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PUBLICATION

Not All Experts Are Treated Like Experts: The Court of Appeal Provides Much Needed Clarity

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When can a witness who has not been retained by a party to the litigation give opinion testimony at trial? Must that witness comply with the requirements of Rule 53.03 of the *Rules of Civil Procedure*, which is directed at expert witnesses and requires that no opinion evidence may be tendered unless a report is prepared and signed by the expert witness, who must in turn acknowledge that he or she has a duty to the Court to be unbiased and impartial?

The confusion surrounding these critical issues was cleared this past week with the release of the Court of Appeal's decision in *Westerhof v Gee Estate*. The result of the decision is good news for litigants and their counsel, as all relevant evidence will be before the courts while at the same time, the cost and delays of preparing expert reports that comply with the *Rules of Civil Procedure* will be minimized.

The Facts of *Westerhof* and its Procedural History

The Plaintiff Mr. Westerhof was injured in a car accident. The Defendant Estate admitted liability and the trial proceeded on causation and damages alone. At trial, rulings were made on the admissibility of various medical evidence. The trial judge ruled that medical witnesses who treated or assessed Mr. Westerhof could not give opinion evidence concerning their diagnosis or prognosis as they were required to first comply with Rule 53.03 even though they were not witnesses retained to provide expert evidence for the litigation. The medical witnesses included Mr. Westerhof's treating chiropractor and psychiatrist as well as two medical witnesses retained by Mr. Westerhof's Statutory Accident Benefits (SABS) insurer.

On appeal, the Divisional Court affirmed the trial judge's decision, concluding that all opinion evidence requires compliance with Rule 53.03, including opinion evidence from treating medical

practitioners who were not retained by a party to the litigation. In so holding, the Divisional Court focused on the nature of the proffered evidence rather than the status of the witness as previous Courts had done. If the evidence is opinion evidence as it relates to such matters as causation, diagnosis, and prognosis compliance with Rule 53.03 was required. If the evidence is factual evidence alone - such as observations of the injured plaintiff and a description of the treatment provided - compliance was not required.

The Decision of the Court of Appeal

The Court of Appeal rejected the Divisional Court's conclusions. The Court of Appeal held that a witness with special skill, knowledge, training or experience who has not been engaged by a party to the litigation may give opinion evidence at trial, without complying with Rule 53.03 where

- the opinion to be given is based on the witness's observation of or participation in the events at issue; and
- the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.

The Court of Appeal termed such experts "participant experts," which would include a treating physician.

In turn, the Court of Appeal concluded that a non-party expert - such as a physician retained by a SABS insurer - who was retained for a purpose other than the litigation, may give opinion testimony where the opinion is based on personal observations or examinations relating to the subject-matter of the litigation.

Applying these principles, the Court considered each impugned evidentiary ruling made by the trial judge. The Court concluded that some of the treating physicians and non-party experts should not have been excluded from giving expert opinion testimony for failure to comply with Rule 53.03, while others were properly excluded. Notably, the Court held that the trial judge erred in excluding the opinion testimony of a treating psychiatrist and pain specialist, as well as two non-party experts who conducted a functional abilities assessment of Mr. Westerhof in August 2005 and prepared a report for Mr. Westerhof's SABS insurer. Despite their non-compliance with Rule 53.03, these witnesses were entitled to testify concerning the medical history they took from the plaintiff, the tests they performed, and the treatment results they observed, including their observations about whether Mr. Westerhof was experiencing pain.

The Court held that the trial judge's erroneous evidentiary rulings prevented Mr. Westerhof from placing important evidence before the judge and jury that could reasonably have affected the outcome of the trial. These errors warranted the granting of a new trial.

The Implications of *Westerhof*

The decision in *Westerhof* and its companion case, *McCallum v Baker*, brings much needed clarity to the scope of Rule 53.03 and will have significant practical consequences for litigants heading to trial.

Although, *Westerhof* arose in a personal injury context, the decision applies equally across other areas of civil and commercial litigation, where “participant” or non-party expert witnesses not retained by one of the parties to the litigation may be present, such as engineers, financial advisors, accountants, and environmental consultants.

Westerhof provides greater certainty to litigants that they will be able to introduce the necessary evidence to prove their case. Previously, where an expert witness did not comply with Rule 53.03, litigants were forced to either abandon the expert’s evidence or seek leave of the Court before trial to excuse non-compliance. Now, where the requirements stated in *Westerhof* are met, litigants will have greater certainty knowing whether their treating physicians or other experts not retained for the purpose of trial can testify.

Lastly, *Westerhof* may help to cut down on the delay and costs of going to trial. Where an expert witness is uncooperative, unavailable, or otherwise unable to meet the requirements of Rule 53.03, the expert’s evidence may still be introduced, without the possibility of further delay and costs in obtaining Rule 53.03-compliant reports or in retaining new experts.