CITATION: Gutbir v. University Health Network, Nicholson, 2010 ONSC 6394
COURT FILE NO: 02-CV-230528CM1
DATE: 20101119

ONTARIO
SUPERIOR COURT OF JUSTICE

2010 ONSC 6394 (CanLII)

B E T W E E N:	)	
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ZMORA GUTBIR, A MENTALLY INCAPABLE PERSON, AND TAMAR GUTBIR AND YUVAL GUTBIR, MINORS BY THEIR LITIGATION GUARDIAN, SHAYA PETROFF, AVRAHAM GUTBIR AND ATALYAH GUTBIR	)	*Hilik Elmaliah and Andreas Seibert*, for the Plaintiffs
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
	)	
UNIVERSITY HEALTH NETWORK AND R. DEREK NICHOLSON	)	*Deborah Berlach, Renee Kopp and Emily McKernan*, for the Defendant University Health Network
Defendants	)	
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	)	
	)	
	)	
	)	**HEARD:** November 16, 2010

D.A. WILSON J.

RULING

[1] This is an action for damages brought as a result of alleged negligence on behalf of the defendant hospital and its employees arising from the birth of Zmora Gutbir which took place January 10, 1984. The trial commenced with a jury on November 3, 2010. Both liability and causation are in issue at trial, the quantum of the Plaintiffs' damages having been agreed upon between counsel.

[1] Dr. Max Perlman is a neonatologist who was a treating physician of the baby Zmora at The Hospital for Sick Children following her birth. He has delivered two reports in these proceedings: one dated February 26, 2008; and another dated September 22, 2010. Counsel for

the Plaintiff intend to call Dr. Perlman to testify about his treatment of Zmora and also to have him qualified as an expert by the Court, to permit him to give expert opinion on the cause of her brain injury and disability. Counsel for the hospital does not dispute Dr. Perlman's area of expertise, she objects to his being permitted to testify as an expert in this case, given the nature of his evidence and the fact that, as a treating physician, he lacks the objectivity necessary to permit him to be called as an expert.

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Positions of the Parties

[2] Counsel for the defendant Hospital argues that it is clear from a reading of his reports that Dr. Perlman has relied on his own notes of his treatment of Zmora as well as on his memory in coming to his expert opinion. In his second report, it is submitted, Dr. Perlman criticizes other experts in this case who have provided opinions and states that they have not interpreted his notes correctly. He states in his report that his opinion remains the same as it was at the time he was providing treatment to Zmora and suggests that the other expert opinions offered are incorrect. As a result, it is submitted that Dr. Perlman is not objective which is an essential element under the Rules for an expert to testify.

[3] Ms. Berlach also submits that because this area of evidence is quite complex and rather scientific, it would be exceedingly difficult, if not impossible, for a jury to distinguish between Dr. Perlman's "fact" evidence as a treating doctor and his "expert" opinion and there is a real concern that the jury might attach more significance to his testimony than to that of the other experts because of his role as a treating doctor.

[4] In response, Mr. Seibert submits that Dr. Perlman has no interest in the outcome of the case and simply because he was a treating doctor does not impugn his objectivity as an expert. While he acknowledged that Rule 53 was amended in January, it is his position that the changes made no difference to the duties of an expert, who always had to be impartial when providing their opinion to the court. He submitted that the amendments codified what was already the known practice among experts.

[5] Further, simply because this is a medical negligence case does not mean that the jury would not be able to comprehend the evidence offered by Dr. Perlman, particularly if proper questions are put to him and they are charged appropriately. There are numerous other personal injury cases where treating physicians have been qualified by the Court to give expert opinion.

Analysis

[6] While experts testify in the vast majority of civil trials that are brought in the Superior Court, their role has been the subject of much debate in recent years and has been commented on in many cases, both at the trial level and on appeal. The often quoted text, *The Law of Evidence in Canada, (Third Edition),* Bryant, Lederman and Fuerst, notes at page 819,

> Expert opinion is admitted to assist the fact-finder to appreciate the facts due to their scientific or technical nature or to form a correct judgment on a matter if

> ordinary persons are unlikely to do so without the assistance of persons with special knowledge. The expert witness provides a ready-made inference for the trier of fact because the judge or jury do not have the knowledge or experience to draw the required inferences from the evidence presented without assistance.

[7] In the case at hand, counsel for the hospital does not dispute that Dr. Perlman has the requisite knowledge to be qualified as an expert in the trial; rather that because of his role as a treating doctor coupled with the contents of his second report, Dr. Perlman lacks the necessary objectivity to permit him to give expert opinion.

[8] I must state at the outset that I reject Mr. Seibert's submission that the amendments to Rule 53 do not change an expert's obligations to the Court but simply codify what was the existing practice.

[9] The Honourable Coulter Osborne undertook a *"Civil Justice Reform Project"* and produced a summary of findings and recommendations in November of 2007. In that report ("the *Osborne Report*"), after meeting with various groups, members of the Bar and Bench, as well as reviewing the practices in other jurisdictions, he noted that the use of experts was perceived as being a "significant problem" which needed to be addressed. Mr. Osborne stated at pages 75-76:

> …to help curb expert bias, there does not appear to be any sound policy reason why the Rules of Civil Procedure should not expressly impose on experts an overriding duty to the court, rather than to the parties who pay or instruct them. An expressly prescribed overriding duty to provide the court with a true and complete professional opinion will, at minimum, cause experts to pause and consider the content of their reports and the extent to which their opinions may have been subjected to subtle or overt pressures. Matched with a certification requirement in the expert's report, it will reinforce the fact that expert evidence is intended to assist the court with its neutral evaluation of issues.

[10] Mr. Osborne recommended that Rule 53.03 be amended to require an expert to include further information including the basis for the opinion and to sign an acknowledgement 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 who retained him or her.

[11] In my view, it is clear that the amendments that were made to Rule 53.03 in January of 2010 were to address a number of problems that were frequently encountered by the courts when dealing with expert testimony, one of which was ensuring the impartiality of the expert opinion. Thus, the changes to the Rules expressly require that an expert acknowledge that his or her duty is to the court, to provide objective opinions arising from his or her particular expertise to assist the court in making various determinations.

[12] I agree with the comments of my colleague Justice Moore on the role of an expert in *Frazer v. Haukioja*, [2008] O.J. No. 3277 (Ont. Sup. Crt.) where he stated,

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> 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.
>
> At trial the expert must be and appear to be independent of the party or counsel who retained the services of the expert and must demonstrate objectivity and impartiality in the analyses and opinions that she or he is allowed to give. Because the opinions stated by an expert are predicated upon expertise that the court does not possess, the court must be confident in relying upon the expert to provide a thorough, balanced and technically sound analysis. Independence and impartiality; the court expects nothing more and it will accept nothing less.

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[13] The expert as an advocate has been considered extensively both by the courts and by lawyers and academics in numerous papers. In a paper given to the Advocates' Society in May of this year, Richard Shekter wrote:

> One of the many significant conclusions that can be derived from the *Goudge Report* is the importance of experts maintaining an objectivity and sense of neutrality in the course of their preparation and examination of the subject matter and in the preparation of the reports that they produce. An expert witness cannot be seen as an advocate for one side or the other.

I concur with these statements.

[14] More recently, in *Eastern Power Ltd. v. Ontario Electricity Financial Corp.* (2008), Carswell Ont. 5365 (S.C.J), Justice Bellamy noted:

> The purpose of expert evidence is to assist the trier of fact to understand the evidence outside of his or her range of experience so that a correct conclusion can be reached…It is commonly recognized that, in order to be of assistance to the trier of fact, experts must remain objective.

I agree with these sentiments which are applicable not only to cases tried by a judge alone, but also to those tried with juries.

[15] Counsel were candid in their acknowledgement that they were not aware of any decisions dealing with treating doctors qualified as experts in medical negligence cases tried with a jury since the amendments to Rule 53 in January 2010.

[16] While counsel for the Plaintiffs referred me to several cases in which treating physicians were qualified by the court to give expert testimony, in my view these cases were not helpful to the issue I must determine because the facts were very different. In *M.(N.) v. Alberta (Public Trustee) (*2003), 34 C.P.C. (5th) 225 (Alta. C.A.), the judge stated that in a small centre, it was

not uncommon for treating doctors to be expert witnesses at trial and opinion evidence was usually sought from treating specialists. That is certainly not the case in the city of Toronto.

[17] Similarly, in another case cited by the solicitor for the plaintiff, *Chrappa v. Ohm*, [1996] O.J. No. 1663 (Ont. Gen. Div.) a decision of Justice Lax, the issue Her Honour had to determine was whether the injuries suffered by the plaintiff met the criteria set out in the legislation of constituting a serious permanent injury, sufficient to meet the threshold for compensation that existed at the time. In arriving at her decision, Justice Lax found that the plaintiff's treating family doctor was in the best position to assist the court with an opinion on what complaints arose from the motor vehicle accident and what treatment the plaintiff would undergo in the future. In accepting the expert evidence of the treating family doctor, Justice Lax was persuaded by the fact that having followed the plaintiff for many years, he was in the best position to provide an expert opinion that would be of assistance to the court.

[18] The situation in the case before me is quite different from that encountered in a personal injury case where, for example, a treating orthopaedic surgeon is asked to provide an expert opinion at trial on the future prognosis for the plaintiff in terms of treatment and disability. That opinion is, arguably, of great assistance to the trier of fact precisely because the treating orthopaedic surgeon, with his or her familiarity with the Plaintiff's injury and treatment, may be in the best position to opine on what the future holds for the patient. That is not what is being asked of Dr. Perlman in the case at hand. Rather, he has been asked to review the very limited records available and provide an opinion as to **when** the brain damage occurred to Zmora.

[19] I agree with the comments of Justice Roccamo in *Williams (Litigation Guardian of) v. Bowler*, [2005] O.J. No.3323 (S.C.J.), a medical negligence case tried without a jury, where she stated:

> A medical witness who "wears two hats" and who testifies both as a treating physician and as an expert may, depending on the circumstances of the case, be in the best position to offer firsthand observations as to the patient's condition over the course of medical history; however, to the extent that the physician has any personal interest in the outcome of the case or lacks the objectivity and independence essential to the medical expert, this may adversely affect the weight to be given to the expert testimony.(p. 57).

[20] I note that since the time of the *Williams, supra,* decision, there has been a shift towards increased scrutiny of the validity and usefulness of expert testimony in trials. This was made very clear by Commissioner Stephen Goudge's Report entitled *"Inquiry into Pediatric Pathology in Ontario"*, commonly known as the "*Goudge Report*" which was released in 2008. In that report, Justice Goudge reaffirmed the role of the trial judge as a gatekeeper who is required to rule on the admissibility of an expert opinion and not allow the evidence in, indicating that it would be accorded its proper weight at the end of the day.

[21] The role of the trial judge as gatekeeper is not a new phenomenon. More than 10 years ago in *R. v. J.-L.J.*[2000] 2 S.C.R. 600, Justice Binnie stated:

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> …the court has emphasized that the trial judge should take seriously the role of gatekeeper. The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry n the basis that all of the frailties can go at the end of the day to weight rather than admissibility…

[22] In a more recent case, *Dulong v. Merrill Lynch Canada Inc.* (2006), 80 O.R.(3d) 378 (S.C.J.), Justice Ducharme reviewed the four criteria established in *R. v. Mohan* (1994), 114 D.L.R.(4th) 419 (S.C.C.) for the admissibility of expert testimony and in doing so, stated:

> There is no question that, in civil cases, at least, the path of least resistance in matters such as these seems to be to admit the evidence and then compensate for any of its weaknesses by attaching less weight to the opinion. But such an approach is an abdication of the proper function of the trial judge and was explicitly rejected by Binnie, J in *R. v. J-L.J.*..

[23] I decline to take the route of admitting the evidence on the basis that the "proper" weight can be attributed to it and the jury instructed in this regard. Rather, in my view, the correct and preferable approach is to consider the proffered evidence and make the determination at the present time as to the admissibility of the expert testimony.

[24] The case at hand is unusual in that there are no records from the labour and delivery of the mother on which the various experts can rely in coming to their respective opinions. In his second report dated September 22, 2010, Dr. Perlman states that his opinions

> are based on review of the health records, awareness of the significance of my own notes in the record, my memory of Zmora's case, the relevant literature, and my experience with similar cases. My opinion today is no different from my opinion in 1984 when I was the physician responsible for diagnosing Zmora's condition and for her treatment.

[25] When experts are asked to review a file and provide an expert opinion, in order to do so they must rely on their own clinical experiences and their involvement with other patients in other cases, as well as on their particular education and knowledge gleaned from reviewing literature in the area. This is the basis upon which their expertise is offered to the court.

[26] In the case before me, in arriving at his expert opinion, Dr. Perlman acknowledges that he has relied on his own memory of his treatment of Zmora as well as his review of the notes he made in 1984. I say this not to be critical of Dr. Perlman because I suspect it would be impossible for him to do otherwise. He is in an entirely different position than any other of the medical experts asked to provide an expert opinion in this case: he has the advantage of being part of the team that provided care to Zmora shortly after her birth.

[27] Does this reality impugn his objectivity as an expert in this case? In my view, this question can only be answered in the affirmative. His report of September 22, 2010 is rife with comments about what his notations in Zmora's chart mean and how the other experts have not

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interpreted his notes correctly. Some examples of this include the following comments: "Dr. Kelly cites out of context my statement that Zmora had "subcutaneous fat loss"; he omitted the qualifiers "mild" and "recent"; "In these notations I intended to convey that Zmora did not have the characteristics either of an infant with "postmaturity" syndrome…"; "In summary, Dr. Kelly's reading of Zmora's health record is discordant with mine…"; "in my opinion the health records and my own notes suggest that the meconium-staining of Zmora's skin was not "deep"; "Dr. Kelly cites my "Report of Consultation" to show that I like him thought that the history and the 55 minutes blood gas results appear to exclude severe hypoxia ischemia around the time of birth, despite my statement of "the symptoms typical of HIE. In fact I was biding my time until the CT scan was done…After investigation and by the time of her discharge from the Hospital for Sick Children, we concluded in 1984 that Zmora suffered from intrapartum HIE. That is still my opinion today."

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[28] This last comment, in my view, strikes me as somewhat defensive, and the others I have referred to are statements of an advocate as opposed to an objective expert, although the treatment of Dr. Perlman is not under scrutiny. Perhaps this is not surprising. In his role as a treatment provider to Zmora immediately following her birth, Dr. Perlman was trying to determine the cause of the baby's apparent deficits and to render the appropriate treatment. The comments contained in Dr. Perlman's second report suggest that he has an interest in the court finding that his conclusion reached in 1984 was indeed the correct one and as such, Dr. Perlman lacks the necessary objectivity and impartiality which are essential from an expert testifying in court.

[29] I am not to be taken as being critical of Dr. Perlman for the manner in which he has articulated his views on the case; to the contrary, given that he was Zmora's treating neonatologist immediately following her birth when it was determined that she had suffered brain damage, it would be difficult if not impossible in my view for Dr. Perlman to be completely objective about the opinion he has been asked to provide to this Court, given the facts of the case and the nature of the expert opinion sought. One of the central issues in this case is that of causation, which is one of the issues Dr. Perlman was trying to determine in January of 1984 when Zmora came under his care.

[30] In permitting Dr. Perlman to offer an expert opinion in this case, the Court must be satisfied that the more stringent requirements of the amended Rule 53.03 have been met. It is with reluctance that I have come to the conclusion that as a result of his involvement with Zmora as her treating specialist, Dr. Perlman's acknowledgement that he relies upon his notes in the chart as well as his memory of the case in coming to his expert opinion as well as the comments contained in his September 2010 report which I have referred to earlier make it clear to me that he would not be able to offer opinion evidence that is objective and impartial on the area of causation.

[31] In considering whether Dr. Perlman ought to be permitted to offer an expert opinion at this trial, I am mindful of the fact that this is a medical negligence case being tried with a jury, where the jury will be asked to determinate liability and causation. The nature of the evidence

upon which Dr. Perlman proposes to opine, the timing of the brain damage to the infant, is difficult to comprehend. I agree with the submissions of counsel for the hospital that this type of evidence is complex in nature, and under the optimal circumstances will be difficult for the jury to comprehend. Quite apart from the question of the ability of Dr. Perlman to be objective during the course of providing his expert opinion, I have serious concerns that offering Dr. Perlman both as a treating physician and as an expert would serve to complicate matters for the jury. To offer Dr. Perlman in two different roles, would, in my view, further complicate the task of the jury. There would be a temptation for the jury to accord more significance to the opinion of Dr. Perlman than to the opinions of other experts who did not have the advantage of treating the plaintiff.

[32] There is also the concern that the jury may be confused by the testimony of Dr. Perlman as a fact witness and his testimony as an expert. Counsel for the Plaintiffs suggested that this problem could be remedied by the manner in which questions were put to Dr. Perlman as well as by my charge at the end of the evidence. I am not persuaded that this would, in fact, be the case. In Dr. Perlman's evidence, he would necessarily refer to his notes and thoughts from his role as Zmora's neonatologist and yet he would be asked to render an expert opinion as a neonatologist on the issue that the jury must ultimately decide: the timing of the brain damage. Further, the concern that the jurors might somehow conclude that because Dr. Perlman was involved in the treatment of Zmora that places him in a more advantageous position than the other experts is a very real one, in my mind.

Conclusion

[33] In light of the concerns I have expressed about the ability of Dr. Perlman to provide an objective opinions for the reasons noted, combined with the nature of his evidence in a trial with a jury, I have concluded that in light of all of the circumstances of this case, Dr. Perlman cannot be permitted to offer expert opinion on the issue of causation. He may testify in his capacity as a treating doctor of Zmora Gutbir.

Wilson, D.A., J.

Released: November 19, 2010

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