CITATION: Brandiferri v. Wawanesa Mutual Insurance, et al., 2011 ONSC 3200
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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
SALVATORE BRANDIFERRI and LINDA BRANDIFERRI	)	A. Kwinter/J. Singer, for the Plaintiffs
	)	
- and -	)	
	)	
THE WAWANESA MUTUAL INSURANCE COMPANY and STRONE CONSTRUCTION	)	B. Jenkins, for the Defendant Strone Construction
	)	
	)	M. Forget/A. Dix, for the Defendant Wawanesa Mutual Insurance Company
	)	
	)	**HEARD:** June 1, 2011

RULING ON EVIDENCE

LAUWERS J.:

[1] A fire occurred on August 8, 2001 in the garage at the plaintiffs' home at 34 Granite Street, Woodbridge, Ontario. The contents of the garage were destroyed and the smoke penetrated the house. The plaintiffs claim that their insurer, the Wawanesa Mutual Insurance Company is responsible for the deficient remedial work carried out by Strone Construction. This trial is judge-alone. This ruling is a companion to my ruling at 2011 ONSC 3464.

[2] The plaintiffs tendered David P. Fisher, P.Eng., C.Chem, as an expert witness to give evidence on environmental concerns relating to the remediation of fire damage to the plaintiffs' home. One of the critical issues is whether the remediation carried out by the defendant Strone Construction was properly done, leaving the home in a restored and habitable condition.

[3] Mr. Forget, for the defendants, challenges the format of Mr. Fisher's reports as well as his qualifications under the recent amendments to rule 53.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. While Mr. Fisher did file an acknowledgement of expert's duty required

under rule 53.03 on October 14, 2010, Mr. Forget submits that his reports are not formally or substantively compliant with rule 53.03. He also submits inferentially that Mr. Fisher has not met the standards demanded by new rule 4.1.01 in his reports despite having signed Form 53.

[4] I dismissed Mr. Forget's challenge for the reasons set out below.

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The New Context for Expert Evidence

[5] Mr. Forget's challenge placed me in the midst of the controversy about the proper reach of these new rules. Subrule 53.03(2.1) requires an expert's report to contain the following:

1. The expert's name, address and area of expertise.

2. The expert's qualifications and employment and educational experiences in his or her area of expertise.

3. The instructions provided to the expert in relation to the proceeding.

4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

6. The expert's reasons for his or her opinion, including,

    i. a description of the factual assumptions on which the opinion is based,

    ii. a description of any research conducted by the expert that led him or her to form the opinion, and

    iii. a list of every document, if any, relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 53) signed by the expert.

[6] Rule 4.1.01 provides:

> 4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,
>
> (a) to provide opinion evidence that is fair, objective and non-partisan;

> (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
>
> (c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.
>
> (2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

[7] The controversy about the proper reach of these new rules is reflected in the opposed decisions of Moore J. in *Beasley v. Barrand*, (2010), 101 O.R. (3d) 452, [2010] O.J. No. 1466 (S.C.) and MacLeod-Beliveau J. in *McNeil v. Filthaut*, 2011 ONSC 2165, [2011] O.J. No. 1863 about how best to accommodate what appears to be a sea change in the judicial approach to expert evidence brought about by the 2007 Civil Justice Reform Project (the "Osborne Report")[1] and by the 2008 *Report on the Inquiry into Pediatric Forensic Pathology in Ontario* (the "Goudge Report")[2].

The Law of Expert Evidence

[8] In general terms, evidence is admissible if it is relevant, material and probative, and where its probative value exceeds its prejudicial effect: see Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3d ed. (Markham, Ont.: LexisNexis Canada, 2009) at paras. 12.48-12.50.

[9] The purpose for admitting expert opinion evidence is set out in Sopinka, Lederman & Bryant:

> 12.2 As a general rule, a witness may not give opinion evidence but may testify only to facts within her or his knowledge, observation and experience. It is the province of the trier of fact to draw inferences from the proven facts. A qualified expert witness, however, may provide the trier of fact with a "ready-made inference" which the jury is unable to draw due to the technical nature of the subject matter. Thus, expert opinion evidence is permitted to assist the fact-finder form a correct judgment on a matter in issue since ordinary persons are unlikely to do so without the assistance of persons with special knowledge, skill or expertise.

It is sometimes said that opinion evidence is presumptively inadmissible.

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[1] The Honourable Coulter A. Osborne, Q.C., "Civil Justice Reform Project: Summary of Findings & Recommendations" (November 2007), online: Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf>.

[2] The Honourable Stephen T. Goudge, Commissioner, "Inquiry into Pediatric Forensic Pathology in Ontario: Report" (September 2008), online: Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/index.html>.

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[10] The basic rule concerning the admissibility of expert evidence was expressed by Aylesworth J.A. in *R. v. Fisher*, [1961] O.W.N. 94, 34 C.R. 320, 1961 CarswellOnt 7 (C.A.) at para. 49: "expert opinion evidence will be admitted where it would be helpful to the jury in their deliberations and it will be excluded only where the jury can as easily draw the necessary inferences without it."

[11] I can put my basic orientation as a trial judge no better than Barr J. did in *Hunter v. Ellenberger*, (1988), 25 C.P.C. (2d) 14, [1988] O.J. No. 49 (H.C.):

> In my view, it should be remembered that any time a court excludes relevant evidence the court's ability to reach a just verdict is compromised. Relevant evidence should not be excluded on technical grounds, such as lack of timely delivery of a report, unless the court is satisfied that the prejudice to justice involved in receiving the evidence exceeds the prejudice to justice involved in excluding it.

[12] In my view, the civil justice system's commitment to reach a just verdict based on the relevant evidence accompanies the commitment to ensure trial fairness to the parties. Both of these commitments must be taken into account in considering how to administer the rule changes governing expert evidence.

The Changes to the Rules

[13] The rule changes that came into force on January 1, 2010 were not accompanied by an express transitional provision. Since the *Rules of Civil Procedure* are understood to be procedural in nature, they have retrospective effect: *Onex Corp. v. American Home Assurance* (2009), 100 O.R. (3d) 313 (S.C.) per Belobaba J. at para. 5. Accordingly, rules 4.1.01 and 53.03, concerning the duty of an expert and the format and content of expert witnesses' reports, respectively, were binding when they came into force in respect of actions under way at that time including this action.

[14] In *Onex Corp.*, the court held that rules 1.04(1) and 2.03 do not create broad judicial discretion akin to legislated transitional provisions:

> [11] The defendants submit that the broad judicial discretion provided in rules 1.04(1) and 2.03 are akin to "transitional provisions" and allow the judge to achieve the same result as was the case under the s. 156(3) provision (i.e., order that the old Rule 20 will continue to apply if justice so requires).
>
> [12] In my view, rules 1.04(1) and 2.03 do not provide this kind of discretionary power.
>
> [13] Rule 1.04(1) provides that the Rules of Civil Procedure "shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits". Rule 2.03 provides that "the court may,

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> only where and as necessary in the interest of justice, dispense with compliance with any rule at any time". Both are important provisions, to be sure, but neither rule, whether standing alone or in combination with the other, bestows upon the motion judge the kind of power that was granted in 1984 under s. 156(3).
>
> [14] Rule 1.04 requires that the rules be liberally construed so that, as much as possible, every civil proceeding can be resolved on the merits in a just and efficient manner. There is nothing here that gives the motion judge the additional power to set aside a newly enacted rule and, in its place, order that a repealed rule continue in force. This would not be "construing"; this would be legislating.
>
> [15] Rule 2.03 gives the court the discretion to "dispense with compliance with any rule at any time" if it is necessary to do so in the interest of justice. Typically, this power is used to overlook a litigant's technical breach of a service or filing deadline or other instance of non-compliance where it is just to do so. Rule 2.03 does not provide any additional power that would allow the court to dispense with a newly enacted rule and restore or reactivate a repealed provision.

[15] While the new rules are to have retrospective effect, I find that rule 1.04 and rule 2.03 together do give the court jurisdiction to relieve a party from strict compliance with a new rule where trial fairness so demands, as it does in this instance.

[16] The plain language of rule 1.04 is that the rules "shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits"; this rule focuses expressly on justice, expedition and expense. The plain language of rule 2.03 is that "[t]he court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time." The authors of Holmested and Watson, *Ontario Civil Procedure*, looseleaf (Toronto: Carswell, 1993) vol. 2 at p. 2-21 state: "These words [in rule. 2.03] might be rendered more fully as 'only in a case where the interest of justice requires it, and then only to the extent necessary in the interest of justice.'" They add that: "It is to be expected that this rule will be used sparingly . . ."

[17] In my view, the court's discretion to provide relief in worthy cases could not be more clearly expressed, even with the qualifications suggested by the authors of Holmested and Watson. I find that the combination of rule 1.04 and rule 2.03 confers significant discretion on the court, not "to set aside a newly enacted rule" or "to dispense with a newly enacted rule and restore or reactivate a repealed provision", using the words in *Onex Corp.*, but simply to relieve against rule compliance "only where and as necessary in the interest of justice" in the particular situation. This is such a situation.

[18] Experience shows that rule changes can give rise to procedural unfairness against which some relief ought to be provided: *Marshall v. Hoffman* (1985), 48 O.R. (2d) 701, [1985] O.J. No. 2406 (S.C.), per Master Sandler at p. 703 (*Marshall* cited to O.R.); *Jeffrey v. Baker*, 2010 ONSC 5620, [2010] O.J. No. 4415 per Quigley J. at para 18, who permitted a new defence medical because of the prospect that the trial judge might follow *Beasley v. Barrand, supra*, and might

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not permit the doctors who examined the plaintiff on behalf of accident benefit carriers to testify at trial.

[19] I find that the principle of trial fairness is radically implicit in rules 1.04, rules 2.01 to 2.03, and rule 53.03, among others. See the decision of J.W. Quinn J. in *Basque v. Stranges*, 2010 ONSC 5605, [2010] O.J. No. 4312 at paras. 58-59:

> 58 I agree that rule 53.03 is a procedural enactment and, therefore, the law generally requires that it apply retroactively. Nevertheless, as with most good legal principles, there are exceptions and so the retroactive application of rule 53.03 is not absolute. This can be seen within rule 53.03 itself which contains sufficient flexibility to respond to specific situations where relief from retroactivity is necessary for a just result: subrule 53.03(2.2) contains the words, "unless the court orders otherwise"; subrule 53.03(3) speaks of, "except with leave of the trial judge"; and, subrule 53.03(4) provides that times may be extended or abridged by a pre-trial judge or the trial judge or "by the court, on motion." Furthermore, parties have rule 2.03 which provides that "[t]he court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time."
>
> 59 I do not think it was contemplated that all actions (and there could be hundreds of them) involving expert reports that were set down for trial before the amendments to rule 53 would be struck from the trial list as not being in compliance with the new rule. If parties to such actions are unable to agree on a time schedule for the delivery of expert reports or other issues that go to their admissibility at trial, they may resort to the subrules of 53.03 that I have mentioned or to rule 2.03. [Footnotes omitted.]

[20] A similar observation is made by D. Wilson J. in *Grigoroff v. Wawanesa Mutual Insurance Co.*, 2011 ONSC 2279, [2011] O.J. No. 2277 who explores some of the factors relevant to the exercise of the court's discretion at paras. 22-23:

> **22** . . . I am mindful that the majority of the cases that are proceeding to trial at the present time were commenced years before these 2010 amendments to the Rule. Consequently, many expert reports may exist in any given case which pre-date the amendments and do not comply with the requirements of the new Rule 53.03. I appreciate it may be a costly undertaking to contact numerous experts to secure new reports. . . .
>
> **23** When I agree with Mr. Solomon's submissions that the reports at issue do not technically comply with the requirements of the amended Rule 53.03, I am in complete agreement with the comments of Justice Moore in *Beasely, supra*, where he stated, "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

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> 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 ...” In my view, there is no prejudice that results to the Plaintiff by reason of the admission of these expert opinions: they have been in possession of these reports for more than a year and they have known since March of 2010 that the defence intended to rely on these opinions at trial. There is nothing in the reports that can be said to take the Plaintiffs by surprise. Further, as I have indicated, the contents of the reports deal with the very issues the jury will be called upon to decide. In my view, fairness dictates that the Defendant be permitted to call evidence from Drs. Devlin, Stewart and Kirkpatrick at the trial of this action.

[21] Cases have recognized the court’s discretion to continue a process commenced under the old rule in the context of transitions to new rules or provisions: *Brand Name Marketing Inc. v. Rogers Communications Inc.* (2010), 90 C.P.C. (6th) 253, [2010] O.J. No. 978 (S.C.) at paras. 82-85 per Master Short (semblance of relevance test applied despite rule change); *Marshall v. Hoffman*, *supra* (application of new discovery rules); *Smith Estate v. Rotstein* (2010), 56 E.T.R. (3d) 216, [2010] O.J. No. 1527 (S.C.) at paras. 27-29 per D.M. Brown J. (motion for partial summary judgment under old rules); *1588143 Ontario Inc. (c.o.b. Upper Canada Malt) v. Lantic Inc*., 2010 ONSC 1613, [2010] O.J. No. 1191 at paras. 26-28 per Master Short; *Jeffrey v. Baker*, *supra*, cf. *Brown’s Cleaners and Tailors Ltd. v. Omers Realty Corp.*, 2010 ONSC 1073, [2010] O.J. No. 611 at paras. 17-21 per Valin J., aff’d 2010 ONCA 599; *Aylmer Meat Packers Inc. v. Ontario*, 2010 ONSC 649, [2010] O.J. No. 437 at para. 27 per Conway J.

Analysis

[22] The cases reaching trial in the sittings since January 2010, and in the next few sittings, including this case, have progressed in accordance with the practice under the old rules. All but one of Mr. Fisher’s reports were written years before the recent changes to the rules respecting expert evidence. The first is dated October 23, 2003 and was accompanied by the results of an air quality test Mr. Fisher carried out on the property on October 15, 2003. There are reports dated December 13, 2004, September 14, 2005. The response report dated October 13, 2010 is the only one that came after the rule changes.

(a) Formal Compliance

[23] I could oblige Mr. Fisher to recast his reports in the proper format, as the court sought to do in *Beasley v. Barrand*, *supra*. But that would impose an unnecessary expense on the plaintiffs, contrary to the words and spirit of rule 1.04. Mr. Fisher could be cross-examined on his earlier reports even if he filed a new report that was formally compliant with subrule 53.03(2.1), and nothing would be accomplished by so doing.

[24] Further, although Mr. Fisher’s reports do not set out the elements required by the subrule in the way that one would expect of a report prepared under the new rules, I find that most of the prescribed elements can be easily inferred from the language of the reports. The reports contain

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nothing surprising, any omissions are not material and there is no prejudice to the defendants who have had the reports for years. I would have been far more sympathetic to Mr. Forget's complaint if he had sought some missing information from the plaintiffs' expert and been refused. But Mr. Fisher's evidence is not especially arcane or "scientific", requiring the sorts of testing that the Goudge Report discussed. As it is, Mr. Forget's challenge on this ground therefore seems more strategic than real. I do not hesitate to dispense with strict compliance by Mr. Fisher with the formal elements of the subrule under rule 2.03 and subrule 53.03(3) of the *Rules of Civil Procedure.*

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(b) Substantive Compliance

[25] But formal compliance is only one of Mr. Forget's concerns. The factors to be assessed by a court in determining the admissibility of expert evidence were specified in *R. v. Mohan*, [1994] 2 S.C.R. 9 at para. 17. Mr. Forget implicitly concedes that the proposed evidence is relevant, necessary in assisting the court in determining the facts, and is not excluded by any rule of evidence, because he does not challenge the evidence on these grounds.

[26] Mr. Forget focuses on whether Mr. Fisher is a "properly qualified expert". He concedes that Mr. Fisher has the appropriate professional qualifications and experience to provide an informed opinion on the issues. He submits, however, that in some respects, Mr. Fisher goes beyond his area of expertise and, more importantly, that Mr. Fisher is not appropriately neutral but is biased in the plaintiffs' favour.

[27] The mischief in expert evidence was explained by Sopinka J. in *R. v. Mohan*, *supra* at para. 19:

> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. As La Forest J. stated in *R. v. Béland*, [1987] 2 S.C.R. 398, at p. 434, with respect to the evidence of the results of a polygraph tendered by the accused, such evidence should not be admitted by reason of "human fallibility in assessing the proper weight to be given to evidence cloaked under the mystique of science".

[28] The serious problem of "expert bias" was addressed at pages 71, 75-76 of the Osborne Report. It called for new provisions in the Rules "to establish that it is the duty of an expert to assist the court on matters within his or her expertise and that this duty overrides any obligation to the person from whom he or she has received instructions or payment" (p. 83). The Report recommended that a requirement be imposed on "the expert, in an expert report, to certify that he or she is aware of and understands this duty" (p. 83). This is the genesis of new rule 4.1.01, rule 53.03 and Form 53.

[29] The Goudge Report reinforces these desiderata. Goudge J. was troubled by the idea that a jury might be "overwhelmed by the 'mystic infallibility' of the [expert] evidence" (Vol. 3, ch. 18 at p. 476), echoing the common law's worry about evidence that tends to usurp the function of the trier of fact. Goudge J. also criticized "roaming expert witnesses" who go beyond their area of expertise (Vol. 3, ch. 18 at p. 472). He rejected the idea that juries can be successfully instructed to give less weight to evidence outside of an expert's area of expertise, because of the problem, metaphorically expressed, of "unringing the bell" (Vol. 3, ch. 18 at p. 474). As such, he recommended that "the court should clearly define the subject area of the witness's expertise and vigorously confine the witness's testimony to it" (Rec. 129 at Vol. 3, ch. 18 at p. 475). The most serious problem addressed by Goudge J. in his Report was the assessment of the reliability of expert evidence (Vol. 3, ch. 18 at p. 477 et seq.).

[30] The Goudge Report provides counsel and the court with a considerable tool kit for ferreting out the truth and testing the actual reliability of the expert witness' evidence at Vol. 3, ch. 18 at p. 495. But these tools are more useful and applicable in some instances than in others.

[31] Trial judges are expected to play a fortified gatekeeper role, and not just in criminal cases or just in cases with a jury. Judges are increasingly aware that for them too, the bell cannot be easily unrung. It is better if inadmissible evidence is simply not heard. As the Ontario Court of Appeal stated in *R. v. Abbey* (2009), 97 O.R. (3d) 330, [2009] O.J. No. 3534 at para. 76, leave to appeal dismissed [2010] S.C.C.A. No. 125: "This 'gatekeeper' component of the admissibility inquiry lies at the heart of the present evidentiary regime governing the admissibility of expert opinion evidence".

[32] Mr. Forget relies on the reasoning of D. Wilson J. in the context of a jury trial in *Gutbir (Litigation Guardian of) v. University Health Network*, 2010 ONSC 6394, [2010] O.J. No. 4982 at paras. 12-14, in which Wilson J. permitted the treating doctor to give evidence as a fact witness but not as an expert.

[33] Mr. Forget also relies on *Laudon v. Roberts* (2007), 49 C.P.C. (6th) 311, [2007] O.J. No. 1414 (S.C.), in which DiTomaso J. refused to permit an expert to testify who rendered an opinion in his reports that one party was contributorily negligent and in fact equally at fault. DiTomaso J. refused to let this evidence go to the jury on the basis, at para. 29, that "[h]e has rendered opinions beyond his area of expertise and has intruded into the exclusive roles of the trial judge and jury which he is not permitted to do." In short, the proposed witness "usurps the function of the triers of fact" (para. 22). In a jury case, this testimony would be most problematic even though the jury never sees the report. But this is not a jury case.

[34] The law is clear that an expert who lacks impartiality and independence should be disqualified: *Alfano (Trustee of) v. Piersanti*, 2009 CanLII 12799, [2009] O.J. No. 1224 (S.C.) per E.M. Macdonald J. at paras. 5-6. This is not new law under the amended rules: *Bank of Montreal v. Citak*, 2001 CanLII 12419, [2001] O.J. No. 1096 (S.C.) per Farley J. at paras. 6-7. But the degree of impartiality and independence required of an expert has always been and will continue to be an open question to be explored in cross-examination.

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[35] Perhaps a curbing of the excesses is the best that can be expected. See the clear-eyed and utterly realistic view of Alan W. Mewett and Peter J. Sankoff in *Witnesses*, looseleaf (Toronto: Carswell, 1991) at section 10.5(c) at pp. 10-48:

> In the oft-cited decision of *National Justice Cia Naviera SA v. Prudential Assurance Co. Ltd, The Ikarian Reefer* [[1993] 2 Lloyd's Rep. 68 at 81-82 (Q.B.), rev'd on other grounds [1995] 1 Lloyd's Rep. 445 (C.A.)] Cresswell J. went so far as to make this a criteria of admissibility:
>
> > Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation. An expert should provide independent assistance to the court by objective unbiased opinion in relation to matters within his or her expertise. An expert witness should never assume a role of advocate.
>
> Laudable as it may seem at first glance, this statement is difficult to swallow, as taken literally it is impossible to imagine many experts meeting the high standard it requires. Certainly, very few would survive a reasonable apprehension of bias test, as most experts are financially compensated for their testimony, and have a fair bit to gain – in terms of future employment – by providing beneficial evidence to the persons who are paying them for their work. This is not to suggest that most experts lie or provide evidence to solely comply with their client's desires, but it nonetheless cannot be said that paid experts are neutral, unbiased witnesses. So long as parties are given freedom to choose their own experts, a certain amount of favouritism from these witnesses is simply a reality of the adversarial process. Moreover, it is not entirely clear why partiality should be treated as a precondition of admissibility. Obviously, the expert's ties to the party tendering them will be attacked in cross-examination, and any partiality can be considered as a matter of weight [citing, as an example, *R. v. Klassen*, [2004] 4 W.W.R. 351 (Man. Q.B.)]. [Footnotes omitted.]

Assessing Bias

[36] In support of his challenge, Mr. Forget picks out certain language in Mr. Fisher's reports. In the report of October 23, 2003, Mr. Forget points to one sentence as being congruent with the views of the plaintiffs: "The reconstructive works, as conducted by Strone Construction, were authorized by the insurer who determined that the restorative works are to be completed without complete demolition." This sentence is, however, factually accurate.

[37] Mr. Fisher also wrote: "We also are interested in the inspectors or engineer's name who has approved the job prior to closing the ceiling with the wallboard . . ." The plaintiffs complain that Strone Construction proceeded without a building permit and that there should have been a municipal inspector monitoring *Building Code* compliance throughout. This was not, however,

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the point of Mr. Fisher's reference. For him, it was simply a matter of getting more information about what was under the drywall.

[38] Mr. Fisher refers to the results of a previous air quality investigation by Walters Engineering for the plaintiffs and concludes that, based on the readings, "the general air quality inside the subject house is unacceptable." But the Walters report reached a different conclusion: "The tabulated data does not contain any of the chemical compounds normally found in atmospheres containing "smoke" or fire damage odours. . . . None of the detected compounds are present to a sufficient concentration to be considered a health hazard, although many of these compounds, in the concentrations noted, could be bothersome to sensitive individuals and produce headaches and nausea." Mr. Forget argues that the difference in interpretation shows Mr. Fisher's bias. In my view, however, the difference between the reports reflects a genuine difference of opinion between experts to be sorted out at trial.

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[39] Mr. Forget is troubled by the description of the smell of smoke and the effects that Mr. Fisher personally experienced during his one and-a-half hour visit in October 2003. Mr. Fisher claims to have an especially sensitive sense of smell. He comments: "After spending one and half hour at the house I experienced dry throat, which persisted for two hours after vacating the premises. People prone to allergies should not reside in the house in the present state, due to the omni present paint odors and smoke. (sic)" The personal comment is a fact issue, and the implication seems well within the expertise of an environmental engineer; it is, ironically perhaps, supported by the Walters Engineering report just quoted.

[40] Mr. Forget also complains about the sentence that ends "most importantly restorative works of this magnitude should not take this long." This comment is obviously critical about the rate of remediation progress, but that is as far as it goes.

[41] In his report dated December 13, 2004, Mr. Fisher reports to the plaintiffs on further air testing and notes: "In conclusion we consider the house free of detectable hydrocarbon. Further, no indication of mold contamination was detected." This sentence is actually of assistance to the defendants and does not show bias on Mr. Fisher's part.

[42] In his report dated September 14, 2005 Mr. Fisher notes:

> Inspection in the dining room ceiling revealed that some of the wood joists were painted over badly charred joists. The wood preservative and sealer did not fulfill their intended purpose. Smoke has penetrated into the wood fibres and samples of wood chips show raw smoke and soot still impregnated on wood. The I-beam has been painted over without removal of black soot from the fire. In the electrical panel black stain is still present, indicating smoke damage.

[43] These are purely factual observations and can quite easily be tested by the evidence. The report goes on:

> It is impossible to examine the entire job, as now it has all been covered by drywall, but from our very limited investigation it is clear that an incomplete job was carried out.
>
> In conclusion there is a problem, which can only be remedied by replacement of all impacted wood. The inspection indicates that smoke and fire damage is still present to some extent, and that the occupants are correct in demanding appropriate rectification.

[44] Mr. Forget submits that this last sentence is a substantive opinion that weighs in on the very issue that the court must decide and so, as in *Laudon v. Roberts, supra*, is inadmissible.

[45] In his report of October 13, 2010, Mr. Fisher responds to the report of an expert retained by the defendants, Air Quality Engineering. He opines that the chemicals revealed in the air quality test by Walters Engineering which he reviewed in his previous report related to the burning of wood. Mr. Fisher adds: "We have not visited the house for a considerable period of time and if after all this time the listed compounds are still present in the house, then there is a very strong suspicion that this house needs significantly more systemic remediation or alternatively a complete demolition." In my view, this is a defensible contingent opinion that does not demonstrate bias.

[46] Mr. Fisher adds:

> In many cases when there is significant fire and smoke damage, it is next to impossible to completely remedy the situation, especially when we are dealing with allergic and sensitive individuals, such as Mrs. Brandiferri and to a lesser extent her husband. On a personal note, I experienced a significant headache after only a two-hour exposure in the house.

This statement just repeats his earlier evidence about the impact of the interior air on him personally, which is something he is surely able to testify about as a fact witness.

Conclusions

[47] Mr. Fisher's reports are not substantially different in style and expression from the text expert reports prepared and filed under what I might loosely call the old rules. I did not find his reports to be particularly partisan in their substance or tone. The facts on which he relied are clearly expressed and eminently testable. The reports are not especially arcane and as a judge sitting alone, they do not trouble me. I did not find the reports to have crossed the proverbial line and therefore did not disqualify Mr. Fisher at the threshold on the ground of bias. Whether his opinions survive trial scrutiny is another matter altogether.

[48] In the future, Mr. Fisher and experts like him will need to adapt the style of their reports to more closely hue to the requirements of rule 4.1.01 and rule 53.03. In the meantime, in my view, the two commitments of the court to reaching a just verdict on the evidence and to trial

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fairness urge me to exercise the court's discretion to dispense with strict compliance with these rules on Mr. Fisher's part.

[49] I agree with the comments of Moore J. in *Frazer v. Haukioja* (2008), 58 C.C.L.T. (3d) 259, [2008] O.J. No. 3277 (S.C.) at para. 138, aff'd (2010), 101 O.R. (3d) 528 (C.A.):

> Whatever role the expert may have undertaken during the course of the litigation in assisting counsel to a fuller appreciation of the facts in dispute and the inferences that might be drawn from them, the expert must set aside that role upon entering the witness box at trial. From the witness box the expert speaks only to assist the court.

[50] I take comfort in the fact that Mr. Fisher has signed Form 53, which will have brought his serious obligations to the court to his attention.

Justice P.D. Lauwers

DATE: June 13, 2011

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