Court File No. C58338

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

BLAKE MOORE

Respondent
(Plaintiff)

- and -

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

Appellant
(Defendants)

- and -

THE ADVOCATES' SOCIETY, THE HOLLAND ACCESS TO JUSTICE IN MEDICAL MALPRACTICE GROUP, THE CRIMINAL LAWYERS' ASSOCIATION, THE CANADIAN INSTITUTE OF CHARTERED BUSINESS VALUATORS, THE CANADIAN DEFENCE LAWYERS ASSOCIATION, AND THE ONTARIO TRIAL LAWYERS ASSOCIATION

Intervenors

Court File No. C58021

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

WESTERHOF

Respondent
(Plaintiff)

- and -

GEE ESTATE

Appellant
(Defendant)

- and –

THE ADVOCATES' SOCIETY, THE HOLLAND ACCESS TO JUSTICE IN MEDICAL MALPRACTICE GROUP, THE CRIMINAL LAWYERS' ASSOCIATION, THE CANADIAN INSTITUTE OF CHARTERED BUSINESS VALUATORS, THE CANADIAN DEFENCE LAWYERS ASSOCIATION, AND THE ONTARIO TRIAL LAWYERS ASSOCIATION

Intervenors

Court File No. C56514

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

McCALLUM

Respondent
(Plaintiff)

- and -

BAKER

Appellant
(Defendant)

- and –

THE ADVOCATES' SOCIETY, THE HOLLAND ACCESS TO JUSTICE IN MEDICAL MALPRACTICE GROUP, THE CRIMINAL LAWYERS' ASSOCIATION, THE CANADIAN INSTITUTE OF CHARTERED BUSINESS VALUATORS, THE CANADIAN DEFENCE LAWYERS ASSOCIATION, AND THE ONTARIO TRIAL LAWYERS ASSOCIATION

Intervenors

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PART I. OVERVIEW

1. Pursuant to an order of the Honourable Justice Laskin, dated July 10, 2014, the Holland Access to Justice in Medical Malpractice Group (the **"Holland Group"**), was granted leave to intervene in these companion appeals, *Moore v. Getahan*[1], *Westerhof v. Gee (Estate)*[2], and *McCallum v. Baker*, as a friend of the Court. The Holland Group does not take a position with respect to the merits of any of the decisions under appeal or the factual findings made by the trial judges.

2. The Holland Group is composed of leading practitioners involved in medical malpractice cases throughout the Province of Ontario. Its mission includes promoting reforms in medical malpractice to serve the public interest by increasing access to justice to achieve equitable, affordable and just resolutions of medical malpractice claims.

3. Composed of members of the plaintiffs' and defence (both hospital and physician) bars in Ontario and currently chaired by The Honourable Coulter Osborne, the Holland Group has, since 1998, encouraged dialogue amongst all parties involved in the medical malpractice field with a view to conducting such cases fairy and efficiently while maximizing access to justice. It is this interest arising in the context of medical malpractice cases that underlies the Holland Group's participation in theses appeals.

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[1] 2014 ONSC 237 [*"Moore"*]

[2] 2013 ONSC 2093 [*"Westerhof"*]

PART II. ISSUES

4. These appeals raise vital issues relating to whether and how counsel should interact with experts and review draft expert reports, how reports should be treated at trial, and the scope of Rule 53.03 of the *Rules of Civil Procedure*.

5. The Court's determination of these issues will have implications beyond the idiosyncratic facts of these appeals and will dictate the practices of counsel acting for all parties in medical malpractice and other litigation. These practices will determine in part how timely and expensive the pursuit and defence of such actions will be.

PART III. ARGUMENT

A. MOORE V. GETAHUN

6. The Holland Group's submission in the *Moore* appeal reflects the perspective of its members who met following the release of the trial decision to discuss the current, common practices wherein counsel review draft expert reports and communicate with experts as necessary to ensure the delivery of appropriate reports. As set out above, the membership of the Holland Group represents all corners of the medical malpractice bar.

7. An issue in this appeal is whether the trial judge erred in her treatment of the expert opinion evidence called at trial by counsel for the defendant.

8. At paragraph 50 and 52 of Justice Wilson's Reasons for Decision, she considers the 2010 amendments to the Rules as they apply to expert reports and concludes that:

> ...the purpose of Rule 53.03 is to ensure the expert witness' independence and integrity. The expert's primary duty is to assist the court. **In light of this change**

> **in the role of the expert witness, I conclude that counsel's prior practice of reviewing draft reports should stop.**
>
> ...
>
> If after submitting the final expert report, counsel believes that there is need for clarification or amplification, **any input whatsoever from counsel should be in writing and should be disclosed to opposing counsel.**
>
> I do not accept the suggestion in the 2002 Nova Scotia decision, Flinn v. McFarland, 2002 NSSC 272, 211 N.S.R. (2d) 201, that discussions with counsel of a draft report go to merely weight. **The practice of discussing draft reports with counsel is improper and undermines both the purpose of Rule 53.03 as well as the expert's credibility and neutrality.**[3] [Emphasis added]

9. The Holland Group submits that there has been no change to the role of an expert witness as suggested by Justice Wilson. Justice Wilson's conclusion effectively condemns and prohibits long-standing practices of counsel consulting with experts and reviewing draft reports. Wilson, J. does this in part on the basis that Rule 53 constitutes a "change in the role of the expert witnesses"[4], and without taking into account that counsel's practice of reviewing and discussing draft expert reports may lead to a more timely, affordable and just resolution of medical malpractice claims.

10. Leading up to the 2010 amendments, there was a concern for expert bias and the battle of competing experts. Specifically, the complaint was that too many experts were "no more than hired guns who tailor their reports and evidence to suit their clients' needs"[5].

11. The Attorney General for Ontario responded by retaining the former Associate Chief Justice of Ontario, Coulter Osborne, to review potential areas of improvements and provide recommendations to make the civil justice system more accessible and affordable. His

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[3] *Moore, supra* note 1 at paras 50-52, the Holland Group Brief of Authorities (**"HBOA"**), Tab 1.

[4] *Moore, ibid.* at para 50.

[5] Honourable Coulter A. Osborne, Q.C., "Civil Justice Reform Project: Summary of Findings & Recommendations" (Toronto: Ontario Ministry of the Attorney General, 2007) [**"Osborne Report"**] at p 71, HBOA, Tab 2.

recommendations, some of which were enacted into legislation, were published in the Civil Justice Reform Project (the **"Osborne Report"**) in 2007. [6]

12. In an attempt to balance the Court's recognition that expert evidence is "of necessity, [and] a mainstay in the litigation process"[7] with the existence of expert bias, the Osborne Report recommended that experts be subject to an expressly prescribed overriding duty to the Court.[8] Its purpose was to "cause experts to pause and consider the content of their reports and the extent to which their opinions may be subjected to subtle or overt pressures".[9]

13. Similar recommendations were expressed one year later by Justice Stephen Goudge in his report, "Inquiry into Pediatric Forensic Pathology in Ontario" (the **"Goudge Report"**).[10] The Goudge Report, in the context of expert evidence in criminal proceedings, recommended that experts be required to certify that they understand their duties to agree to be bound by the obligations contained in the code of conduct before giving evidence.[11] Justice Goudge explained:

> Properly prepared expert reports, along with a certification that that the expert understands the duty to provide impartial advice to the court, are also helpful and should facilitate the process of ensuring the threshold reliability of expert evidence.[12]

14. Neither Report recommended fundamental changes be made to the roles or duties of experts, or counsel's interactions with experts. Rather, both Reports recommended codifying the

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[6] Osborne Report, *ibid.*

[7] *R. v. Abbey*, 2009 ONCA 624 at para 73, HBOA, Tab 3.

[8] Osborne Report, *supra* note 5 at pp 75 -76.

[9] Osborne Report, *supra* note 5 at p 76.

[10] The Honourable Stephen T. Goudge, Commissioner, "Inquiry Into Paediatric Forensic Pathology in Ontario" (Toronto: Ontario Ministry of the Attorney General, 2008) [**"Goudge Report"**], HBOA, Tab 4 .

[11] Goudge Report, *ibid.* at p 505.

[12] Goudge Report, *ibid.* at pp 48 and 513.

duties of experts, particularly their duties of independence and objectivity that had already been established by common law.[13]

15. The Goudge Report expressly recommends discussions with experts and emphasizes the important role of these discussions:

> One of the principal lessons learned at the Inquiry is that, although it is vital that forensic pathologists be highly skilled scientists, it is equally vital that they be able to communicate their opinion effectively to the criminal justice system. Improvement in the quality of forensic pathology must be paralleled by improvement in the effectiveness with which forensic pathologists are able to communicate to the criminal justice system. It is with the better achievement of this objective in mind that I make a number of specific recommendations on how opinions and their limitations should be articulated, in light of the principles I have set out.
>
> ...
>
> Counsel, whether Crown or defence, should properly prepare forensic pathologists they intend to call to give evidence.[14]

16. The amendments that followed (among other things) did just that. In a recent decision, Justice Lederman eloquently described the amendments to Rules 4.1 and 53 as follows:

> The new rule amendments ... impose no higher duties than already existed at common law on an expert to provide opinion evidence that is fair, objective and non-partisan ... **the purpose of the reform was to remind experts of their already existing obligations.**[15] [Emphasis added]

17. It cannot be the case that Rule 53 was intended to stifle interactions between counsel and experts that strengthen the assistance that an expert's report can provide to the Court, as to do so would ultimately create a barrier to access to justice.

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[13] See for example: *Fellowes, McNeil v. Kansa General International Insurance Company Ltd. et al*, (1998) 40 O.R. (3d) 456 at pp 4-5 (Gen Div), HBOA, Tab 5; *Frazer v. Haukioja*, [2008] O.J. No. 3277 at para 138-141 (SCJ), HBOA, Tab 5; *Baynton v. Rayner*, [1995] O.J. No. 1617 at para 124 (Gen Div), HBOA, Tab 7.

[14] Goudge Report, *supra* note 10 at pp 45 and 47.

[15] *Henderson v. Risi*, 2012 ONSC 3459 at para 19, HBOA, Tab 8.

18. If followed, Justice Wilson's conclusion will have the effect of impairing normal, reasonable and prudent litigation practices: will substantially increase the cost of litigation for both plaintiffs and defendants; will deprive the Court of fulsome, comprehensive expert evidence; will interfere with appropriate settlement discussions; and will ultimately restrict access to justice. These adverse consequences cannot be overstated.

19. To the extent that the trial judge relies on the Osborne Report to support her conclusion that counsel must halt the practice of consulting with experts as they draft reports, in the Holland Group's submission, with respect, Wilson, J. has misconstrued the findings in the Osborne Report as well as the basis upon which expert testimony is admitted in court, and reached a conclusion that was not intended in the report and adopted in the changes to the Rules.

(i) Interactions between counsel and experts should not be discouraged or stopped

20. In reaching her decision, Justice Wilson reasoned that the practice of discussing draft reports with counsel undermines both the purpose of Rule 53.03 as well as an expert's neutrality.[16] This reasoning does not withstand scrutiny.

21. An expert cannot draft his or her report in a vacuum. Communication with counsel as they draft expert reports is required provided that interaction does not in any way offend the overriding duty of an expert to the Court.

22. There are compelling reasons to promote the interaction between counsel and experts in preparation of reports, including:

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[16] *Moore, supra* note 1 at para 52.

(a) Experts must understand that it is the legal burden of proof, and not the scientific threshold of certainty, that frames the issues;

(b) Experts must understand which facts are contested to ensure that their opinions are based on an accurate understanding of the facts or on clearly stated assumptions, and ensure that their written reports present an accurate recitation of the facts or assumptions in order to assist the Court;

(c) Counsel must ensure that an expert takes into account all material information potentially impacting on the expert's opinion, and in the case of reply reports, the opinions offered by experts for the other side;

(d) Counsel must test the foundation and reliability of the opinion and explore possible alternative conclusions to those reached by the expert;

(e) Counsel must ensure that the expert's opinion is properly confined within his or her expertise.

(f) Counsel must ensure the expert's opinion does not, within the meaning of the relevant cases, "usurp the function of the Court".

23. The suggestion that counsel can have no interaction with an expert after providing the assignment to the expert is unrealistic and will not allow the expert to assist the Court in the best way possible. This interaction ought to be permitted even on matters involving the professional conclusions and inferences of an expert, provided that interaction is consistent with the overriding duty of the expert to the Court in all aspects (see paragraph 26, below).

24. For instance, absent discussions with counsel, experts' reports will be less comprehensive with less focus. In addition, it might hamper the preparation of reports that are helpful to the court in understanding complex issues with counsel potentially feeling compelled to retain a "shadow" expert to communicate with or risk missing important issues. This will add to the cost and expense of litigation, and limit access to justice. This runs contrary to the important objectives of promoting access to justice and proportionality.

25. Further, the review by counsel of draft reports and discussions with the experts who authored these reports does not conflict with the expert's duty to the court, the need to maintain neutrality, or the changes recommended in the Osborne Report, as adopted in the amendments to the Rules. Conversely, early review of expert reports by counsel ensures that the Court receives, and opposing counsel can cross-examine on, a focused, comprehensive report that accurately states the facts and assumptions relied upon and emanates from the expert's specific field of expertise.

26. Historically, counsel's interactions with experts have been crucial to counsel's appreciation of the merit (or lack thereof) of a case and the evaluation of the retained expert as a cogent witness at trial. This has been a part of counsel's role when dealing with the experts to ensure the best interests of the client are served (by only pursuing or defending claims or defences with merit and adducing the best possible expert witness to prosecute or defend the case). Ultimately, the expert will satisfy the duty owed to the court and the requirements of Rule 53.03 by ensuring that the opinions expressed are consistent with the expert's clinical experience; the opinions are compatible with prevailing medical thought in literature and elsewhere; and, the expert can truthfully express those opinions under oath. Interaction with the expert in no way impairs the ability of the opposite side to test the veracity or reliability of the opinions expressed in cross-examination.

27. The Holland Group firmly supports the practice, which it believes to be in the category of best practices, of counsel reviewing draft reports and communicating with experts as necessary to ensure the delivery of appropriate expert reports. Naturally, any involvement by counsel that creates bias or compromises the independence of experts runs afoul of best practices and one's obligation as an officer of the Court.

28. The Holland Group's position finds support in *Mendlowitz v. Chiang*, a 2011 decision of the Ontario Superior Court. In that case, Justice Morocco endorses counsels review of and input to draft reports and finds that it was appropriate for counsel to make suggestions while the expert was formulating his report:

> I am satisfied that it is appropriate for counsel for the plaintiffs to make suggestions to Mr. Berenblut and his staff. In this way, counsel will come to understand the report, and Nera Economic Consulting can get the benefit of any information which counsel has that may have been inadvertently excluded from the report.
>
> It is not possible to know whether counsel made suggestions which were incorporated into subsequent drafts of the report because all prior drafts are destroyed when a new version is produced. Mr. Berenblut agreed that one of the reasons Nera Economic Consulting follows this practice is to prevent cross-examination on earlier drafts of their report.
>
> In my view, it is not necessary for an expert to keep all previous drafts of a report. It is possible that the failure to keep previous drafts could become an issue for the judge on a *voir dire* concerned with the admissibility of opinion evidence. It is not possible to imagine all situations which might occur and, therefore, I do not propose to define or create a list of such situations
>
> In this case, I am satisfied, based on Mr. Berenblut's evidence, which, apart from the documentary exhibits was the only evidence on the *voir dire*, that Mr. Berenblut did exercise independent judgment about the contents of his report and did not include anything which he felt he could not defend by reference to source documentation. The characterizations and conclusions in the January 7, 2011 report do not appear to be unsupported characterizations and conclusions.[17]

(ii) Experts' reports provided to a trial judge as aides memoir may not be considered as evidence

29. The Holland Group is aware of and supports the well-established practice of providing copies of expert reports to trial judges to assist them in following an expert's testimony (aides memoire), when such reports are not in evidence.

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[17] *Mendlowitz v. Chiang*, [2011] O.J. No. 6648 at paras 20-23, HBOA, Tab 9.