EXPERT WITNESSES

The Ontario Court of Appeal Provides Guidance on Communications by Counsel With Expert Witnesses

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Introduction

On January 29, 2015, the Ontario Court of Appeal released its highly anticipated decision in *Moore v. Getahun*.[1] In the lower court's controversial decision released last year, the trial judge criticized the practice of counsel reviewing draft expert reports and communicating with experts. The trial judge stated that counsel should not review or comment on draft expert reports because of the risk that such reports could be shaped by the views expressed by counsel. This caused considerable concern in the legal profession, as well as in the community of expert witnesses.

The Court of Appeal disagreed with the lower court and ruled that it is quite proper and indeed, often necessary, for lawyers to aid expert witnesses with drafting their reports. The Court clarified that the 2010 amendments to Rule 53.03 of the Ontario *Rules of Civil Procedure*[2] did not change the existing common law duties of an expert witness; rather, the amendments merely codified the existing common law principles. A summary of the decisions in both levels of court follows, along with a discussion of the principles derived from the Court of Appeal's decision.

Decision of the Trial Judge

In *Moore*, the plaintiff commenced a personal injury action against various medical staff at a hospital on the basis that they were negligent in treating an injury. At trial, there were several evidentiary issues with respect to expert evidence, including whether it is appropriate for counsel to review draft expert reports and provide input. The controversy concerned one 90-minute telephone call between counsel and an expert regarding his draft report. The trial judge found this communication improper in light of the recent amendments to Rule 53.03. In particular, she stated that "counsel's prior practice of reviewing draft reports should stop. Discussions or meetings between counsel and an expert to review and shape a draft expert report are no longer acceptable."[3] She further found that following submission of an expert report, where counsel believes that there is need for clarification or amplification, "any input whatsoever from counsel should be in writing and should be disclosed to opposing counsel."[4]

The decision of the lower court was soon the subject of much discussion in the legal community and not because of any remarkable facts; rather, attention was given as a result of the upheaval to the general practices surrounding expert witnesses. Indeed, the general consensus was that the trial decision in *Moore* went too far by imposing categorical rules that apply in all cases for the purpose of safeguarding the independence and objectivity of testifying experts.[5] The appeal to the Court of Appeal for Ontario was welcomed and a number of parties intervened in support of the position that reviewing draft expert reports should be permissible, without attempting to undermine or persuade the expert.[6] It was hoped that these issues would be clarified by Ontario's highest court.

[1] *Moore v. Getahun*, 2015 ONCA 55.

[2] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[3] *Moore v. Getahun*, 2014 ONSC 237 at paragraph 50.

[4] Ibid. at paragraph 51.

[5] See The Advocates Society, Communications with Experts Task Force, *Position Paper on Communications with Testifying Experts* (June 2014), online: The Advocates Society, http://www.advocates.ca/assets/files/pdf/news/The%20Advocates%20Society%20-%20Position%20Paper%20on%20Communications%20with%20Testifying%20Experts.pdf.

[6] The interveners included the Criminal Lawyers' Association, the Ontario Trial Lawyers Association, The Holland Group, the Canadian Defence Lawyers Association, the Canadian Institute of Chartered Business Valuators, and the Advocates' Society.

Court of Appeal Decision

As many expected, the Court of Appeal rejected the trial judge's holding that counsel should no longer review draft reports with experts, as well as her holding that all changes in the reports of expert witnesses should be routinely documented and disclosed. The decision of Justice Sharpe, speaking for the majority, restores the commonly understood role of experts, which is to provide opinion evidence that is fair, objective, and non-partisan. The key points of Justice Sharpe's decision are discussed below.

(i) Discussions Between the Expert Witness and Counsel

Although the Court of Appeal ultimately dismissed the appeal, holding that the determinations made on the expert evidence issue by the trial judge did not affect the actual outcome of the trial, Justice Sharpe held that the trial judge erred in holding that it was improper for counsel to assist an expert witness in the preparation of the expert's report. Justice Sharpe stated that "the ethical and professional standards of the legal profession forbid counsel from engaging in practices likely to interfere with the independence and objectivity of expert witnesses" and that "it would be bad policy to disturb the well-established practice of counsel meeting with expert witnesses to review draft reports."[7] Given the crucial role that counsel plays by explaining the legal issues to the expert witness, and then presenting complex expert evidence to the court, Justice Sharpe found that it would be difficult to envisage how counsel could perform this role without engaging in communication with the expert as the report is being prepared.[8]

(ii) Continuous Disclosure Obligations

Justice Sharpe then went on to consider the extent to which consultations between counsel and expert witnesses need to be documented and disclosed to an opposing party. He recognized that although litigation privilege attaches to expert reports, such privilege is not absolute and thus, disclosure may be required in certain situations. Some situations are more obvious than others, such as disclosure of the expert's report (where the party intends to call the expert to testify), as well as disclosure of the expert's foundational information pursuant to Rule 53.03(2.1). "Foundational information" has been restricted to material relating to formulation of the expressed opinion, and may include (list not exhaustive):

- instruction letters to experts by the lawyers, or if non-existent, a memorandum outlining the instructions;
- expert's notes of any meetings that reflected information the expert obtained that formed part of the foundation of the opinion – factual or by assumption; or
- an outline from the expert of any assumptions he or she was advised to make, along with particulars of texts, articles, and case law relied on.

However, Justice Sharpe cautioned against a trial judge requiring wide-ranging disclosure of all solicitor-expert communications and draft reports. With respect to these types of documents, Justice Sharpe held that absent a factual foundation to support a reasonable suspicion that counsel improperly influenced the expert, a party should not be allowed to demand production of draft reports or notes of interactions between counsel and expert witnesses.[9] Thus, where the party seeking production of draft reports or notes of discussions between counsel and an expert can show reasonable grounds to suspect that counsel communicated with an expert witness in a manner likely to interfere with the expert witness's duties of independence and objectivity, the court can order disclosure of such discussions. This appears to be a high threshold for the party seeking disclosure to meet.[10]

In Justice Sharpe's view, making preparatory discussions and drafts subject to automatic disclosure would be contrary to existing doctrine and would inhibit careful preparation. Further, compelling production of "all drafts,

[7] Supra note 1 at paragraph 57.

[8] Ibid. at paragraph 64.

[9] Ibid. at paragraph 78.

[10] The example provided by Justice Sharpe was a case where a trial judge ordered disclosure of draft reports and affidavits after an expert witness testified that he did not draft the report or affidavit containing his expert opinion and admitted that his firm had an ongoing commercial relationship with the party calling him: ibid. at paragraph 77.

good and bad," would discourage parties from engaging experts to provide careful and dispassionate opinions, but would instead encourage partisan and unbalanced reports. Moreover, allowing open-ended inquiry into the differences between a final report and an earlier draft would run the risk of needlessly prolonging proceedings.[11]

(iii) Use of the Expert Report During Cross-examination

Finally, Justice Sharpe clarified the use to which the trial judge can make of expert reports at trial when the expert testifies *viva voce*. In order for counsel to attempt to impeach an expert witness between inconsistencies in the report and his or her *viva voce* evidence, Justice Sharpe stated that counsel must enter the expert's report into evidence as an exhibit. Any inconsistencies must then be put to the expert witness so that he or she can have an opportunity to explain or clarify any apparent discrepancies. This is a matter of trial fairness. Accordingly, if the expert witness was not cross-examined as to an inconsistency between his or her *viva voce* evidence and the contents of his or her report, it is not open to a trial judge to place any weight in assessing the expert's credibility on this perceived inconsistency.[12]

Conclusion

The Court of Appeal's decision in *Moore* seems to have lifted the haze caused by the trial judge's decision and clarified the role of the expert and the manner in which expert reports are to be prepared under the 2010 amendments to Rule 53.03 of the Ontario *Rules of Civil Procedure.* The Court of Appeal took the opportunity to confirm the following principles:

1. Counsel has a role in assisting experts to provide a report that satisfies the criteria of admissibility, as well as the duties reflected under Rule 4.1.01, which includes:
   - ensuring that the expert witness understands matters such as the difference between the legal burden of proof and scientific certainty;
   - clarifying the facts and assumptions underlying the expert's opinion;
   - confining the report to matters within the expert witness's area of expertise; and
   - assisting the expert in not usurping the court's function as the ultimate arbiter of the issues.
2. The law currently imposes no routine obligation to produce draft expert reports. The general rule with respect to draft reports and communications with counsel is that absent a factual foundation to support a reasonable suspicion that counsel improperly influenced the expert, a party should not be allowed to demand production of draft reports or notes of interactions between counsel and an expert witness.
3. In order to impeach the expert witness on cross-examination at trial, the following rules must be adhered to:
   (1) the expert report must be entered into evidence as an exhibit prior to any attempt to impeach the expert witness on apparent inconsistencies between his or her report and *viva voce* evidence; and
   (2) the expert witness must be confronted by opposing counsel with the contradictions during cross-examination so that he or she has the opportunity to explain or clarify the apparent inconsistencies.

If an expert's report has not been entered into evidence as an exhibit, it has no evidentiary value, even if provided to the trial judge as an *aide memoire*.

Although some clarity has now been provided with respect to how these issues may be dealt with by courts going forward, it will be interesting to see how the lower courts proceed to interpret disclosure requirements in future cases. In particular, what types of documents are included under the rubric of "draft reports or notes of interactions between counsel?" Does this include all working documents contained in the expert's file, including the expert's dockets[13] and all accounts

[11] Ibid. at paragraph 71.

[12] Ibid. at paragraph 86.

[13] See *Alfano v. Piersanti* (2009), 175 ACWS (3d) 1012 (O.N.S.C.), varied on other grounds 2015 ONCA 55.

rendered by the expert?[14] Or is it subject to a much more limited interpretation such that only draft reports and notes (handwritten or otherwise) are included? The Court of Appeal did not provide any specifics in this regard and so it remains to be seen whether the lower courts will apply a narrow or broad interpretation to this limitation on disclosure.

[14] See *Bookman v. Loeb*, 2009 CarswellOnt 3796 (S.C.J.).