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EXPECT THE BEST

Court of Appeal Clarifies Rules Regarding Contact with Experts

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Yesterday, the Ontario Court of Appeal handed down its highly anticipated decision in *Moore v. Getahun*. The decision provides much needed guidance for litigators and their clients in relation to the role of counsel in interacting with an expert witness in the preparation of an expert's report.

The underlying trial dealt with a medical malpractice suit. The plaintiff was injured in a motorcycle accident. He was treated by the defendant orthopedic surgeon for a fractured wrist. The defendant had applied a full cast to the plaintiff's wrist and forearm. The plaintiff alleged that he suffered permanent damage to muscles in his arm caused by the defendant's negligence in applying a full cast.

The trial judge preferred the plaintiff's expert's evidence, and found that the application of the cast was a breach of the standard of care and had caused the alleged damage to the plaintiff's arm. While the ultimate finding may not have been controversial, Justice Wilson's comments regarding the preparation of written reports certainly proved to be.

During cross examination at trial, the defendant's expert witness had indicated that he had sent a draft report to the defence counsel for review. The expert indicated that he had produced his final report following an hour and a half long conference call with defence counsel. Notably, the trial judge commented adversely on the consultation between the defendant's counsel and the expert, and stated that it was improper for counsel to assist an expert witness in any manner in the preparation of the expert's report as this had the effect of undermining the expert's credibility and neutrality.

The important issue on the appeal for insurers was whether the trial judge had erred in her treatment of the defence's expert opinion evidence, and specifically in her strong reprimand of counsel for discussing the contents of draft reports with the expert. This issue brought about the involvement of a number of interveners, including The Advocates' Society and the Ontario Trial Lawyers Association, all of whom took issue with the trial judge's admonition. In fact, the trial judge's position in relation to this issue did not find support in the respondent's submissions either.

In its decision, the Court of Appeal concluded that the trial judge had erred in holding that it was unacceptable for counsel to review and discuss draft expert reports. The Court approvingly cited one of the intervener's position papers, which stated that if accepted, the trial judge's ruling:

> [W]ould have the effect of impairing normal, reasonable and prudent litigation practices, would substantially increase the cost of litigation, would do a disservice to the Court in terms of hearing fulsome, well-organized and appropriate evidence, and ultimately would result in a chilling and significantly restricted effect on access to justice.

The Court specifically found that the trial judge's conclusions, which effectively foreclosed undocumented discussions between counsel and expert witnesses and mandated disclosure of all

written communications, were both unsupported by and contrary to existing legal authority. The Court stated that consultation and collaboration between counsel and expert witnesses was a well-established and essential practice:

> Reviewing a draft report enables counsel to ensure that the report (i) complies with the *Rules of Civil Procedure* and the rules of evidence, (ii) addresses and is restricted to the relevant issues and (iii) is written in a manner and style that is accessible and comprehensible.

In the Court's view, the changes to standard practice as suggested by the trial judge would not be in the interests of justice, and "would frustrate the timely and cost-effective adjudication of civil disputes."

The Court offered its own views on the extent to which consultations between counsel and expert witnesses needed to be documented and disclosed to an opposing party. Specifically, the Court stated that "improper conduct" is not shielded by the litigation privilege which encompasses the communications relating to expert reports. In cases where there is suggestion that an expert's duties of independence and objectivity have been interfered with, the party seeking production of draft reports or notes of discussions must show *reasonable grounds* to suspect that counsel communicated with an expert witness in a manner likely to interfere with the witness's duties.

Absent a factual foundation to support reasonable grounds of suspicion, the Court stated that "a party should not be allowed to demand production of draft reports or notes of interactions between counsel and an expert witness."

With these reasons, the Court unequivocally rejected the trial judge's comments in relation to consultation between counsel and expert witnesses in relation to draft reports. Interestingly, this did not affect the outcome of the appeal. While the Court found errors in the trial judge's reasons, these errors did not give rise to a substantial wrong or miscarriage of justice, and a new trial was not ordered.

The litigation community had been very concerned with the potential implications of the trial decision. Would counsel have to retain two experts - one with whom counsel can discuss the case and the science or medicine underlying the case, and one to actually write a report? Further, there was a concern that the ruling could interfere with counsel's ability to assist an expert with the form, length and relevance of a report - aspects which assist trial judges in understanding the expressed opinion.

By eliminating the need for a redundant expert, and permitting counsel to discuss a draft, the Court of Appeal has endorsed a more cost effective and productive approach to expert evidence. Further, the Court of Appeal has essentially expressed that the propriety of counsel (both sides) in dealing with experts should be presumed. Only a demonstrable case of improper influence will permit the other side to delve into the interaction between counsel and expert. ■