CITATION: Beasley et al. v. Barrand, 2010 ONSC 2095
COURT FILE NO.: 06 CV 324751
DATE: 2010/03/22 & 2010/04/07

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: *Beasley and Scott v. Barrand*

BEFORE: Moore J.

COUNSEL: Doug Wright and Sharon Ramsden, for the Plaintiffs

Martin Forget and Stephen Kennedy, for the Defendant

RULING

. This action arises from a motor vehicle accident that occurred on 16 September 2002 when the plaintiff, Gordon Beasley (the plaintiff) was the operator of a motorcycle involved in a collision with a car that was owned and operated by the defendants. The plaintiff's claim is for damages for injuries suffered in the accident.

. Before the jury was selected, defence counsel applied for a ruling on the matter of whether certain expert witnesses could be called to provide opinion evidence at trial.

Background

. The plaintiff was examined by a series of assessors in December of 2002 and early in 2003. The defendants filed a brief containing the reports authored by three medical doctors. Apparently the reports at issue have been in the possession of the plaintiff since at least 2006 and the plaintiff has known since 2008 that the defendants propose to rely upon these reports at trial.

. The defendants seek to elicit the opinions of these three experts regarding their physical examinations of the plaintiff, their diagnoses, and their prognoses.

The Positions of the Parties

. The Defendants submit that this evidence is clearly relevant and probative of issues between the parties at this trial.

The defendants concede that the reports authored by these three medical specialists do not comply with the provisions of Rule 53.03; however, the defendants submit that there is sufficient compliance with the provisions of that Rule that the evidence should be received.

The defendants also request leave to speak to the three experts to prepare them to give evidence at this trial. In this respect, the defendants can point to no authority or procedural rule to support this request, one made over the stated objection of the plaintiff.

The plaintiff objects to the use of the reports of the three experts, Drs. Soric, Moddel, and Weinberg.

The plaintiff points out that these three doctors saw the plaintiff in connection with a claim that the plaintiff had made to his own insurer, a claim for accident benefits. The applicable legislation and the insuring agreement required the plaintiff to attend upon such examinations in order to satisfy the insurer that an appropriate claim for benefits existed.

The experts have not seen the plaintiff since they authored their respective reports over seven years ago.

The plaintiff points out that the reports of these experts cannot possibly be read to comply with the provisions of Rule 53.03. The plaintiff adds that Wilkins J. ordered that the evidence of these three experts could not be received at trial unless their reports were brought into compliance with Rule 53.03.

It appears that the defendants made efforts to bring the three doctors before the court in substantial compliance with Rule 53.03. Each of the three doctors has now signed forms entitled: Acknowledgment of Expert's Duty [Form 53]. Indeed, in the interval between the dates on which this application was argued, Drs. Soric and Moddel signed new and slightly different forms, about which I will have more to say later.

The plaintiff observes that the forms provided by the experts are flawed. The form requires the expert to name the party by whom they were engaged to provide evidence in "the *above-noted* court proceeding" and to enumerate the instructions provided to the expert in relation to "*this proceeding*" [emphasis added]. In this case, the doctors were not retained by a party to this proceeding, nor were their reports prepared in the context of the current dispute. In addition, the form signed by Dr. Weinberg states that he has "been engaged by or on behalf of the Lawyers for the Defendants to provide evidence in relation to the above-noted court proceeding." Dr Weinberg has not been retained by defence counsel. His report was written to an insurance adjuster for the benefit of the accident benefits insurer.

The original forms signed by Drs. Soric and Moddel confirm that they had been "engaged by or on behalf of" the insurance adjusters. The forms these doctors signed more recently state that they have been "engaged by or on behalf of the defendant...in relation to [this] court proceeding" There is no contest that none of the three doctors had been retained by or on behalf of the defendants. These reports were not commissioned by any party to this action for the purposes of this action.

The plaintiff insists that any steps taken by the defendants to bring the evidence of the three doctors into compliance with Rule 53.03 and/or the order made by Wilkins J. are inadequate.

Further, the plaintiff submits that the practical implication of allowing the three doctors to provide opinion evidence at trial will be to lengthen the trial and to focus the jury on the matter of whether the evidence of these doctors is accurate and complete. In this regard, the plaintiff asserts that these doctors gave their opinions before January of 2003. They apparently concluded at that time, for example, that the plaintiff could return to work. Among other things, Dr. Moddel wrote that, "from a neurological point of view I feel this gentleman is able to do his normal daily activities including housekeeping and home maintenance duties." Dr. Weinberg voiced the opinion that the plaintiff's psychological impairments were "of moderate severity and are not of a magnitude that would substantially preclude him from performing the essential tasks of his pre-accident employment position." Dr. Soric wrote that, in her opinion, the plaintiff "does not suffer substantial inability to perform essential tasks of his employment, housekeeping, home maintenance duties and personal care as long as these activities do not require full grip strength of the right hand."

So, it seems that the defendants wish to put forward the expert opinions of the three doctors as a shield to the assertion that the plaintiff's ongoing impairments were disabling; however, the plaintiff points out that he did not return to work for three and one half years thereafter and even then it was on a supervised basis and on modified duties. In that interval, the plaintiff received income replacement benefits from his insurer as well as long-term disability benefits and Canada Pension Plan disability benefits. The plaintiff was seen by a host of doctors. These are matters that post-dated the involvement of the three doctors in question.

The defence may also seek to call evidence at trial from two further experts that had been retained to assist the accidents benefits insurer. Ms. Desai is an occupational therapist, and Mr. Lin, a kinesiologist, are identified in The Statement of Law filed on this application; however, in oral argument, counsel allowed that these two experts have not yet been found. Therefore this portion of the application is moot.

The Reports at Issue

For purposes of this application, it is agreed that the evidence to be given in chief by each of the three doctors is as stated in their respective reports.

The reports of Drs. Soric, Moddel, and Weinberg followed upon an assignment issued by Sobel, Adamsons, Clements, insurance adjusters for Kingsway General Insurance Company, by way of a letter dated 31 October 2002, addressed to Seiden Health Management Inc. asking:

> ... that you please accept this as our formal request for Seiden Health Management Inc. to conduct an ***In Home Assessment*** of Mr. Beasley and advise us as to whether or not he suffers a substantial inability to perform the essential

> tasks of his pre-accident employment duties, housekeeping and home maintenance duties and activities of daily living including personal care.

The assignment letter described an interview that the adjuster completed with the plaintiff, indicating, in part that:

> at the time of our interview with the insured, he continues to experience fatigue and mild headaches. He advised that he still has pain and muscle spasm in his upper back and lower back, pain in the inside of his right knee, pain in his ankles and in his right hand. He also has pain in the back of his leg.
>
> The insured advised that he worked for Seaton House Hostel for Men at 339 George St. in Toronto. He is the supervisor [shift leader]. He has been with this organization for about 10 years. ***His duties include scheduling, staff supervision, physical intervention leading to physical restraints***[1], performing CPR, etc. It is a full-time job.
>
> Your insured advised that since the accident he has not been able to return to work...

Dealing with the three reports in chronological order, I begin with the report of Dr. Moddel, a report dated 10 December 2002. It describes the reason for assessment to be "an independent neurological assessment for injuries sustained in a motor vehicle accident that occurred on September 16, 2002." The doctor does not specifically reference his instructions but does note that he received and reviewed certain documentation including a "statement of fact" which may well have been the adjuster's letter described above.

After describing the plaintiff's stated concerns and noting that he "has not been able to return to work because of the continuing back discomfort and difficulties with his right hand," Dr. Moddel went on to discuss information he received by way of social and past health history. He described his neurological examination findings and concluded that:

> at this point in time I find that this gentleman has no neurological sequelae as far as the motor vehicle is concerned... from a neurological point of view I feel this gentleman is quite able to return to his usual occupation. From a neurological point of view I feel this gentleman is able to do his normal daily activities including housekeeping and home maintenance duties. From a neurological point of view I do not think he needs any further treatment at this time.

In his report of 19 December 2002 addressed to the adjuster, Dr. Weinberg confirmed that he saw the plaintiff "for the sole purpose of conducting an impartial psychological examination." He went on to describe the history given by the patient, the documents he reviewed, the testing performed, and behavioral observations made during the plaintiff's clinical interview.

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[1] Emphasis added.

Dr. Weinberg concluded that "the results of the clinical interview and psychometric testing indicate that Mr. Beasley is experiencing mild to moderate levels of anxiety and depression respectively that appear to be secondary to his accident related physical injuries, pain and compromised activity levels." He added that:

> It is evident that Mr. Beasley exhibits psychological impairments [i.e. depression, anxiety, sleep disturbance, reported somatic distress], which, in my opinion, are directly attributable to the subject motor vehicle accident....
>
> In my opinion, Mr. Beasley's psychological symptoms may serve to lower his pain threshold and may exacerbate his subjective experience of pain. In view of this, his psychological and physical symptoms may act in a mutually reinforcing manner.
>
> Given this, I believe that Mr. Beasley would certainly benefit from a course of psychological intervention.... Further, in order to ensure a smooth transition to the work force, I believe that psychological treatment should also be in concert with any physically-based care deemed appropriate by medical personnel.

Dr. Weinberg did not enumerate any questions having been put to him for answer as part of his "his impartial psychological examination" but stated:

> In response to your questions:
>
> although Mr. Beasley exhibits accident-related psychological impairments, it is my opinion based on the current evaluation, that they are of moderate severity and are not of a magnitude that would substantially preclude him from performing the essential tasks of his preaccident employment position...

Dr. Weinberg did not attempt to correlate the plaintiff's work related abilities and/or limitations to the psychological impairments and symptoms that he described in his report.

Dr. Soric wrote her report to the adjuster and dated it January 15, 2003. She listed the referral letter dated October 31, 2002, among the documentation that she referred to in connection with her physiatric evaluation. At the outset she reported that:

> The purpose of this assessment is to obtain detailed history from client, to examine him and to determine the nature of underlying pathology and the degree of resulting impairment and disability. I was also asked to determine if there is a need for further diagnostic and/or therapeutic interventions.

The source of the request for information regarding further diagnostic and/or therapeutic interventions is not clear; I see no reference to that request in the adjuster's instructing letter.

Dr. Soric concluded that:

> Mr. Beasley sustained multiple contusions as a result of the accident and likely survival and thoracic strain. At the present time the most significant impairment relates to his right hand.... I do believe that he would benefit from modified treatments... there is no indication to restrict his level of function in any manner. The only exception to this are activities that require full strength of his right hand. At the present time I don't think he would be able to manage such activities.

She went on to state an opinion that the plaintiff did "not suffer substantial inability to perform the essential tasks of his employment, housekeeping, home maintenance duties and personal care as long as these activities do not require full grip strength of the right hand."

Analysis

Clearly, none of the three doctors attempted or managed to author reports containing the requirements listed in subrule (2.1) of Rule 53.03. Drs. Moddel, Weinberg, and Soric did not state in their reports whether they were qualified to opine, on the basis of the information and documentation available to them, that the plaintiff was physically or psychologically capable of returning to all and every aspect of his activities of daily living, including his pre-accident employment. Nor did they describe on what basis Mr. Beasley might (as the adjuster's instructing letter asked) undertake the essential duties of his occupation [including, for example, physical intervention leading to physical restraints]. In any event, the basis for their optimism that Mr. Beasley would be able to meet the demands of the job is simply not addressed.

In the result, if these reports are received into evidence, the plaintiff will surely need to undertake a laborious, time-consuming, and unnecessarily complicated description, for the benefit of the jury, of the statutory accident benefits system in place in this province at the time of the accident and at the time of the assessments undertaken by these three doctors. The plaintiff will have to lead evidence to explain the role and function of medical examiners retained by insurance adjusters for accident benefits insurers in connection with claims for benefits of the kind that the plaintiff apparently asserted under his automobile insurance contract with Kingsway. The plaintiff will need to contrast that with the roles of doctors retained by the parties to provide fair objective and non-partisan opinions upon issues joined by the pleadings between the parties in this litigation. To do less than that would risk misleading the jury into the belief that all doctors giving evidence would be opining from an equal footing and according to the same rules (in this case, Rule 53) when, in fact, they are not.

The relationship between an insured and an insurer in accident benefits matters involves a duty of good faith, a fiduciary obligation; the relationship between plaintiff and defendant in a tort action does not. The obligation, if any, to pay accident benefits is very different from the exposure, if any, that a defendant faces in a tort action.

Further, on the facts of this case, the three medical assessments, even if proven to contain expert opinions related only to matters within the expertise of their authors and even if they are correct, fair, objective, and impartial, notwithstanding that they were written for purposes

largely, perhaps entirely, unrelated to the issues between the parties to this action, are snapshots of the plaintiff's situation taken at a point more than seven years ago. These assessments can be of little, if any, help to the jury in assessing the plaintiff's medical and vocational progress (and the defendant's exposure potentially arising) over the past seven years. There is no contest that these doctors did not see the plaintiff after January of 2003 and that several doctors engaged for the purposes of this litigation did. The latter have prepared reports and executed proper Form 53 documents in preparation for attending to give opinion evidence at trial.

The fact that Kingsway paid accident benefits to the plaintiff, including income replacement benefits, over the course of more than three years following the date of these three reports is not disputed. I am not persuaded that the interests of trial fairness could be well served by allowing the three experts to testify; the additional time, complexity and expense necessarily involved, when weighed against the prejudice to the plaintiff, prejudice that I find cannot be compensated for by costs or an adjournment (especially as I have granted an adjournment of over two weeks to provide time to defence counsel to consider his alternatives) cannot be justified.

While this motion stood adjourned, the defendant wrote to the three doctors and sent fresh forms for their consideration and execution. The letter referenced each doctor's involvement on behalf of the accident benefits insurer and stated that defence counsel intended to "call you to give evidence...as set out in your report".

The letter quoted from Rule 53.03 and added:

> We believe your report....complies with the requirements of subsections 1, 2, 4, 5 and 6 of Rule 53.03. For the purposes of subsection 3 this letter constitutes the instructions provided to you in relation to this proceeding.
>
> ... While we have not engaged to you but are merely calling it was a witness to give opinion evidence, we have indicated for the purpose of completing the form that you have been engaged by Patrick Barrand.

The forms attached to each doctor's letter stated that the doctor had been retained to provide evidence in relation to this proceeding. The forms did not state that the doctors had not been retained by the defendants, nor that they had been engaged by the defendants merely for the purposes of completing the form. Drs. Soric and Moddel, nevertheless, signed and returned the fresh forms to counsel and they were filed on the resumption of the motion.

The Law

Before turning to an analysis of the impact of Rule 53.03 upon this application, I pause to address two matters raised in argument: the matter of defendants meeting with a plaintiff's physician before trial and my ruling regarding the evidence to be heard from an occupational therapist in the *Song*[2] case.

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[2] *Song v. Hong,* [2008] O.J. No. 772 (Sup. Ct.) (QL).

First, I reject the submission that there is no impropriety in defence counsel meeting with the plaintiff's physician before trial, without the consent of the plaintiff, regarding evidence from the physician's clinical records that were provided by the plaintiff to the defendants. The *MacEachern*[3] case does not answer the question of whether this proposition is still sound law in British Columbia (paras. 25-28); rather, it frames the issue for determination to be:

> not whether the CN Defendants may interview Dr. Dowey in the absence of plaintiff's counsel, as that has already occurred. The issue before me is quite different: should Dr. Dowey be prohibited from testifying as an expert witness for the defence.[4]

For reasons unrelated to the facts in this case, Dr. Dowey was allowed to testify but that outcome does not assist the defendants here.

Counsel conceded that for purposes of this matter the defendants cannot contact and they have not contacted the three doctors to discuss their medical opinions relating to their assessments of the plaintiff.

Nor do I accept the proposition that my ruling in the *Song* case assists the defendants in this matter. It must be remembered that the *Song* case settled before the defendant called the witness in question to give evidence and that the evidence she may have given would have been based upon reports which plaintiff's counsel took no objection to, provided the evidence was otherwise properly received in the trial.[5] Even with the benefit of hindsight, we cannot now predict whether the witness would have provided evidence about her retainer in that matter from the accident benefits insurer. Further, and importantly, that ruling issued well before Rule 53.03 was amended.

Rule 53.03

As of January 1, 2010, amendments to Rule 53.03 came into force, with the result that any party who intends to call an expert witness at trial must, according to a specific timeline, serve every other party to the action with a report, signed by the expert and containing the information listed in subrule (2.1).

The following information is now required:

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.

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[3] *MacEachern (Committee of) v. Rennie,* 2009 BCSC 939.
[4] *Ibid.* at para. 27.
[5] *Song, supra,* at para. 14.

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 acknowledgment of expert's duty (Form 53) signed by the expert.

The Rule goes on to provide that 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 report under the Rule or a supplementary report served on every other party to the action not less than 30 days before the commencement of the trial.

The time provided for service of a report or supplementary report under the Rule may be extended or abridged.

The defendants assert that the three medical experts hold expert opinions that are highly probative as to the plaintiff's health status in late 2002 and early 2003 and go to the core of the issues regarding damages and that their evidence should not be rejected on an overly technical interpretation of Rule 53.03.

There is no provision in Rule 53.03, or elsewhere in the Rules of Civil Procedure, addressing relief to be considered or granted where, as here, substantially all of the preconditions to admission of the evidence of an expert have been breached by the party seeking to adduce the evidence of the expert(s). This is not a matter of technically interpreting the provisions of the Rule but rather one of whether to ignore the Rule altogether.

The Purpose of Rule 53.03

Counsel for the defendant asserts that the purpose of Rule 53.03 is to promote and facilitate the leading of expert evidence at trial in order to allow the parties to establish opinion evidence generated for the parties during the course of the litigation. I disagree.

In my view, the rule advances the law that has been developing in recent years toward reining in the growing use of and reliance upon the evidence of experts at trial.

I have addressed this issue repeatedly in the course of determining whether expert witnesses could give evidence at trial and in deciding whether the evidence given by expert witnesses was of assistance to the court.

In *Frazer*,[6] I said:

> Whatever role the expert may have undertaken during the course of the litigation in assisting counsel to a fuller appreciation of the facts in dispute and the inferences that might be drawn from them, the expert must set aside that role upon entering the witness box at trial. From the witness box the expert speaks only to assist the court.
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> At trial the expert must be and appear to be independent of the party or counsel who retained the services of the expert and must demonstrate objectivity and impartiality in the analyses and opinions that she or he is allowed to give. Because the opinions stated by an expert are predicated upon expertise that the court does not possess, the court must be confident in relying upon the expert to provide a thorough, balanced and technically sound analysis. Independence and impartiality; the court expects nothing more and it will accept nothing less.
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> The court endeavors to adjudicate each matter coming before it fairly and free from bias. To the extent that the court must receive and rely upon the expert opinions of others and to the extent that those opinions are tainted, the administration of justice is imperiled.[7]

In England[8] and also in Canada[9], courts have identified and applied several factors relevant to the receipt of expert evidence including:

> 1. Expert evidence presented to the Court should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation....
> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or

[6] *Frazer v. Haukioja*, [2008] O.J. No. 3277 (Sup. Ct.) (QL).
[7] *Ibid.* at paras. 138-140.
[8] *National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd.*, ("*The Ikarian Reefer*"), [1993] 2 Lloyd's L.R. 68 at 81-82 (Q.B.D.) [*The Ikarian Reefer*], rev'd on other grounds but aff'd on this point [1995] 1 Lloyd's L.R. 455 at 496 (C.A.) [*The Ikarian Reefer C.A.*].
[9] *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Prov. Ct.).

her] expertise.... An expert witness ... should never assume the role of advocate.

3. An expert witness should state the facts or assumptions on which his [or her] opinion is based. He [or she] should not omit to consider material facts which detract from his [or her] concluded opinion....

4. An expert witness should make it clear when a particular question or issue falls outside his [or her] expertise.

5. If an expert's opinion is not properly researched because he [or she] considers [there to be] ... insufficient data ... available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report....

The point is that even before Rule 53.03 was amended I was concerned about the use and effect of expert evidence in cases coming before our court for trial. I was not alone.[10]

In June of 2006, the Honourable Coulter Osborne was charged with the task of leading a review of Civil Justice Reform in the Province of Ontario. Having considered his Terms of Reference, which states that he consulted widely with members of the judiciary, the bar, and the public, he reviewed potential areas of reform and made recommendations aimed at making the civil justice system more accessible and affordable, in the hope and expectation that access to justice would be enhanced for Ontarians.

Mr. Osborne authored a Report[11] to which I will make selective reference, especially to portions of interest on the subject of expert evidence.[12] I endorse the views he expressed, views that I conclude inform any reasonable understanding of the purpose underlying Rule 53.03. He found that:

> There is general agreement that the increased use of experts is a factor that increases the cost of litigation and causes delay through trial adjournments. There is very little agreement on what to do about it....
>
> Consistent with the views of the CBA Task Force on Systems of Civil Justice, the Discovery Task Force and the Advocates' Society Policy Forum, the vast majority of those consulted in the course of this Review identified the proliferation of experts as a significant problem that often leads to a battle of

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[10] *Johnson v. Milton (Town),* 2008 ONCA 440, 91 O.R. (3d) 190 per Moldaver JA., at paras. 48-50; *Science in the Courtroom, the Mouse that Roared,* The Advocates' Society Journal, Autumn 2008, per The Honourable Mr. Justice Ian C. Binnie.

[11] Honourable Coulter A. Osborne, Q.C., *Summary of Findings & Recommendations, Civil Justice Reform Project,* November 2007.

[12] *Supra at 68 ff.*

competing experts. Some observed that as soon as one party retains an expert, an opposing party is forced to retain an expert. The expert witness merry-go-round bears with it an advantage to a litigant who has significant financial resources.

There is also the issue of partiality. A common complaint was that too many experts are no more than hired guns who tailor their reports and evidence to suit the client's needs. I know that this problem exists, but I hasten to add that not all experts should be tarred with the same brush....

The issue of "hired guns" and "opinions for sale" was repeatedly identified as a problem during consultations. To help curb expert bias, there does not appear to be any sound policy reason why the Rules of Civil Procedure should not expressly impose on experts an overriding duty to the court, rather than to the parties who pay or instruct them. The primary criticism of such an approach is that, without a clear enforcement mechanism, it may have no significant impact on experts unduly swayed by the parties who retain them.

An expressly prescribed overriding duty to provide the court with a true and complete professional opinion will, at minimum, cause experts to pause and consider the content of their reports and the extent to which their opinions may have been subjected to subtle or overt pressures. Matched with a certification requirement in the expert's report, it will reinforce the fact that expert evidence is intended to assist the court with its neutral evaluation of issues. At the end of the day, such a reform cannot hurt the process and will hopefully help limit the extent of expert bias....

...the most relevant organizations on this issue, including the medical experts and actuaries who participated in this Review, endorsed imposing an overriding duty to the court on experts, along with a certification that they understand that duty....

Currently, rule 53.03 requires the expert only to set out his/her opinion, name, address, qualifications and the substance of his or her proposed testimony. It is silent about the degree of information to be provided in the report.[13]

For purposes of this application, it should be noted that, conspicuous by its absence from the list of considerations enumerated by Mr. Osborne in support of the recommendations for reform of Rule 53.03 is any reference to the need to encourage placing expert opinion evidence found or developed by parties during the course of litigation into the trial record.

Mr. Osborne recommended the adoption of:

[13] *Supra* note 11 at 68 – 80.

> ... a new provision (in the Rules of Civil Procedure or *Evidence* Act) to establish that it is the duty of an expert to assist the court on matters within his or her expertise and that this duty overrides any obligation to the person from whom he or she has received instructions or payment. Require the expert, in an expert report, to certify that he or she is aware and understands this duty....
>
> Amend rule 53.03 to require all expert reports include the following information:
>
> - Expert's name, address and current curriculum vitae;
> - A detailed description of the expert's qualifications and area of expertise;
> - A description of the instructions provided to the expert;
> - The nature of the opinion being sought and the specific issues to which the opinion relates;
> - A description of research conducted by the expert to be able to reach his/her opinion;
> - A description of the factual assumptions on which the opinion is based;
> - The list of any documents relied upon in formulating the opinion; and
> - The opinion and the basis for the opinion. Where there is a range of opinion on the matters dealt with in the report, summarize the range of opinion and give reasons for his/her own opinion.[14]

In my view, there can be no doubt but that Rule 53.03 was amended to reflect the concerns and recommendations raised by Mr. Osborne and the many people he consulted in the course of his review of the Civil Justice System in this province. I propose to give effect to the rule and the underlying rationale for its creation.

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

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[14] *Ibid.* at 83-84.

I am aware that the court has allowed experts retained outside of the scope of the four corners of the litigation to attend and give opinion evidence at trial. The cases cited to me all predate the amendments to Rule 53 and they involve very different considerations.

We are not dealing here with the treatment related opinions formed in the course of providing primary care to a plaintiff[15] and nor is the opinion of any of the three experts here so central to the outcome of the litigation as might be the opinion of an origin and cause expert, an assistant fire chief in a case where negligence causing a building fire is alleged.[16]

In my view, having considered all of the circumstances of this case, I think that the application of Rule 53.03 to the proposed evidence of the three experts is necessary. I am troubled by the fact that these experts were retained in fact by an insurer that is not before this court. They were not treating physicians. Their opinions addressed instructions that are not well described in the evidence before me.

I can conceive of circumstances where an expert who is retained by a person outside of the litigation may be uncooperative or be professionally unable to communicate with one or more of the parties at trial but, in this case, the defendants have simply not made reasonable efforts to assist the three doctors to an understanding of the requirements of Rule 53.03 and to enlist their help to assist the court by properly reporting on their opinion evidence in advance of the trial.

As noted above, defence counsels' letters and the forms sent are inaccurate and confusing. More troubling is the fact that the doctors appear to have signed the forms without reading or understanding their content.

I suggested that the defendants could invite the doctors, at the defendants' expense, to write meaningful, Rule 53.03 compliant, reports to plaintiff's counsel which, if relevant and producible, could help me to understand any opinions they might be able to express on issues between the parties before this court. That was not attempted. No request has been made for more time to redress the current situation.

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

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

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[15] *Burgess v. Wu* (2003) 68 O.R. (3rd) 710 (Sup. Ct.) at para 80.
[16] *Hall v. Kawartha,* [2007] O.J. No. 4293 (Sup. Ct.).

Disposition

The three medical reports at issue here were authored for the purpose of assisting an insurance company to process an accident benefits claim brought forward by its insured. That claim triggered contract and statutory provisions of an automobile insurance policy, matters very different from the rights and obligations of the litigants before this court.

The purpose of the three reports is not a purpose within the meaning of Rule 53.03(2.1) and, in any event, in their present form and content, the three reports cannot be read to comply with the requirements enumerated in the Rule and the circumstances here do not support a claim for relief from the requirements of the Rule.

Further, I find that the Acknowledgment of Expert's Duty forms are seriously flawed; it appears clear to me that the doctors did not take time to read and reflect upon the content of the form before signing it and that affords me no comfort to believe that these experts understand their duty to assist the court with opinion evidence that is fair, objective, non-partisan and within the area of expertise of each doctor.

The defendants' application to call expert, oral evidence from and/or to file the medical expert reports of Drs. Weinberg, Moddel, and Soric is therefore denied.

If the parties cannot resolve the issues of costs of this application, I may be spoken to.

Moore J.

DATE: 2010/04/09