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TAB 4B

Best Practices In Medical Malpractice Litigation

Experts: Practical Application of Westerhof and White Burgess
Putting OCA and SCC direction into practice

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Experts as witnesses are allowed to do something other witnesses are not: draw inferences from facts and express an opinion. Some people do that every day as part of their jobs and service to others. Family doctors form opinions about diagnosis, police officers form opinions about causes of collisions, accountants form opinions about the profitability of an enterprise. Some are engaged by lawyers to offer opinions to assist the court in understanding technical issues or matters beyond the ability of a lay person to understand in lawsuits. Finally, others are engaged by strangers to a lawsuit, but have formed opinions at the request of that stranger.

Westerhof v Gee et al 2015 ONCA 206

This case identifies to whom, or rather what type of expert, Rule 53.03 applies.[1] Rule 53.03 deals with Expert Witnesses. The result of this decision: it does not deal with ALL experts.

Westerhof identifies three kinds of experts:

1. Litigation Experts. These are persons engaged by or on behalf of a party to provide opinion evidence in relation to a proceeding. Rule 53.03 applies to those. That means Rule 4.1.01 and Form 53 also apply to those experts.

2. Participant experts. These are persons who form opinions but are not
    a. Engaged by any party
    b. Forming an opinion in relation to a proceeding but as a part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in the events.[2]

       Rule 53.03, 4.1.01 and Form 53 do not apply to these experts. They are called to testify about opinions they have already formed. [3]

       This witness will have his opinions admitted for the truth of its contents, because “he formed his opinions relevant to the matters at issue while participating in the events and as part of the ordinary exercise of his

[1] At para 1
[2] At para 60
[3] Para 82

expertise… He was therefore a “fact witness”, or, as I have referred to such witnesses in these reasons, a “participant expert”.[4]

3. Non-party experts. These are persons who form opinions for someone other than a party to the litigation. Rule 53.03, 4.1.01 and Form 53 do not apply to these experts.[5] For a non-party expert a relevant opinion is formed based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than litigation[6].

Implications and Questions for Practice:

1. Preparation of the Aide Memoire. I recommend you now divide your Aide Memoire into the three categories above.

2. Service of reports:
    a. Litigation Experts are subject to Rule 53.03 so the 90/60/30 day rules apply.

    b. Participant Experts
        i. who are also practitioners as defined by s. 52 of the *Evidence Act* have a time limit imposed. Ten days notice of a report obtained for or by a party must be given, after which the report is admissible in evidence. A CV is not required. Form 53 is not required.

        ii. Rule 30.09 requires a party to abandon a claim of privilege in respect of a document at least 90 days before trial. If not done, the party may not use it at trial except with leave of the trial judge.
            1. If the report is considered privileged, but a party wants to use it at trial, this Rule pertains.
            2. If the report is not privileged, and has already been disclosed through the discovery process, there does not appear to be a Rule respecting “notice” of the report.

    c. Non-Party Experts. The reasons in *Westerhof* only refer to AB experts. They can be health practitioners, accountants or engineers. There is no Rule or provision in the *Evidence Act* that deals with Notice respecting this kind of witness.

[4] Para 70
[5] Para 86
[6] Para 62

The rules relating to disclosure of relevant evidence will cover service in the case of Participant and Non-Party Experts. Put another way, everyone already has the report, as a result of discovery obligations, so service is a non-issue. [7]

3. Disclosure under Rule 31.06 (3). This Rule requires disclosure of the findings, opinions and conclusions of an expert *engaged by or on behalf of the party being examined*. It is clear from the Rule that it applies to Litigation Experts. A party may avoid disclosure of the opinions by undertaking not to call the expert. Case law that previously held it applicable to what we now consider Participant experts and Non-Party experts is very likely wrong[8].

4. Participant or Non-Party Experts becoming Litigation experts.

   A participant expert is one who has formed an opinion already. Consider the family doctor who writes a note about her patient who was in a car crash. The patient cannot return to work for 4 months. To come to that conclusion, the doctor must form an opinion about the patient's ability to work. That is a participant opinion.

   A surgeon writes a consult note to the family doctor about restrictions concerning return to work, and says no work above shoulder height, heavy lifting or repetitive bending at the waist. Long-term analgesics and anti-inflammatories are prescribed. The doctor has formed an opinion about the prognosis of this patient, and his ability to work.

   Now consider the following requests by plaintiff's counsel of the surgeon:
   a) Is the plaintiff capable of returning to work as a carpenter?
   b) Will the plaintiff retire early due to the injuries sustained?

   The first question is really the articulation of the doctor's opinions formed at the time the treatment was given. However, the second may fairly be seen as outside the doctor's contemplation or consideration when offering return to work restrictions.

[7] Para 85
[8] *Babakar v Brown*, (2010), 100 OR (3d) 191 (SC); *Anderson v St Jude Medical Inc*.(2007) 61 CPC (6th) 315

As soon as an opinion is requested that goes beyond those formed "while participating in the events and as part of the ordinary exercise of his expertise", the opinion becomes one subject to Rule 53.03 and all of its requirements.

Similarly, if a non-party expert is asked questions that go beyond the report already prepared, it must be served under rule 53.03.[9]

As a matter of practice, you may wish to request separate reports, or keep them together. The line is not always going to be bright. Rather than engage in a time-consuming argument about where a fuzzy line must be drawn in a particular case, the court may be inclined to admit an opinion provided that notice was otherwise given (consider giving it at least 90 days before trial, or erring on the side of caution and complying with Rule 53.03).

5. Does privilege apply to reports from Participant Experts? If the opinion is not an expert report as defined by Rule 53.03, but is served under s. 52 of the *Evidence Act*, does privilege apply to the report? It is arguable that the report is as protected as is the report of a litigation expert, because privilege attaches to the document that is the report. Alternatively, once you have identified the person as a participant expert, does that not argue that the report is now just part of his or her clinical notes and records, and likely subject to an undertaking to produce. This will be a consideration when deciding whether to obtain a separate report from the practitioner for litigation opinions.

6. Section 12 of the *Evidence Act* raises an interesting conundrum. It reads as follows:

> Where it is intended by a party to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the judge or other person presiding.

A litigation expert is clearly covered by this section. A non-party expert would be called to provide opinion evidence, but could give observational evidence as well, which would not be an opinion.

What of the Participant Expert? Recall that *Westerhof* approved of their characterization as fact witnesses. In my view, that is really what they are testifying about – the fact of their opinion. It is an unassailable <u>fact</u> that the doctor took a history, undertook tests, arrived at a differential diagnosis, working

[9] Para 63

diagnosis and final diagnosis, then undertook a treatment plan with a view to prognosis and expected results. No amount of cross examination will change that fact.

In *Leonard v Kline*[10] a trial judge faced with a long list of "experts" proposed by the Plaintiffs, characterized treating doctors this way:

> Drs. Shamess and Maione are "fact" witnesses and their evidence ought to be restricted to that. As treating physicians, they are entitled to give evidence with respect to their observations of the plaintiff, both pre- and post-accident, their medical diagnoses, and the treatment prescribed. They ought not to provide opinion evidence with respect to whether the plaintiff is now competitively employable, as that is the purpose for which the plaintiff proposes to call the other experts.

The neat question becomes the ambit of the opinion they can articulate. *Westerhof* permits a fairly broad ambit. If the doctors are still treating the plaintiff at the time of trial, their evidence on the issue of competitive employability should be heard. It remains a fact that the doctor is viewing his or her patient as employable or not and treating and advising accordingly.

> As Dr. Bartolucci was a treating psychiatrist and pain specialist, I agree that the trial judge erred in making a blanket ruling that he could not give evidence of the history he took and of his diagnosis and prognosis. This evidence should have been admitted[11]

More helpful is the *McCallum v Baker* ruling in respect of Dr. Kraus, a treating physiatrist:

> Concerning Dr. Kraus, when asked if Mr. McCallum could return to any form of gainful employment, he testified that if Mr. McCallum was going to go back to work as an electrician, he (Dr. Kraus) would not let Mr. McCallum into his house. He explained:
>
> > [B]ut if you look at – with the way he is right now, his concentration isn't good enough, his motivation is not good enough, his energy level is not good enough. I don't think that he could do any kind of activity related to any sort of complex task that would require a significant period of sustained activity that aren't [*sic*] interruptible. I don't think he could do

[10] 2011 ONSC 2730 at para 14 (CanLII)
[11] Para 93

> those things because he can't right now and I don't see anything on the horizon that is rapidly likely to change that.
>
> Considered in context, Dr. Kraus's opinion concerning Mr. McCallum's employability was no more than a conclusion that flowed naturally from his observations concerning Mr. McCallum's presenting condition. The observations and Dr. Kraus's conclusion arising from them fell within his expertise.[12]

7. Paper reviews by SABS experts. The requirement is articulated this way:

> A relevant opinion was formed based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than litigation.[13]

Quaere whether a review of documents will qualify as an examination.

8. Gaining admission of opinions from Participant Experts and Non-Party Experts.

Beyond considerations of notice and service, are the common law rules for admissibility of and weight to be accorded to an expert opinion.

The *Mohan* criteria continue. To exemplify with an extreme example, a social worker who gives an opinion about need for surgery to replace a knee is not likely a person qualified to give that opinion to a court.

9. Service under s. 52 and or 35 of the *Evidence Act* matters. A critical issue arises with practitioners' reports that are not served under s. 52 and their use at trial. In *Westerhof,* Dr. Rathbone, a litigation expert, wanted to rely on an MRI report. The trial judge (erroneously) refused to permit the author of the MRI report to testify. The records were served under s. 35 as business records. Dr. Rathbone could not rely on the MRI <u>unless the author testified or it was filed under s. 52.</u>

It was important:

> Dr. Rathbone testified that the MRI reports disclosed a labral tear; that such tears almost always occur in the presence of some abnormality in

[12] Paras 167-168
[13] Para 62

the bone; that the first MRI disclosed changes within the labrum that looked like a crack and that the second MRI was compatible with degenerative changes plus trauma. He also testified that a forceful movement is necessary to tear the labrum. And he explained that "the literature says that 2.5 years from trauma to diagnosis is characteristic". Nonetheless, the fact remains that Dr. Rathbone was not permitted to refer to the redacted portions of the MRI reports, which were consistent with his opinion that the labral tear happened traumatically – something he would have been entitled to do had the radiologist who authored the reports been permitted to testify.

White Burgess Langille Inman v Abbot and Haliburton 2015 SCC 23

The WBLI decision was released on April 30, 2015. In an action by shareholders against the auditors of the company, a summary judgement motion was brought. The company claimed that the accountant who advised the shareholders could not then give expert testimony in an action due to bias, and moved to dismiss the action. The motions judge struck the affidavit of the accountant. On appeal, the Nova Scotia Court of Appeal held that the motion judge was wrong to strike it out. The company appealed to the SCC which took the opportunity to clarify the rules surrounding admissibility. The affidavit was allowed to stand.

The take-aways from this decision are as follows:

1. The *Mohan* criteria remain. Relevance, necessity, reliability and the absence of bias are

   > *[p]art of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence*[14]*.*

2. The Ontario Court of Appeal's formulation of the appropriate way to apply the *Mohan* criteria in *R v Abbey* was approved.[15] It is a two-stage process which starts with admissibility. If that threshold is passed, then the judge's gatekeeping role is engaged.

3. At the first stage of the enquiry, which is a series of yes (admit) or no (don't admit) questions, lack of impartiality and/or independence sufficient to exclude an expert (a "no" answer) will be rare. To be inadmissible, the expert's "lack of

[14] Para 54
[15] Para 22; *R v Abbey,* 2009 ONCA 624 leave to appeal refused [2010] 2 SCR v

independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case".[16]

4. Exclusion requires evidence. Burdens of proof shift.[17]
    a. The burden of proof on a balance of probabilities that the expert is qualified to testify is on the party who proffers the evidence. The proposed expert must be able and willing to fulfill his or her duty to the court.
    b. An attestation under oath by the expert, (as with the requirement of the Rules 53.03 and 4.01) is *generally sufficient*.
    c. Once that burden is met, the burden shifts to the opponent to show there *is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty*.
    d. If the opponent demonstrates that it should not be received, *those parts of it that are tainted by a lack of independence or by impartiality should be excluded*. An important practice note here: the baby is not thrown out with the bath water. It may be that an essential aspect of the opinion can be saved.
    e. The *threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it.*

5. Impartiality and independence must be looked at both at the first stage and second stage.
    a. The first stage (yes/no) enquiry is about the expert's duty to the court. A helpful test was accepted by the Court (the acid test): would the expert's opinion be the same if he or she was retained by the other side?[18]
    b. The second stage of the enquiry is when the trial judge considers bias in weighing the worth of the evidence. This is the gatekeeping stage. The expert's testimony can be excluded here too, or accepted subject to weighing its value. This is the nub of the case as quoted from the SCC judgement:

> (2) The Gatekeeping **Exclusionary Discretion**
>
> [54] Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge must still take

[16] Paras 49, and 37 citing Mouvement laïque québécois v Saguenay (City) 2015 16 at para 106
[17] Para 47-49
[18] Para 53

> concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.(emphasis added)

Consequently, in practice, an expert can be attacked based on any of the *Mohan* criteria at the admissibility stage and then again at the gatekeeping stage. Whether it is acted on, or the weight to be accorded it, is in play even if it gets past stage one and two.

1. Admissibility. If the answer to all of the questions is yes, it goes in, if no, it is not admitted.
    a. Relevance
    b. Necessity
    c. Reliability
    d. Absence of bias
2. Gatekeeping – exclude if the cost benefit analysis weighs against its admission. Is it worth its cost to the litigation process.
3. Weight. Cross examination of the expert once admitted into evidence remains on all of the foregoing criteria.

Inconsistencies between Burgess White and Westerhof

If an expert must attest to his or her willingness to give unbiased evidence to the court, what do we do with treating health practitioners, and other experts who are retained or employed by a party?

One argument will be that they are always biased, therefore never capable of having their testimony admitted. Here are some preliminary thoughts on that issue:

1. Participant experts are also called fact witnesses by the Supreme Court. That is important and underscores the nature of the opinion they are giving. It is an opinion arrived at while performing their professional role. The duty to the Court is to express that opinion in a fair and unbiased manner, and to replicate it in a fair and unbiased manner.

2. The “acid test” is whether the opinion would change depending on who calls the witness. An honest practitioner should not change their testimony for the person who proffers them as a witness. But read the court’s concerns about witnesses who are retained to “take a position”. A classic example is the future care expert retained to critique another expert’s report. They are *retained* to offer criticism. Added to this is the argument that a future care report must be relevant to the trilogy ratio[19]: full compensation for needs and losses. If it is not, and is merely an exercise in chipping away, does it pass the acid test?

3. There must be evidence of bias. In *Burgess White*, recall that an accountant who was retained by the plaintiffs to review the work of the defendants, submitted an affidavit in a summary judgement motion. The SCC would have allowed her affidavit to stand. The analysis should be read carefully, because it offers an outline of sorts:

   First, there must be a finding of bias. Appearance of partiality plays no part at the admissibility stage. Following the standards of one’s profession is critical, as is an understanding of the duty to the court:

   > [57] <u>There was no finding by the motions judge that Ms. MacMillan was in fact biased or not impartial or that she was acting as an advocate</u> for the shareholders: C.A. reasons, at para. 122. On the contrary, she specifically recognized that she was aware of the standards and requirements that experts be independent. She was aware of the precise guidelines in the accounting industry concerning accountants acting as expert witnesses. She testified that she owed an ultimate duty to the court in testifying as an expert witness: A.R., vol. III, at pp. 75-76; C.A. reasons, at para. 134. To the extent that the motions judge was concerned about the “appearance” of impartiality, this factor plays no part in the test for admissibility, as I have explained earlier.

Second, if the witness was not involved in the events to “take a position”, and understands his or her duty to the court, the fact that his or her independent worked pointed at an outcome does not render the witness biased.

> [58] The auditors’ claim that Ms. MacMillan lacks objectivity rests on two main points which I will address in turn.
> [59] First, the auditors say that the earlier work done for the shareholders by the Kentville office of Grant Thornton “served as a catalyst and foundation for the claim of negligence” against the auditors

[19] Teno v Arnold, Andrews v Grand and Toy, citation omitted because this is personal injury law 101.

and that this "precluded [Grant Thornton] from acting as 'independent' experts in this case": A.F., at paras. 17 and 19. Ms. MacMilllan, the auditors submit, was in an "irreconcilable conflict of interest, in that she would inevitably have to opine on, and choose between, the actions taken and standard of care exercised by her own partners at Grant Thornton" and those of the auditors: A.F., at para. 21. This first submission, however, must be rejected.

[60] The fact that one professional firm discovers what it thinks is or may be professional negligence does not, on its own, disqualify it from offering that opinion as an expert witness. Provided that the initial work is done independently and impartially and the person put forward as an expert understands and is able to comply with the duty to provide fair, objective and non-partisan assistance to the court, the expert meets the threshold qualification in that regard. There is no suggestion here that Grant Thornton was hired to take a position dictated to it by the shareholders or that there was anything more than a speculative possibility of Grant Thornton incurring liability to them if the firm's opinion was not ultimately accepted by the court. There was no finding that Ms. MacMillan was, in fact, biased or not impartial, or that she was acting as an advocate for the shareholders. The auditors' submission that she somehow "admitted" on her cross-examination that she was in an "irreconcilable conflict" is not borne out by a fair reading of her evidence in context: A.R., vol. III, at pp. 139-45. On the contrary, her evidence was clear that she understood her role as an expert and her duty to the court: ibid., at pp. 75-76.

Third, reliance on the work of other professionals in particular where it is not the mere acceptance of another's opinion will not disqualify the opinion.

[61] The auditors' second main point was that Ms. MacMillan was not independent because she had "incorporated" some of the work done by the Kentville office of her firm. This contention is also ill founded. To begin, I do not accept that an expert lacks the threshold qualification in relation to the duty to give fair, objective and non-partisan evidence simply because the expert relies on the work of other professionals in reaching his or her own opinion. Moreover, as Beveridge J.A. concluded, what was "incorporated" was essentially an exercise in arithmetic that had nothing to do with any accounting opinion expressed by the Kentville office: C.A. reasons, at paras. 146-49.

Fourth, the court wants evidence of bias.

> [62] There was no basis disclosed in this record to find that Ms. MacMillan's evidence should be excluded because she was not able and willing to provide the court with fair, objective and non-partisan evidence. I agree with the majority of the Court of Appeal who concluded that the motions judge committed a palpable and overriding error in determining that Ms. MacMillan was in a conflict of interest that prevented her from giving impartial and objective evidence: paras. 136-50.

Non-party experts may be subject to greater scrutiny than participant experts. Their involvement is closer to a litigation expert, and may have been retained to "take a position". The point here, is to consider each expert separately about how he or she came to the litigation.

Conclusion

There is very evidently more to come from these two decisions. Read them carefully.