

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

BLAKE MOORE

Respondent (Plaintiff)

and

DR. JAFEDIN GETAHUN, THE SCARBOROUGH HOSPITAL
GENERAL DIVISION, DR. JOHN DOE and JACK DOE

Appellant (Defendants)

Court of Appeal File No. C58021

AND B E T W E E N:

JEREMY WESTERHOF

Appellant (Plaintiff)

and

ESTATE OF WILLIAM GEE and
KINGSWAY GENERAL INSURANCE

Respondent (Defendants)

CONSENSUS SUBMISSION OF PARTICIPATING PARTIES

**REGARDING PERMISSIBLE INTERACTION BETWEEN COUNSEL AND
EXPERT WITNESSES**

PREAMBLE

The participating parties to this consensus submission agree that the trilogy of cases being considered by the Court of Appeal gives rise to crucially important issues for the entire litigation bar in Ontario with regard to the scope of acceptable interaction between experts and counsel.

The participating parties hope that a statement reflecting their consensus views regarding permissible interaction between counsel and expert witnesses will assist the Court of Appeal in their deliberations on this issue.

THE PARTICIPATING PARTIES

This submission reflects the consensus of the following participants in these appeals:

1. Tom Curry, on behalf of the appellant Getahun;
2. Paul Pape, on behalf the respondent Moore;
3. Linda Rothstein, on behalf of the Advocates' Society;
4. Bill Black, on behalf of the Holland Group;
5. John Olah, on behalf of the Canadian Defence Lawyers;
6. Richard Halpern, on behalf of the Ontario Trial Lawyers Association.

CONSENSUS SUBMISSION

The following submissions have as their foundation the long-standing legal principles that apply to Litigation Expert Witnesses and the Opinion Evidence rule that permits this class of witness to offer inferences and conclusions to the trier of fact. The principles must also be balanced with the law of privilege, both litigation privilege and solicitor-client privilege. As well, it should be recognized that the role of counsel is to advocate on behalf of their client at every juncture of the litigation process, provided such advocacy takes place within acceptable ethical and professional parameters.

The participating parties submit:

- a. The limit on interaction with an expert witness is that an advocate must not persuade an expert to express an opinion that the expert does not genuinely share or believe;
- b. Unfettered interaction between expert witnesses and counsel is not only desirable but is essential to the proper prosecution or defence of an action. The scope of interaction must, by necessity, be broad and not subjected to arbitrary limitations;
- c. Before counsel declares an intention to call the expert witness to testify, all communications and interactions with the expert are protected by litigation privilege;
- d. Once the expert witness is called to testify, litigation privilege with regard to all communications and interactions with the expert witness is preserved, subject to the following qualifications:

- I. Any and all evidence used by the witness that forms the foundation for the opinion is to be disclosed to the opposing parties;
 - II. Draft reports and any memorialization of the communications and interactions between counsel and the expert witness will continue to be protected by litigation privilege unless, in the trial judge's opinion, there is real or substantial concern about bias or reliability that justifies access to more than just the foundational information;
 - III. Any communications that are entitled to the protection of solicitor-client privilege shall continue to be so protected, unless expressly waived.
- e. It is unnecessary to require that the interaction between experts witnesses and counsel be memorialized in any fashion or that draft reports, as evolving works in progress, be kept or disclosed in all circumstances;
 - f. By and large, the adversarial system allows parties to identify non-compliance with the expert's duty to the court. This can be achieved by opposing expert reports and through cross-examination at trial.