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As Director of Legal Research at Torkin Manes, Marco provides legal opinions and analyses on a range of topics in the civil litigation and corporate/commercial context. He has drafted legal memoranda, facta and materials for all levels of court, with a particular emphasis on appellate cases.

Do Experts Always Have to Produce a Report to Give an Opinion at Trial?

The Ontario Court of Appeal has held that non-party and "participant" experts may give opinion evidence at trial without necessarily having to comply with the rules governing ordinary litigation experts.

In *Westerhof v. Gee*, 2015 ONCA 206, per Simmons J.A., the Court heard two appeals from two claims resulting from two separate car accidents. In both cases, the defendants had admitted liability and the trials concerned whether the accidents led to the plaintiffs' injuries and the amount of damages.

In the *Westerhof* action, the trial judge ruled opinion evidence concerning the history, diagnosis and prognosis of various medical practitioners inadmissible. According to the trial judge, the evidence of these witnesses constituted "opinion evidence" and thus had to comply with Rule 53.03 of the *Rules of Civil Procedure*, which requires, amongst other things, that the expert provide a report setting out his or her findings and signing an acknowledgment of the expert's duty of impartiality to the Court. On appeal to the Divisional Court, the plaintiff argued that the trial judge erred in his evidentiary rulings by failing to distinguish between the opinion evidence given by litigation experts, i.e. those experts retained by the parties for the purposes of the litigation, and the opinion evidence given by "participant" and non-party expert witnesses. The Divisional Court dismissed the plaintiff's appeal and held that if the evidence at issue was opinion evidence, compliance with Rule 53.03 was required.

In the *McCallum* action, the trial judge permitted several medical practitioners who treated the plaintiff to give opinion evidence concerning the plaintiff's future employment prospects and future treatment, without requiring those

practitioners to comply with Rule 53.03. According to the trial judge, these witnesses could give opinion evidence without complying with Rule 53.03 because they were treating medical practitioners.

On appeal to the Court of Appeal, the Court held that in the *Westerhof* action, the trial judge erred in holding as a general rule that various medical practitioners who treated the plaintiff could not give opinion evidence because they did not comply with Rule 53.03. The jury's verdict and trial judge's judgment were set aside and a new trial was ordered. In the *McCallum* appeal, the Court held that permitting the opinion evidence of medical practitioners without compliance with Rule 53.03 was not unfair. Accordingly, the *McCallum* appeal was dismissed.

In making these rulings, the Court of Appeal established a number of critical principles as to when the opinion evidence of non-litigation experts will be admissible, absent compliance with Rule 53.03. These principles are as follows:

1. There are three (3) classes of experts who may testify at trial.

The Court identified three classes of experts who may testify at trial. This classification is essential to determining whether the expert is required to comply with Rule 53.03, as set out below. First, the Court recognized the existence of what it calls **"litigation experts"**, i.e. those who are retained by a party for the purposes of the litigation and who the party intends to call as an expert at trial. According to the Court, litigation experts are required to comply with Rule 53.03 and provide a report if the party intends to call that expert at trial. Second, the Court recognized the existence of what it called **"participant experts"**, i.e. those witnesses whose evidence is derived from their observations or involvement in the underlying facts. Participant experts may include witnesses such as treating physicians in a personal injury case, accident reconstruction engineers, or the fire marshals who investigated a fire. The third type of witness is the **"non-party expert"**, i.e. those experts hired by a non-party and who have formed a relevant opinion based on personal observations or examinations relating to the subject-matter of the litigation. Non-party experts may include those who, for example, provide long-term disability or accident benefits opinions, but whose reports are being used in a different proceeding.

2. Participant experts and Non-Party experts may testify at trial without having complied with Rule 53.03.

The Court held that both participant experts and non-party experts with special skill, knowledge, training or experience, who have not been engaged by or on behalf of a party to the litigation, may give opinion evidence for the truth of its contents without complying with Rule 53.03. This opinion evidence may be given so long as:

(a) the opinion to be given is based on the witness's observation of or participation in the events at issue; and

(b) the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.

However, where participant experts or non-party experts give opinion evidence that extends beyond the limits set out in paragraphs (a) and (b) above, they must comply with Rule 53.03 with respect to the "portion of their opinions extending beyond those limits".

According to the Court, the trier of fact retains his or her "gatekeeper" function in relation to opinion evidence. Thus, a Court may, if the evidence did not meet the test for admissibility, exclude all or part of the opinion evidence of a participant expert or non-party expert or rule that all or part of such evidence is not admissible for the truth of its contents. The Court may also require the participant or non-party expert to comply with Rule 53.03 if the opinion offered goes beyond the scope of the opinion formed in the "course of treatment or observation for purposes other than the litigation".

3. There are good reasons for allowing participant and non-party experts to proffer opinion evidence without having to comply with Rule 53.03.

In analyzing why it was appropriate to allow participant experts and non-party experts to offer opinion evidence at trial without having to, amongst other things, file a Rule 53.03 report and sign an acknowledgement of the expert's duty of impartiality to the Court, the Court of Appeal offered a number of rationales. They include:

(i) Prior to the amendments to the *Rules of Civil Procedure* in 2010, Ontario case law was clear that Rule 53.03 did not apply to opinion evidence given by participant experts. The Court of Appeal's ruling in *Westerhof* is consistent with previous case law and confirms that the amendments to the Rules ushered in 2010 did not represent a normative shift in the way expert evidence is to be treated at trial;

(ii) Ontario case law issued after the amendments to the *Rules of Civil Procedure* in 2010 does not support the view that participant and non-party experts are obliged to comply with Rule 53.03;

(iii) Nothing in the report of the Honourable Coulter Osborne, Q.C. (the "Osborne Report"), which led to the amendments to the *Rules of Civil Procedure* in 2010, indicated an intention to address participant experts or non-party experts. The problems identified in the Osborne Report, i.e. relating to an "industry of competing experts", related to litigation experts, not participant experts or non-party experts;

(iv) The text of the 2010 amendments to the *Rules* governing experts support the view that Rule 53.03 does not apply to participant or non-party experts. For example, Rule 4.1, the new "Duty of Expert" rule, requires an objective, fair and non-partisan opinion from "every expert engaged by or on behalf of a party". Rule 53.03 also speaks of experts "engaged by or on behalf of a party". The Court thus concluded that Rules 4.1 and Rule 53 create a comprehensive framework addressing a specific class of expert witness and expert report. They were intended to apply to experts engaged by or on behalf of a party;

(v) There are no serious disclosure problems that exist in relation to the opinions of participant experts and non-party experts, such that it would require them to comply with Rule 53.03:

> In many instances, these experts will have prepared documents summarizing their opinions about the matter contemporaneously with their involvement. These summaries can be obtained as part of the discovery process. Further, even if these experts have not prepared such summaries, it is open to a party, as part of the discovery process, to seek disclosure of any opinions, notes, or records of participant experts and non-party experts the opposing party intends to rely on at trial…

(vi) Not requiring participant and non-expert witnesses to file Rule 53.03 reports will minimize expense and delay. Requiring these types of experts to file reports would actually lead to further expense and delay. Participant experts and non-party experts are not paid an expert's fee to write a report. Rather, they testify because they are involved in the underlying events and have already documented their opinions. Requiring them to produce Rule 53.03 reports would only increase the cost of litigation.

The Court's ruling ensures that all experts provide objective, fair evidence at trial and that participating and non-party experts are not unduly burdened by the requirements of Rule 53.03.

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