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CANADIAN LAWYER MAGAZINE 2015-16 TOP 10 PERSONAL INJURY BOUTIQUE CANADIAN Lawyer

ACCIDENT BENEFIT REPORTER

Volume 16 Issue 2
FALL 2015

In this issue:

- How to be an 'Expert', Expert
- Owners' Liability Triggered by Consent to Possession Rather than Consent to the Operation of the Vehicle
- Special Announcement: launch of new website thomsonrogers.com

HOW TO BE AN 'EXPERT', EXPERT

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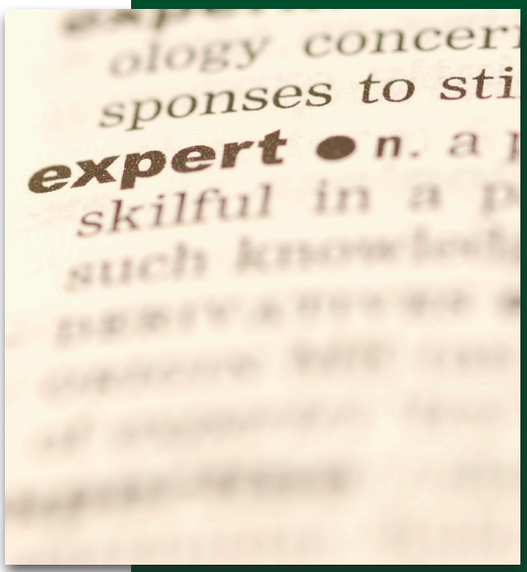
The determination of the legal disputes that arise out of complex personal injuries has become more and more dependent upon the observations and opinions of health care practitioners. Therefore, the ability of health care practitioners to communicate their observations and opinions in the legal arena is vitally important to all patients who are unfortunately involved in a serious injury case.



An "expert" in a legal case is someone who is considered to have special skill, knowledge, training, or experience, such that their observations and opinions will assist the ultimate decision maker (a judge or jury) in adjudicating a legal case.

Often, treating health care practitioners are eager to help their injured patient but are unfamiliar with what may be involved. Equally, 'independent' health care practitioners might be keen to assess the Plaintiff for litigation purposes but are reticent about ultimately having to testify in Court. The goal of this article is to provide potential medical expert witnesses with some (brief) insight into what may be involved in the process.

– Continued on page 2

YOUR ADVANTAGE,
in and out of the courtroom

How to be an 'Expert', Expert

Continued from cover story

Procedure in a personal injury legal case is governed by a set of rules called the ***Rules of Civil Procedure (the "Rules")***. There are two primary *Rules* which govern the contents of expert reports: *Rule* 4.1 and *Rule* 53.03.

Rule 4.1 sets out the duty of an expert. It provides that an expert must:

- provide an opinion that is fair, objective, and non-partisan;
- limit the scope of his or her opinion evidence to that which is within the scope of his or her expertise; and
- otherwise assist the Court as may be reasonably required to determine an issue.

The *Rule* further confirms that the expert's duty to the Court overrides any obligation to the person by whom the expert was retained.

Rule 53.03 describes (among other things) the information that must be contained in the report.

An expert's report must include:

- the instructions provided to the expert;
- the nature of the opinion being sought;
- the opinion and, where there is a range of opinions, an explanation about why the opinion falls within that range;
- the reasons for the opinion, including any assumptions, research conducted, and/or document relied upon;
- a signed Acknowledgement of Expert's Duty (Form 53);

The more persuasively the expert can express his or her opinion, the more assistance that opinion will be to the Plaintiff. However, it is important to keep in mind the fine line between being persuasive and being partisan. If an expert crosses the line into advocacy, less authority is given to the expert's opinion. In a worst case scenario, the judge may bar the expert from testifying at trial entirely.

It is critical for health care practitioners to understand the burden of proof required in the legal realm. In civil/tort cases, the Plaintiff is required to prove his/her case "on the balance of probabilities" or that it is "more likely than not". 100% medical certainty is not required – 51% probability is. The "more likely than not" burden applies not only to establishing the cause of the Plaintiff's injuries, but also to any losses that have been incurred to date. The legal language and corresponding burden of proof is less when proving future losses. The Plaintiff need only prove that there is a "real and substantial risk or possibility" of a future event or loss. The use of the proper legal language in a medical report is important.

Some health care providers are called upon to give expert evidence in their capacity as a treating professional; while others are hired specifically to assess a Plaintiff and provide an opinion solely for the purpose of the litigation. Our Courts often struggled with how to accept evidence from treating health care practitioners, when their record keeping and report writing was not completed for use in a legal case and therefore has not complied with the *Rules*.

In a recent decision of the Ontario Court of Appeal, the Court considered the use of opinion evidence provided by treating health professionals who had not provided a Rule 53 compliant expert report, and clarified the circumstances under which a treating health care professional may testify at a trial without having complied with the *Rules*. In the case of *Westerhof v Gee*, the Court concluded that a witness with special skill, knowledge, training or experience who has not been retained by a party to the litigation may nonetheless give opinion evidence without complying with Rule 53.03, where:

1. the opinion to be given is based on the witness' observation of or participation in the events at issue; and
2. the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.

Health care practitioners who are called upon to give expert opinions in a Plaintiff's case are often reticent about discussing the formation of their opinions with counsel. In January 2015, the Ontario Court of Appeal released its decision in *Moore v Getahun* which answered many practical questions about how lawyers and expert witnesses can interact in the preparation of expert reports and when preparing experts for giving evidence at a trial. In the decision, the Ontario Court of Appeal provided considerable guidance about how lawyers and expert witnesses should interact and about the extent to which communications or draft reports are subject to disclosure to the opposing side. Very specifically, the Court of Appeal explained:

> It would be bad policy to disturb the well-established practice of counsel meeting with expert witnesses to review draft reports. Just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case.

Consultation and collaboration between counsel and expert witnesses is essential.

The Court of Appeal also recognized that preparation of a case for trial requires an umbrella of protection that allows counsel to work with experts while they make notes, test hypotheses and write and edit draft reports. The Court of Appeal further held that draft reports need not be disclosed and the notes and records of any consultation between experts and counsel need not be disclosed – even if the expert is going to be called as a witness at trial. However, the claim of protection (a.k.a. litigation privilege) cannot be used to shield improper conduct. If there are reasonable grounds to suspect

– Continued on page 4

How to be an 'Expert', Expert

Continued from page 3

that counsel communicated with an expert witness in a manner likely to interfere with the expert witness' duties of independence and objectivity, the court can order disclosure of such discussions.

When a legal case must be decided by a judge or jury, the ability of the medical expert (both treating health care professionals and litigation hired health care professionals) to communicate their observations and opinions to the trier of fact is crucial. The expert must be well-briefed for trial.

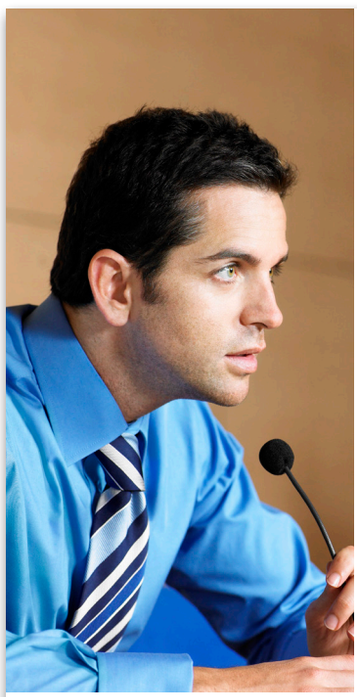
Expert briefings should include:

1. A review of the duty of the expert, in order to prevent the appearance of advocacy.
2. A review of all the records which may be relevant to the expert's opinion.
3. A review of helpful and hurtful legal language.
4. A review of the theories and themes of the case.
5. A review of the facts in the case, especially if those facts have been relied upon for any assumptions or conclusions.
6. A review of other expert opinions in the case, both corroborating and conflicting.
7. A review of any authorities (e.g. textbooks), which may be put to the expert in cross-examination.
8. A review of any flaws in the expert's report that become apparent with the fullness of time, more evidence, and intensive trial preparation.
9. A review of the contents of the expert's file, which may have to be brought to Court.

A persuasive expert witness at a trial will:

1. Speak slowly and clearly
2. Look at the trier of fact when answering questions
3. Use simple language (wherever possible)
4. Be responsive to questions
5. Consider using visual aids

In order for the expert's testimony to be both permitted and preferred, it is vital that the expert's report is Rule 53.03 compliant; that the expert is aware of the boundaries that the Court will impose upon the expression of their opinions; and that the expert and his/her counsel have consulted about the preparation of the report and the presentation at trial.



OWNERS' LIABILITY TRIGGERED BY CONSENT TO POSSESSION RATHER THAN CONSENT TO THE OPERATION OF THE VEHICLE

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In a rare move, the Ontario Court of Appeal overturned its previous decision in the 1955 case of *Newman v. Terdik,* firmly closing the door on an automobile insurer's ability to deny liability coverage to its insured when a negligent driver operates their vehicle in a manner prohibited by the owner.

In *Fernandes v. Araujo* 2015 ONCA 571, Craig Brown and Stacey L. Stevens successfully challenged the principle that Courts must adhere to prior decisions, and persuaded the panel that leaving the decision in *Newman v. Terdik* to stand would result in inconsistency and unpredictability with respect to the proper interpretation of s. 192(2) of the *Highway Traffic Act*, which provides:

> *192(2) The owner of a motor vehicle or street car is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle or street car on a highway, unless the motor vehicle or street car was without the owner's consent in the possession of some person other than the owner or the owner's chauffeur.*

On May 26, 2007, Sara Fernandes was a passenger on an ATV being driven on a public highway. The driver lost control and Ms. Fernandes sustained catastrophic injuries. There was no dispute the owner of the ATV consented to the driver's possession of the ATV. However, he took the position that his consent was limited to

– Continued on page 6

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Owners' Liability Triggered by Consent to Possession Rather than Consent to the Operation of the Vehicle

Continued from page 5

the operation of the ATV on his farm property and not the highway.

Allstate insured the ATV. Allstate took the position that Ms. Fernandes did not have a valid claim against the ATV owner based on a lack of consent as required under s. 192(2). Allstate subsequently brought a motion for summary judgment to dismiss Ms. Fernandes' claim.

On November 4, 2014, Stacey L. Stevens appeared before Justice Perrell to oppose this motion. Ms. Stevens successfully argued the ATV owner's vicarious liability for Ms. Fernandes' injuries was triggered once he gave consent to the driver possessing his vehicle and not his consent to operate it.

Allstate appealed, forcing the Court of Appeal to decide between its previous decisions in *Newman v. Terdik* [1953] O.R. 1 (Ont. C.A.) and *Finlayson v. GMAC* 2007 ONCA 557 (CanLII).

In *Newman*, the Defendant Terdik owned a tobacco farm. Terdik gave his employee Perkinson possession of his farm truck for the sole purpose of driving it on the tobacco farm – with express instructions not to go on the highway with the automobile. Perkinson took the truck on the highway and subsequently injured the Plaintiff, Newman. The trial judge and the Court of Appeal held that given that Terdik expressly forbade Perkinson from driving the truck on the highway, he did not have possession of it with Terdik's consent and, therefore, Terdik was not vicariously liable.

The *Finlayson* decision follows a line of authority that began with *Thompson v. Bourchier*, [1933] O.R. 525 (C.A.), wherein the Court of Appeal held that vicarious liability under 192(1) of the *Highway Traffic Act* is based on possession, not operation, of the vehicle. In *Finlayson*, the Defendant GMAC leased a motor vehicle to John Simon and Theresa Jefferies. Section 18 of the lease expressly prohibited Mr. Simon from operating the vehicle. Both Simon and Jefferies signed an acknowledgement to that effect. On March 3, 2000, Simon was operating the vehicle when it was involved in a single vehicle collision. His passengers were injured and commenced an action against Mr. Simon and GMAC. GMAC subsequently brought a motion for summary judgment arguing that its vicarious liability under section 192(1) was limited by the terms of the contract. The motion judge agreed. The Plaintiff appealed. The Court of Appeal overturned the lower court's decision and in doing so, ruled that consent to possession is the triggering event for owner's liability based on the reasoning established in *Thomson* – which found that public policy dictates a motor vehicle owner cannot escape vicarious liability simply because the person with possession breaches some condition of having possession, but rather it imposes the responsibility of careful management upon whom possession is entrusted.

Counsel for Allstate argued that "possession can change from rightful possession to wrongful possession, or from possession with consent to possession without consent" where the person in possession violates a condition imposed by the owner. Further, Allstate argued there is no consent within the meaning of s. 192(2) where the person with possession of the vehicle violates the owner's stipulation that the vehicle not be taken off private property and on to the highway. In those circumstances, the consent required by the statue is absent. Justice Strathy, on behalf of the 5-member panel expressly rejected Allstate's position and concluded as follows:

> *The reference to "negligence in the operation of the motor vehicle… on a highway" means nothing more than that the owner's liability will only be triggered where the place of the negligence and injury is on a highway. That does not qualify the general proposition that the owner's liability turns on consent to possession, and consent to possession is not vitiated by violation of a condition attached by the owner to his or her consent to possession. If the owner cannot escape liability where the person with possession violates a condition that he or she not drive the car at all, it is difficult to see why the result should be different where the condition is that the car not be driven on a highway. I see nothing in the language of s. 192(2) capable of justifying treating a stipulation by an owner that his or her vehicle not be taken on the highway differently from any other stipulation restricting the use or operation of the vehicle.*

In the end, the Court of Appeal unanimously ruled that the interests of certainty and predictability in law would not be served by leaving *Newman* intact as it undermines the coherence of the law and is likely to lead to confusion.

The result obtained by Stacey L. Stevens and L. Craig Brown ensures the Defendant, and his insurer Allstate, will not be unjustly absolved of their responsibility for the damages suffered by Sara Fernandes and protects the rights of future litigants. ■■■

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SPECIAL ANNOUNCEMENT!

We are pleased to announce the launch of our new website: thomsonrogers.com.

If you would prefer to receive an email version of the Accident Benefit Reporter instead of a hard copy, please email your request to: eoneill@thomsonrogers.com

Thank you.

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