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PUBLICATION

‘DIY': Experts Must Write Their Own Reports

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Recently, I received a report from an engineering expert, which was poorly written: bad grammar and organization, unnecessarily long, and missing several pivotal issues relating to liability. I was familiar with this expert’s work, and was convinced that he had not written the report himself, and likely had not even reviewed it. So, I asked him. He assured me that he had written it. Shortly thereafter, the expert rendered his invoice, which demonstrated that a junior engineer had done almost all of the work, and my expert relatively little (he must have overlooked the fact that I might actually read the invoice). The expert eventually confessed. He was of the view, however, that, given his seniority, it was unreasonable of me to expect that he would have drafted the report himself. He then explained that the report was so poor because his junior engineer, who does not have a good command of English, had written it. He assured me, however, that I needn’t worry because his secretary (an administrator with no professional education in engineering) had directed him to the questionable sections of the draft, so that he could correct them.

Obviously, this state of affairs was unacceptable, both in terms of my expectations (I had hired the expert to provide *his* opinion not someone else’s), and with respect to the accuracy and validity of the opinion (I was hoping to use the report to broker a pre-trial settlement and avoid trial).

Fortunately, the Ontario Superior Court recently addressed this precise issue in *Kushnir v. Macari*, 2017 ONSC 307. In October 2014, the plaintiff, Slava Kushnir, while a pedestrian in the parking lot of a shopping mall, owned and operated by CP Reit Ontario Properties Limited, was struck by a motor vehicle, driven by Jamie Macari. Kushnir sued Macari and CP Reit for damages.

In support of Macari’s defence, Macari’s counsel scheduled two independent medical examinations, one with Dr. Michael Ford (an orthopaedic surgeon), and the other with Dr. Donald Young (a neuropsychologist). There was no issue that Macari was entitled to obtain

these opinions. Kushnir, however, wanted to impose various conditions on the physicians, one of which was that their respective reports must not be 'ghost written', and that they be the exclusive work product of the doctors. In that regard, he relied on the following definition of "ghost writing":

When an expert opinion is tendered that is attributable to one author but where the opinion contained is in fact the opinion even, in part, of people not named on the report.

Kushnir's counsel articulated the proposed condition as follows:

…The reports of Dr. Ford and Dr. Young will not be ghost written and that the reports must be the sole work of the doctor and not any other individual(s) and not a report partly written by administrative staff or other individuals employed by the agency through which the doctor provides expert services.

Kushnir took the position that if the doctors did not agree to be subject to this condition, he would not attend the appointments.

The defendants took the position that Rule 33 of the *Rules of Civil Procedure* (which governs the process relating to expert medical examinations) was unambiguous, and that it sufficiently addressed Kushnir's concern. In particular, Rule 33.06 provides that the examining health practitioner shall prepare a written report. Furthermore, Rule 53.03 (2.1) compels the expert to execute an Acknowledgement of Expert's Duty form, which contains an acknowledgement of the expert's duty to provide opinion evidence that is fair, objective and non-partisan.

The defendants advised Kushnir that they would be bringing a motion to compel his attendance at the examinations.

On the motion, Justice MacLeod-Beliveau acknowledged that the purpose of Rule 33 and Section 105 of the *Courts of Justice Act*[1] is to ensure a fair trial and create a level playing field.

She adopted the Oxford Dictionary's definition of "ghost writer": "A person whose job it is to write material for someone else who is the named author". While acknowledging that ghost writing properly exists in the legal profession (e.g. motion materials, facta etc.), it is distinctly different from ghost writing an expert's report, wherein the expert provides opinion evidence that can directly affect the result of the litigation and the parties' interests. The court referred to the case of *Lavecchia v. McGinn*[2], wherein Master MacLeod (as he then was) said,

…The parties are in agreement that an expert report must be the report of the expert and not a report partly written by administrative staff or other individuals employed by the agency through which the doctor provides expert services.

He complained, however, that ghost-written reports were becoming a significant problem in litigation. He noted, for example, that an expert once admitted at trial that much of her report had actually been written by someone else, a fact that was not previously disclosed.[3]

Justice MacLeod-Beliveau pointed out that the issue of who actually authors a report is of particular concern in circumstances where cases are resolved prior to trial on the basis of untested expert opinion, which forms the basis of counsel's assessment of the case and subsequent offers to settle. She said,

[31] …The parties pay substantial fees to experts for their reports and they have a right to expect those reports to be written by the author of the report. If the parties cannot rely on the reports being actually written by the author of the report, it attacks the very foundation and purpose of the expert report in the first place, and frankly wreaks havoc with the litigation process. If reports cannot be relied upon, unnecessary litigation is promoted.

[32] The parties, counsel and the court rely on the expertise of the stated author and the opinion stated in an expert's report. Many cases resolve after the delivery and exchange of expert reports, without the test of the opinion in court through examination-in-chief and cross-examination. If the parties cannot rely on the fact that the report is the sole work of its author, then the benefit and cost of expert reports is dubious.

…

The real danger is what about the cases that were settled based on the expert's opinion as stated in the report without ever going to trial? The parties, counsel or the court at a pre-trial would never know if it was solely written by the author of the report or not. Sadly, because of a few rogue experts who have admitted to using ghost writing when they were cross-examined at trial…, the issue has become serious enough that the litigation bar is now requiring that it be put into conditions of these assessments…

The court concluded that ghost writing offends Rule 33.06, and that a condition to preclude ghost writing is necessary in order to ensure trial fairness and maintain faith in the administration of justice. The expert report must be that of the expert, and not written partly by administrative staff or other individuals employed by the expert through which the doctor provides expert services. This implies that the research and review of the medical records must also be conducted solely and entirely by the expert. It is what the parties and the courts expect, and what Rule 33 implies.

Accordingly, Justice MacLeod-Beliveau ordered that Drs. Ford and Young must draft their respective reports themselves, and that Kushnir's health records and medical information must not be disclosed to any other person or entity other than defence counsel.

Discussion

So, what does this mean?

If a case proceeds to trial, any deficiency in an expert opinion or report can, theoretically, be exposed by competent cross-examination, which is an effective tool to reject, or limit the weight of, expert evidence.

The more pressing concern is when an expert opinion is relied on in the context of pre-trial settlement, and does not get to be rigorously tested by cross-examination.

The *Kushnir* decision will likely serve to ensure that expert reports are more reliable and thus more likely to stand up to scrutiny at trial. Furthermore, in the pre-trial context, such opinions will now likely carry more weight and be perceived as being more valid, despite not having been tested, so that parties will likely be more inclined to ely on them for settlement purposes.

Although *Kushnir* is a personal injury case, with the issue of confidentiality being somewhat central, it is most likely that the principles governing the accuracy and validity of the expert opinion, as well as the expectations of the client, would apply equally to any expert including an engineering/technical expert.

On a final note, while it is imperative that lawyers maintain a positive relationship with their experts, it would certainly be prudent for the lawyer to outline, in writing, at the beginning of a retainer, the lawyers' expectations, and to remind the expert of her obligations and appropriate role in the process.

I really must have another word with my expert…

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[1] Section 105 concerns physical or mental examinations.

[2] [2016] O.J. No. 1750 (S.C.J.)(QL).

[3] *El-Khodr v. Lackie* (Action No. CV-09-43686, transcript of cross-examination of expert called by defendant, p. 10); See also *Children's Aid Society of London and Middlesex v. B. (C.D.)*, [2013] ONSC 2858 at para. 40 (S.C.J.).