PERSONAL INJURY CONFERENCE 2015

The Treating Physician's Role in Litigation

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THE TREATING PHYSICIAN'S ROLE IN LITIGATION

WESTERHOF v.GEE ESTATE[1]

I. Introduction

The law pertaining to expert testimony in civil and criminal trials has developed significantly over the past two decades as a direct result of the proliferation of expert opinion across a broad range of disciplines. It has been a recurring theme in commentaries and in the case law that as the complexity of our society increases and the speed of developments in matters medical and technological accelerate, the role of the expert has become increasingly integral to the court process. While writers and judges have debated the pitfalls of "hired guns," at length there is no doubt that judges and juries face increasing challenges in assimilating medical and scientific concepts in order to render decisions that are rational and in accordance with current thinking. Accordingly, justice demands that decision makers be assisted in discharging their duty.

In the result, two critical issues have become how to ensure that an expert is advancing at least an honestly held opinion and how to prevent a party from ambushing the adverse party with complex evidence. The latter has been dealt with quite simply by establishing timelines within which propounding and responsive reports must be served. While there has been and continues to be a residual discretion for the trial judge to relax timelines or other technical shortcomings in expert reports, such relaxation is clearly intended to be the exception rather than the rule. Moreover, while judges with some regularity permit editing, summarizing or rewriting of reports to comport with the common law and statutory requirements and thereby render them admissible it is a procedure that counsel will wish to avoid.

The issue of attempting to ensure that an opinion is advanced based upon an honest and objective review of the available evidence applied to sound medical/technical reasoning has been far more problematic. Experts occupy a unique role in the adversarial system. Despite the previous

[1] ***Westerhof v. Gee Estate*** *2015 OCA 206*

absence of certification requirements, the role of the expert has long been defined as a person possessing specialized skill or knowledge who can provide the trier of fact with ready-made inferences which the judge and/or jury are unable to draw due to the technical nature of the facts.[2]. Clearly, the fact that the trier of fact will rely upon an inference it is incapable of drawing itself imports a duty of candor and good faith on the part of the expert. Unfortunately, over the years there have been too many examples of experts abusing the power inherent in the role they play in the justice system.

Under Rule 11-2 of our *Supreme Court Civil Rules* ("SCCR") experts are required to certify their understanding of their duty to assist the court and not to be an advocate for any party as required in Rule 11-1. It does not change the traditional role of the expert but requires witnesses who provide opinions to turn their mind to their role each and every time they write or testify to an opinion. There should be no serious disagreement that such a modest requirement intended to promote the integrity of the administration of justice is a welcome addition to our Rules.

Ultimately however, the expert is required to defend her opinion and while technically not advocating for any party the expert is advocating an opinion that will help one party's position (presumably the party who retained the expert) and will damage that of the adverse party. It is an inescapable conclusion that the purpose of tendering opinion evidence in the zero-sum environment of litigation is for the retained expert's opinion to prevail. It is precisely because of this dynamic that I suggest that certification and content requirements are essential to ensuring an awareness on the part of the independent expert to be objective both in writing the report and in the course of cross examination.

II. THE TREATING HEALTHCARE PROVIDER CONUNDRUM

It is worthwhile to take a step back and to make some semblance of order in the trial process. The role played by "fact" witnesses is straight forward. The persons who witnessed the accident or observed the plaintiff at the scene, the family members, friends and employers all of whom interacted before and/or after the accident will be called in order to establish the factual underpinnings necessary to establish or refute liability and to paint a picture of the plaintiff that will entitle the judge to determine liability and, if liability is found to perform the function of making an award in keeping with the principle of *restitutio ad integrum*.

The independent expert will typically have examined the plaintiff on one or two occasions and will have reviewed a body of documentary evidence including clinical records, consultation reports and test results. The independent expert will synthesize all of this, apply specialized knowledge and venture an opinion with respect to the etiology and extent of the plaintiff's injuries. In compliance with the SCCR this expert will disclose counsel's instructions and will provide the factual assumptions upon which the opinion is based, describe the research done, if any and will provide a list of the documents reviewed in order to render the opinion.

[2] *R. v. Abbey* [1982] SCR 24

In between these two specific types of witnesses are the healthcare providers who perhaps examined and treated the plaintiff for years before the accident and participated in the plaintiff's care following the accident either for a discrete period of time or from the time of injury through to trial. Each of these witnesses will have drawn on his or her expertise, not to render assistance to the court but to their patient. At the same time they will have made and recorded a variety of observations. Implicit in the role they play is the assumption that they will use their skill and knowledge to effect the best result for their patient. They are not examiners or investigators.

There is no appreciable risk in the course of treatment rendered before an action is commenced and continuing for perhaps years before trial, that diagnoses or treatments will be made or rendered for the purpose of persuading the court of the nature or severity of the plaintiff's injuries. While there is always the possibility that a plaintiff will feign or magnify symptoms in order to induce the treating healthcare provider to arrive at an opinion that will garner a greater award, that is not a reflection upon the integrity of the treater nor does it bear on the way in which the court ought to view treating experts. Cross examination is meant to counter such conduct.

In my experience it has always been difficult to truly view a GP or other treating professional's report as an expert report in the traditional sense. The provider will give a narrative of observations, tests, consult reports and statements made by the plaintiff, all of which are drawn from the clinical records which are created as the patient's treatment progresses. Contemporaneous with the observations and receipt of test results and consult reports the provider will exercise professional judgment in arriving at a diagnosis or differential diagnosis that will then inform the type of treatment to be given to the patient. The "factual assumptions" in a Rule 11-3 report will invariably be drawn from the clinical records in the possession of counsel long before the 84 day deadline.

The trier of fact, after hearing all of the evidence will then be in a position to evaluate the lay witness testimony and the diagnoses of the treating healthcare providers against the opinion of the experts in order to make the findings necessary to reach a decision. These three distinct components of proof at trial, the lay witness, the independent expert and the treating expert all come together to provide the basis for the judge's decision. As referenced below, the treating primary care physician is not always called as a fact witness or as an expert. The absence of evidence from this source of information is often problematic particularly where clinical records are not introduced pursuant to a document agreement.

So, the overriding question is whether it is fair or necessary to require a treating provider to certify that an opinion is rendered to assist the court and that the treating provider is not an advocate for the plaintiff when in fact it was arrived at in order to determine a treatment protocol, irrespective of whether or not litigation is contemplated or ongoing,. Justice Simmons writing for the Ontario Court of Appeal in *Westerhof* ruled that it is not necessary.

III. ONTARIO AND BRITISH COLUMBIA RULES

Generally speaking the Ontario Rules 53.03, 4.1.01 and Form 53 track Part 11 of the SCCR. However, one potentially critical distinction is that rule 4.1.01 and Form 53, the form of expert certification in Ontario specifically refer to the expert being **"engaged"** by a party whereas our Rule 11-2(1) uses the word **"appointed"**. At paragraphs 80-84 Justice Simmons reviewed the evolution of the new expert rules in Ontario and held that use of the word "engaged" was designed to apply to a "specific class of witness and expert reports," namely those employed in the course of the litigation to render an opinion.

Justice Simmons refers to the engagement of an expert to underscore that there is a need to recognize different types of experts. In allowing Mr. Westerhof's appeal she found fault with the Divisional Court's characterization of witnesses as either being "fact" witnesses or "opinion" witnesses. She held that the court ought to characterize the witness based upon the role of the witness in the unfolding narrative of the case rather than the type of evidence tendered. Consistent with this concept she labelled treating physicians as **"participant"** experts and persons retained to render an opinion for trial as "**litigation"** experts. A third type of witness described as "non-party" experts are to be treated in the same fashion as participant experts; however, that categorization in a pure tort scheme does not appear to be relevant.

In order for the participant expert's testimony to be admissible it must be given based upon the witness' observation of or participation in the events and the witness must have 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.

It is arguable that an appointment of an expert has a more expansive meaning than engaging an expert witness. It is not infrequent that a party decides not to call a treating physician and thus declines to appoint her as an expert. Thus, it can be said without straining the definition that "appointing" an expert simply means to identify them as a person who will provide an opinion without the need that they be "engaged" for the purpose of presenting an opinion as that term is discussed in *Westerhof*.

Undoubtedly the concept of a participant expert as defined in *Westerhof* will be argued in British Columbia. It is impossible to say whether the issue will be determined on the basis of statutory interpretation but the general approach taken by our courts to the requirements in Part 11 of the SCCR in my view lead in the direction of maintaining the requirement that all expert opinion evidence meets those requirements without regard to whether the witness is a participant or litigation expert.

By way of example, Madam Justice Saunders in *Healey v. Chung*[3] writing for the court held that in order for any opinion to be admissible it must contain the "essential components of qualifications, education, experience, information and assumptions upon which the opinion is

[3] *Healey v. Chung* [2015] B.C.J. No. 158 (CA)

based, the instructions given, and the research" in order to "justify receipt of the report as an exception to the hearsay rule." While *Healey* dealt with a factually distinct scenario the court seems to focus on the distinction between "opinion" and "fact."

IV. POLICY CONSIDERATIONS

The Canadian Defence Lawyers Association submitted a factum in *Westerhof.* The argument focussed on several factors including that trial fairness requires the opposing party have proper notice of the opinion; that early disclosure by complying with expert report timelines is important to maintain; disclosure allows the court to better assess the range of opinions; the requirements in Rule 53.03 help eliminate potential bias; cross examination on qualifications where a full resume has been provided assists the court in determining whether the expert is properly qualified to testify and; service of reports which comply with the rule assists the court in discharging the gatekeeper function.

Justice Simmons rejected these arguments. Two of six reasons for rejecting the argument are relevant to this jurisdiction. First, in the case of participant experts there is generally early and complete disclosure of documents which disclose opinions made contemporaneously with treatment and second, that requiring compliance by participant witnesses will unduly add to the expense and time involved in bringing a matter to trial thus thwarting the intention of Rule 1-3. One could also add that in BC there is the ability to conduct a *Swirski* interview in many instances. In any event, Justice Simmons points out that the court always retains its gatekeeper function in relation to opinion evidence and may exclude part or all of proposed opinion evidence of a participant witness.

It is certainly arguable that trial fairness could be ensured without imposing the full requirements of Part 11 of the SCCR on participant experts. When the participant witness is a specialist such that fellowship training and experience may be crucial elements counsel could address the extent of disclosure required at a CPC or TMC. A party could nonetheless be required to give 84 days notice of its intention to call a participant expert and to identify the documents that pertain to the opinion. The requirement of contemporaneous observation and formation of opinion ensure that full disclosure of clinical records will provide the adverse party with the scope of the opinion. Venturing outside of what is disclosed in the records would not be permitted.

V. CONCLUSION

In order for a trier of fact to reach a just decision there must be rules that permit relevant information to be adduced and considered. The strict rules-driven approach to evidence has been chipped away by the Supreme Court of Canada over the past twenty years with the principled approach to evidence. When one considers the overarching object of the SCCR is to secure the just, speedy and inexpensive determination of every proceeding on its merits, it is difficult to conceive that a highly formulaic approach to opinion evidence developed outside of the litigation process can be sustained in the long run.

I do not see the evolution of the category of participant expert working an unfairness on the defendant. Invariably those same records that form the basis of such opinion are supplied to the defendant's litigation experts who will be mindful that their own opinions must be comprehensive – something that most expert reports already are, often to a fault. There is an artificiality to restricting the use of a treating physician's diagnosis and prognosis solely to explain the rationale for treatment rather than permitting the trier of fact to consider it for its truth in the fabric of all the evidence. The empirical data developed in the course of treatment is used by litigation experts to found their opinions. Surely it is possible and indeed desirable to permit the properly trained treating physician to present the ready-made inference he or she has arrived at in the discharge of their professional duties.