

Litigation - Canada

Participant and non-party experts exempt from expert witness requirements

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April 21 2015

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Introduction

In September 2014 the Ontario Court of Appeal heard three appeals that raised important questions involving expert witnesses. In *Moore v Getahun* the court examined the acceptable scope of interaction between counsel and experts in reviewing draft reports.⁽¹⁾ The court then ruled on two further cases, *Westerhof v Gee Estate* and *McCallum v Baker*.⁽²⁾

The legal issue in *Westerhof* and *McCallum* was whether participant experts and non-party experts could give opinion evidence without complying with Rule 53.03 of the Ontario Rules of Civil Procedure, which imposes a number of procedural safeguards for expert witnesses.⁽³⁾ The Ontario Court of Appeal held that the Divisional Court erred in concluding that the type of evidence (ie, fact or opinion) is the key factor in determining to whom Rule 53.03 applies. Rather, the court unanimously decided that participant experts and non-party experts may give opinion evidence without complying with Rule 53.03. According to the court, Rule 53.03 does not apply to the opinion evidence of a non-party expert or participant expert where he or she has formed a relevant opinion based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than the litigation.

Facts

In *Westerhof* the plaintiff proposed to call evidence from nine medical witnesses. From the outset, the trial judge ruled that the medical witnesses who had treated or assessed the plaintiff but who did not comply with Rule 53.03 would not be entitled to give opinion evidence concerning their diagnoses or prognoses – even though they had not been retained for the purpose of the litigation. Those witnesses were also prevented from giving evidence of the history they had taken from the plaintiff. The Divisional Court upheld the trial judge's conclusion. The Ontario Court of Appeal did not agree and reversed the decision, ordering a new trial.

In *McCallum* the defendant appealed the trial decision on the basis that, among other things, the trial judge erred by allowing witnesses who had not complied with Rule 53.03 to give "an avalanche" of opinion evidence.⁽⁴⁾ The Ontario Court of Appeal dismissed this appeal.

Ontario Court of Appeal decision

Justice Simmons, writing on behalf of the court, concluded that a witness with special skills, knowledge, training or experience who has 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 where:

- the opinion is based on the witness's observation of, or participation in, the events at issue; and
- the witness formed the opinion as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.⁽⁵⁾

Simmons also attempted to clear the confusion that often arises from referring to these witnesses as 'fact witnesses' because their evidence is derived from their observations of or involvement in the underlying facts. She preferred to refer to these witnesses as 'participant experts', which takes into account that in addition to providing evidence relating to their observations of the underlying facts, they may also give opinion evidence admissible for its truth.⁽⁶⁾ Simmons reiterated that – as with all evidence – the court retains its gatekeeper function regarding opinion evidence from participant experts and non-party experts.⁽⁷⁾

Simmons cited six important factors as reasons why the Divisional Court erred:

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- The Divisional Court failed to refer to a single case under the pre-2010 jurisprudence, which supports the conclusion that Rule 53.03 does not apply to opinion evidence given by participant experts. Simmons reiterated the court's view in *Moore* that "the 2010 amendments to Rule 53.03 did not create new duties but rather codified and reinforced... basic common law principles".⁽⁸⁾ Simmons found no basis for the Divisional Court to conclude that the pre-2010 jurisprudence did not continue to apply following the 2010 amendments to the Ontario Rules of Civil Procedure relating to expert witnesses.
- Apart from *Westerhof*, no cases were brought to the court's attention that supported the view that participant experts must comply with Rule 53.03 when giving evidence concerning treatment opinions.⁽⁹⁾
- One of the focuses of Justice Osborne's report on the Civil Justice Reform Project, which resulted in the 2010 amendments to the rules, was litigation experts (ie, expert witnesses engaged by or on behalf of a party to provide opinion evidence in relation to a proceeding).⁽¹⁰⁾ This is distinct from participant experts or non-party experts, whose evidence is relevant because of their observation of or participation in events underlying the litigation. Simmons found nothing in Osborne's report that indicated an intention to address participant experts or non-party experts.⁽¹¹⁾
- The use of the words "expert engaged by or on behalf of a party to provide [opinion] evidence in relation to a proceeding" in Rule 4.1.01 and Form 53 makes it clear that an expert must be "engaged by or on behalf of a party to provide [opinion] evidence in relation to the proceeding before the rule applies".⁽¹²⁾ Simmons concluded that witnesses – albeit ones with expertise – testifying to opinions formed during their involvement in a matter do not come within this description.⁽¹³⁾ They are not engaged by a party to form their opinions and do not form them for the purpose of the litigation.
- Simmons was not persuaded that disclosure problems exist in relation to the opinions of participant experts and non-party experts, such that they must comply with Rule 53.03. These experts often prepare documents summarising their opinions on the matter contemporaneously with their involvement; these can be obtained as part of the discovery process. In addition, a party can seek disclosure of any opinions, notes or records of participant experts and non-party experts on which the opposing party intends to rely at trial.⁽¹⁴⁾
- Requiring participant witnesses and non-party experts to comply with Rule 53.03 can only:
 - add to the cost of the litigation;
 - create the possibility of delay because of potential difficulties in obtaining Rule 53.03 compliant reports; and
 - add unnecessarily to the workload of persons not normally expected to write Rule 53.03-compliant reports.⁽¹⁵⁾

Comment

Westerhof provides welcome clarification by the Ontario Court of Appeal regarding which expert witnesses must comply with Rule 53.03. If the proffered expert is a litigation witness specifically retained by a party to provide opinion evidence in respect to an issue in dispute, Rule 53.03 applies. If the expert witness is a non-party expert or a participant expert (formerly referred to as a fact witness), such as a treating physician, the expert may give evidence without complying with Rule 53.03, provided that his or her testimony does not stray beyond the limits imposed by the court. Although the witnesses at issue in both *Westerhof* and *McCallum* were physicians, this decision will have broad implications outside of personal injury cases. In addition, given that the principles of expert independence are similar in many common-law jurisdictions, both within and outside Canada, this decision (together with *Moore*) will likely have significant impact outside Ontario.

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Endnotes

(1) 2015 ONCA 55.

(2) 2015 ONCA 206.

(3) Rules of Civil Procedure, RRO 1990, Reg 194, Rule 53.03.

(4) *Westerhof*, *supra* note 2 at para 17.

(5) *Ibid* at para 60.

(6) *Ibid* at para 61.

(7) *Ibid* at para 64.

(8) *Ibid* at para 73.

(9) *Ibid* at para 74.

(10) Civil Justice Reform Project: Summary of Findings and Recommendations (Toronto: Ontario Ministry of the Attorney General, 2007).

(11) *Westerhof*, *supra* note 2 at paras 77-79.

(12) *Ibid* at para 80.

(13) *Ibid* at para 82.

(14) *Ibid* at para 85.

(15) *Ibid* at para 86.

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