The Shifting Landscape for Treating Professionals Giving Evidence: The Implications of *Westerhof* and *Moore*

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INTRODUCTION

Historically, Ontario courts have not only welcomed, but in many cases, preferred evidence of treating health professionals on issues relating to the diagnosis, treatment, and prognosis of their patients. In January 2010, the Ontario government introduced sweeping changes to the *Rules of Civil Procedure*, which govern civil lawsuits in Ontario. These amendments included changes to Rule 53.03, "Expert Witnesses", which fell into three broad categories:

- The introduction of a formal codification of the duty of an expert, including an "Acknowledgement of Expert's Duty", which articulates these duties and which every expert must now execute;
- The introduction of a set of basic requirements for every expert report; and
- A revised timetable for the service of expert reports.

In the period that followed the introduction of these rule changes, courts have wrestled with their application to treating health professionals, with divergent results. The most recent of these decisions is *Westerhof v. Gee*.[1]

[1] *Westerhof v. Gee*, 2013 ONSC 2093 (Div. Ct.) ("*Westerhof*").

The additional scrutiny courts have given to the role of expert witnesses has also extended to communications between lawyers and experts in *Moore v. Getahun*,[2] including the use of expert reports.

Both *Westerhof* and *Moore* were appealed. The Ontario Court of Appeal heard both appeals together in September 2014, but has not yet released decisions on the appeals. This paper will review the current state of the law under both *Westerhof and Moore*, as well as the course we hope the Ontario Court of Appeal will follow with respect to treating health professionals and expert witnesses.

THE ROLE OF TREATING HEALTH PROFESSIONALS

The Law Before *Westerhof*

Before the 2010 changes to the Rules, courts looked at opinion evidence of treating health professionals based on the context in which they arrived at their opinion, rather than solely considering the person giving the opinion. In other words, the focus was on the nature of the opinion not the nature of the proposed expert.

For example, in the 2003 case of *Burgess v. Wu*,[3] the Court distinguished "treatment opinions" formed at the time of treatment from "litigation opinions" formed for the purpose of litigation:

[2] *Moore v. Getahun*, 2014 ONSC 237 ("*Moore*").

[3] *Burgess v. Wu* (2003), 68 O. R. (3d) 710 (S.C.J.) per Ferguson J.

> The qualification I have added to the previous rulings is to take account of the fact that when a physician attends on a patient the process typically involves making a diagnosis, formulating a treatment plan and making a prognosis. All three involve forming opinions. Those are different from the opinions and expert is asked to provide a trial as the latter usually involve the consideration of much more information from various sources and are formed for the purpose of assisting the court at trial and not for the purpose of treatment. I shall call opinions formed at the time of treatment "treatment opinions" and those formed for the purpose of litigation "litigation opinions."

In *Slaght v. Phillips*,[4] decided in May 2010, just a few months after the changes to the Rules, Justice Turnbull held that the changes to the expert provisions were directed litigation opinions rather than at treatment opinions. The expert in question in *Slaght* was a vocational consulting and counselling experts who had treated the plaintiff through coverage provided by the accident benefits insurer. The plaintiffs wanted to call this expert to give her opinion based on her work with the plaintiff and not on questions posed to the expert for the purpose of litigation. Justice Turnbull concluded that the witness was a treating expert witness and that the opinions in question were "treatment opinions". Accordingly, he held that the strict application of this Rule 53.03 was not necessary for treatment opinions.

In *Kusnierz v. The Economical*,[5] the court was faced with a somewhat different situation. The plaintiff's lawyer had retained a physiatrist to assist in advancing a SABS claim. Almost immediately, the physiatrist assumed a quasi-treating role, sending information to the plaintiff's family doctor and, later, assisting the plaintiff finding a new

[4] *Slaght v. Phillips* (May 18, 2010), No. 109/07 (Ont. S.C.J. at Simcoe)

[5] *Kusnierz v. The Economical Mutual Insurance Company*, 2010 ONSC 5749 per Lauwers J.

family doctor. Justice Lauwers concluded that the physiatrist was in a category most akin to "the treating physician like the family doctor." Accordingly, the physiatrist did not fall squarely within the scope of rule 53.03, but was someone who had and exercised expertise routinely and "ought to be able to give relevant evidence about his or her patient." Justice Lauwers did note, however, that the physiatrist had been a passionate advocate for the plaintiff and, therefore, Justice Lauwers proposed to take that relationship into account when assessing the weight to be given to physiatrist's evidence.

In *Gutbir v. University Health Network*,[6] the plaintiff sought to call a treating neonatologist as an expert witness in a medical malpractice action. The neonatologist, Dr. Perlman, proposed to give evidence about his treatment of the infant plaintiff and opinion on the cause of the infant's brain injury and disability. Justice Wilson drew a distinction between a treating professional's treatment opinions relating to the patient's condition and needs on the one hand, and expert opinion based on review of records or medical literature. In this regard, she cited with approval a quote from an earlier decision, *Williams v. Bowler*:[7]

> 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 firsthand 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

[6] *Gutbir v. University Health Network, Nicholson,* 2010 ONSC 6394 per Wilson J.

[7] *Williams (Litigation Guardian of) v. Bowler*, [2005] O.J. No. 3323 (S.C.J.) at p. 57.

> expert, this may adversely affect the weight to be given to the expert testimony.

Justice Wilson noted that *Williams* had been decided before the Rules changes and that, in light of the changes, the appropriate approach is no longer to admit evidence first and later subject it to the "appropriate" weight based on any frailties. Rather, in her view, the correct approach is to consider the proposed evidence and determine at the outset whether the expert testimony is admissible. Turning to the proposed evidence of Dr. Perlman, Justice Wilson pointed to Dr. Perlman's acknowledgement that he relied on health records and his own memory of events. Part of that memory referred to Dr. Perlman's own performance in determining the cause of the baby's deficits to render appropriate treatments. Justice Wilson considered that in this instance, Dr. Perlman demonstrated an interest in having the court find that the conclusion he originally reached was indeed the correct one. As a result, she concluded that he lacked the necessary objectivity and impartiality which are essential for an expert testifying in court. In addition, Justice Wilson expressed serious concern that permitting Dr. Perlman to give evidence both as a treating physician and as an expert would complicate matters for the jury and create a temptation for the jury to give more significance to the opinion of Dr. Perlman then to the opinions of other experts who did not have the advantage of treating the plaintiff. It should be noted that Justice Wilson's concerns were restricted to see portion of Dr. Perlman's expert opinion dealing with causation. In the result, Justice Wilson permitted Dr. Perlman to give evidence in his capacity as a treating doctor, but declined to qualify him to give expert opinion on the issue of causation.

Weight to Be Given to Reports of Treating Experts

A relatively recent decision of the Ontario Court of Appeal demonstrates that, in the right circumstances, courts will prefer the evidence of treating health professionals over supposedly "independent" experts. In *Degennaro v. Oakville Trafalgar Memorial Hospital*,[8] the trial judge preferred the opinions of the plaintiff's treating physicians on issues of chronic pain and fibromyalgia, over the competing opinions of defence medical experts. On appeal, the defendants argued that the trial judge had preferred the opinions of the treating physicians because they were treating physicians. They argued that if this practice was supported, defendants would always be at a disadvantage because they are unable to speak to or retain treating physicians as expert witnesses. The Court of Appeal rejected the defendants' submissions on this point.

Rouleau J.A. noted that the trial judge did not simply reject the evidence of the defence experts on the basis that they were not treating physicians. Rather, he considered a number of factors. First, he considered one defence physician's concession that the treating physicians were in a better position to make a diagnosis of fibromyalgia than a doctor conducting a paper review. Second, the trial judge found the qualifications of one of the plaintiff's treating physicians to be superior to those of the defence experts on this issue of chronic pain. Finally, the trial judge pointed to deficiencies in the factual foundation and evidence of the defence experts.

[8] *Degennaro v. Oakville Trafalgar Memorial Hospital*, 2011 ONCA 319

Rouleau J.A. added that there was no suggestion of bias on the part of the treating experts in this case. This last point is significant as, in several other decisions, courts have similarly found that where a treating physician has a personal interest in the outcome of the case or lacks sufficient objectivity or independence, a trial judge should give less weight to the evidence of those treating physicians than to expert witnesses who display true impartiality.[9]

The *Westerhof* Decision

Westerhof v. *Gee*[10] is the first appellate level decision after the Rules changes to consider the admissibility of opinion evidence provided by treating health professionals and remains the only such decision as of the writing of this paper.

In Westerhof, the plaintiff, Jeremey Westerhof, called a number of treating health professionals as witnesses. In particular, Mr. Westerhof called his driving counselor, his treating chiropractor, a treating psychiatrist, and his family doctor. None of these treating health professionals completed reports that complied with Rule 53.03. At trial, the trial judge restricted their evidence to their clinical observations, treatment they provided, and the progress of that treatment. After the trial, Mr. Westerhof appealed the decision to the Divisional Court. Not surprisingly, Mr. Westerhof relied on the decisions of *Slaght v. Phillips* and *Kusnierz v. The Economical*, which recognized the distinction between treating health professionals and privately retained expert witnesses.

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[9] See, for example, *Williams v. Bowler*, *supra*, note 7, and *Greer v. Horton* (1996), 38 C.C.L.I. (2d) 251.

[10] *Westerhof v.* Gee, 2013 ONSC 2093 (Div. Ct.)

On appeal, Justice Lederer delivered the Court's decision on behalf of the unanimous panel of three judges. The Court began its analysis by reviewing the amendment to Rule 53.03 and the cases that had been decided under the new rule. The Court noted that both *Slaght* and *Kusnierz* made "striking" distinctions that arose from who the witnesses were, rather than the nature of the evidence to be provided. It pointed to the judge's acknowledgment in *Kusnierz* that the treating physiatrist's evidence needed to be taken with a grain of salt because of the physiatrist's passionate advocacy on behalf of, and therapeutic alliance with, the plaintiff. The Court was critical of this approach, characterizing it in the following way:

> In other words, having allowed the evidence to be admitted, the judge recognized that it might reflect a bias in favor of the plaintiff. Precisely a concern rule 53.03 was intended to guard against.

Instead of focusing on the type of witness giving evidence (i.e. treating vs. non-treating), the Court advocated an approach that focuses on the type of evidence being proffered. Under this approach, opinion evidence must comply with Rule 53.03 to be admitted, while factual evidence need not comply. Turning specifically to treating professionals, the Court noted that these individuals are present during the progress of an injury suffered by plaintiff. Their role permits them to give evidence as to their observations of the plaintiff and the treatment administered without the need to comply with Rule 53.03. This is because descriptions of progress and treatment are factual and not opinion. However, if the treating professional seeks to offer opinions as to the cause of an injury, it is pathology, or prognosis, that evidence requires compliance with Rule 53.03 The Court explicitly rejected the plaintiff's submission that a diagnosis made

by treating professional is a fact and not an opinion. However, the Court allowed that a treating health professional may give evidence of the diagnosis made solely for the purpose of enabling the judge or jury to understand the basis for the treatment chosen (and not for the purpose of establishing that the diagnosis was in fact correct).

The plaintiff argued that requiring treatment providers to comply with Rule 53.03 would put them in an impossible position, as treatment providers could not affirm a duty to the court that prevails over any other obligation the treatment provider may hold to any party. The Court rejected this submission.

In the result, the Court agreed with the decision of the trial judge, holding that the opinion evidence of the proposed treatment providers was correctly excluded from the trial.

PRETRIAL COMMUNICATIONS AND DRAFT REPORTS: *MOORE*

There has been a long history of pretrial communications between lawyers and experts, both treating and non-treating. Lawyers felt free to work with experts and provide feedback and comment on draft reports before final reports were generated. In many instances, the changes that lawyers proposed to draft reports involved correcting factual errors, educating the experts on the significance of legal terminology to ensure that the expert was conveying what he or she intended to convey, and reviewing opinion evidence that might fall outside of the expertise of the expert witness. The ability to work through a draft report before serving final report was particularly helpful to experts who did not regularly engage in medical legal report writing or other forms of litigation.

For the most part, the process of working through draft reports resulted in more reliable final reports, as the expert's opinion rested on a solid factual foundation and the report did not venture into areas outside of the expert's scope of expertise. To the extent that the lawyer involved in this process went beyond educating the expert on the facts and law and ventured into "ghostwriting" the opinions, cross-examination by the opposing party on the process that led the expert to his or her final conclusions, combined with a competing expert opinion, was typically sufficient to expose deficiencies in the opinion.

The practice of medical experts engaging in pretrial communications with lawyers and working with draft reports was called into question *Moore v. Getahun*.[11] Moore was a medical malpractice case. During the course of trial, the defence called Dr. Ronald Taylor to testify as an expert. The plaintiff reviewed Dr. Taylor's file and found notes referring to a one and a half hour telephone call between Dr. Taylor and defence counsel, during which defence counsel reviewed Dr. Taylor's draft report and made suggested changes. Dr. Taylor made the changes that defence counsel had suggested to his report. The trial judge considered this evidence and the new Rule 53.03 and concluded that the existing practice of reviewing draft reports was no longer acceptable. In addition, she held that discussions or meetings between lawyers and an expert to review and shape a draft report were also unacceptable. In her opinion, such discussions undermine the "credibility and neutrality" of an expert witness. With respect to expert reports that require clarification or application, the trial judge suggested that a

[11] *Moore v. Getahun, supra*, note 2.

lawyer who seeks that clarification or application should make that request in writing, and that written request should be disclosed to opposing counsel.

APPEALS IN *WESTERHOF* AND *MOORE* AND FUTURE DIRECTIONS

The Ontario Court of Appeal heard submissions on the appeal of both the *Westerhoff* and *Moore* decisions on the week of September 22, 2014. Because of the far-reaching consequences of these decisions on the evidence of treating health professionals and their implications for how lawyers and expert witnesses may interact with each other, six different organizations acted as interveners at the Court of Appeal, in addition to the parties themselves. The remainder of this paper sets out what we hope the Ontario Court of Appeal will decide on these issues, and does not reflect the current state of the law.

Westerhof and Evidence of Treating Health Professionals

The *Westerhof* The decision of the Divisional Court in Westerhof attempted to delineate a bright line between opinion evidence and fact evidence, with the provisions of Rule 53.03 applying strictly to the former and not at all to the latter. Under this conception of the law, the type of witness giving the evidence is immaterial, as only the type of evidence matters. However, as *Westerhof* itself illustrates, the application of this rule is not always straightforward. Can we really expect that a jury will understand how to make use of a diagnosis that is admissible only for the purpose of understanding the treatment that a treating health professional has provided, but which is in admissible for the purpose of determining whether the diagnosis itself was correct?

An alternative approach, and in our view a preferable one, is to distinguish between Litigation Expert Witnesses who are strangers to the dispute and those witnesses who have direct knowledge of the facts and circumstances in dispute. Under this approach, Litigation Expert Witnesses would be required to comply strictly with the requirements of Rule 53.03 while other witnesses with direct knowledge, including treating health professionals, would be permitted to testify about their observations, conclusions, or inferences without the requirement that they comply with Rule 53.03. This would include the ability to testify on matters that are currently considered "opinion."

Moore and Pretrial Communications Between Lawyers and Experts

Justice Wilson's decision to prohibit all non-written communications between counsel and expert witnesses, including reviewing draft reports, was clearly motivated by a desire to ensure experts were not being pushed in a direction that favoured the party that retained them. The insistence on written communication created a perceived safeguard to ensure that the opposing parties and the court could see how the expert had initially formulated his or her opinion, and how it had come to change, if at all, by the time of a final report.

However, this approach has resulted in a communications chill, under which experts and lawyers are reluctant to engage in any form of pretrial communication for fear that a an opposing lawyer may point to the mere fact of communication as evidence of bias or that a court will view the communication as improper.

Consider the example of a family doctor who provides a report that is based on a misunderstanding of the facts. The family doctor's resulting opinion now rests on a shaky factual foundation. Under the *Moore* approach, the lawyer representing the plaintiff is left with the options of either remaining silent on the issue or writing to the family doctor to advise of the correct facts. If the lawyer opts to write to the doctor, and the doctor changes his opinion to reflect the facts, the doctor will be subject to cross-examination at trial about that communication and his shifting opinions and could lose credibility – even if his final opinion is completely sound. If instead, the family doctor could freely speak with the lawyer throughout the process and build an opinion on a solid factual foundation, as well as restricting the extent of the opinion to a degree that could withstand a vigorous challenge by an equally qualified and informed opposing expert, the result would be a credible, unbiased, final opinion. Cross examination in this circumstance would focus on the merits of the opinion and not the minutia of the process that led to it.

In its intervening submissions to the Ontario Court of Appeal, the Ontario Trial Lawyers Association (OTLA) suggested that all interaction between lawyers and expert witnesses should be permitted so long as it takes place within the following parameters:

a) The expert must be clear on her role as aide or assistant to the trier of fact so that the trier of fact can reach fair and accurate conclusions or inferences;

b) the expert's analysis or opinion must be in accordance with her training and clinical experience as well as that of respected colleagues;

c) the expert's analysis or opinion must be in accordance with scientific knowledge as set out in authoritative scientific writings;

d) the expert must be prepared to truly and honestly support the analysis and opinion under oath;

e) the expert must appreciate that her opinions will have important consequences for the parties and that the parties' pecuniary interests are not the expert's concern; and

f) the expert must ensure that her analysis and opinion offered in her report and testimony can withstand the most vigorous cross-examination by a well-informed opponent.

Unless there is specific reason to believe that a particular expert is biased, a system designed with these parameters in mind would best serve the interests of justice. Experts who go too far in their opinions, or who provide opinions that depart from accepted medical science, will still be subject to cross-examination on the deficiencies in the opinions themselves. In addition, treating health professionals who do not regularly engage in medical-legal work, can more confidently participate in litigation without fear that they will be cross-examined on procedural issues that do not have anything to do with the merits of their opinions.

CONCLUSIONS

The landscape in which treating health professionals must now prepare reports and give evidence is truly a shifting one. As the law stands today, the Westerhof decision is binding on lawyers and treating health professionals. This means that, unless and until the decision is modified on appeal, treating health professionals must comply with Rule 53.03 in order to give opinion evidence as that term has been defined by the Court in *Westerhof*.

The Moore decision, on the other hand, is a decision of a lower court to that is not binding on other courts. It should be noted that other courts have historically permitted pretrial communications between expert witnesses and lawyers, including the use of draft reports. Here again, the Court of Appeal is expected to provide guidance and more certainty on this issue in the near future. Hopefully, the Court of Appeal will adopt an approach that recognizes the value of open lines of communication between lawyers and experts to produce more sound and robust final opinions.