information would be required. Justice Brown stated as follows in relying on the authors of Sopinka, Lederman and Bryant in the *Law of Evidence in Canada*, Third Edition:

> Generally, the implied waiver (by the expert taking the stand or having his or her report tendered into evidence) should be narrowly construed and the privilege should be maintained whenever it is fair to do so. The waiver of litigation privilege should be restricted to material relating to formulation of the expressed opinion.
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> No doubt the witness should be subject to cross-examination on the factual basis of the opinion…As to the expert's credibility, caution should be exercised before that becomes the basis for wide-ranging disclosure of all solicitor-expert communications and drafts of reports. Certainly, confidential communications which are not the foundation of the expert opinion are not waived. In any event, it might just lead to a general practice among solicitors of destroying drafters after they are no longer needed just to avoid the problem.
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> I accept the cautions voiced by the authors of Sopinka, Lederman and Bryant about the approach that a trial judge, or final hearing judge should take when considering the scope of the waiver associated with a party placing an expert "in the box" to testify. In the present case I consider the determining factor the answer which Mr. Hall gave on his cross-examination that he did not draft his affidavit. It is unusual, to say the lease, to come across an expert who has not drafted his own report, in this case in affidavit form. Mr. Hall's admission that he did not gives rise to issues as to what findings or conclusions in his report originated as his own, or were those of others, and whether the opinion he now ventures, or the information upon which he relies, may have changed from draft to draft, with the drafts prepared by others. Those issues concern the independence and impartiality of the opinion advanced by Mr. Hall to this Court, as well as the weight which should be attached to his opinion.
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> Accordingly, in light of those specific circumstances, I conclude that by tendering Mr. Hall as an expert witness Continental has waived litigation privilege attaching to any written documentation between Mr. Hall/Kingsdale and Stikeman Elliott, Continental's counsel, regarding Mr. Hall's affidavit or his evidence, including prior drafts of his affidavit report.

[17] 2012 ONSC 1123 at pars. 73 – 75.

In a recent decision[18], Master Muir did not order the production of prior draft reports of the expert as there was no evidence that the expert was anything other than independent and that the principle that implied waiver of litigation privilege should be narrowly construed. Master Muir distinguished the case from the case of *Ebrahim v. Continental Precious Minerals Inc*., 2012 OJ No. 716 where the expert acknowledged that he did not draft his own report.

Counsel should have the ability to interact with the expert to fairly advocate for their clients throughout the litigation process. There is nothing inherently improper about counsel reviewing a draft expert report. Pursuant to Rule 20.1(10)¶2, where there is a range of opinion, the expert is required to provide a summary of the range and the reasons for the expert's opinion within that range. In relation to income calculations pursuant to the *Child Support Guidelines,* it is not uncommon for counsel to discuss with the expert the inclusion of various factual Scenarios reflecting the expert's range of opinion based on the application of the *Child Support Guidelines* to the particular factual scenario i.e. adding back business expenses of a personal nature. This type of involvement by counsel should not implicitly result in the expert's duty to the court or the expert's objectivity being undermined. Further, a review of the facts set out in the report for accuracy does not raise any impropriety.

In *Bailey v. Barbour*, 2013 ONSC, the trial judge ordered production of copies of all email communications exchanged between the expert and counsel, to which privilege might attach. The trial judge held that production was justified to expose expert witness bias when the evidence is probative of that issue. Such an order was made because the expert's initial evidence under cross-examination conveyed an "involvement in the proceeding beyond that expected of an expert witness, and necessitated further exploration of his role in the litigation in order that

[18] *Thermapan Structural Insulated Panels Inc. v. City of Ottawa and Arlene Gregoire*, 2014 ONSC 2365

the Court be in a position to properly evaluate his evidence."[19] The Court referred to *Blank v. Canada,* 2006 SCC 39 and *General Accident Assurance Company v. Chrusz,* 1999 CanLII 7320 (Ont. C.A.) in permitting the disclosure despite litigation privilege where necessary for procedural fairness. The Court noted that such an order for production of email communications could only be justified on the basis that the communications between counsel and expert revealed a reasonable apprehension of bias.[20]

In *Alfano v. Piersanti*,[21] the Plaintiffs challenged the impartiality and independence of experts. The trial judge ordered production of e-mails between an expert and counsel that revealed that the expert had assumed the role of an advocate. An example of an email sent stated "[t]ry to prioritize the "killer" points, otherwise a judge might be overwhelmed by a series of small technical points." Each draft of the expert's report was delivered to the party for review, revision and approval. The expert was disqualified.

Communication between experts and counsel, other than communication which goes to the foundational information of an expert's opinion and that does not undermine the expert's assistance to the Court or foster bias, should be covered by the umbrella of litigation privilege. Until the decision of the Court of Appeal is released, counsel should treat all communications with experts as potentially discoverable.

Consensus Statement in relation to interactions between counsel and expert

A Consensus Statement by a number of the participating parties was provided to the Ontario Court of Appeal in the appeals of *Westerhof* and *Moore,* which set out the proposed

[19] *Bailey v. Barbour*, 2013 ONSC at para. 15
[20] *Bailey v.Barbour*,[2014] O.J. No. 2920
[21] *Carmen Alfano Family Trust (Trustee of) v. Piersanti*, 2012 ONCA 297

ethical and professional parameters to be applied to all interaction between expert and counsel:[22]

1. The limit on interaction with an expert witness is that an advocate must not persuade an expert to express an opinion that the expert does not genuinely share or believe;
2. Unfettered interaction between expert witnesses and counsel is not only desirable, but is essential to the proper prosecution or defence of an action. The scope of interaction must, by necessity, be broad and not subjected to arbitrary limitations;
3. Prior to declaring an intention to call the expert witness to testify, all communications and interactions with the expert are protected by litigation privilege;
4. Once the expert witness is called to testify, litigation privilege with regard to all communications and interactions with the expert witness is preserved, subject to the following qualifications:
    a. Any and all evidence used by the witness that forms the foundation for the opinion is to be disclosed to the opposing parties;
    b. Draft reports and any memorialization of the communications and interactions between counsel and the expert witness will continue to be protected by litigation privilege unless, in the trial judge's opinion, there is real and substantial concern about bias or reliability that justifies access to more than just foundational information;
    c. Any communications that are entitled to the protection of solicitor-client privilege shall continue to be so protected, unless expressly waived.

[22] The participants of the Consensus were the appellant Getahun, respondent Moore, Advocates' Society, Holland Group, Canadian Defence Lawyers and Ontario Trial Lawyers Association.

5. It is unnecessary to require that the interaction between expert witnesses and counsel be memorialized in any fashion or that draft reports, as evolving works in progress, be kept or disclosed in all circumstances;
6. By and large, the adversarial system allows parties to identify non-compliance with the expert's duty to the court. This can be achieved by opposing expert reports and through cross-examination at trial.

It will be interesting to see if and when a claim of litigation privilege over all communications and interactions between expert and counsel will be pierced if the evidence shows that counsel had inappropriately interfered with the completion of the report.

Challenging an expert's independence, impartiality and objectivity

Consideration must be made as to if and when counsel should challenge an expert for bias. Should counsel raise the issue in the qualification *voire dire* which goes to the admissibility of the evidence or during cross-examination of the qualified expert when the issue most likely goes to weight?

The issue of was commented on in *Carmen Alfano Family Trust (Trustee of) v. Piersanti*, 2012 ONCA 297. The Ontario Court of Appeal stated:

> [110] In most cases, the issue of whether an expert lacks independence or objectivity is addressed as a matter of weight to be attached to the expert's evidence rather than as a matter of the admissibility. Typically, when such an attack is mounted, the court will admit the evidence and weigh it in light of the independence concerns. Generally, admitting the evidence will not only be the path of least resistance, but also accord with common sense and efficiency.
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> [111] That said, the court retains a residual discretion to exclude the evidence of a proposed expert witness when the court is satisfied that the evidence is so tainted by bias or partiality as to render it of minimal or no assistance. In reaching such a conclusion, a trial judge may take into

> account whether admitting the evidence would compromise the trial process by unduly protracting and complicating the proceeding: see *R. v. Abbey*, 2009 ONCA 624 (CanLII), 2009 ONCA 624, 97 O.R. (3d) 330, at para. 91. If a trial judge determines that the probative value of the evidence is so diminished by the independence concerns, then he or she has a discretion to exclude the evidence.
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> [112] In considering the issue of whether to admit expert evidence in the face of concerns about independence, a trial judge may conduct a *voir dire* and have regard to any relevant matters that bear on the expert's independence. These may include the expert's report, the nature of the expert's retainer, as well as materials and communications that form part of the process by which the expert formed the opinions that will be the basis of the proposed testimony: see *R. v. INCO Ltd.* 2006 CanLII 14962 (ON SC), (2006), 80 O.R. (3d) 594, at p. 607 (S.C.).

In *Henderson v. Risi*,[23] Justice Lederman adopted the principles set out in the Newfoundland Court of Appeal case of *Gallant v. Brake-Patten* 2012 NLCA 23 that the question of institutional bias on the part of the expert is best left to be a matter of weight and not admissibility. In *Gallant v. Brake Patten*, the Court drew a distinction in the admissibility analysis between expert evidence that is challenged on the basis of bias or partiality and cases of legal advocacy, containing legal argument, legal interpretations and conclusions masquerading as expert evidence.

Legal advocacy disguised as expert evidence is, in principle, not admissible evidence, because it does not meet the admissibility criteria set out in *Mohan* as it is not necessary to assist the court. However, it would seem to be only in the extreme cases where the approach taken by the proposed expert would render the opinion evidence inadmissible. In other cases, the issue should be left for cross-examination to refute or diminish the weight to be given to the expert's opinion.

[23] *Henderson v. Risi*, 2012 O.J. No. 2935

It is suggested that only in the clearest cases involving a patent lack of impartiality should counsel try and impeach the proposed expert witness for lack of independence at the qualification hearing to warrant its exclusion from the outset.

In the recent family law case of *Berta v. Berta*, [2014] O.J. No. 4198, while counsel objected at the qualification stage that the proposed expert, Mr. Horsely, was not a neutral and unbiased expert, Justice Harper qualified him to give opinion evidence and stated that the Court would deal with the issues of bias and neutrality as an issue of weight. After hearing both parties' experts, Justice Harper gave very little weight to the evidence of Mr. Horsely as he conducted himself as an advocate instead of a neutral expert attempting to assist the Court. Justice Harper was critical that Mr. Horsely refused to meet with the other side's experts in order to narrow the issues and did not amend his reports, as the other side's expert did, when certain facts were learned during evidence in the trial that required such amendments.

A linkage can be drawn between Justice Harper's findings about Mr. Horsely's partiality and his failure or refusal to meet with the opposing side's experts to narrow or resolve issues. By experts setting out the areas of agreement and disagreement and their respective reasons, they will assist the court and advance their overarching duty to the court. In the Osborne Report, *Civil Justice Reform Project: Summary of Findings & Recommendations*, it stated that "Expert bias can, I think, best be reduced or somewhat controlled by a "meet and confer" requirement."

In *Bailey v. Barbour*, 2013 ONSC 4731, the Court did not preclude the issue of bias from being raised when not raised in the qualification hearing and stated at paragraph 32:

> In hindsight, it might have been more efficient to have questioned Mr. Stewart on issues of bias during the qualification stage, as opposed to the cross-examination stage. However, not doing so cannot be seen as fatal to a party's rights to challenge on the basis of bias at a later stage. It is sometimes the case that a party innocently consents to the expertise of a witness, but that their impartiality is not exposed until cross-examination. In this case Mr. de Rijcke was alive to the issue

> of impartiality, but the full extent of Mr. Stewart's involvement in this case was only revealed once cross-examination was undertaken. To permit the issue to be explored in one scenario, but not the other, is unjustifiable. It would be a miscarriage of justice, in my view, to disallow exploration of bias at any stage of the expert's testimony, given the importance of this issue to the Court's truth-finding function.

The Court decided that the determination of the extent of the expert's bias and whether it was sufficient to affect only weight as opposed to admissibility would be dealt with after all of the expert's evidence was given.

Counsel must be wary of the decision of *Bailey v. Barbour*, [2014] O.J. No. 2920, in terms of proffering an expert to the Court that counsel reasonably knew, or should have known was not impartial. In that case, counsel was held personally liable for a portion of the costs of a trial due to involving an expert that was overwhelmingly biased. Continuing with that expert was therefore an unnecessary waste of costs.

The determination of when an expert will be barred from testifying from the outset awaits the outcome of the Supreme Court of Canada's appeal in *Abbott*. It appears that the flux in the law in relation to experts has encouraged the use of the joint retainer of experts in the family law context to avoid any suggestions of partiality or bias.

Admissibility of the Expert Report itself

It is hoped that the Court of Appeal's pending decisions will also clarify the issue of what use the trial Judge can make of expert reports at trial when the expert testifies *viva voce*. In *Moore* copies of the expert reports were not filed as exhibits in evidence but rather were made available to the judge as an "aide" to assist in following the evidence. Justice Wilson posed the following questions to be answered by a higher court or the Civil Rules Committee at paragraph 71:

> Does the common law rule, that an expert has the option of filing his report or testifying at the trial, continue after the amendments to the *Rules of Civil Procedure*? Should experts be allowed to prepare affidavits affirming their reports so the report can be admitted as evidence to both streamline trial process and assist the trier of fact in understanding and assessing the evidence? Are there different considerations in judge alone trials and jury trials? If there are differences or omissions between the expert report and the expert evidence, how are the differences or omissions to be treated?
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> Justice Wilson goes on to state:
>
> In any event, in light of defence counsel's insistence, I considered only the *viva voce* of the expert witnesses for its truth. However, where there was a conflict between the evidence at trial and the contents of the expert report, or if there were omissions in the expert report compared to the evidence given at trial, I conclude that the contents of the expert's report were admissible and relevant to assess the reliability and credibility of the expert's opinion.[24]

A condition precedent to a proposed expert witness giving opinion evidence is that the witness has delivered a Rule 53.03 or Rule 20.1 compliant report. The report itself is not evidence rather it is the testimony of the expert although counsel may consent to file the expert as an Exhibit for identification purposes to allow the trial Judge to follow along the expert testimony.

Contrary to the above general understanding, Rule 20.1(11) provides that an expert's report is admissible in evidence in the case.[25] This is confusing as the preconditions for admissibility cannot be presumptively satisfied solely by preparing a Rule 20.1 compliant report, which is contrary to the general exclusionary rule of opinion evidence. The Rules Committee may need to reconsider the wording of this rule.

Rule 20.1(11) mirrors the language of Rule 30(9) of the *Children's Law Reform Act* that statutorily admits the assessment report in evidence and which forms part of the Trial Record. Rule 20.1(11) is not limited to a trial. On a motion, the rule is contrary to the general principle

[24] *Moore v. Getahun*, [2014] ONSC 237 at para. 73.
[25] Rule 20.1(11) does not apply in respect of assessments under Section 30 of the *Children's Law Reform Act*, Section 54 of the *CFSA* and Section 112 of the *Courts of Justice Act*.

that a party intending to rely on the opinion of an expert on a motion must swear an affidavit appending his or her report and swear to its truth or set out the substance of the opinion in affidavit form. This permits the cross-examination of the expert. Rule 20.1(12) expressly permits a party to cross-examine the expert at trial but is silent on a motion. For purposes of an interim motion, there is case law that suggests that there is an inherent danger in relying on reports which have not been tested by cross-examination, particularly when there have not yet been any factual determinations made on conflicted evidence filed. The rationale is that the facts upon which the expert's opinion is based must be proved. Further, Rule 20.1(9) requires the expert to file the report with the Court although it is not clear from the face of the rule that this requirement only applies to court appointed experts.

Counsel must await the decisions of the Court of Appeal as it would be unfair to presumptively admit expert reports as evidence under Rule 20.1(11) without meeting the requirements of admissibility of expert evidence.

The pending decision of the Supreme Court of Canada will affect whether a motion judge can strike an expert's affidavit or report prior to trial on the basis that the expert is not independent.

Conclusion

Counsel should eagerly await the decisions of the Ontario Court of Appeal and Supreme Court of Canada, which will hopefully clarify the issues and provide guidance on the scope of permissible interaction between counsel and experts, litigation privilege with respect to communications with experts, the circumstances and extent to which treating practitioners should be allowed to give opinion evidence and the admission/weight dichotomy of expert evidence.

Pending the release of the decisions, counsel would be wise to have a working knowledge of the basis of the evidentiary rules allowing expert testimony and above all remember that there is only one question you should ask yourself before deciding to proffer expert evidence and that is: “Is the expert’s opinion required to assist the court?”