Calling the Treating Expert Witness: Concerns and Considerations

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OVERVIEW

Expert evidence is a significant and controversial feature of civil litigation.[1] This paper will review the push for impartiality in expert evidence; the Court's role as gatekeeper for the admissibility of expert evidence; the debate over the impartiality of treating experts; the permissible scope of testimony of treating experts; and some pre-trial, intra-trial, and post-trial considerations respecting treating expert witnesses.

THE PUSH FOR IMPARTIALITY

It has been said that "[l]essening the prevalence of the "hired gun" expert and moving closer to the ideal of the non-partisan "amicus curiae" expert is a matter of great importance to the administration of justice in Ontario and thus a matter of considerable importance."[2]

In 2010, the Honourable Mr. Justice Coulter Osborne undertook a review of the civil justice system in Ontario. His Honour addressed a pervasive view that experts were "hired guns" rather than people with specialized knowledge whose opinions could aid the trier of fact to draw inferences where the trier of fact would not otherwise be able. What flowed from the Osborne Report[3] were amendments to the *Rules of Civil Procedure*[4]. The amendments were designed to codify the common law expectation that experts had a duty to provide unbiased and properly founded opinions. The two primary amendments to the *Rules* were:

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1 *Moore v. Getahun*, [2015] ONCA 55 (CanLII) at para. 33, Sharpe J.A [*Moore*].
2 *Platnick v. Bent*, [2016] ONSC 7340 (CanLII) at para. 68, S.F. Dunphy, J.
3 Honourable Coulter A. Osborne, Q.C., *Civil Justice Reform Project: Summary of Findings & Recommendations* (n.p: Queen's Printer for Ontario, 2007), online: http://www.attorneygeneral.jus.gov.on.ca./english/about/pubs/cjrp/CJRP-Report_EN.pdf [the *Osborne Report*].
4 R.R.O. 1990, O.Reg. 194 [the *Rules*].

1. the enactment of rule 4.1.01(1), which prescribed the duty of experts engaged by or on behalf of a party to provide evidence in relation to a proceeding under the *Rules*; and

2. the enactment of rule 53.03(2.1), which prescribed certain information that expert reports were required to contain.

Subrule 53.03(2.1)(7) was enacted to require each expert to sign an Acknowledgement of Expert's Duty ("Form 53") in conjunction with the preparation of a report. The key contents are contained at paragraphs 3 and 4 of the form, which state:

> 3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:
>
> (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 my area of expertise; and
>
> (c) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.
>
> 4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

With the amendment of the *Rules* and the push for impartiality, the Court's function as a gatekeeper for the admissibility of expert evidence has become all the more important.

THE COURT AS GATEKEEPER

Mohan: The Standard for Admissibility

In the matter of *R. v. Mohan*[5], the Supreme Court of Canada set out the four criteria that would have to be satisfied in order for expert evidence to be admissible:

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5 [1994], 2 SCR 9 (CanLII) [*Mohan*].

1. relevance;

2. necessity in assisting the trier of fact;

3. the absence of any exclusionary rule; and

4. a properly qualified expert[6].

Briefly, with respect to each criterion, Sopinka J. stated:

> a) Relevance
>
> ...Although prima facie admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry...Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability...
>
> b) Necessity in Assisting the Trier of Fact
>
> ...What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury"...
>
> As in the case of relevance, discussed above, the need for the evidence is assessed in light of its potential to distort the fact-finding process...
>
> The possibility that evidence will overwhelm the jury and distract them from their task can often be offset by proper instructions...
>
> c) The Absence of any Exclusionary Rule
>
> ...Compliance with criteria (a), (b) and (d) will not ensure the admissibility of expert evidence if it falls afoul of an exclusionary rule of evidence separate and apart from the opinion rule itself...
>
> d) A Properly Qualified Expert
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> Finally the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.

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6 *Ibid.*

Mohan Revisited: Impartiality as a Basic Standard

Notably absent from this delineated set of criteria was a basic requirement that an expert be impartial. This deficiency was subsequently addressed by the Supreme Court of Canada in the matter of *White Burgess Langille Inman v. Abbott and Haliburton Co.*[7] The decision provides helpful guidance on three points.

First, the Supreme Court of Canada set out a general expectation that all experts should be impartial. Cromwell J. stated[8]:

> Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her...Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

Second, the Supreme Court re-iterated that the *Mohan* criteria remain the analytical framework for the admission of expert evidence. Cromwell J. stated[9]:

> At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose...Relevance at this threshold stage refers to logical relevance...Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement...

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7 [2015], 2 SCR 182 (CanLII) [*White Burgess*].
8 *Ibid.* at para. 32.
9 *Ibid.* at paras. 23-25.

> At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks...

Third, and most importantly, the Supreme Court clarified that within the analytical framework of the *Mohan* criteria an expert's impartiality ought to be considered. Cromwell J. stated[10]:

> Expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers. To guard against them, the Court over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role. These developments seek to ensure that expert opinion evidence meets certain basic standards before it is admitted. The question on this appeal is whether one of these basic standards for admissibility should relate to the proposed expert's independence and impartiality. In my view, it should.
>
> ...a proposed expert's independence and impartiality go to admissibility and not simply to weight and there is a threshold admissibility requirement in relation to this duty. Once that threshold is met, remaining concerns about the expert's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.
>
> In my opinion, concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the Mohan framework...A proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert. Situating this concern in the "properly qualified expert" ensures that the courts will focus expressly on the important risks associated with biased experts...
>
> Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.

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10 1, 34, 53-54.

The *White Burgess* analysis has since been applied by the Ontario Court of Appeal. In the matter of *Bruff-Murphy v. Gunawardena*[11], the Ontario Court of Appeal was asked to review a decision made by a trial judge to qualify an expert psychiatrist who was called by the defence. It was apparent that the judge had serious reservations about the expert's methodology and independence. Nevertheless, the judge elected to neither exclude the opinion evidence nor to alert the jury to these reservations during the charge. As it happens, the trial judge's ruling was made shortly before the release of *White Burgess*.

The Ontario Court of Appeal concluded that the admission of the expert's evidence in that case was such a miscarriage of justice that the matter had to be re-tried. Hourigan J.A. speaking for the Court stated[12]:

> ...Appellate courts have repeatedly instructed trial judges that they serve as gatekeepers when it comes to the admissibility of expert opinion evidence. They are required to carefully scrutinize, among other things, an expert witness's training and professional experience, along with the necessity of their testimony in assisting the trier of fact, before the expert is qualified to give evidence in our courts...
>
> In my view, the appeal must be allowed and a new trial ordered. I reach this conclusion because the trial judge failed to properly discharge his gatekeeper duty at the qualification stage. Had he done so, he would have concluded that the risks of permitting the expert to testify far outweighed any potential benefit from the proposed testimony.
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> ...
>
> Under the *White Burgess* framework, and in most other leading cases on the admissibility of expert evidence, the issue of admissibility is decided at the time the evidence is proffered and the expert witness's qualification is requested by a party. To the extent that this is possible, it should be the norm...
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> ...
>
> A trial judge in a civil jury case qualifying an expert has a difficult task. She must make a decision based on an expert report that will, in most cases, never be seen by the jury. While the report provides a roadmap of the anticipated testimony and specific limits may be placed on certain areas of testimony, the trial judge obviously cannot predict with certainty the nature or content of the expert's testimony.

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11 [2017] ONCA 502 (CanLII) [*Bruff-Murphy*].
12 *Ibid.* at paras. 2, 5, 60, 62-63, 65.

> Where, as here, the expert's eventual testimony removes any doubt about her independence, the trial judge must not act as if she were *functus*. The trial judge must continue to exercise her gatekeeper function. After all, the concerns about the impact of a non-independent expert witness on the jury have not been eliminated. To the contrary, they have come to fruition. At that stage, when the trial judge recognizes the acute risk to trial fairness, she must take action…
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> …
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> As mentioned above, the cost-benefit analysis under the second component of the framework for admitting expert evidence is a specific application of the court's general residual discretion to exclude evidence whose prejudicial effect is greater than its probative value. This general residual discretion is always available to the court, not just when determining whether to admit an item of evidence, but after the admission stage if the evidence's prejudicial effect is only revealed in the course of its presentation to the trier of fact.

The Ontario Court of Appeal even went one step further than the Supreme Court of Canada by stating that a judge's gatekeeper role is not dependent upon an objection being raised by counsel. Hourigan J.A. stated[13]:

> I am mindful that counsel for Ms. Bruff-McArthur did not seek an instruction regarding Dr. Bail's evidence. The law is generally that the failure to object to a civil jury charge is fatal to a request for a re-trial on appeal based on misdirection or non-direction. However, this rule is subject to the exception that where the misdirection or non-direction resulted in a substantial wrong or miscarriage of justice, it may warrant a new trial…
>
> I would go further and state that, given the importance of a trial judge's on-going gatekeeper role, the absence of an objection or the lack of a request for a specific instruction does not impair a trial judge's ability to exercise her residual discretion to exclude evidence whose probative value is outweighed by its prejudicial effect.

THE *TREATING* EXPERT & THE DEBATE OVER IMPARTIALITY

One concern that has been raised by the defence is the extent to which a treating expert can ever be impartial given the expert's direct involvement in the subject events and/or what

13 *Ibid.* at paras. 69-70.

may be a long-standing doctor-patient relationship whereby the expert may be acting as the patient's advocate.

Although the admissibility of treating expert opinions *per se* has been challenged, no absolute rule has been established against their admissibility. Rather, just as with any other expert witness, the treating expert's testimony will be judged by the usual standards of admissibility, including the need for impartiality.

In the matter of *Williams v. Bowler* Roccamo J. stated[14]:

> A medical witness who "wears two hats", and who testifies both as a treating physician and as an expert may, depending on the circumstances of the case, be in the best position to offer first hand observations as to the patient's condition over the course of medical history; however, to the extent that the physician has any personal interest in the outcome of the case or lacks the objectivity and independence essential to the medical expert, this may adversely affect the weight to be given to the expert testimony.

Similarly, in the matter of *Farooq v. Miceli*, Lauwers J. stated[15]:

> Typically family doctors or treating doctors do not provide expert reports to the court. Their evidence is set out in a letter sent to counsel or in a will say statement, along with the medical records that they authored. Their evidence is clearly relevant, material and probative. Are treating doctors capable of being experts within the meaning of rule 4.1.01 and rule 53.03? Given their intensive roles, are they capable of impartiality?
>
> For practical purposes, treating physicians have always been allowed to give evidence and have been allowed to give opinion evidence about their working diagnosis and working prognosis. Treating physicians use their expertise to form opinions routinely in the examination of patients, in their assessment of patients and in their treatment.

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14 [2005] ONSC 27526 (CanLII) at para. 222 [*Williams*]. Note this was decided before *White Burgess*, so impartiality is not just considered as a matter of weight.
15 [2012] ONSC 558 (CanLII) at paras. 24-25, 29 [*Farooq*].

> ...I conclude that Dr. Sidhu is not incapable of providing an expert opinion to the court on the standard of care applicable to Dr. Miceli. I put the proposition that way because the final decision on Dr. Sidhu's qualifications is that of the trial judge after a voir dire. My decision is simply that Dr. Sidhu is not disqualified because he was and is Mr. Farooq's treating physician.

There can be great value in proffering the evidence of a treating expert. Unlike most medical-legal experts, treating experts often have had the benefit of:

1. treating the Plaintiff prior to the subject incident;
2. treating the Plaintiff more than once post-incident;
3. treating the Plaintiff over a period of time post-incident;
4. consulting with collateral sources, such as other members of the Plaintiff's treatment team and/or family;
5. being involved in decisions about diagnosis, treatment, referrals, and recommendations contemporaneously with symptoms or events occurring (rather than having to retrospectively review medical records and determine what or why something occurred);
6. having first becoming involved in the Plaintiff's life through "organic" and publicly-funded means, rather than through private funding by a litigant; and
7. by virtue of the foregoing, having likely fostered a more trusting relationship conducive to an open and fulsome assessment.

The value of receiving treating expert evidence has been recognized by a number of judges. In the matter of *Chrappa v. Ohm*[16], Lax J. stated:

> In any event, it is my view that, in general, the evidence of a family physician who has followed a patient over a long period of time can often be the most helpful evidence in sorting out the predictably differing views of medical experts who are assembled for the purposes of litigation...

Similarly, in the matter of *Doxtater v. Farrish*, Morissette J. stated[17]:

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16 [1996] O.J. No. 1663 (QL) at para. 27 [*Chrappa*].
17 [2014] ONSC 4224 (CanLII) at para. 50 [*Doxtater*].

> Although there are some with a different view, subject to the same reliability and credibility standards, treating physicians may be qualified to give expert evidence. They may have a greater knowledge of their patient's situation and they may be in a better position to opine on what the future holds.

Because of the potential value of such evidence, another concern that has been raised by the defence is an alleged inherent unfairness in admitting or favouring such opinions since the defence will not likely ever be able to call such evidence. This concern was addressed by the Ontario Court of Appeal in *Degennaro v. Oakville Trafalgar Memorial Hospital*[18]. Rouleau J.A. stated:

> The appellants submit that the trial judge rejected their evidence and preferred the evidence of the respondents' experts on the basis that the respondents' experts were Ms. Degennaro's treating physicians. This, in the appellants' view, was an error of law. The appellants argue that the fact that an expert is a treating physician is not a proper basis to prefer that evidence and, in fact, should lead a court to assign less weight to that expert's evidence and not more...The appellants maintain that rejecting the evidence of independent experts because they are not treating physicians, as the trial judge did in this case, creates unacceptable unfairness for defendants. Defendants are not permitted to speak with, let alone retain, a plaintiff's treating physicians. This places defendants in the position where they will always be at a disadvantage as they can never tender treating physicians as experts.
>
> I would not give effect to this submission. The trial judge did not, as the appellants suggest, simply reject the appellants' experts solely on the basis that they were not the treating physicians. In reaching his decision to prefer the respondents' experts, the trial judge considered a number of factors. First, as the trial judge explained, the appellants' own expert, Dr. Clark, agreed on cross-examination that treating physicians were in a better position to make a diagnosis of fibromyalgia than a doctor conducting a paper review...There was, therefore, ample basis for the trial judge's decision to prefer the opinion of the respondents' experts.
>
> ...These cases simply provide that where a treating physician has a personal interest in the outcome of the case or lacks the objectivity and independence essential to a medical expert, this may adversely impact the weight to be given to the expert's testimony. There was no suggestion that the experts who testified on behalf of the respondents lacked objectivity or independence.

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18 [2011] ONCA 319 (CanLII) at paras. 22-24.

As such, the requirement of impartiality is common to all experts. As noted earlier, in the matter of *Bruff-Murphy*, the Ontario Court of Appeal ordered a new trial where it was apparent that a litigation expert retained by the defence had crossed the line into advocacy, resulting in a miscarriage of justice. Conversely, in the matter of *Gutbir v. University Health Network*[19], the causation opinion of the Plaintiff's treating neonatologist was excluded. D.A. Wilson J. stated:

> In the case before me, in arriving at his expert opinion, Dr. Perlman acknowledges that he has relied on his own memory of his treatment of Zmora as well as his review of the notes he made in 1984. I say this not to be critical of Dr. Perlman because I suspect it would be impossible for him to do otherwise. He is in an entirely different position than any other of the medical experts asked to provide an expert opinion in this case: he has the advantage of being part of the team that provided care to Zmora shortly after her birth.
>
> Does this reality impugn his objectivity as an expert in this case? In my view, this question can only be answered in the affirmative. His report of September 22, 2010 is rife with comments about what his notations in Zmora's chart mean and how the other experts have not interpreted his notes correctly... Some examples of this include..."Dr. Kelly cites my "Report of Consultation" to show that I like him thought that the history and the 55 minutes blood gas results appear to exclude severe hypoxia ischemia around the time of birth, despite my statement of "the symptoms typical of HIE. In fact I was biding my time until the CT scan was done...After investigation and by the time of her discharge from the Hospital for Sick Children, we concluded in 1984 that Zmora suffered from intrapartum HIE. That is still my opinion today."
>
> This last comment, in my view, strikes me as somewhat defensive, and the others I have referred to are statements of an advocate as opposed to an objective expert, although the treatment of Dr. Perlman is not under scrutiny. Perhaps this is not surprising. In his role as a treatment provider to Zmora immediately following her birth, Dr. Perlman was trying to determine the cause of the baby's apparent deficits and to render the appropriate treatment. The comments contained in Dr. Perlman's second report suggest that he has an interest in the court finding that his conclusion reached in 1984 was indeed the correct one and as such, Dr. Perlman lacks the necessary objectivity and impartiality which are essential from an expert testifying in court.
>
> I am not to be taken as being critical of Dr. Perlman for the manner in which he has articulated his views on the case; to the contrary, given that he was Zmora's treating neonatologist immediately following her birth when it was determined that she had suffered brain damage, it would be difficult if not impossible in my view for Dr.

19 [2010] ONSC 6394 (CanLII) [*Gutbir*]

> Perlman to be completely objective about the opinion he has been asked to provide to this Court, given the facts of the case and the nature of the expert opinion sought. One of the central issues in this case is that of causation, which is one of the issues Dr. Perlman was trying to determine in January of 1984 when Zmora came under his care.
>
> In permitting Dr. Perlman to offer an expert opinion in this case, the Court must be satisfied that the more stringent requirements of the amended Rule 53.03 have been met. It is with reluctance that I have come to the conclusion that as a result of his involvement with Zmora as her treating specialist, Dr. Perlman's acknowledgement that he relies upon his notes in the chart as well as his memory of the case in coming to his expert opinion as well as the comments contained in his September 2010 report which I have referred to earlier make it clear to me that he would not be able to offer opinion evidence that is objective and impartial on the area of causation.

THE SCOPE OF THE TREATING EXPERT'S TESTIMONY

Generally, treating experts are concerned with diagnosis, prognosis, and current treatment needs. Prognostications about, for instance, the cause of an injury or the type of care the patient may require 20 years down the road might fall outside the usual scope of a treating expert's day-to-day role. These issues, however, often play a central role in personal injury litigation.

In the matter of *Westerhof v. Gee Estate*[20], the Ontario Court of Appeal created a classification system whereby experts were labelled as[21]:

- "litigation experts": experts engaged by or on behalf of a party to provide opinion evidence in relation to a proceeding;
- "participant experts": experts, such as treating physicians, who form their opinions based on their participation in the underlying events; or
- "non-party experts": experts retained by a non-party to the litigation, such as accident benefits insurer examiners, who form their opinions based on personal observations and examinations relating to the subject matter of the litigation for a purpose other than the litigation.

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20 [2015] ONCA 206 (CanLII) [*Westerhof*].
21 *Ibid.* at para. 6.

Speaking for the Court, Simmons J.A. addressed the scope of testimony and the need for compliance with rule 53.03[22]:

> In my opinion, participant experts and non-party experts may give opinion evidence without complying with rule 53.03…
>
> …I conclude that a witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents without complying with rule 53.03 where:
>
> - the opinion to be given is based on the witness's observation of or participation in the events at issue; and
>
> - 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.
>
> Such witnesses have sometimes been referred to as "fact witnesses" because their evidence is derived from their observations of or involvement in the underlying facts. Yet, describing such witnesses as "fact witness" risks confusion because the term "fact witness" does not make clear whether the witness's evidence must relate solely to their observations of the underlying facts or whether they may give opinion evidence admissible for its truth. I have therefore referred to such witnesses as "participant experts".
>
> Similarly, I conclude that rule 53.03 does not apply to the opinion evidence of a non-party expert where the non-party expert has formed a relevant opinion based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than the litigation.
>
> If participant experts or non-party experts also proffer opinion evidence extending beyond the limits I have described, they must comply with rule 53.03 with respect to the portion of their opinions extending beyond those limits.
>
> As with all evidence, and especially all opinion evidence, the court retains its gatekeeper function in relation to opinion evidence from participant experts and non-party experts. In exercising that function, a court could, if the evidence did not meet the test for admissibility, exclude all or part of the opinion evidence of a participant expert or non-party expert or rule that all or part of such evidence is not admissible for the truth of its contents. The court could also require that the participant expert or non-party expert comply with rule 53.03 if the participant or non-party expert's opinion went beyond the scope of an opinion formed in the course of treatment or observation for purposes other than the litigation.

22 *Ibid.* at paras. 14, 60-64.

PRE-TRIAL CONSIDERATIONS RE: TREATING EXPERTS

Disclosure Obligations

One issue raised by the *Westerhof* decision is the extent to which the Plaintiff must disclose the anticipated opinion evidence of a treating expert in advance of trial.

In the matter of *Bishop-Gittens v. Lim*[23], a case released shortly following *Westerhof*, the Plaintiff's treating chiropractor was called as a witness. The chiropractor's clinical notes and records were produced prior to trial and marked as an exhibit at trial. At trial, the Plaintiff's lawyer then asked the chiropractor for an opinion as to whether the Plaintiff still requires treatment. The answer to that question could not be found in the chiropractor's records. Accordingly, the Court was asked to determine whether the Plaintiff was obliged to give notice to the defence that she intended to elicit evidence that went beyond what was contained in the treating expert's clinical notes and records. McKelvey J. held[24]:

> In my view, the question of whether the party adducing the evidence has given notice of an opinion not contained in any of the clinical records is a factor that a court may consider in exercising its gatekeeper function in limiting the admission of opinions from a participant expert. It is reasonable to expect that these opinions will be disclosed within a reasonable time prior to trial. Some of the considerations a court might consider in exercising its discretion, where reasonable notice has not been given, include the following:
>
> (a) Has the opposing party requested notice of any opinions to be relied upon, other than those which are contained in the material provided?
>
> (b) How closely connected are the opinions sought to be elicited to the opinions already disclosed prior to trial?
>
> (c) To what extent is there prejudice which cannot be remedied to the opposing party?

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23 [2015] ONSC 3393 (CanLII) [*Bishop-Gittens*].
24 *Ibid.* at paras. 10-11, 16.

> (d) Have there been any tactics or actions of the party adducing the evidence which are designed to take the other party by surprise?
>
> (e) Any explanation available to explain the delay in disclosing the opinions.
>
> While there is clearly an obligation identified in the *Westerhof* decision for an opposing party to make inquiries at discovery or otherwise about the nature of opinions to be solicited from a participant expert, this does not, in my view, relieve the party calling such a witness from disclosing opinions which are going to be sought from the witness and which are not contained in the material provided to the other side.
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> ...
>
> For the above reasons, I order as follows:
>
> (a) There will be a voir dire to determine whether the opinions of Dr. Antoniazzi in response to the question posed were based on his observation or participation in the events at issue and whether he formed the opinion to be given as part of the ordinary exercise of his skill, knowledge, training and experience while observing or participating in his treatment of the plaintiff;
>
> (b) If so, Dr. Antoniazzi will be allowed to answer the question asked.
>
> (c) The defence will be entitled to have their expert, Dr. Ford, respond to any opinion expressed by Dr. Antoniazzi in response to the question. The formal requirements of rule 53.03 are waived, although the counsel for the defence will be required to provide a brief will-say from Dr. Ford, setting out any additional opinion he intends to express in relation to the additional opinion expressed by Dr. Antoniazzi.

The issue of disclosure was also addressed in the 2018 decision of *Jones v. I.F. Propco*[25]. The Defendant brought a motion seeking: 1) a list of the participant experts that the Plaintiff intended to call at trial along with their complete files; 2) details of any participant expert's opinions not already contained within the expert's records; and 3) legible copies of any participant expert witness' records that are illegible, at the Plaintiff's expense. Leitch J. held[26]:

> Rule 31.06(3) of the *Rules* holds that a party may obtain disclosure of the findings, opinions, and conclusions of an expert that are relevant to a matter in issue in the action except when the expert is a litigation expert who was retained for the sole purpose of the litigation or the other party undertakes not to call the expert as a

25 [2018] ONSC 23 (CanLII) [*Jones*].
26 *Ibid.* at paras. 11, 16, 19, 23-24.

witness at the trial. In other words, a party can obtain the findings, opinions, and conclusions of participant experts through the discovery process under Rule 31.06(3).

...Although the plaintiff is required to provide documentation of the participant experts' findings and opinions that are relevant to the issues in the litigation, the plaintiff is not required to provide a list of experts that the plaintiff "intends to rely on at trial" as requested by the defendant. While the plaintiff has to provide disclosure related to any relevant findings of the participant experts, it is still open to the plaintiff to not call certain participant experts to testify at trial or to not rely on certain participant experts' reports. There is no authority that requires a party to provide a finalized list of participant experts that the party intends to rely on this early in the proceedings.

...

The defendant's request for the complete file is also not supported by the *Rules*. Rule 31.06(3) only requires a party to disclose the "findings, opinions and conclusions of an expert...that are relevant to a matter in issue in the action and the expert's name and address." Anything in the file that is not relevant to a matter in issue is therefore not required. In my opinion, the defendant's request for the complete file is therefore, as the plaintiff puts it, overbroad.

...

The defendant's request for "details of participant experts' opinions that are not already in expert reports" should therefore be dismissed for prematurity since the pre-trial conference is not until November 15, 2018 and the plaintiff has a significant amount of time to produce such opinions and remain in compliance with Rule 53.03.

I note also that the Court of Appeal in Westerhof stated that if the notes of the participant experts are "illegible, the party producing them must provide a readable version" (Westerhof at para. 85).

Reports

To the extent that a treating expert is going to delve into the litigation issues that go beyond the scope of a "participant expert", then he or she must comply with rule 53.03. That means that he or she will have to deliver a report for those matters that go beyond the role of participant. The treating expert may well need assistance to better understand the legal process and what is to be addressed within an expert report – especially if he or she does not have previous experience testifying.

In *Moore*, the Ontario Court of Appeal recognized the nuances of providing expert testimony and the consultation that may be required between counsel and expert prior to the delivery of a report. Sharpe J.A. stated[27]:

> ...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 to ensure that the expert witness understands the duties reflected by rule 4.1.01 and contained in the Form 53 acknowledgment of expert's duty. Reviewing a draft report enables counsel to ensure that the report (i) complies with the Rules of Civil Procedure and the rules of evidence, (ii) addresses and is restricted to the relevant issues and (iii) is written in a manner and style that is accessible and comprehensible. Counsel need to ensure that the expert witness understands matters such as the difference between the legal burden of proof and scientific certainty, the need to clarify the facts and assumptions underlying the expert's opinion, the need to confine the report to matters within the expert witness's area of expertise and the need to avoid usurping the court's function as the ultimate arbiter of the issues.
>
> Counsel play a crucial mediating role by explaining the legal issues to the expert witness and then by presenting complex expert evidence to the court. It is difficult to see how counsel could perform this role without engaging in communication with the expert as the report is being prepared.
>
> Leaving the expert witness entirely to his or her own devices, or requiring all changes to be documented in a formalized written exchange, would result in increased delay and cost in a regime already struggling to deliver justice in a timely and efficient manner. Such a rule would encourage the hiring of "shadow experts" to advise counsel. There would be an incentive to jettison rather than edit and improve badly drafted reports, causing added cost and delay. Precluding consultation would also encourage the use of those expert witnesses who make a career of testifying in court and who are often perceived to be hired guns likely to offer partisan opinions, as these expert witnesses may require less guidance and preparation. In my respectful view, the changes suggested by the trial judge would not be in the interests of justice and would frustrate the timely and cost-effective adjudication of civil disputes.
>
> For these reasons, I reject the trial judge's proclamation that the practice of consultation between counsel and expert witnesses to review draft reports must end...

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27 *Moore*, *supra* note 1 at paras. 62-66.

It is the responsibility of Plaintiff's counsel to ensure that if a treating expert is going to give an opinion in the litigation, and certainly if the opinion is to be a "litigation" opinion requiring rule 53 compliance and a report, that the expert be given access to the relevant records that relate to the crux of the opinion sought. Otherwise, the expert will be vulnerable on cross-examination.

The treating (and any other) expert should be properly briefed about what his or her report should address. That briefing *may* include, but not be limited to:

1. An explanation of the expert's duty to the Court, including a review of:
    a. rules 4.1.01 and the Form 53;
    b. what may be perceived as "advocacy";
    c. the potential consequences of the expert being perceived as an advocate;
    d. ways to avoid coming across as an advocate while still being persuasive.
2. An explanation as to what is required in order for the contents of a report to comply with rule 53.03, including a review of:
    a. rule 53.03(2.1);
    b. the ambiguities and/or omissions in rule 53.03(2.1);
    c. the potential consequences for failing to comply with rule 53.03(2.1).
3. An explanation about the concept of "legal language", including a review of:
    a. [for tort cases] the burden of proof and, in particular, where the burden is a "balance of probabilities" versus a "real and substantial risk or possibility";
    b. [for accident benefits cases] the (perhaps lesser) burden of proof for causation;
    c. examples of legal language that connotes a satisfaction of the burden of proof as compared to an opinion that fails to satisfy the burden of proof (i.e. possible vs. probable).
4. An explanation as to the importance of comprehensiveness, including a review of:

a. the need to review and consider various records depending upon the nature of the opinion (e.g. pre and post-incident records, treating records, medical-legal opinions, defence medical opinions, diagnostic imaging films, discovery transcripts, photographs, liability and/or damages documentation, etc.);

b. the "four corners" doctrine[28].

For a more detailed discussion on the type of briefing that expert witnesses should receive, please see our earlier drafted paper entitled: "Five Tips to Being a Great Expert Witness"[29].

Oral Testimony

The expert should also be briefed about how to give oral testimony. It should be explained to treating experts who are reluctant to meet with counsel in advance that a) the briefings are as much for their own comfort and benefit as they are for counsel's and b) the expert can be paid for his or her briefing time[30].

Generally, 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 helpful and hurtful legal language, as discussed above.

3. A review of the theories and themes of the case.

4. A review of the facts in the case, especially if those facts have been relied upon for any assumptions or conclusions.

5. A review of other expert opinions in the case, both corroborating and conflicting.

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

29 https://www.thomsonrogers.com/resources/5-tips-to-being-a-great-expert-witness/.

30 See the *Arpy-Ara Company Limited* decision referred to later in this paper under the heading "post-trial considerations".

6. A review of any authorities (e.g. textbooks), which may be put to the expert in cross-examination.

7. A review of those flaws in the expert's report that have become apparent with the fullness of time, more evidence, and intensive trial preparation.

8. A review of the contents of the expert's file, which may have to be brought to Court.

9. Persuasive techniques for oral evidence, including but not limited to:

    a. speaking slowly and loudly;

    b. looking at the trier of fact when answering questions;

    c. speaking in "English" rather than "fancy" terms or jargon;

    d. being responsive to the specific question being posed;

    e. using demonstrative aids.

10. Cross-examination, including but not limited to:

    a. anticipated areas of cross-examination (credentials, assumptions, records reviewed, omissions in report, literature relied upon or the lack thereof, conflicting opinions, hindsight, etc.);

    b. important legal terminology (e.g. an error in judgement vs. a breach of the standard of care);

    c. the need to avoid defensive demeanor;

    d. the need to be mindful of "absolute" (e.g. never, always, etc.), factually presumptive, and/or factually inaccurate pre-suppositions contained in leading questions.

Additionally, briefings for treating expert witnesses might include, but not be limited to:

1. A review of when, how, and why the Plaintiff was referred to the treating expert's care.

2. A review of the number of years and/or times that the treating expert has seen the Plaintiff.

3. A review of those opinions which fall within the treating expert's scope as a "participant expert" versus any opinions that may be offered outside this domain and which would require rule 53 compliance.

4. A review of any records, collateral consultations, or other matters on which the expert would have relied to formulate his or her opinion and which would not otherwise be obvious from what is contained in his or her clinical notes and records.

5. A review of the treating expert's education, training, experience which would most relate to the issues at hand in the litigation.

Again, for a more detailed discussion on the type of briefing that expert witnesses should receive, please see our earlier drafted paper entitled: "Five Tips to Being a Great Expert Witness."[31]

INTRA-TRIAL CONSIDERATIONS RE: TREATING EXPERTS

Motion to Call More than Three Experts

Another question raised by the *Westerhof* decision is whether treating or "participant" experts are captured by the "three expert rule" prescribed in section 12 of the Ontario *Evidence Act*.[32]

This question was answered in the matter of *Davies v. The Corporation of the Municipality of Clarington*[33], where the Plaintiff sought to call 18 litigation experts and 18 participant experts; some of which experts overlapped in discipline/specialty. Edwards J. held:

> ...It was never the intention of s. 12 of the Evidence Act that leave should be given to allow such duplicative evidence. To the extent that the plaintiff intends to call any of the proposed participant experts to give opinion evidence that strays beyond the opinion evidence of a treating doctor, leave will not be granted...

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31 *Supra* note 29.
32 R.S.O. 199, c. E.23 at s. 12.
33 [2016] ONSC 1079 (CanLII) [*Davies*].

> ...*Westerhof* has now clarified that where a treating doctor goes beyond diagnosis, treatment and prognosis type evidence, the requirements of Rule 53.03 must be complied with. This is so because that treating doctor has essentially taken on the role of a litigation expert.
> ...
> The plaintiff does not have to seek leave to call, as a participatory expert, any of the plaintiffs treating doctors to the extent their evidence relates to the history taken from the plaintiff; the treatment afforded the plaintiff; the diagnosis of the doctor; and the doctor's prognosis as revealed in his clinical notes. To the extent a doctor proceeds to offer opinion evidence, along the lines set forth in the report of Dr. Baranowski, the plaintiff will have to seek leave to call that evidence if the plaintiff also intends to call the evidence of a litigation expert in the same specialty. In short, the plaintiff and the defendants will be limited to one expert per specialty unless leave is first sought from the court.

Proving the Treating Expert's Credentials

Treating experts who are not accustomed to being retained to give expert evidence in Court may not have an up-to-date (or any) curriculum vitae. As such, during the briefing, it will be important for the Plaintiff's lawyer to canvass the expert's credentials including, but not limited to his or her:

1. education (including any post-graduate training);
2. work experience, especially any teaching or supervision of medical students or residents;
3. focus of practice and/or research;
4. patient demographics;
5. papers published by the expert, especially those in peer-reviewed journals;
6. presentations given by the expert;
7. Boards or committees upon which the expert has sat;
8. medical, research, and/or teaching awards received by the expert;
9. patient demographics.

The more background or training that the expert has that can relate directly to the Plaintiff's impairments and/or the issues in the case, the more persuasive the treating (or any) expert's opinion will be.

POST-TRIAL CONSDIDERATIONS RE: TREATING EXPERTS

Now that treating experts are considered "participant experts" who are permitted to give opinion evidence within the scope of their own observations and treatment of the Plaintiff, the question arises as to whether they ought to be paid their professional rates for trial preparation and testimony.

In the matter of *Arpy-Ara Company Limited v. A.R. Manufacturers et al.*[34], following a successful trial, a corporate Defendant sought the payment of professional fees for its (non-medical) "participant experts". In Her Honour's Costs Endorsement, C.J. Brown J. stated[35]:

> ...These professional fees amount to $9,270.52, $6,056.80 and $5,781.16, respectively...
>
> Mr. Rotenberg on behalf of the corporate defendant submits that while these witnesses were not independent experts within the meaning of rule 53, they were "participating experts" whose expert evidence is admissible because they were involved in the very events: *Westerhof v. Gee Estate*, 2015 ONCA 206 (CanLII), 124 O.R. (3d) 721, leave to appeal to S.C.C. filed, [2015] S.C.C.A. No. 198. He submits that while rule 53.03 witnesses are "a specific class" of experts, the tariff only refers to "experts," and it is therefore proper to pay "a reasonable amount" for the testimony of "the participating experts" as well as for Woolley, who prepared a written report.
> ...
> I am satisfied that the witnesses in question here were all professionals and were all necessary to the case. Further, they were of assistance to the court. Given the foregoing, I am prepared to permit a reasonable amount for the testimony of these professional witnesses as follows: Mr. Weigenbroker, $5,781.16; Mr. Vernon, $6,056.80; Mr. Karr, $9,270.52...

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34 [2015] ONSC 6175 (CanLII) [*Arpy-Ara*].
35 *Ibid.* at paras. 11, 13, 16.

CONCLUSION

It is likely that more and more treating experts will be relied upon in personal injury cases, be they "participant experts" or "litigation experts" as long as they can be impartial and their evidence meets the basic criteria for admissibility. Treating experts have the potential for being an invaluable part of the presentation of the Plaintiff's case. As more treating experts are called upon to testify, it can be expected that more procedural issues will be addressed by our courts.

A Note on the Authors:

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Sloan H. Mandel is one of a select group of personal injury lawyers in the Province of Ontario to be concurrently listed in the peer-reviewed Canadian Legal Lexpert® Directory, named in the Best Lawyers® in Canada publication, and certified by the Law Society of Ontario as a Specialist in Civil Litigation. Sloan may be reached for questions or comments at 416.868.3123 or smandel@thomsonrogers.com.

Deanna S. Gilbert was added to the peer-reviewed Canadian Legal Lexpert® Directory in 2017, ranked as "repeatedly recommended." She is also listed in the 2018 Best Lawyers® in Canada publication. Deanna may be reached for questions or comments at 416.868.3205, dgilbert@thomsonrogers.com, or through LinkedIn.