Torkin Manes
Barristers & Solicitors

EXPERT EVIDENCE

Direct Examination and Cross Examination

of Expert Witnesses

Torkin Manes Continuing Professional Development

Barbara MacFarlane and Loretta Merritt

December 5, 2012

Need for Experts

- "Despite justifiable misgivings, expert opinion evidence is, of necessity, a mainstay in the litigation process. Put bluntly, many case, including very serious criminal cases, could not be tried without expert opinion evidence. The judicial challenge is to properly control the admissibility of expert opinion evidence, the manner in which it is presented to the jury and the use that the jury makes of that evidence." *R. v. Abbey,* [2009] O.J. No. 3534 (C.A.)

The Rules

Rules 4.1.01, 53.03, and Form 53
A Comprehensive Framework

- Duty of Expert (4.1.01):
  - Fair, objective, non-partisan
  - Opine only within expertise
  - Provide assistance the Court requires
  - Duty regardless of retainer

The Rules cont'd

- **Notice of Expert Evidence (R.53.03)**
  - **Content and timing of delivery of report setting out qualifications, opinion and foundation for same**
- **Acknowledgement of Expert's Duty (Form 53)**
  - **Confirming duty outlined in R.4.1.01**

Who is an Expert?

- Must be outside the experience and knowledge of the trier of fact.
- More than just “helpful”
- Acquired special or peculiar knowledge
- Advanced education not precondition; training and practical experience may be sufficient.
  - *Laudon v. Roberts,* [2007] O.J. No. 1702

Common Law Criteria for Admissibility of Expert: *Mohan* 4-Part Test

- **Relevance**
- **Necessity in assisting trier of fact**
- **Properly qualified expert**
- **No exclusionary rule prohibiting its admission**

R. v. Mohan, [1994] 2 S.C.R. 9

Voir Dire for Admissibility

- **Procedure to be determined by trial judge**
  - Inquiry not conducted in a vacuum
  - On balance does it favour the admissibility of the evidence (gatekeeper function)?
    - *R. v. Abbey,* [2009] O.J. No. 3534 (C.A.)
  - Is the Person Qualified to be an Expert?
  - Examine and cross-examine on proposed evidence possible

DEMOS

- **Qualifying your expert**
- **Examination in Chief**
- **Cross Examination**

Qualifying an Expert

- Precisely define the scope of the expert's qualifications - Keep within their area of expertise.
- Precisely define the scope of the opinion being proffered - Keep in mind necessity and exclusionary rules.
- Lead your expert through C.V.
- Confirm duty to Court
- Accepted previously by a Court?
- Acts for both plaintiffs and defendants
- Don't forget: Ask to qualify & file CV as exhibit

DEMONSTRATION

Examining Your Expert

- **Emphasize expertise: what they do**
- **Retained and what reviewed**
- **Elicit opinion: as per report**
- **Foundation for opinion**
  - **Authoritative texts, articles, statistics**
  - **Facts (heard evidence/hypothetical)**
- **Comment on opposing expert**
- **Diagram/charts if useful**
- **Exhibits**

DEMONSTRATION

Cross Examining an Expert

- **Decide if you want to challenge in *voir dire***
- **Use their CV to bolster your expert**
- **Show witness lacks impartiality**
  - **% work for opposition and income earned**
- **Get concessions – deference to your expert**
- **Shatter foundation for opinion**
- **Use authorative texts, articles, statistics**

DEMONSTRATION

Development of the Law Rule 53/Form 53

- **Retrospective effect of Rule (get experts to sign a Form 53):** *Brandiferri v. Wawanesa Mutual Insurance Co,*
- **Non-compliance is not fatal – Trial Judge decides:** *Garnder v. Hann (#1)*

DEVELOPMENT OF LAW
Rule 53/Form 53: "litigation expert"

- **Different class of expert if not hired for litigation:** *Beasley v. Barrand; Anand v. State Farm; Slaght v. Phillips;*
- **Non-litigation experts need not sign a Form 53:** *Kusnierz v. Economical Mutual Insurance Co.; McNeill v. Filthaut; Grigoroff v. Wawanesa Mutual Insurance Co., Continental Roofing Ltd v. JJ's Hospitality Ltd.*

DEVELOPMENT OF LAW
Rule 53/Form 53: "litigation expert

- **Impartiality questioned:** *Gutbir (Litigation guardian of) v. University Health Network, Farooq v. Miceli, Hossny v. Belair Insurance (no reason to exclude treating Dr.), Degennaro v. Oakville Trafalgar Memorial Hospital (no presumbed bias), Gould v Western Coal (outside area), Ottawa v. TKS Holdings (counsel editing report), Henderson v. Risi (no higher duty).*

THANK YOU!

(1) Brandiferri v. Wawanesa Mutual Insurance Co., [2011] O.J. No. 2723 (Sup. Ct.), Justice Lauwers

Facts:

- **Fire damage to the Plaintiffs' home**
- **Plaintiffs tendered a professional engineer, Mr. Fisher, as an expert witness to give evidence on environmental concerns relating to the remediation of the fire damage**
- **Mr. Fisher signed a Form 53 "Acknowledgment of Expert's Duty" required under Rule 53.03**

Held:

- **Since all but one of the reports were written years before the recent changes to the rules they did not have to strictly comply with the formal elements of subrule 53.03(3)**
- **In the future, Mr. Fisher and experts like him will need to adapt the style of their reports to more closely align with the requirements of rule 4.1.01 and rule 53.03**

NOTES

(1) Brandiferri v. Wawanesa Mutual Insurance Co., [2011] O.J. No. 2723 (Sup. Ct.), Justice Lauwers… continued

Reasoning:

- **Although the new rules are to have retrospective effect, the principle of trial fairness is implicit in rules 1.04, rules 2.01 to 2.03, and rule 53.03 and allows the court to relieve a party from strict compliance with a new rule where trial fairness so demands**
- **Most of the prescribed elements could be easily inferred from the language of the reports even if they did not set out the elements required by the new rules**
- **The reports did not contain anything surprising and any omissions were not material nor prejudicial to the defendants who had the reports for years**
- **The reports were not particularly partisan in their substance or tone and the facts relied upon were clearly expressed and eminently testable**

(2) Brandiferri v. Wawanesa Mutual Insurance Co., [2011] O.J. No. 2724 (Sup. Ct.), Justice Lauwers

NOTES

Facts:

- **The Plaintiffs tendered an expert witness, Mr. Jones, who owned and operated an "insurance restorator" and fire remediation firm, to give evidence on the need to remediate Stone Construction's work and what it would cost**
- **The Defendants objected to Mr. Jones being qualified as an expert witness as he lacked the requisite independence since he had been directly involved in the case**
- **The Defendants also objected to Mr. Jones giving opinion evidence as a fact witness**
- **Mr. Jones did not file an expert's report and instead, counsel for the Plaintiffs proposed that Mr. Jones be permitted to testify as an expert using as his "expert reports" the 2004 and 2005 estimates he provided**
- **Mr. Jones signed a Form 53 "Acknowledgment of Expert's Duty" required under Rule 53.03**

Held:

- **Mr. Jones was not qualified as an expert witness but he could still be called to give fact evidence and opinion evidence**
- **The credibility and weight of his evidence would be determined by Justice Lauwers**

(2) Brandiferri v. Wawanesa Mutual Insurance Co., [2011] O.J. No. 2724 (Sup. Ct.), Justice Lauwers… continued

Reasoning:

- **The evidence was relevant and material since Mr. Jones saw the house and was able to recount what he saw in appropriate detail**
- **Whilst rule 53.03 intended to address issues concerning expert bias, Mr. Jones was not a typical "hired gun" since he usually worked for insurance companies and recognized fully that he was accountable for his assessments and his estimates**
- **His evidence was tied to the physical facts as he saw them**
- **The opinion evidence was not especially arcane or "scientific" to warrant excluding it**
- **There was no prejudice to the Defendants in admitting the evidence as they had the estimates for a very long time and their witnesses would have the opportunity to challenge Mr. Jones' evidence and opinions**

(1) Garnder v. Hann, [2011] O.J. No. 2578 (Sup. Ct.), Justice Wilson

Facts:

- **Motor vehicle accident**
- **During pre-trial, the Plaintiff had served a number of expert reports**
- **Following the first pre-trial, the Plaintiff served some additional reports**
- **Defendant sought to exclude the expert reports served after the deadline in the amended Rule 53 which requires expert reports to be served 90 days in advance of the pre-trial**

Held:

- **Motion by the Defendants for an order excluding the expert reports served by the Plaintiffs after the pre-trail conference, was dismissed**

NOTES

(1) Garnder v. Hann, [2011] O.J. No. 2578 (Sup. Ct.), Justice Wilson… continued

Reasoning:

- **Counsel for the Defendant was prepared to select a new trial date several months after the late reports were served, proving that there was no demonstrable prejudice arising from the late delivery of the report**
- **The *Rules* make it clear that the court has discretion to admit evidence that does not strictly comply with the set out time requirements**
- **The underlying considerations for the Court when determining if it is appropriate to make an order extending or abridging the time are the same as they were prior to the amendments:**
- **"whether in all of the circumstances and in order to ensure a fair adjudication of the matters before the Court it is in the interests of justice to allow the evidence in."**
- **Justice Barr in *Hunter v. Ellenberger* (1988) stated:**
- **"relevant evidence should not be excluded on technical grounds, such as lack of timely delivery or a report, unless the Court is satisfied that the prejudice to justice involved in receiving the evidence exceeds the prejudice to justice involved in excluding it"**

NOTES

(2) Garnder v. Hann, [2011] O.J. No. 3182 (Sup. Ct.), Justice Wilson

Facts:

- **Defendant sought an order that the expert neuroradiologist, Dr. Cooper, retained by the Plaintiff to review medical documentation, not be permitted to testify**
- **Defence claimed the expert lacked the necessary impartiality to provide an expert opinion as he had authored an article to assist lawyers representing Plaintiffs in personal injury cases prove their client's disability**
- **Dr. Cooper had reviewed the medical documentation of the Plaintiff, the imaging studies, provided a report, and signed Form 53**

Held:

- **Justice Wilson dismissed the motion for an order that Dr. Cooper not be permitted to testify on the basis of bias**

Reasoning:

- **Experts participating in seminars organized by various legal associations do not compromise their ability to offer an unbiased opinion**
- **This would preclude many qualified experts from testifying in court**
- **The article was published in a journal intended for lawyers acting exclusively for Plaintiffs, however, the article itself was not biased**
- **The article did not contain comments described as advocacy and rather suggested various ways neuroradiologists could be of assistance in personal injury cases**

NOTES

Beasley v. Barrand, [2010] O.J. No. 1466 (Sup. Ct.), Justice Moore

Facts:

- **Motor vehicle accident**
- **Defendants wanted to call 3 doctors who saw the Plaintiff for the accident benefit insurer**
- **Defendants made efforts to have 3 doctors sign Form 53**

Held:

- **3 doctors not allowed to give evidence**

Reasoning:

- **Contents of reports did not comply with Rule 53**
- **Experts had misunderstood & incorrectly signed Form 53 (because experts were not retained by a party)**
- **Defendants did not make efforts to help 3 doctors understand their obligations**
- **Doctors/experts should, at Defendant's expense, write reports which comply with Rule 53**

NOTES

Anand v. State Farm (2010), 85 C.C.L.I. (4th) 34. unreported, April 23, 2010 (Sup. Ct.), Justice Stinson

Facts:

- **Motor vehicle accident**
- **Defendant wanted to call 2 doctors and an occupational therapist who saw the Plaintiff for her statutory accident benefits claim**
- **Plaintiff objected to the admission of the evidence because it was opinion evidence and their reports did not comply with Rule 53.03**

Held:

- **Experts retained by accident benefit insurers allowed to give evidence re their "factual observations" but not opinion evidence**

Reasoning:

- **Agreed with Justice Moore's analysis of Rule 53.03 in *Beasley***
- **Law in Ontario allows contents of statutory accident benefits claim examinations to be produced to the Defendants – i.e. it is relevant**
- **Not improper for persons who have direct knowledge of Plaintiff's condition, even if gleaned through accident benefits claim-based examination, to testify about those 'facts' at trial as those facts were clearly relevant**

NOTES

Slaght v. Phillips, [2010] O.J. No. 5343 (Sup. Ct.), Justice Turnbull

Facts:

- **Motor vehicle accident**
- **Plaintiff wanted to call a vocational consulting expert who saw the Plaintiff under accident benefits insurer coverage**
- **Defence objected to opinion evidence by vocational expert due to non-compliance with Rule 53.03**

Held:

- **Vocational expert allowed to give opinion evidence because she was a "treating expert witness". Therefore, not insisting on strict compliance with Rule 53.03**

Reasoning:

- **Agreed with Justice Moore in *Beasley* that as a general rule, experts must comply with Rule 53.03**
- **Distinction between "<u>treatment opinion</u>" – opinions formed at time of treatment – and "<u>litigation opinions</u>" – opinions formed for the purpose of assisting the court at trial and not for the purpose of treatment**

NOTES

Slaght v. Phillips, [2010] O.J. No. 5343 (Sup. Ct.), Justice Turnbull… continued

- Purpose of Rule 53.03 directed at "litigation opinions" rather than at "treatment opinions". Treating expert is to give opinion based on his/her work with the Plaintiff as opposed to being hired as a litigation expert who has not had any involvement with either party in the litigation
- Provided different "classifications" of experts, to which Rule 53.03 applies more stringently to some than to others

1. Treating experts who form treatment opinions as part of ongoing work. Rule 53.03 does not strictly apply. Relief from non-compliance with Rule 53.03 can be ordered.
2. Experts retained by a party to an action to express litigation opinions. Not treating specialists. Rule 53.03 strictly applies.
3. Experts retained by third parties, such as accident benefit insurers. Provide opinions to third parties. Rule 53.03 strictly applies.
4. Experts paid by third parties, but then provide care to a party in the action, and produce a report with their opinions and become treating experts. Rule 53.03 not strictly applied and relief from non-compliance with Rule 53.03.

Kusnierz v. Economical Mutual Insurance Co., [2010] O.J. No. 4462 (Sup. Ct.), Justice Lauwers

Facts:

- **Motor vehicle accident**
- **Plaintiff wanted to call a doctor initially retained by counsel for the Plaintiff to assist him in preparing a SABS claim**
- **Doctor closer to treating physician than independent expert**
- **Report not in compliance with Rule 53.03**

Held:

- **Doctor allowed to testify at trial, however, Justice Lauwers only accorded minimal weight to the doctor's evidence as he was a "passionate advocate" for Mr. Kusnierz and formed a therapeutic alliance with him**

Reasoning:

- **Treating doctors do not fall squarely under Rules 4.1.01 or 53.03**
- **Treating physician exercises expertise routinely**
- **Should be able to give relevant evidence about his/her patient**
- **Evidence of treating physician like that of a family doctor thus allow report even if not in compliance with Rule 53.03**

NOTES

McNeill v. Filthaut, [2011] O.J. No. 1863 (Sup. Ct.), Justice Macleod-Beliveau

Facts:

- **Motor vehicle accident**
- **Defendant wanted to call professionals who saw the Plaintiff for the accident benefit insurer (IMEs)**
- **Defendant sought declaration that Rule 53.03 strictly applies to experts engaged by parties to the litigation and doesn't apply to experts retained by non-parties**
- **Plaintiff objected because of non-compliance with Rule 53.03 which applies to all experts**

Held:

- **Professionals allowed to give evidence. Rule 53.03 does not apply to experts retained by non-parties.**

Reasoning:

- **Upon reading Rules 4.1.01, 53.03 and Form 53 together, applicability is triggered when an expert is engaged by or on behalf of a "party" to the litigation**
- **The new Rules and Form 53 not intended to apply to experts retained by or on behalf of non-parties to the litigation**
- **Reports prepared by accident benefit assessors not retained by a party to the action do not need to comply with requirements set out in Rule 53.03(2.1), and misleading to sign Form 53**

NOTES

Grigoroff v. Wawanesa Mutual Insurance Co., [2011] O.J. No. 2277 (Sup. Ct.), Justice Wilson

Facts:

- **Trial on the AB matter**
- **Defendant wanted to call 3 doctors retained by the Tort Defendant to examine the Plaintiff**
- **Plaintiff claimed the reports did not comply with Rule 53.03**

Held:

- **3 doctors allowed to give evidence**

Reasoning:

- **Although reports did not technically comply with requirements of Rule 53.03, they did contain the info contemplated by Rule 53.03(2.1), i.e. set out issues, reasons for opinion, and instructions given**
- **Agreeing with Justice Moore in *Beasley,* a Court can relieve of the requirements set out in 53.03(2.1) if it is in the interests of justice to do so**
- **Contents of reports and evidence dealt with the very issues jury would be asked to decide upon**
- **There was no prejudice because the Plaintiff knew for a long time that the Defendant intended to call these doctors**

NOTES

Continental Roofing Ltd v JJ's Hospitality Ltd, 2012 ONSC 1751, per Koke J

- In an action for breach of contract, the defendant sought to call as a witness an engineer who had previous been retained by the defendant in connection with the subject-matter of the litigation. The court held that the engineer could testify that that the requirements of Rule 53.03 do not apply to witnesses who have had involvement with the subject matter of the litigation.
- Facts:
- Action by Plaintiff for breach of contract and Counterclaim by Defendant.
- Plaintiff roofing company entered into a contract to repair Defendant's roof. Defendant counterclaimed for damages caused by leaking roof.
- Defendant sought to call as a witness an engineer who had been retained by Defendant as consultant.
- Held:
- Engineer permitted to give opinion evidence at trial with respect to his involvement in the subject matter of the litigation (para 42).The requirements of Rule 53.03 do not apply (para 51).
- Reasons:

Continental Roofing Ltd v JJ's Hospitality Ltd, 2012 ONSC 1751, per Koke J

- The amendments to Rule 53.03 have not changed the purpose and intent of the Rule, as stated in Marchand v Public General Hospital Society of Chatham, 51 OR (3d) 97 (CA).
- The purpose of the rule, is to facilitate orderly trial preparation by providing opposing parties with adequate notice of opinion evidence to be adduced at trial (para 24, citing Marchand, supra).
- Recent cases have held that Rule 53.03 is limited in its application to witnesses who are hired as "litigation experts" and have not had any involvement with the subject matter of the litigation or either of the parties (para 28).
- The engineer is not an expert witness under Rule 53.03 because he has not been retained by the defendant for the sole purpose of providing expert testimony. He has been directly involved in the events of the case. In providing consulting services to the defendant, he was doing his ordinary work, very much like a treating physician is viewed as doing his or her own ordinary work in providing care to an injured party (paras 40-41).
- The amendments to the Rule were intended to eliminate the use of “hired guns” in civil litigation. In this case, the engineer is not a typical “hired gun”. He was not retained for the sole purpose of litigation. This fact eases some of the concern about bias (paras 43-44).
- Concerns about bias should be balanced against the need to allow parties to put their best evidence before the court. Bias can be dealt with through cross examination, by the plaintiff’s tendering its witnesses, and the weight attributed to any given evidence by the trier of fact (para 49).

Gutbir (Litigation guardian of) v. University Health Network, [2010] O.J. No. 4982 (Sup. Ct.), Justice Wilson

Facts:

- **Alleged medical malpractice by the defendant hospital and its employees from the birth of Zmora Gubir in 1984**
- **Both liability and causation were at issue at trial**
- **Plaintiffs sought to call a neonatologist, Dr. Perlman, who treated Zmora at a different hospital after she was born, as an expert**

Held:

- **Justice Wilson held Dr. Perlman was not permitted to offer expert opinion on the issue of causation. He was allowed to testify in his capacity as the treating doctor of Zmora**

Reasoning:

- **Amendments made to Rule 53.03 were meant to ensure the impartiality of expert opinions and to ensure the duty of experts are to the court to provide objective opinions**
- **In his role as treatment provider of Zmora immediately following her birth, Dr. Perlman was trying to determine the cause of the baby's apparent deficits, which was the main issue at trial, and to render the appropriate treatment**

NOTES

Gutbir (Litigation guardian of) v. University Health Network, [2010] O.J. No. 4982 (Sup. Ct.), Justice Wilson

- It would be impossible for Dr. Perlman to be completely objective about the opinion he had been asked to provide to the Court
- The comments in his second report suggested Dr. Perlman had an interest in the court finding that his conclusion reached in 1984 was indeed the correct one
- Dr. Perlman had relied upon his notes in the chart as well as his memory of the case in coming to his expert opinion
- This was a medical negligence case being tried with a jury and the nature of Dr. Perlman's evidence was difficult to comprehend
- The jury would be further confused by the testimony of Dr. Perlman in two roles as both treating physical and an expert witness
- The jury would be tempted to accord more significance to the opinion of Dr. Perlman having been Zmora's treating physician than to the opinions of other experts

Farooq v Miceli, 2012 ONSC 558, per Lauwers J

- **In Farooq v Miceli, the defendant doctor brought a motion to dismiss a malpractice claim against him on the grounds that the plaintiff had no expert evidence to support his claim. The plaintiff admitted that he had not yet been able to find an expert to provide an opinion on standard of care. The motions judge reviewed the case law on treating physicians as expert witnesses and ruled that the plaintiff's treating family doctor was not disqualified from providing an expert opinion simply because he was the treating physician, but that admissibility could only be determined by the trial judge after a voir dire.**
- **Facts:**
- **Plaintiff sued his doctor for medical malpractice and conspiracy.**
- **Defendant brought a motion to dismiss the claims against him on the grounds that the Plaintiff had no expert evidence to support his malpractice claim.**
- **Held:**
- **Motion adjourned. The Plaintiff's family doctor may be able to provide an expert opinion on standard of care.**
- **Reasons:**
- **The evidence of a treating physician is clearly relevant, material and probative (para 24):**

Farooq v Miceli, 2012 ONSC 558, per Lauwers J

- **Typically family doctors or treating doctors do not provide expert reports to the court. Their evidence is set out in a letter sent to counsel or in a will say statement, along with the medical records that they authored. Their evidence is clearly relevant, material and probative.**
- **Treating physicians fall into a different category than other experts (para 25, referencing Beasley v Barrand, [2010] OJ No 1466).**
- **To the extent that a treating physician has a personal interest in the outcome of the case, this may adversely affect the weight of the expert's testimony (at para 26, citing Williams v Bowler, [2005] OJ No 3323).**
- **The Plaintiff's family doctor is not disqualified from providing an expert opinion on the applicable standard of care simply because he is a treating doctor (para 29).**
- **The final decision on qualification of the Plaintiff's doctor as an expert witness is for the trial judge to make after a voir dire (para 29).**

Hossny v Belair Insurance Co, 2011 ONSC 6440, per Sanderson J

- Endorsement for costs after a second mistrial in a personal injury action. In the course of explaining why this is an appropriate case for costs, Justice Sanderson addressed the question of whether treating doctors can give independent expert evidence.
- Facts:
- Plaintiff had summoned his treating physician to testify as a non-expert witness. On consent the physician tendered evidence in the form of a report without testifying in person. Counsel agreed to redact the portions of the report that stated an expert opinion on the question of causation.
- At paragraph 9 Justice Sanderson states:
- I do not agree as a general proposition that treating doctors cannot give independent expert evidence. I see no reason to exclude the expert opinion of treating doctors so long as their reports are Rule 53 compliant, so long as they are otherwise expert, so long as their treatment is not under attack and so long as there are no other specific bases grounding a lack of independence. Indeed, treating doctors may well have greater depth of knowledge and be better able to assist the Court than experts who have been retained only to provide opinion evidence.

Degennaro v. Oakville Trafalgar Memorial Hopsital, 2011 ONCA 310 (April 26, 2011), Docket C50853, appealed from (2009), 67 C.C.L.T. (3d) 294.

Facts:

- **Plaintiff fell from hospital bed and alleged chronic pain but had a pre-existing injury from an old MVA**
- **Treating physician gave opinion that cause of chronic pain was fall and not MVA**
- **Defence experts gave opinion that the MVA caused the chronic pain**
- **Judge preferred the treating physician and defence appealed on basis that case law had developed that presumed a bias with treating physicians**

Held:

- **The trial Judge did not prefer the plaintiff's expert simply because he was a treating doctor as there were other reasons why the expert was preferred (e.g., qualifications, etc.)**

Reasons on case law:

- **case law is not such that there is a presumed bias, rather," the cases provide that where a treating physician has a personal interest in the outcome of the case or lacks the objectivity and independence essential to a medical expert, this may adversely impact the weight to be given to the expert's testimony."**
- **No automatic exclusion of treating expert's evidence – it can go to weight**

Gould v Western Coal Corp, 2012 ONSC 5184, per Strathy J

- Facts:
- Motion to certify the action as a class proceeding.
- Applicant tendered an expert report by an accounting expert
- Held:
- The evidence of the Plaintiff's expert is not independent and should be given no weight (para 95).
- Reasons:
- The expert exceeded the bounds of his expertise and engaged in advocacy, contrary to the rules applicable to expert evidence (para 91).
- The willingness of an expert to step outside his or her area of proven expertise raises real questions about his or her independence and impartiality. It suggests that the witness may not be fully aware of, or faithful to, his or her responsibilities (para 85).

Ottawa (City) v TKS Holdings Inc, 2011 ONSC 7633, per Beaudoin J

- **Facts:**
- **Application by the City to confirm an emergency order requiring the respondent to demolish an unsafe building.**
- **City objected to the admissibility of an expert report prepared by an engineer for the respondent.**
- **Held:**
- **The evidence of the respondent's expert shall not be received. The failure to comply with Rule 53.03 and the editing of the report in response to comments from the respondent's counsel indicate that the expert is an advocate for the respondent (paras 81-82).**
- **Reasons:**
- **The admissibility of any expert report, either on an action or an application, is to be determined by application of the common law rules of necessity and reliability and Rule 53 (para 73).**
- **The expert did not provide a signed Form 53. This requirement applies to reports that were prepared before the rule came into effect, and it applies to all proceedings, including actions and applications (para 78).**
- **An additional problem with the expert's report is that the expert admitted changing the language of a critical sentence in response to comments from the respondent's counsel (para 79).**

Henderson v Risi, 2012 ONSC 3459, per Lederman J

- In this case the plaintiff challenged the defendant's expert witness on the grounds that the witness exhibited institutional bias. The court qualified the witness and stated that the presence of institutional bias goes to weight. The court refused to accept the plaintiff's argument that the 2010 amendments impose a higher duty on an expert than exists at common law.
- Facts:
- Defendants sought to qualify M as an expert witness to provide an opinion on the value of the Plaintiff's shares in T corporation.
- Plaintiff objected that the proposed expert witness exhibited institutional bias because M was a partner in the same accounting firm as the trustee in bankruptcy of T corporation.
- Held:
- M should be accepted as an expert witness. Lack of institutional independence is a matter of weight.
- Reasons:
- Legal advocacy which masquerades as expert evidence is distinctly different from expert evidence which is alleged to be biased or partial on the basis of the expert witness having a connection to a party or an issue in the case (para 14, citing Gallant v Brake-Patten, 2012 NLCA 23).
- The introduction of rule 4.1.01 and the amendments to rule 53.03 do not impose a higher duty on an expert than already exists at common law. The purpose of the reform was to remind experts of their already existing obligations (para 19).
- Bias or partiality in expert evidence which is based on the expert having a connection with a party or issue or a possible predisposition or approach in the case goes to weight and not admissibility (para 20).