Moore v. Getahun

Experts files remain closed to scrutiny as bias threshold rises

BY JUDY VAN RHIJN
For Law Times

Personal injury lawyers have dodged a bullet in the form of a court decision that would have substantially altered the current practice of reviewing and refining expert reports prior to trial.

While the trial judge held it was improper for counsel to assist an expert witness in the preparation of the report, the Court of Appeal has endorsed protocols for dealing with draft reports, acknowledging the importance of solicitor review. The Supreme Court of Canada, in two new cases, has also confirmed that experts are not generally assailable for bias without strong cause.

The Ontario Superior Court case of *Moore v. Getahun* had caused a flurry of activity and consternation in advocacy circles when Justice Janet Wilson held that it was improper for counsel to assist an expert witness in the preparation of the report. Colin Stevenson of Stevenson Whelton MacDonald & Swan LLP articulates the widely held opinion that Wilson's decision was clearly untenable.

"It was inconceivable that experts such as medical doctors, with no legal training or understanding of legal causation as opposed to scientific causation or burdens of proof or, for that matter, editing or presentation skills, would be able to produce a coherent, reasoned, focused, and presentable report without reasonable input from the instructing lawyers," he says.

Numerous organizations intervened in the appeal, including the Ontario Trial Lawyers Association, the Criminal Lawyers' Association, the Holland Access to Justice in Medical Malpractice Group, and The Advocates' Society. In fact, The Advocates' Society convened a task force and created a set of principles for lawyers to follow as well as a position paper. "These principles were commented on favourably by the Court of Appeal which, although not reversing the actual trial decision, did set aside Justice Wilson's reasons with respect to experts' reports," says Stevenson.

Justice Robert Sharpe, in a unanimous decision, noted that if accepted, the trial judge's ruling would represent a major change in practice. "It is widely accepted that consultation between counsel and expert witnesses in the preparation of Rule 53.03 reports, within certain limits, is necessary to ensure the efficient and orderly presentation of expert evidence and the timely, affordable and just resolution of claims," he wrote.

John McLeish of McLeish Orlando LLP confirms that was the case. "Before the decision, counsel could talk to the expert and discuss draft reports," he says.

"Plaintiffs' lawyers in personal injury litigation deal with many unsophisticated experts such as treating doctors, be they family doctors or orthopaedic surgeons. They are not familiar with legalese. For example, most do not know the huge significance between the words 'possibly' on the one hand and 'probably' on the other," he adds, noting these two words can be the difference between recovering full compensation or nothing at all.

"The decision of Justice Wilson prevented any discussion about what the orthopaedic surgeon meant to say."

Stevenson notes the general consensus is that would have led to more expensive litigation. "Multiple experts would likely have to be retained by each side depending on how the first report was written by the first expert. There would be greater delays to ensure the appropriate expert was retained and a proper report obtained. It would also have likely led to the emergence of specialized experts without any more expertise in the specific discipline but who were more expert in the presentation and writing of reports."

In *Getahun*, Sharpe expressed the view that existing law and practice already foster the independence and objectivity of expert witnesses in a number of ways, such as the ethical and professional standards of the legal profession and other professional bodies and the adversarial process itself as it allows for the cross-examination of expert witnesses on those very points. He found it would be "bad policy to disturb the well-established practice of counsel meeting with expert witnesses to review draft reports. Just as lawyers and judges need the input of experts, so, too, do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case."

Stevenson notes the decision acknowledged the fact the trial or motions judge could order disclosure of discussions between counsel and experts where there's a legitimate concern. "By contrast, counsel's 90-minute telephone conversation with the expert in *Moore v. Getahun* does not warrant further review," he says.

"The latter is part of the reasonable to and fro between counsel and expert in any case."

The Supreme Court of Canada recently endorsed such a light-handed approach in *Mouvement Laïque Québécois v. Saguenay (City),* where it clarified that a simple appearance of bias isn't enough to disqualify an expert, and in *White Burgess Langille Inman v. Abbott and Haliburton Co.*

Stevenson believes the decision has restored the status quo with only a slight raising of the bar for obtaining disclosure of consultation details and draft reports.

"It is true that the Court of Appeal in *Moore* clarified that litigation privilege generally extends to draft reports and e-mails. While this view had been questioned in many earlier court decisions, it is now clear that in the absence of significant concerns about a lack of independence or the integrity of the expert's report, the expert's file will not be open for production."

McLeish thinks it's difficult to imagine many scenarios where the instructing lawyer's behaviour would meet the threshold. "The only exception to this is if counsel can show that opposing counsel communicated with the opposing expert in a way to interfere with the expert's duties of independence and objectivity," he says. **LT**