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Moore v Getahun: lawyers are not permitted to review and shape draft expert reports

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Introduction

The recent decision of the Ontario Superior Court of Justice in *Moore v Getahun*(1) will have major implications on the practice of lawyers reviewing draft expert reports. As a medical malpractice case in which liability was determined primarily on issues of standard of care and causation, *Getahun* is perhaps most important for Justice Wilson's pronouncement 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".(2)

Facts

The plaintiff, Blake Moore, and his friends were performing tricks on their motorcycles in a parking lot. The plaintiff attempted to perform a wheelie, but lost control of his motorcycle and crashed into a parked vehicle. The plaintiff suffered a high-impact fracture to his right wrist and was taken to the emergency department at the Scarborough General Hospital.

At the hospital, X-rays confirmed that the plaintiff's wrist was broken. The defendant, Dr Tajedin Getahun, met with the plaintiff and performed a closed reduction to his wrist. A closed reduction is a medical procedure to return a fractured or broken bone to the correct anatomical position. After the closed reduction, the defendant applied a closed circumferential cast to the plaintiff's right lower arm.

After applying the cast, the defendant ordered further X-rays of the plaintiff's wrist. The second set of X-rays indicated that the lunate facet was not properly aligned in the plaintiff's wrist. Treatment options were then discussed. The defendant recommended bone graft surgery – a procedure that would take a piece of bone from the plaintiff's hip to replace the crushed fragments in the plaintiff's wrist.

The plaintiff and the plaintiff's father were concerned about the defendant's youth and inexperience, along with the seemingly drastic nature of the bone graft, and requested a second medical opinion. The defendant informed the plaintiff that he had one week to obtain a second opinion and proceed with surgery.

The plaintiff complained about significant pain after the application of the cast, but was told by the defendant that it was normal to experience pain and swelling for a period of two to three days after a high-impact injury. There was no discussion about compartment syndrome – a serious condition resulting from expanded tissue within the anatomical enclosure that creates pressure and interferes with blood circulation. Compartment syndrome can lead to muscle necrosis and the loss of a limb. The plaintiff was simply provided with a pamphlet about cast care and left the hospital without being informed about the legitimate risk of complications from his high-impact injury.

The next day, the plaintiff was in excruciating and throbbing pain. The plaintiff's father took the plaintiff to North York General Hospital. The emergency room physician, Dr Russell Tanzer, observed that the plaintiff's cast had been applied too tightly and made a preliminary diagnosis of compartment syndrome. Tanzer ordered removal of the cast

and contacted Dr Emil Orsini, who performed emergency surgery.

After the surgery, Orsini spoke to the plaintiff's father and informed him that the application of the closed circumferential cast was improper and had caused the development of compartment syndrome. Orsini passed away before trial. The plaintiff was left with permanent damage to his right wrist, which included extensive scarring and limited range of motion. He sued the defendant, among others, for negligence.

Expert witnesses: qualifications and credibility

The court took the opportunity in *Getahun* to review several issues related to expert witnesses. The admissibility of expert evidence is subject to the criteria outlined by the Court of Appeal for Ontario in *R v Abbey*(3):

> *"(i) a properly qualified expert,*
>
> *(ii) absence of any exclusionary rule,*
>
> *(iii) relevance, and*
>
> *(iv) necessity in assisting the trier of fact."*(4)

Counsel agreed that each expert was properly qualified to provide testimony. Therefore, the court focused its analysis on issues of credibility. The court referred to *Dulong v Merril Lynch Canada Inc*(5) for the following factors in considering the expert witnesses' comparative reliability and credibility:

- *"The proposed expert's professional qualifications.*
- *Actual experience.*
- *Participation or membership in professional associations.*
- *The nature and extent of his or her publications.*
- *Involvement in teaching.*
- *Involvement in courses or conferences in the field and his or her efforts to keep current with the literature.*
- *Whether the expert has previously been qualified as an expert in the area."*(6)

In addition to the factors in *Dulong*, the court posed the following questions to guide its assessment of the expert evidence:

- *"Is the witness fair and impartial in the report presented and in the evidence given?*
- *Is the expert's report and oral evidence consistent?*
- *Is the expert's opinion clearly set out in the report, including the facts and documents underpinning the opinion?*
- *Do the conclusions logically flow from the facts?*
- *Are alternative theories canvassed?*
- *Does the expert make concessions in the report where appropriate that may not be helpful to the party who retains him or her?*
- *Are the facts relied upon by the expert confirmed in the evidence at trial?*
- *Does the expert make reasonable concessions in his or her viva voce evidence if the facts are not as he or she assumed them to be?*
- *Does the witness provide balanced evidence that is neutral, or is he or she dogmatic and fixed in his or her opinion?*
- *Does it appear that the witness [is] aligned with one party's position, assuming the role of an advocate, rather than [acting] as a neutral witness with a duty to the court?*
- *Is there an appearance of bias, or is there evidence of actual bias?"*(7)

Improper for counsel to discuss and change draft expert reports

Dr Ronald Taylor testified as an expert witness on behalf of the defendant. During the course of the trial, Taylor was asked questions about various draft reports in addition to notes of a one-and-a-half-hour telephone conversation with defence counsel.

Taylor testified that defence counsel made "suggestions… of what to put in" his expert report.(8) The doctor adjusted his report to include "the corrections over the phone".(9) Although Taylor sought to downplay the nature of counsel's corrections, the court determined that some content which was helpful to the plaintiff was deleted or modified.

The court adopted a purposive approach to expert witnesses under the Ontario Rules of Civil Procedure.(10) The 2010 amendments established that the duty of an expert is to the court and not to the parties. An expert is required to provide opinion evidence that is

fair, objective and non-partisan.(11) According to the court:

> *"The 2010 amendments to the Ontario rules were to address the hired 'gun approach' to expert evidence, and to emphasize the importance of expert witness independence and integrity.*
>
> *The practice formerly may have been for counsel to meet with experts to review and shape expert reports and opinions. However, I conclude that the changes in Rule 53.03 preclude such a meeting to avoid perceptions of bias or actual bias. Such a practice puts counsel in a position of conflict as a potential witness, and undermines the independence of the expert.*
>
> *If counsel seeks clarification or amplification after receipt of an expert's final report, all communication should be in writing, and any communication should be disclosed to the opposing party."*(12)

Taylor's credibility was compromised as he obviously viewed his obligations as being to the defence rather than to the court.(13) In the result, the court preferred the evidence of the plaintiff's expert, Dr Robin Richards, who provided a fair and unbiased opinion. The court underscored Richards' independence and neutrality, as he made concessions where appropriate and offered non-partisan testimony.(14)

Standard of care

In a medical malpractice case, the plaintiff bears the burden of proving on a balance of probabilities that the defendant's conduct fell below the standard of care of a reasonable and prudent medical professional with the same training and experience in the circumstances.(15)

The court referred to the decisions in *Bafaro v Dowd*(16) and *Morin v Korkola*(17) for a summary of the legal principles applicable to the standard of care for medical practitioners:

- *"An unfortunate outcome does not constitute negligence. Physicians are obliged to provide certain means, not a certain result. Courts must not judge a physician's treatment by its result.*
- *Physicians should not be held liable for mere errors in judgment, only professional faults. An error in judgment is distinct from acts of unskillfulness, carelessness, or lack of knowledge. An error in judgment is not negligence where the physician exercises clinical judgment. The law requires reasonable care, not perfection. Even reasonable doctors make mistakes.*
- *Courts must not judge a physician's conduct with hindsight. Physicians are not liable for mistakes that are apparent only after the fact. Courts must assess a physician based on the knowledge that a physician ought to reasonably possess at the time of the alleged act of negligence.*
- *Courts may give significant weight to a professional's invariable practice. If a person claims that he invariably performs a certain task in a certain way, this is evidence that he performed that task in that way on the day in question.*
- *A physician should not be held liable for a treatment decision based on unreliable patient data when its unreliability was neither known to him nor discoverable by him upon reasonable inquiry at the critical time.*
- *The trier of fact may determine that the standard of care itself is inherently negligent. The standard practice must be '"fraught with obvious risks" such that anyone is capable of finding it negligent, without the necessity of judging matters requiring diagnostic or clinical expertise':* ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, at para. 41.*
- *Courts often require expert evidence in medical malpractice cases due to the specialized knowledge of the medical profession. Courts should use expert evidence when the issues to be decided involve diagnostic or clinical skills that are not within the trier of fact's ordinary knowledge and experience."*(18)

The decision of Justice Carpenter-Gunn in *Bafaro* provides specific principles in respect of the consideration of expert evidence in medical malpractice cases:

- *"Courts must be particular about accepting expert evidence in assessing the standard of care. Medical specialists should not opine on the standard of care of specialists in other areas: see e.g.* Alakoozi v. Hospital for Sick Children *(2002), 117 A.C.W.S. (3d) 828 (Ont. S.C.), aff'd (2002) 187 O.A.C. 187 (C.A.).*
- *Practice guidelines are not equivalent to the legal standard of care. Practice guidelines may be relevant to the court's assessment of the standard of care. However, they cannot determine the legal standard of care for a specific medical professional, especially when there is expert evidence on the standard of care with reference to the particular facts of the case.*
- *An expert's personal practice is not the standard of care.*

- *If there are different techniques available to treat the same medical condition, a physician may exercise his discretion to determine the best course of treatment for that particular patient. In* Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351, at para. 31, L'Heureux-Dubé J. states that 'a doctor will not be found liable if the diagnosis and treatment given to a patient correspond to those recognized by medical science at the time, even in the face of competing theories.' In* Connell v. Tanner *(2002), 158 O.A.C. 268, at para 1, Laskin J.A. writes, 'a doctor who treats a patient in accordance with a respectable body of medical opinion — even if it is a minority opinion — will not normally be held liable in negligence.'"* (19)

The court, not expert witnesses, ultimately determines the standard of care. If there are conflicting expert opinions, then the trier of fact must weigh the comparative strength of the conflicting testimony.(20)

The court accepted Richards' evidence and determined that the defendant's conduct fell below the acceptable standard of care.The application of a closed circumferential cast could not accommodate the inevitable swelling in the plaintiff's wrist. After reviewing the X-rays, the defendant should have removed the cast and applied either a splint or a bivalved cast that was split to the skin. These measures would have accommodated the anticipated swelling from the plaintiff's high-impact injury.(21)

The court also determined that the defendant had failed to educate and warn the plaintiff about the enhanced risk of complications from his high-impact injury. In the circumstances, it was incumbent on the defendant to warn the plaintiff about the possible development of compartment syndrome rather than simply providing assurances that pain and swelling were normal for a few days.(22)

Causation

To establish liability, a plaintiff must prove that the defendant's breach of the standard of care caused the plaintiff's injury. This is a factual inquiry. In most medical malpractice cases, the 'but for' test is the applicable analysis to establish causation.

According to the court, the:

> *"defendant's negligence must only be a cause, not the cause. There may be multiple "but for" tortious and non-tortious causes of the injury… As long as the defendant is a necessary cause of the injury, the defendant is liable, even though his act alone was not sufficient to create the injury."*(23)

The court once again accepted the testimony of the plaintiff's expert. On the facts, 'but for' the application of the full circumferential cast to the plaintiff's injury, which could not accommodate the anticipated swelling, the compartment syndrome would not have developed.(24)

Comment

Medical malpractice and other professional liability cases are often won and lost on the relative strength of the parties' expert witnesses. *Getahun* warns counsel that it is no longer appropriate to review and edit draft expert reports. After submission of an expert's final report, any corrections, suggestions or clarifications made by counsel should be disclosed to the opposing party in writing. In practice, the decision in *Getahun* may have unintended consequences as counsel attempt to determine whether certain edits are substantive or stylistic.

For further information on this topic please contact Norm Emblem or Ara Basmadjian at Dentons Canada LLP by telephone (+1 416 863 4511), fax (+1 416 863 4592) or email (norm.emblem@dentons.com or ara.basmadjian@dentons.com). The Dentons website can be accessed at www.dentons.com .

Endnotes

(1) *Moore v Getahun*, 2014 ONSC 237.

(2) *Ibid* at para 50.

(3) *R v Abbey*, 2009 ONCA 624.

(4) *Getahun*, *supra* note 1 at para 250, citing *Abbey*, *supra* note 3 at para 75.

(5) *Dulong v Merril Lynch Canada Inc* (2006), 80 OR (3d) 378.

(6) *Getahun*, *supra* note 1 at para 253, citing *Dulong*, *supra* note 5 at para 21.

(7) *Getahun*, *supra* note 1 at para 255.

(8) *Ibid* at para 289.

(9) *Ibid*.

(10) Rules of Civil Procedure, RRO 1990, Reg 194.

(11) Rule 4.1 and Rule 53.03.

(12) *Getahun*, *supra* note 1 at paras 297-299.

(13) *Ibid* at para 300.

(14) *Ibid* at para 325.

(15) *Ibid* at para 327.

(16) *Bafaro v Dowd*, 2008 CanLII 45000 [*Bafaro*].

(17) *Morin v Korkola*, 2011 ONSC 1393 [*Morin*].

(18) *Getahun*, *supra* note 1 at para 331, citing *Bafaro*, *supra* note 16 at paras 24-43 and *Morin*, *supra* note 17 at para 20.

(19) *Getahun*, *supra* note 1 at para 332, citing *Bafaro*, *supra* note 16 at paras 32-38.

(20) *Getahun*, *supra* note 1 at para 333.

(21)*Ibid* at paras 392 and 397.

(22) *Ibid* at paras 408-409.

(23) *Ibid* at para 422 [emphasis in original].

(24) *Ibid* at para 511.

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