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Becoming an "Expert" Expert

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Becoming 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 healthcare 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. Health care practitioners are not typically focused on how best to communicate their observations and opinions in the legal realm; quite rightly, their goal is to improve the health and welfare of their patients, to the best of their ability with the resources available to them. Therefore, it is incumbent on lawyers and health care practitioners to work together in order to facilitate the communication of the health care practitioner(s’) observations and opinions and therefore achieve the best possible outcome for their patients and clients.

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. Health care practitioners are routinely called upon as experts in their respective fields and their observations and opinions (often referred to as ‘evidence’ in a legal case) are routinely sought by lawyers who represent injured people (the “Plaintiffs”). Expert evidence may

be required from a variety of practitioners: from a physician who initially treated the Plaintiff in hospital; from an in-hospital therapist involved in the Plaintiff's acute care; from a healthcare professional on the Plaintiff's post-discharge or community treatment team; or from a medical-legal expert hired by the Plaintiff's lawyer for the specific purpose of providing a medical opinion in a personal injury lawsuit, to name a few. Although the nature of each expert's involvement in the Plaintiff's case may differ, the importance of his or her evidence often does not.

As Plaintiff personal injury lawyers, we often find that treating health care practitioners and medical-legal experts are keen to assist their patients/our clients, but are anxious about participating in the legal process and/or testifying in a Courtroom and wish to avoid involvement in the legal realm altogether.

The goal of this paper¹ and our accompanying presentation is for healthcare professionals to have a deeper understanding of how their observations and opinions may be used to advance a personal injury case; to provide these important experts with the communication tools that will help them best play their part; and to prepare them for what it may be like to testify in Court. In that respect, this paper will address five areas of importance:

1. The expert's report;
2. The responding or rebuttal report;
3. The respective importance of treating vs. medical-legal opinions;

¹ Some of the points addressed in this paper were also addressed in a paper previously authored by Deanna S. Gilbert and Sloan H. Mandel in 2014, entitled "Five Tips for Expert Witnesses."

4. The appropriate interaction between lawyers and experts;
5. Preparing for giving evidence at a trial.

THE EXPERT REPORT

Most legal disputes are not resolved in a courtroom. The overwhelming majority of cases settle at some point prior to trial. The observations and opinions of an expert are an important component of the legal case, both inside and outside of the courtroom, and are often used as a tool for narrowing the issues, assessing the Plaintiff's losses (and, therefore, the value of the case), and facilitating settlement discussions. Therefore, in many cases the expert is asked to reduce his or her opinion to writing.

The Rules Pertaining to Expert Reports

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*. A full reproduction of these *Rules* is attached at **Appendix A** to this paper. A more general overview of these *Rules* is provided below.

a. Rule 4.1: Duty of Expert

Rule 4.1 sets out the duty of an expert. It provides (not verbatim) that an expert:

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

The *Rule* further confirms that the duty to the Court overrides any obligation that the expert may otherwise have (or feel) to the person by whom the expert was retained.

The aim of this *Rule* is to prevent the use of a “hired gun”; an expert is well within his or her right to provide an opinion – but not at the cost of objectivity.

b. Rule 53.03: Expert Reports

Rule 53.03 prescribes timelines for the exchange of expert reports and describes information that must be contained in the report. The timelines for serving or providing a copy of the expert report to the opposing party are directly related to the timing of the Pre-Trial conference. The Pre-Trial conference is typically the last major procedural step in the legal case before it reaches Trial. The Pre-Trial conference involves the parties and their lawyers meeting with a judge to see whether the case can be resolved and, if not, to review the witnesses that will be called at Trial, to set the time required to hear the case and to address any procedural issues that are expected to arise at the Trial. Since this is often the last meaningful opportunity for the parties to try to settle the case, it is important that all anticipated evidence is “available”, which is why expert reports are expected to have been exchanged prior to that date.

The deadlines for producing expert reports are:

- for an initiating report: 90 days before pre-trial;
- for a responding report: 60 days before pre-trial.

An initiating report is one that comments on the case for the first time or is the first report delivered by a specific discipline. A responding report is one that addresses or rebuts another expert’s report or is prepared by an expert of the same discipline as an expert who has already provided a report.

The Rules prescribe certain content requirements for expert reports. Each report must include:

- the instructions provided to the expert;
 - e.g. “I was asked by Plaintiff’s counsel to assess the Plaintiff and to consider certain referral questions that were asked of me.”
- the nature of the opinion being sought;
 - e.g. “Specifically, I was asked to provide a diagnosis, prognosis, and to consider any future care recommendations that I may have.”
- the opinion and, where there is a range of opinions, an explanation about why the opinion falls within that range;
 - e.g. “The severity of a TBI can be judged by a number of markers including, but not limited to: GCS scores, loss of consciousness, functioning, and others. The range typically goes from mild, to moderate, to severe. For the reasons set out below, in my opinion, it is likely that as a result of the motor vehicle crash, the Plaintiff suffered a severe TBI. ”
- the reasons for the opinion, including any assumptions, research conducted, and/or document relied upon;
 - e.g. “My opinion that the TBI is severe is based upon the fact that the Plaintiff was obtaining good grades in school prior to the crash, suffered a GCS score of 3/15 at the scene, and has been unable to reach grades remotely similar to what she was receiving before the crash despite having the benefit of an educational assistant and multidisciplinary rehabilitation team.”
- a signed Acknowledgement of Expert’s Duty (Form 53);
 - e.g. this Form that requires the expert to acknowledge his or her duty to the Court, as described in rule 4.1.

Objectivity vs. Advocacy

Unequivocally, an expert’s overriding duty is to the Court. With that being said, the more persuasively the expert can express his or her opinion, the more assistance that

opinion will be to the Plaintiff. It is important to keep in mind the fine line between being persuasive and being partisan.

The Court accepts that:

- an expert called by a party will, unsurprisingly, ordinarily give evidence that is helpful to that party;
- the fact that the expert has “taken a side” does not, alone, make that expert an advocate in an impermissible way;
- the alignment of interest between an expert and the party by whom he or she is retained does not, in and of itself, make that expert an advocate;
- the fact that the expert is being paid to testify by the Plaintiff or her lawyer does not, alone, make the expert an advocate;
- the fact that the expert is also the Plaintiff’s treating health care practitioner does not make the expert an advocate.

Ultimately, a determination of whether or not the expert crosses the line from being persuasive to being partisan will include such considerations as:

- whether the expert is using inflaming versus neutral language;
 - e.g. “Obviously the Plaintiff is injured!” vs. “The Plaintiff is injured.”
- whether the expert has conducted a careful analysis in order to reach his or her opinion;
 - e.g. “The Plaintiff cannot do any housekeeping.” vs. “The Plaintiff has limitations with repetitive bending, weight-bearing, kneeling, and crouching, such that she will have difficulty carrying out housekeeping duties that involve these movements.”
- whether the expert also acknowledges limitations in his or her opinion, unfavourable aspects to the Plaintiff’s claim on a particular point in issue, or areas where he or she cannot give a definite opinion;

- e.g. “In my opinion, it is likely that the Plaintiff had, at least, an above-average cognitive capacity prior to the crash based upon her high-level, demanding job; however, there is no pre-crash neuropsychological testing with which I can compare the results of today’s assessment.” vs. “Clearly the Plaintiff was a genius because he had a high-paying job.”
- whether the expert has launched a personal attack against the defence expert;
 - e.g. “Dr. X has no idea what he is talking about.” vs. “I respectfully disagree with Dr. X for the following reasons...”

A risk of crossing the line into advocacy is that the judge or jury will give less authority to the expert’s opinion. In a worst case scenario, the judge may bar the expert from testifying at trial entirely. The Plaintiff’s lawyer will have great difficulty relying upon an expert’s report if the Defendant’s lawyer does not respect the expert due to a perceived bias.

Health care practitioners should be aware that lawyers check the background of the experts that they retain and that the opposing party has retained. To the extent that an expert has testified previously and there was negative judicial commentary about the expert’s objectivity it is unlikely that said expert will be hired again.

Legal Language and the Burden of Proof

In the legal realm, individual words can take on important meaning and ultimately affect the outcome of the case. There is a specific burden of proof that the Plaintiff in a personal injury case must meet in order to successfully prove his or her case. The specific wording used by health care experts in their reports (or testimony) can directly impact the Plaintiff’s ability to meet that burden of proof. The challenge for personal

injury lawyers is to ensure that health care practitioners are sufficiently educated on the specific wording or words that fall within this category of important “legal language” and the implications that these words can have on the burden of proof in the legal case.

Tort: Injury & Damages to Date

In civil/tort cases, the level of proof that the Plaintiff must meet is a “balance of probabilities”. This means that 100% medical certainty is not required; what is required is a threshold of 51% or higher. In other words, the Plaintiff must prove that a fact is “more likely than not.”

In tort cases, the “but for” test is the basic rule for:

1. Causation - what caused the Plaintiff’s injuries; and
2. Compensation for damages *incurred to date* - losses resulting from the Plaintiff’s injuries which have been sustained by the time of trial or a settlement, and for which a monetary value is assessed (e.g. pain and suffering, past income loss, and past out-of-pocket expenses).

The “but for” test requires the Plaintiff to prove that “but for” the Defendant’s fault, the injury and losses would not “likely” have been sustained. When determining whether the Plaintiff has met the “but for” test, the Court will consider, amongst other evidence, the expert opinions tendered on the particular point in issue.

In *rare* cases, the Plaintiff may only be required to prove that the subject incident “materially contributed” to her injuries and damages (rather than the “but for” test); however, these cases are limited to circumstances where the Plaintiff²:

1. has established that her loss would not have occurred “but for” the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; or
2. through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or “but for” cause of her injury, because each can point to one another as the possible “but for” cause of the injury.

Experts should assume that the “but for” test applies unless specifically told otherwise by the expert by whom they were retained.

Accordingly, the key “legal language” relating to the burden of proof that experts should carefully consider when drafting their reports include the terms: “but for” and “more likely than not”. The use of this wording will convey to the Court that the expert supports the Plaintiff’s case on the particular point or fact in issue.

Tort: Future Contingencies & Losses

The burden of proof and, therefore, the corresponding key “legal language” changes when the issue upon which the expert is being asked to opine relates to:

1. future contingencies (e.g. deterioration of condition, development of further injuries/impairments; future surgeries, etc.); and
2. future pecuniary losses (e.g. future income loss, future care needs, future loss of an interdependent relationship, etc.).

² *Clements v. Clements*, [2012] SCC 32 at para. 46(2) (CanLII).

For these future contingencies and pecuniary losses, the burden of proof reduces from “a balance of probabilities” to a “real and substantial risk or possibility”³. This risk must be something that is beyond *de minimus*; in other words, beyond mere speculation.

Accordingly, for future contingencies and future pecuniary losses, the key “legal language” for experts to consider when drafting their reports includes the terms: “real and substantial possibility” or “real and substantial risk.” For these particular types of future losses, the use of these terms will convey to the Court that the expert supports the Plaintiff’s claims.

Accident Benefits

Briefly touching upon accident benefits cases, rather than tort cases, the burden of proof for both causation (e.g. how/why the Plaintiff suffered injuries or impairments) and for the Plaintiff’s entitlement to accident benefits (e.g. medical and rehabilitative benefits) is lower. Rather than applying the “but for” test, the burden of proof is the “material contribution” test.

Examples of Legal Language Relating to the Burden of Proof

Accordingly, “helpful” legal language which can assist the Plaintiff to prove causation, damages, or entitlement to accident benefits includes:

- probably;
- likely;

³ *Schrump v. Koot*, [1977] ONCA 1332 (CanLII).

- more likely than not;
- will;
- on the balance of probabilities;
- real and substantial possibility (when addressing future contingencies);
- real and substantial risk (when addressing future contingencies);
- materially contributed to (in the accident benefits context).

Conversely, “unhelpful” legal language includes:

- may;
- possibly;
- unlikely;
- could;
- can;
- perhaps;
- a chance that;
- lost the opportunity to (with respect to potential past losses or claims).

Comprehensiveness: The Four Corners

In circumstances where an expert is required to provide a report before testifying at trial, it is important that the report is comprehensive. The report should address all of the issues about which the expert has been asked to provide an opinion, all of the reasons for the expert’s opinion, and all of the documentary or evidentiary support underlying those reasons.

A comprehensive report is important because the general rule at trial is that an expert may only testify as to the “four corners” of his or her report⁴. In other words, an expert may explain or amplify matters the expert has touched upon or which are latent in his or her report, but the expert cannot testify about matters that open up a new field and are not canvassed in his/her report.

In order to ensure that the report is comprehensive, experts may wish to consider the following:

- Have I reviewed all of the records that may be relevant and which may be available to me (e.g. diagnostic imaging CDs, photographs, medical charts, etc.)?
- Have I interviewed or examined the Plaintiff in-person, if necessary?
- Is the information that I have been given relatively up-to-date?
- Should I request to speak to a corroborating source?
- Have I considered all other expert evidence that may be available?
- Have I included the information required under rule 53.03?
- Have I addressed the main issues in the case and/or the referral questions?
- Have I cited all supporting documentation, literature, and/or reasons for my opinion?
- Have I sufficiently explained the rationale for my opinion?

Simplified Language

Finally, expert reports should be understandable. If an expert uses highly technical language that is unfamiliar to the reader, the expert runs the risk that his/her opinion will

⁴ *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham*, (2000), 51 O.R. (3d) 97 (CanLII) [*Marchand*].

be lost by the reader. Generally speaking, experts should try to use simple language. The goal is not for the expert to *impress* the reader, but to *communicate with* the reader. Where technical or uncommon wording or language must be used, the expert should try to explain the wording in plain English.

THE RESPONDING OR REBUTTAL REPORT

Generally, responding or rebuttal reports serve three purposes:

1. to narrow the issues;
2. to critique the opposing party's expert opinion;
3. to respond to any critique made by the opposing party's expert.

Purposely absent from the list is "re-stating the original opinion." While it is entirely appropriate for experts to re-state their original opinion within their responding or rebuttal reports (if the opinion remains unchanged); it should not be the primary purpose or focus of the report. The goal of the responding or rebuttal report is to offer new insight, explanation, or information.

Narrowing the Issues

Responding or rebuttal reports often narrow the issues between the parties. When experts can agree on certain facts or points, it may resolve an issue in the case. Even when an issue cannot be resolved, there is still benefit in acknowledging areas of agreement between the experts because credibility of the expert agreeing will be enhanced.

Accordingly, when preparing a responding or rebuttal report, it is helpful for experts to acknowledge when the opposing party's expert opinion is consistent with the expert's own opinion with respect to:

- the Plaintiff's pre-morbid history (or lack thereof);
- the Plaintiff's presentation at the assessment (e.g. no pain behaviours, appearing to put forth a good effort, being cooperative, etc.);
- causation;
- diagnosis;
- prognosis;
- the appropriate testing methods, guidelines, or theories;
- test or examination findings;
- the significance of a particular fact, test finding, or diagnostic image;
- the Plaintiff's limitations or restrictions;
- future care recommendations;
- future ability to work.

Critiquing the Defence Report

Typically, the most important aspect of the responding or rebuttal report is the critique of the opposing party's expert opinion. All critique should be presented in a neutral, reasoned tone; not as an "attack" on the expert's opinion or on the expert himself/herself.

Accordingly, when preparing a responding or rebuttal report, it is helpful for experts to consider the following areas for critique:

- Did the other expert rely upon an unfounded assumption?
 - E.g. "The Plaintiff intended to have children, so she probably would not have worked full-time."

- Is the expert's reasoning flawed?
 - E.g. "If the diagnostic imaging was negative, then there could not have been a head injury."
- Was the expert's opinion roused in what could be a perceived bias?
 - E.g. "This Plaintiff is really bringing this lawsuit because she wants money, not because she is injured."
- Has the expert provided an opinion that is inconsistent with views the expert has previously expressed, for example, in papers or articles authored by that expert?
 - E.g. Has the published an article that, in some cases, concussions can have long-term consequences but, in his or her report, has indicated that concussion symptomatology should have resolved within three months?
- Did the expert conduct a test or rely upon a theory that is outdated, experimental, or invalid?
 - E.g. "A head injury cannot exist in the absence of objective evidence by way of imaging."
- Has the expert failed to mention, consider, or incorporate into his opinion any critical piece of evidence including, but not limited to: a diagnostic image, a treating record, or another expert opinion?
 - E.g. Did the expert rely upon a GCS score of 15/15 in the Ambulance Call Report without acknowledging police notes that indicate that multiple bystanders witnessed a prolonged loss of consciousness before the ambulance arrived on scene?
- Has the expert made bald statements without providing any underlying rationale or support for the opinion?
 - E.g. "The Plaintiff should be able to work."
- Has the expert considered lay evidence or corroborating information?
 - E.g. If the Plaintiff has little insight into her injuries, has the defence expert considered what the family members have reported?
- Has the expert provided an opinion or made a statement that shows a failure to understand or a misunderstanding of the evidence?
 - E.g. Has the defence expert said that the Plaintiff was "unemployed" prior to the incident when, in fact, the Plaintiff was just on a temporary layoff from which he or she was expecting to be recalled?
- Has the expert focused on only a narrow aspect of the Plaintiff's life?

- E.g. Has the expert focused on the fact that the Plaintiff has returned to work, while ignoring that she has not returned to her social life, recreational activities, etc.?
- Has the expert applied the wrong burden of proof?
 - E.g. Has the expert stated that it is “unlikely” the Plaintiff will develop arthritis, when the real burden of proof is whether there is a “real and substantial risk” of the Plaintiff developing arthritis?
- Is there literature that rebuts the expert’s opinion?
 - E.g. Has the expert opined that concussions should resolve within three months, when there are empirical studies of patients who have suffered long-term impairment?
- Is there a way to “read between the lines” of the expert’s opinion to weaken its impact?
 - E.g. If the expert has stated that only a small percentage of people will have symptoms three months post-incident, is there some reason why this Plaintiff could not fall within that small percentage of unlucky people?
- Are there ways to explain the expert’s negative findings?
 - E.g. If the expert has concluded that the Plaintiff’s neuropsychological testing was invalid because she over-endorsed symptoms on cognitive tests, could this over-endorsement have been the result of psychological distress rather than a deliberate attempt to exaggerate?
- Has the expert gone outside his scope of expertise?
 - E.g. Has a neuropsychological expert provided an opinion about the Plaintiff’s physical injuries?

Responding to the Defence Expert’s Critique

The responding or rebuttal report can also address critique proffered by the opposing party’s expert.

First, to the extent that the opposing party’s expert’s opinion is based upon a fundamental misstatement or misunderstanding of the opinion it purports to critique, this misunderstanding should be clarified.

Second, in cases whether there is no misunderstanding but there is disagreement, the responding report should not just re-state the original opinion. Rather, the responding report should either offer further explanation or support for the opinion, or should provide reasoning for why the opinion should be preferred. This type of analysis will involve much of the same considerations as set out in the section above, including, but not limited to:

- Is there literature to justify the opinion?
- Is there further evidence or corroborating information that supports the opinion?
- Are there different tests or schools of thought that can apply?
- Is there a difference in scope of expertise between the experts?

TREATING VS. MEDICAL-LEGAL OPINIONS

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.

Generally speaking, the opinions of treating health care providers (who have a history of treating the Plaintiff over time and have not been hired specifically for the purpose of the legal case) are given greater weight by defence counsel and by judges and juries than the opinions of experts hired solely for the purpose of the litigation. However, it is usually more difficult to secure expert evidence from treating health care practitioners. Treating practitioners (as opposed to experts hired specifically for the purpose of the litigation) often do not have the time required to prepare comprehensive reports for use in litigation

and they are not familiar with the legal tests that apply to the assessment of injuries in the context of litigation. As an example, ‘Catastrophic impairment’ in a motor vehicle case has a very specific legal definition and importance that has little meaning otherwise. Additionally, our Courts often struggled with how to accept evidence from treating health care practitioners, when their record keeping and report writing was not done 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 highest Court in Ontario), the Court considered the use of opinion evidence provided by treating health care practitioners who had not provided a Rule 53 compliant expert report and clarified the circumstances under which a treating health care practitioner may testify at a trial without having complied with the *Rules*.

In the case of *Westerhof v Gee*,⁵ Jeremy Westerhof called a number of treating health care practitioners as witnesses at his trial. None of them had provided reports under *Rule 53*. None of them were hired for the purpose of litigation. At the trial, the Judge restricted what the health care practitioners were permitted to talk about to their clinical observations, treatment, and the progress of that treatment. They were not allowed to give their opinion concerning diagnosis or prognosis of Mr. Westerhof (even though they were obviously trained and medically qualified to provide such opinions).

When the trial judge’s decision was reviewed by the Ontario Court of Appeal, 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.

The Court of Appeal's clarification is significant because prior to its decision, some judges did not permit treating health care practitioners to testify at all, absent compliance with the *Rules*. While other judges permitted treating health care professionals to testify about their involvement in the patient's care and about their observations of the patient during said care, but did not permit the health care practitioners to offer any opinion about the patient's diagnosis or prognosis.

Since the decision of the Court of Appeal in *Westerhof*, treating health care practitioners can offer their opinion about a patient and are not required to prepare a report or sign a Form 53 so long as the substance of their opinion will relate directly to their observations or participation in the Plaintiff's care, and any opinion that is offered forms part of the ordinary exercise of their expertise as it relates to their participation in the Plaintiff's care.

There remain some limitations on a treating expert's ability to give evidence, in the absence of a *Rule* compliant report. For example, there may be circumstances where a

⁵ *Westerhof v. Gee Estate*, 2015 ONCA 206 (CanLII).

treating expert who has not complied with the *Rules* may not be permitted to give opinion evidence about issues which commonly arise in personal injury cases; specifically:

- causation (e.g. the likelihood that the subject accident/incident caused the injuries suffered by the Plaintiff);
- future extra-ordinary needs (e.g. the likelihood that the Plaintiff will require adaptive equipment, future therapy or will require care assistance from others);
- the impact that the injuries or impairments will have upon the Plaintiff's ability to earn an income.

Further, the trial judge still retains discretion to disallow opinion evidence from a treating health care practitioner that is beyond the scope of an opinion formed in the course of treatment or observation of a patient.

APPROPRIATE INTERACTION BETWEEN EXPERTS AND LAWYERS

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. As an expert, it's not only acceptable, it's encouraged to consult with the Plaintiff's lawyer about the opinions that you will provide.

In January 2015 the Ontario Court of Appeal released its decision in *Moore v Getahun*⁶ 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.

⁶ *Moore v. Getahun*, 2015 ONCA 55 (CanLII).

Moore was a medical malpractice case where the trial judge held that counsel were forbidden to discuss draft reports with their experts; and that all discussions between counsel and experts must be documented and were subject to be disclosed to the opposing side. The decision had a chilling effect on the interactions between lawyers and their experts.

The decision of the trial judge was appealed and the Ontario Court of Appeal reversed (overruled) the trial judge on these issues and by doing so it affirmed that practices that had existed for years regarding interactions with expert witnesses are both permissible and to be encouraged.

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 explained⁷:

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.

[Emphasis added]

⁷ Moore p.62

Consultation and collaboration between counsel and expert witnesses is essential. Reviewing a draft report enables counsel to ensure that the report complies with the procedural rules and the rules of evidence, addresses and is restricted to the relevant issues, and is written in a manner and style that is accessible and comprehensible.

Counsel need to ensure that the expert witness understands the legal issues that frame the dispute (such as the difference between the legal burden of proof and scientific certainty).

The Court of Appeal explained⁸:

...leaving the expert entirely to his or her own devices, or requiring all changes to be documented in a formalized written exchange, would result in delay and increased costs in an already struggling system. It would also encourage the hiring of shadow experts to advise counsel and there would be an incentive to burry rather than edit and improve badly drafted reports.

[Emphasis added]

The Court of Appeal 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 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. The Court of Appeal explained that allowing an open-ended inquiry into the differences between a final report and an earlier draft would unduly interfere with the preparation of a party's case and run the risk of needlessly prolonging the case.

However, disclosure may be required in certain situations. The claim of litigation privilege cannot be used to shield improper conduct. Where the party seeking production of draft reports or notes of discussions between counsel and an expert can show reasonable grounds to suspect 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. In the matter of *Ebrahim v. Continental Previous Minerals*⁹, the Court ordered disclosure of draft reports and affidavits after an expert witness testified that he did not draft the report or affidavit which contained his opinion, and admitted that his firm had an ongoing commercial relationship with the party who hired him.

The Court of Appeal has provided the following guidance about the appropriate interaction between lawyers and experts:

- Counsel must not persuade or attempt to persuade an expert to give an opinion that the expert does not genuinely believe;
- Counsel cannot communicate in a manner likely to interfere with the expert's independence or objectivity; and
- Counsel must remain alive to the expert's duty to remain objective and impartial.

On the issue about whether or not experts must keep draft reports, the Court of Appeal has not explicitly provided guidance one way or the other. However, in the majority of

⁸ Moore p.66

⁹ *Ebrahim v. Continental Previous Minerals*, 2012 ONSC 1123 (Can LII)

cases, it will be near impossible to demonstrate that counsel interfered with the expert's duties of independence and objectivity and hence production of draft reports is unlikely to occur.

Well considered opinions evolve. Opinions change with consultation, with greater research, as further information becomes available, and with a deeper understanding of the facts. Therefore, lawyers should confer with their experts, test their opinions, and participate in the shaping of their reports.

TRIAL PREPARATION

As explained at the outset, most cases are resolved prior to trial. However, when a legal case must be decided by a judge or jury, the ability of the medical expert (both treating and litigation-hired health care practitioners) to communicate their observations and opinions to the trier of fact is crucial.

Trial Briefings

Of paramount import, the expert must be well-briefed for trial. The better the briefings, the more comfortable the expert will be in the witness box, and the more likely a natural dialogue will occur at trial before the judge or jury.

Lawyers are well-aware that experts carry on busy practices and sympathize with the inconvenience caused by trial briefings. However, briefings are absolutely critical and beneficial to the expert. Briefings are not only used to go over the expert's opinion, but

are also used to review areas of critique that can arise in cross-examination. Briefings therefore educate the expert in advance of trial about what s/he may face. Anticipating what issues may arise at trial, and preparing for those issues, will ultimately decrease the stress on the expert while sitting in the witness box.

Expert briefings should include, but not be limited to:

1. A review of the duty of the expert, in order to prevent the appearance of advocacy, as discussed above.
2. A review of the theories and themes of the case.
3. A review of all of the records which may be relevant to the expert's opinion (clinical notes, hospital chart, photographs, other reports in support of the Plaintiff's case).
4. A review of helpful and hurtful legal language.
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 those flaws in the expert's report that may have become apparent with the fullness of time, more evidence, and/or intensive trial preparation.
9. A review of the "four corners" of the expert's report (where applicable) to ensure that the expert does not stray outside of permissible testimony.
10. A review of the contents of the expert's file, which may have to be brought to Court.
11. A review of any questions or concerns that the expert may have with respect to giving oral testimony in a Courtroom.

Oral Testimony

A persuasive expert witness will:

1. Speak slowly and clearly.
 - a. If the judge is taking notes, it is helpful to keep an eye on the judge's pace so that s/he has time to write down anything important that is said.
2. Look at the trier of fact when answering questions.
 - a. It may seem unnatural to look away from the person who is asking the questions, but it is not the questioning lawyer that needs to be convinced of the expert's opinion. The opinion must be conveyed and understood by the judge or jury.
3. Use simple language (wherever possible).
 - a. While sophisticated terminology may sound impressive, if no one understands what the terminology means then the message will be lost.
4. Be responsive.
 - a. It is important for an expert to listen to the specific question being asked and to respond to the question. Doing so, both in examination-in-chief and in cross-examination, will enhance the expert's credibility.
5. Consider demonstrative aids.
 - a. Experts should not be afraid to alert the referring lawyer *well in advance of trial* to a demonstrative aid that might assist the expert when providing his/her testimony. Demonstrative aids are not necessary all the time, but can be particularly helpful when the evidence will be complicated, lengthy, or involve sophisticated terminology. Demonstrative aids may include: x-ray films, medical illustrations, medical hardware (plates, IM nails, screws, surgical mesh), medical tools (surgical saws, catheters, aspiration needles), charts, graphs, photographs, and videos

CONCLUSION

The use of experts in personal injury litigation is a crucial part of the presentation of the case. In order for the expert's opinion to be permitted and preferred, it is vital that the

expert's opinion is objective; that any report is Rule 53.03 compliant; that the opinion addresses the issues in dispute with appropriate "legal language"; that the treating health care 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.

**APPENDIX “A”:
RULES OF CIVIL PROCEDURE, R.R.O. 1990, REG. 194**

Duty of Expert

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

- (a) to provide opinion evidence that is fair, objective and non-partisan;
- (b) to provide opinion evidence that is related only to matters that are within the expert’s area of expertise; and
- (c) to provide such additional assistance as the court may reasonably require to determine a matter in issue. O. Reg. 438/08, s. 8.

Duty Prevails

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged. O. Reg. 438/08, s. 8.

Experts’ Reports

53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48; O. Reg. 170/14, s. 17.

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48.

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

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.
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. O. Reg. 438/08, s. 48.

Schedule for Service of Reports

(2.2) Within 60 days after an action is set down for trial, the parties shall agree to a schedule setting out dates for the service of experts' reports in order to meet the requirements of subrules (1) and (2), unless the court orders otherwise. O. Reg. 438/08, s. 48.

Sanction for Failure to Address Issue in Report or Supplementary Report

(3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,

(a) a report served under this rule; or

(b) a supplementary report served on every other party to the action not less than 30 days before the commencement of the trial. O. Reg. 348/97, s. 3.

Extension or Abridgment of Time

(4) The time provided for service of a report or supplementary report under this rule may be extended or abridged,

(a) by the judge or case management master at the pre-trial conference or at any conference under Rule 77; or

(b) by the court, on motion. O. Reg. 570/98, s. 3; O. Reg. 186/10, s. 4.