LITIGATION - CANADA

"Gimme shelter": expert testimony immunity

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The recent decision of the Ontario Superior Court of Justice in *Paul v Sasso*(1) reaffirmed the principle that a testifying expert enjoys immunity from a subsequent lawsuit arising out of the testimony that he or she has previously given in court. The decision is a breath of fresh air for all experts, but particularly those routinely engaged in litigation.

Shareholder valuation and oppression action

The plaintiffs held minority interests in a company that owned a century-old hotel in Thunder Bay, Ontario. After falling out with the majority shareholders, the plaintiffs brought an action to have their shares valued and for damages, alleging that the majority shareholders had acted in an oppressive manner.

The trial lasted 13 days and a number of experts were called to give evidence before the court regarding the valuation of the hotel on a specific date and the consequent value of the shares in the company that owned the hotel. In its reasons for judgment, the court rejected the evidence tendered by the plaintiffs' appraisal and valuation expert. There was a subsequent appeal and cross-appeal whereby the Ontario Divisional Court agreed with the determined value of the hotel, but varied the valuation of the shares. Those issues were not brought before the Ontario Superior Court in the subsequent proceeding.

Negligence action

After the Ontario Divisional Court rendered its decision, the plaintiffs sued the appraisal and consulting expert who had testified at trial, but whose evidence was not accepted by the trial judge.(2) The appraisal and valuation expert promptly moved for summary judgment, dismissing the negligence action against him.

Summary judgment motion

In granting partial summary judgment dismissing the plaintiffs' action against the appraisal and valuation expert, the Ontario Superior Court set out the following salient background facts regarding the theory of liability that the plaintiffs asserted against the appraisal and valuation expert, whose evidence was rejected in the shareholder valuation and oppression action:

> *"The moving party defendants,...'Lansink Appraisals and Consulting' have brought this motion for summary judgment to dismiss the negligence claim brought against them by the plaintiffs. The plaintiffs claim that Mr. Lansink breached his professional duties to them in providing expert evidence at a trial. The trial judge considered but ultimately rejected substantially all of Mr. Lansink's conclusions regarding the valuation of the plaintiffs' shares and made adverse comments regarding his lack of objectivity*. The moving parties are asking me to dismiss the action in light of their claimed witness immunity. *Wellington is also seeking*

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summary judgment in respect of outstanding invoices totaling $24,086.81 in regards to Mr. Lansink's testimony at trial.

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The trial was heard by Nolan J. over a total of 13 days between February 19 and May 27, 2013. Mr. Paul gave his own evidence of value of the hotel business in addition to three other experts (including Mr. Lansink). Nolan J. commented on the valuation evidence before her as follows in her reasons for judgment (at paras. 55 and 56):

[55] The court was presented with three different opinions of value of the Hotel as of Valuation Day prepared by experts qualified to give such opinions. Every valuation used either an income approach or combined income and market comparison approach. As referred to earlier in this judgment, Mr. Paul prepared his own valuation of the Hotel even though he is not a qualified appraiser. In my view, it was presumptuous of him to take that approach to providing the court with evidence required to determine a proper share valuation. His report was not helpful and the presentation of his 'opinions' resulted in a considerable waste of court time, both in terms of direct and cross-examinations. While Mr. Paul is an experienced real estate broker who has considerable knowledge about the buying and selling of hotels, his views as an interested party are of no value to the court. The fact that he assigned the highest value to the Hotel was not surprising, given his interest in the outcome.

[56] Mr. Paul's presentation of a report had another unfortunate result. His own expert, Mr. Lansink, made reference to various aspects of Mr. Paul's 'findings' in his technical report prepared to respond to the defendants' experts' reports to rebut their opinions. In doing so, it brought Mr. Lansink's objectivity into serious question." (Emphasis added.)

The court then summarised the position of the plaintiffs in the negligence action as follows:

"In the present proceeding, the plaintiffs complain that as lay people they did not know or appreciate that their participation in the appraisal process would invalidate the testimony of Mr. Lansink. Mr. Lansink and Wellington are said to have been negligent and to have breached the terms of their engagement as well as the terms of the Canadian Uniform Standards of Professional Appraisal Practice in failing to provide an unbiased and professional technical review report. Mr. Lansink was also alleged to have lied to the trial judge about the extent of his discussions with the plaintiffs, an entirely extraneous allegation to which I shall return in more detail below. The damages sought from Mr. Lansink and Wellington are $506,000 almost all of which represents the difference between the share value as found by Nolan J. and the value ascribed to those same shares by Mr. Lansink in his expert report." (Emphasis added.)

Witness immunity

The court then examined the case law regarding witness immunity as follows:

"Our courts have long held as a fundamental principle that witnesses and parties are entitled to absolute immunity from subsequent liability for their testimony in judicial proceedings since the proper administration of justice requires the full and free participation of witnesses unhindered by fear of retaliatory suits: *Reynolds v. Kingston (Police Services Board), 2007 ONCA 166 (CanLII), 84 O.R. (3d) 738 at para. 14. The privilege extends to evidence orally or in writing, it includes documents properly used and regularly prepared for use in the proceedings and is not limited to defamation actions but extends to any action, however framed: Samuel Manu-Tech Inc. v. Redipac Recycling Corporation, 1999 CanLII 3776 (ON CA) at paras. 19-20 and Salasel v. Cuthbertson, 2015 ONCA 115 (CanLII). The privilege has been applied in particular to expert reports and evidence given based upon the report at trial: Fabian v. Margulies, 1985 CanLII 2063 (ON CA).*

I can see no principled reason why the privilege should be confined to adverse witnesses. The policy of the common law to ensure that all witnesses are able to give their evidence free of

> fear of retaliatory law suits is not diminished when considered from the perspective of a party's own expert witness. To the contrary, the very strong policy of the common law has been that a party's own expert must be objective and not become a 'hired gun'. Rule 53.03(2.1) of the Rules of Civil Procedure requires an expert to certify his or her understanding of the duties of an expert." (Emphasis added.)

The court commented on the harm that would follow if parties were at liberty to sue experts whom they had previously retained to testify at trial, as follows:

> "The harm that could follow from allowing parties to pursue their own experts for alleged breaches is amply illustrated by the facts of this case. Nolan J. has made a binding determination of the value of the shares of 1433295 formerly owned by the plaintiffs. That decision is binding upon them and has not been set aside or reversed on appeal. Substantially the entire subject matter of the plaintiff's case amounts to a de facto appeal of the decision of Nolan J. The damages sought are based on the value of the shares *not found* by Nolan J. and the costs to the plaintiff of that unsuccessful litigation. Nolan J. had the issue of value before her and weighed the testimony of all of the witnesses. Her determinations bind the plaintiffs and cannot be questioned through the back door by means of a subsequent civil suit. The principle of finality strongly supports the application of the common law immunity in this case. The question of what the result would have been if Mr. Lansink had been accepted as fully independent can neither be asked nor answered in another proceeding."

However, the court did leave the issue of the appraisal and valuation expert's entitlement to his fees for professional services to be determined on the trial of the expert's counterclaim:

> "*This finding does not mean that the question of whether Mr. Lansink's alleged breach of contract and of duty to be fully independent is not justiciable. As shall be seen below, I have concluded that the alleged breach of contract and duty may well sustain a defence to the counterclaim in this case.* It does not follow that Mr. Lansink's immunity from civil suit confers upon him a question-free right to be paid for his services in all circumstances. However, the immunity principle does mean that damages claims that are directly or indirectly premised upon the results of the trial before Nolan J. and what might have been had it gone otherwise cannot proceed. Since the claim against Mr. Lansink and Wellington in the plaintiffs' action is based upon that premise, the claim cannot succeed and these two defendants are entitled to judgment releasing them from the action to that extent at least." (Emphasis added.)

In the result, the court granted summary judgment striking out the plaintiffs' negligence claim against the appraisal and consulting expert to the extent that it was based on the expert's previous testimony in court, but left to be determined at trial that expert's counterclaim for his fees for professional services. The court reasoned as follows:

> "*It is clear that the breaches of duty alleged by the plaintiffs (defendants by counterclaim) go to the root of the retainer of Wellington*. I am of the view that witness immunity can properly be used as a shield by Mr. Lansink to avert liability on the plaintiff's claim but cannot be used as a sword by Wellington to preclude the Pauls from defending Wellington's counterclaim on the basis of the alleged breaches of contract and negligence. *The policy grounds that prevent the plaintiffs from suing their own expert witness for consequential damages are of no application to defending a claim for professional fees brought by an expert witness. I am drawing for this purpose no relevant distinction between Mr. Lansink (who was the actual witness) and Wellington (the company through which he billed his services). If properly demonstrated, these breaches may well provide a defence to some or all of the damages claimed by Wellington*." (Emphasis added.)

Comment

This decision is a welcome development for experts and a reminder to parties that a court facing diverging expert opinions must choose one expert's testimony over another without it necessarily being implied that the testimony of the unsuccessful party's expert was rendered negligently. Even in instances where a court may cast aspersions on an expert, or the testimony of an expert, this will not

ground a subsequent action by the party which engaged that expert.

For further information on this topic please contact Norm Emblem, Joseph Pignatelli or Josh Shneer at Dentons Canada LLP by telephone (+1 416 863 4511) or email (norm.emblem@dentons.com, joseph.pignatelli@dentons.com or josh.shneer@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

(1) 2016 ONSC 7488.

(2) The plaintiffs also sued a law firm who did not join in the motion for summary judgment before Dunphy.
