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Need Help Distinguishing *Beasley*?

by Stephen Taran
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The existing jurisprudence relating to whether an expert witness must comply with Rule 53.03 is in a state of flux (*McNeill v. Filthaut*, 2011 ONSC 2165 at para. 52).

In *Beasley et al. v. Barrand* (2010 ONSC 2095), the court in the tort trial denied the insurer's motion to: (a) file medical expert reports that were used in the statutory accident benefits claim, and (b) call the doctors who authored those reports as experts at trial. Each physician had only seen the plaintiff on one occasion approximately seven years prior to the trial. The court held that non-compliance by the defence with the newly enacted Rule 53.03 was fatal to its motion. Rule 53.03 (2.1) enumerates the content that is now required in an expert's report.

In *Grigoroff v. Wawanesa Mutual Insurance Co.*, 2011 ONSC 2279, the exact opposite facts lead to the exact opposite result. The court allowed expert evidence and reports that did not technically comply with Rule 53.03. In this accident benefits trial, it was the plaintiff who was seeking to exclude the evidence and reports of experts retained by counsel for the defendant in the tort action. The difference being that the court was of the view that the said expert opinions would be of great assistance to the jury in understanding the nature of the injuries sustained and their consequences now and into the future (at para. 21). Similarly in *Brandiferri v. Wawanesa Mutual Insurance*, 2011 ONSC 3200, while the court stated that the new rules are to have retrospective effect, it found that rules 1.04 and 2.03 together gave it the discretion to relieve the plaintiffs from strict compliance with Rule 53.03 where trial fairness so demands (at para. 15).

In the unreported ruling in *Slaght v. Phillips* (May 18, 2010), No. 109/07 (Ont. S.C.J. at Simcoe) Turnbull J. made the distinction between treatment opinions and litigation opinions. In that tort trial, the plaintiff wanted to call as an expert witness a vocational rehabilitation consultant who treated the plaintiff under coverage provided by the accident benefits insurer. The defence objected to the admission of any opinion evidence from the said vocational rehabilitation consultant on the basis of, among other things, non-compliance by the plaintiff with Rule 53.03. Turnbull J. distinguished *Beasley* on the basis that the expert in question was a treating specialist. He relied on the distinction made in *Burgess v. Wu* (2003), 68 O.R. (3d) 710 (Ont. S.C.J.) between "treatment opinions", which are opinions formed at the time of treatment, and "litigation opinions", which are opinions that are formed for the purpose of assisting the court at trial and not for the purpose of treatment. In Justice Turnbull's view, the purpose of Rule 53.03 is much more directed at "litigation opinions" rather than at "treatment opinions". In the circumstances of this case, the court held that there would not be any prejudice to not insisting upon strict compliance with Rule 53.03 and allowed this expert evidence to be called.

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There are no hard and fast rules governing this developing area of the law. As stated by Justice Moore in *Beasley* at page 14:

> I am not to be heard to state that experts retained by accident benefits insurers cannot give opinion evidence in a tort action; rather, I say that such experts should first comply with Rule 53.03. I say "should" for there may be cases where that is not possible and then the court might consider relieving against non compliance to ensure a fair adjudication of the issues upon their merits but this is not one of those cases.

Even if experts retained by an accident benefits insurer are not permitted to give opinion evidence in a particular tort action, they may be called as fact witnesses. In the unreported ruling in *Anand v. State Farm* (April 23, 2010), (Ont. S.C.J. in Toronto), Justice Stinson's view was that it is not improper for persons who have direct knowledge of the plaintiff's condition from testifying about those facts at trial, even when that knowledge may have been gleaned through an accident benefits claim-based examination. The court held that the statutory accident benefits assessors may be called to testify, but only as fact witnesses. As such, counsel had to confine their examinations of these witnesses solely to their observations and not their conclusions and opinions.

There are pitfalls to the strategy of arguing that medical reports and evidence ought to be admitted because they are "treatment opinions" as opposed to "litigation opinions". Sometimes treating physicians can become advocates for their patients and lose their impartiality. You can win the battle but lose the war if the court finds that your expert has formed a therapeutic alliance with, and become an advocate for, your client. While you may win the battle of making the treatment opinions admissible, the court may take this evidence with the proverbial grain of salt that goes to its weight, as was the case in *Kusnierz v. The Economical Mutual Insurance Company*, 2010 ONSC 5749 at para. 118.

In April 2011, the court in *McNeill v. Filthaut* disagreed with the decision in *Beasley* and held that Rule 53.03 does not apply to experts engaged by non-parties to litigation, namely, accident benefit assessors (2011 ONSC 2165 at para. 44). The court held that Rule 4.1.01, Rule 53.03, and Form 53 provide a comprehensive framework for dealing with expert witnesses at trial and that the requirements of Rule 53.03 were intended to and should only apply to experts that are engaged by or on behalf of a **party**. The court found that DAC assessors were bound by guidelines that afforded the plaintiff a strict duty of neutrality and objectivity, and as such were not the "hired guns" that Rule 53.03 are intended to curtail. The court concluded that the AB insurer was not a "party" to the litigation since it has no interest in the tort proceeding and did not stand to be affected by the outcome (at paras. 13, 34 and 35). MacLeod-Beliveau J. in *McNeill*:

> (a) reviewed the *Slaght* decision and noted that unnecessary litigation was being generated on a case by case basis to determine whether an expert witness is a treating expert or a litigation expert, and whether the expert is deserving of relief from non-compliance with Rule 53.03 (at para. 52); and
> (b) observed that the challenges imbedded in Justice Stinson's approach in *Anand* would be daunting to both counsel and for the trier of fact, in particular, trying to avoid a mistrial before a jury (at para. 47).

For a chart of all of the changes to the Ontario Rules of Civil Procedure please visit our website at: http://www.virtualassociates.ca/links/home5.html

For copies of the unreported rulings in *Slaght v. Phillips* and *Anand v. State Farm*, please email Nicole at nmaniar@virtualassociates.ca

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