THE PROPER USE OF EXPERTS IN CIVIL TRIALS:

WHERE DO WE GO FROM HERE?

Steve Rastin
Rastin & Associates
128 Wellington St. W
Barrie, ON L4N 8J6

Catherine Mahony
Sole Practitioner/
Independent Contractor
mahonycm@gmail.com

INTRODUCTION

The proper role and use of experts is becoming an area of increased frustration in Ontario. Personal injury litigation is complex and often requires several expert witnesses to properly inform the trier-of-fact. It is common to call engineers, doctors, rehabilitation and vocational professionals, accountants and more, to give expert evidence. Is it any wonder that trials continue to grow longer and longer? Injury cases make up approximately one quarter of the Ontario Civil caseload. However, they account for the majority of the civil docket. Senior counsel tell me that they used to run a trial, "in the good old days," in under a week. Today, however, even simple trials run three or four weeks, and it is not uncommon to run six or eight weeks or more to deal with complex cases. Compare that to our American colleagues that routinely conduct a personal injury trial in 3-5 days, even in complex areas like medical negligence. Everyone agrees that a major cause of longer and more expensive trials is the proliferation of the "hired gun expert." Once upon an a time, and even today in the United States, parties relied primarily on the treating doctors, and relied upon only a few litigation experts to argue their case. Today, experts are called to develop, and refute, every aspect of a case. In some ways, this is a positive development that assists the trier-of-fact in coming to a more just resolution.

The system only works, however, if the litigation experts properly fulfil their roles as experts assisting the Court in properly understanding complex issues in dispute. In Ontario, this is often not the case. The Judiciary is increasingly expressing frustration at the role that hired-gun experts are taking in the Courtroom. How can two supposedly qualified experts analyse the same car wreck and come to widely different conclusions with one saying, for example, that the plaintiff's car was stopped, and the other saying she was speeding? Or, how can two doctors examine the same accident victim and conclude, on the one hand, that he is totally disabled and will never work again, while the other says he's faking and should go back to work tomorrow? Or, two Occupational Therapists examine the same person, with one saying she needs no attendant care support while the other says she needs the maximum? In Ontario, for us, this has

become the new norm. There remain many balanced and fair experts. There are, alas, also many hired-gun experts working on both sides of the fence. Experts should not be advocates, and the proliferation of the hired-gun-expert-advocate is negatively impacting the administration of justice in Ontario. The Ontario response to this problem was the recently developed rule 53 of the Rules of Civil Procedure.

In this paper, we will provide an overview of how expert testimony is supposed to be used in civil trials, a review of the historic use of experts, and an analysis of the harm caused by hired-gun experts. We will provide an overview of Ontario's Rule 53 and examine whether this has helped correct the harm it seeks to solve. We will compare our Rule 53 with Nova Scotia's Rule 55. We will conclude by providing some concrete suggestions that I think might improve the system.

HISTORIC USE OF EXPERTS

The Courts have long-wrestled with the proper admissibility and use of expert testimony, in both civil and criminal cases. Consider, for instance, the comments of the Supreme Court of Canada in the 1961 criminal decision *Nordstrom v Baumann*[1], where the court cited with approval the following passage from a 1936 decision from Trinidad and Tobago:

> The learned trial judge accepted the view of the medical men adduced as witnesses for the respondent, and rejected the view of the medical men adduced as witnesses for the appellant. Their Lordships see no reason to doubt that, in assessing the relative value of the testimony of expert witnesses, as compared with witnesses of fact, their demeanour, their type, their personality, and the impression made by them upon the trial judge — e.g., whether, ... they confined themselves to giving evidence, or acted as advocates — may powerfully and properly influence the mind of the judge who sees and hears

[1] *Nordstrom v Baumann*, [1962] SCR 147.

> them in deciding between them. These advantages, which were available to the trial judge, are manifestly denied to their Lordships sitting as a Court of Appeal.[2]

Thus, the courts have a long history of requiring that experts be dispassionate and objective, as opposed to acting as advocates for the party paying their bill at the end of the day. Experts crossing the line into advocacy are clearly a long-standing cause of friction.

Guidelines regarding the admissibility of expert evidence were eventually codified by the Supreme Court of Canada in *R v Mohan*[3], where the criteria for admission of expert evidence were delineated as:

(a) relevance;
(b) necessity in assisting the trier of fact;
(c) the absence of any exclusionary rule;
(d) a properly qualified expert[4]

Post *Mohan*, expert evidence is only admitted where a party can satisfy the Court that the proposed evidence meets all four criteria. Note that the *Mohan* test does not explicitly require that the party establish that the expert is neutral and detached. Perhaps the Court felt that neutrality was such an obvious requirement that it did not need to be enunciated. At any rate, the problem becomes that the Mohan criteria can be satisfied by a hired-gun expert, so long as such expert is qualified in the particular area of expertise and is possessed of relevant observations which could assist the trier of fact in coming to a fair and just result.

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[2] *Nordstrom v Baumann*, [1962] SCR 147, at paragraph 46, citing with approval *Caldeira v. Gray*, [1936] 1 WWR 615 (Trinidad & Tobago P.C.), at 618, [1936] 1 All ER 540.
[3] *R v Mohan*, [1994] 2 SCR 9.
[4] *R v Mohan*, *ibid*, at paragraph 17.

EXPERTS AS ADVOCATES

Given the ease with which expert hired gun advocates can satisfy the *Mohan* test, the use of experts as advocates has proliferated. This result is that trials have become, in effect, a "battle of the experts", with both sides presenting highly qualified experts, each ostensibly evaluating the same material, and coming to polar opposite conclusions. How does the trier-of-fact reconcile this conflicting evidence? In practise, judges and juries have effectively been reduced to picking which expert(s) to believe.

The proliferation of hired-gun experts has also resulted in much longer trials. Where, in the old days, each side would have relied on the evidence of treating doctors and argued as to the relevance of certain findings, today much more time is needed to conduct examination-in-chief and cross-examination of each and every expert, which in turn drastically increases the cost of litigation. Outside of the realm of injury law, which is contingency fee driven, justice has become cost prohibitive for most.

While treating doctors sometimes still testify, this is no longer universal. Treating doctors often do not like the Court and many resist making themselves available to testify. Hired-gun experts are not as reluctant, and they have effectively replaced treating doctors as the norm for presenting evidence. These doctors typically provide reports based on a single meeting with a plaintiff. Judges have tended to move to narrow the scope of admissible evidence in order to place controls on the sheer volume of opinions that both sides seek to adduce.

Judges consistently caution against the usefulness of hired-gun advocates. Consider the case of *Frazer v Haukioja*[5] for example, where the court rejected the testimony of one of the plaintiff's medical experts as being more advocacy than objective observation, finding:

> 160 The problem with Dr. McCall's evidence arose not in the context of independence but with his obvious and admitted advocacy on Grant's behalf.

[5] *Frazer v Haukioja*, 2008 CarswellOnt 4948 (OSCJ), aff'd on appeal at 2010 ONCA 249.

> According to Dr. McCall, a "doctor should always be an advocate", that's part of the role of the treating doctor. He is aware of the conflict that can arise for a treating doctor in giving medical legal opinions but he was intent on giving his opinions in this trial regardless.
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> 161 Dr. McCall simply could not, however, reconcile the complaints of pain that Grant has been making with the relative lack of evidence of significant anatomical anomalies demonstrated through x-ray, MR and/or CT scan imaging. He agreed, in fact, that there was no appreciable anomaly seen in images of the sub talar joint yet he persisted in opining that that joint might well be the source of some of Grant's pain. Surely this is just a guess and one which I very much doubt this doctor would have given, let alone clung so tenaciously to, if he was being peer reviewed. In any event, the court does not accept Dr. McCall's evidence as being balanced and fair in this area.[6]

In *Kusnierz v Economical Mutual Insurance Co.*[7], the Court again complains about a plaintiff's medical expert advocating for his patient. In this case, the doctor was originally retained by the accident benefits insurance company, but shortly thereafter became a treating physician. After wrestling with whether such evidence could be admitted at all, the court determined that, while it would accept the evidence, it would assign it the weight it deserved, in light of the fact that this expert was, essentially, an advocate for his patient:

> 117 But I was left in a quandary about the admissibility of Dr. Ameis' evidence as a result of recent concerns about the undue weight that trial judges sometimes give to experts who are not independent within the meaning of the amendments to Rule 53.03 and Rule 4.1.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194: see the recommendations of the Civil Justice Reform Project (2007) related to the problem of "expert bias". It is important that trial judges take seriously the "gate keeping" function: see the Honourable Stephen T. Goudge, Commissioner, *Report of the Inquiry into Paediatric Forensic Pathology in Ontario*, Volume III, Chapter 18 (the Goudge Inquiry). While the new wording does not apply to this case, the underlying policy of due caution does.
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> 118 It would be reasonable in these circumstances, to consider the evidence of Dr. Ameis as one would the evidence of a treating physician like a family doctor. Such a witness does not seem to fall squarely within either Rule 4.1.01 or Rule 53.03, but is someone who has and exercises expertise routinely, and ought to be able to give relevant evidence about his or her patient. I will take into account that Dr. Ameis has been a passionate advocate for Mr. Kusnierz and has formed a therapeutic alliance with him. I must,

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[6] *Frazer v Haukioja*, *ibid*, at paragraphs 160, 161.
[7] *Kusnierz v Economical Mutual Insurance Co.*, 2010 ONSC 5749, appeal all'd on other grounds at 2011 ONCA 823.

> therefore, take his evidence with the proverbial grain of salt that goes to its weight.[8]

Perhaps even more troubling, in my view, than the findings against plaintiffs' doctors acting as advocates, are the numerous examples where defence experts have been found to be hired-gun advocates. Consider, for instance, the case of *Anand v Belanger*[9], where the trial judge conducted a detailed critique of all of the expert evidence he heard. After accepting the testimony of all plaintiff witnesses, the court rejected that offered by the defendant's expert physician, in large part because it viewed her as little more than a "hired gun" for the defence:

> 55 I am compelled to observe that Dr. Soric did not impress me as an expert witness. Quite apart from her long-time (and remunerative) involvement with defence insurers, during the course of her testimony she frequently descended from the role of opinion witness to that of advocate, by either debating issues with counsel, or giving non-responsive answers, or providing information not sought by the questioner but (apparently) supportive of her theory. I am therefore not prepared to place much weight on Dr. Soric's evidence or opinion.[10]

In *Carmen Alfano Family Trust v Piersanti*[11], the court ruled that the defence expert had so thoroughly "bought into" the defence theory, that he was excluded from even giving evidence. The Court observed:

> 6 I accept this as a correct statement of the role of an expert. The court expects objectivity on the part of the expert. In other words, he or she cannot "buy into" the theory of one side of the case to the exclusion of the other side. To do so, poses the danger that could taint the court's understanding of the issues that must be decided with impartiality and fairness to both sides. The fundamental principle in cases involving qualifications of experts is that the expert, although retained by the clients, assists the court. If it becomes apparent that an expert has adhered to and promoted the theory of the case being advocated by either Plaintiffs or Defendants, he or she becomes less reliable and is not an expert in the way that the role has been defined in the recent and well known jurisprudence.
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> …

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[8] *Kusnierz v Economical Mutual Insurance Co.*, *ibid*, at paragraphs 117 and 118.
[9] *Anand v Belanger*, 2010 ONSC 2619.
[10] *Anand v Belanger*, *ibid*, at paragraph 55.
[11] *Carmen Alfano Family Trust v Piersanti*, 2009 CarswellOnt 1576 (OSCJ).

> 11 An expert should exercise extreme caution on analyzing the facts that support his or her client's position. In this *voir dire*, it was very apparent that Mr. Anson-Cartwright was committed to advancing the theory of the case of his client, thereby assuming the role of an advocate. The content of many of the e-mails exchanged between Mr. Anson-Cartwright and Mr. Piersanti reveal that Mr. Anson-Cartwright's role as an independent expert was very much secondary to the role of "someone who is trying to their best for their client to counter the other side." After my detailed consideration of the transcripts from the *voir dire*, I have concluded that these comments correctly describe what took place. Mr. Anson-Cartwright became a spokesperson for Mr. and Mrs. Piersanti and, in doing so, did not complete independent verification of key issues in accordance with the standards that are expected of an expert. The key issues, crucial to the determination of this case, if determined on the basis of Mr. Anson-Cartwright's reports would be tainted by the lack of impartiality that is clearly apparent from the content of the e-mails.[12]

A most egregious example of abuse of the use of expert testimony is the decision of *MacDonald v Sun Life Assurance Co. of Canada*[13]. This was a case about a slip and fall accident in a parking lot and resulting damages. The defence relied on Dr. Lipson, a physiatrist who had conducted a defence medical examination. The case had been referred to Dr. Lipson by a company called Riverfront, which arranged medical assessments of claimants for either the insurance industry, or for counsel, in personal injury cases. Part of Riverfront's mandate was to, "facilitate the preparation and delivery of medical reports and the attendance of the doctor to testify in court if required"[14]. The defense had engaged Riverfront to arrange for a physiatrist's assessment of the plaintiff and to provide them with a report of same and, eventually, plaintiff's counsel was served with three reports of Dr. Lipson, all on Riverfront letterhead.

While giving his testimony at trial and reading from one such report, it became evident to the court that the doctor appeared to be reading from a document different from those which had been served on the plaintiff's counsel. The doctor explained this by testifying that it appeared he was reading from a first draft of the report in question, but other anomalies in his testimony quickly became apparent. Following a court-imposed delay in the trial to allow the defendants to figure out what had happened, it eventually became clear that Riverfront had in fact altered entire portions of Dr. Lipson's

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[12] *Carmen Alfano Family Trust v Piersanti*, 2009 CarswellOnt 1576 (OSCJ), at paragraphs 6 and 11.
[13] *MacDonald v Sun Life Assurance Co. of Canada*, 2006 CarswellOnt 11556 (OSCJ).
[14] *MacDonald v Sun Life*, *ibid*, at paragraph 4.

reports, such that they did not reflect the true opinion of the doctor at all, and in fact, Riverfront had affixed Dr. Lipson's "rubber stamp" signature to reports which the doctor had not, in fact, approved. Given the troubling issues with his testimony, Dr. Lipson was not permitted to testify at the trial. In regard to the role of an expert witness at trial, the court provided the following guidance and direction:

> 100 Expert witnesses play a vital role in proceedings before the courts both in civil and in criminal matters. In personal injury actions in particular, the evidence of the expert witness may be the determining factor in the resolution of the plaintiff's claim In the case of health practitioners, section 52 of the *Evidence Act* provides under certain conditions, the report may be filed in place of the *viva voce* evidence of the health practitioners. The court is entitled to assume that the report represents the impartial opinion of the expert.
>
> 101 In my view Riverfront in this case, went far beyond what can be considered a proper "quality control" function. While I am not prepared to find that they were motivated by a desire to assist the defendant, nonetheless I find their actions constituted an unwarranted and undesirable interference with the proper function of an expert witness.
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> 102 The function of an expert witness is to provide an independent and unbiased opinion for the assistance of the court. An expert witness' evidence should be and should be seen to be the independent product of the expert uninfluenced as to form and content by the exigencies of litigation.[15]

This case makes it clear that counsel must guard against not only experts who step beyond their appropriate role and become advocates, but also overly zealous assessment companies that make impermissible modifications to reports in an effort to assist the parties who hired them.

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[15] *MacDonald v Sun Life*, *ibid*, at paragraphs 100 – 102.

THE JUDICIAL RESPONSE TO HIRED GUNS: RULE 53

By 2010, there was widespread concern by judges, lawyers, and government, relating to the perception that experts giving evidence in trials did not appear to appreciate their inherent obligation to provide neutral, balanced, and objective evidence. After considerable debate and discussion, and the Osborne Report, which carefully considered many of the these questions, the Ontario legislature attempted to rectify the situation by introducing amendments to Rule 53 of the *Rules of Civil Procedure*[16], such that it came to read as follows:

> EXPERT WITNESSES
>
> *Experts' Reports*
>
> 53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).
>
> (2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).
>
> (2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:
>
> 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,
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> 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

[16] RRO 1990, O Reg 194.

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.

Schedule for Service of Reports

(2.2) Within 60 days after an action is set down for trial, the parties shall agree to a schedule setting out dates for the service of experts' reports in order to meet the requirements of subrules (1) and (2), unless the court orders otherwise.

Sanction for Failure to Address Issue in Report or Supplementary Report

(3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,

(a) a report served under this rule; or

(b) a supplementary report served on every other party to the action not less than 30 days before the commencement of the trial.

Extension or Abridgment of Time

(4) The time provided for service of a report or supplementary report under this rule may be extended or abridged,

(a) by the judge or case management master at the pre-trial conference or at any conference under Rule 77; or

(b) by the court, on motion.[17]

In addition to the new Rule 53, the court supplied a "Form 53", appended hereto as "Appendix A". Essentially, the Form 53 requires each expert intended to testify at a civil trial to sign a form indicating that the evidence he/she provides will be fair, objective and non-partisan, and that the signing expert recognizes that this duty prevails over and above any obligation to the party on whose behalf such expert is engaged.

Rule 53 was clearly well intentioned. The Rule sought to make it clear to experts (and the lawyers and insurance companies that hired them), that the job as an expert is not to advocate, but rather to assist the Court in finding the trust. The hope was that the Rule 53 Affidavit would result in fewer conflicting opinions and a more streamlined Court process. If experts acknowledged, in advance and in writing, that their primary duty was to the Court, then the quality and usefulness of expert testimony should improve.

[17] *Rules of Civil Procedure*, RRO 1990, O Reg. 194, Rule 53.

However, in the years following the adoption of Rule 53, the Rule itself appears to have caused little meaningful improvement.

It is perhaps unfortunate that in 2012, the Court found in a decision called *Henderson v. Risi*, that Rule 53 does not impose any NEW duties on experts at all, but rather merely codified their existing duties and obligations. The Court noted,

> 18 The Osborne Report made it clear that the issue of "hired guns" and "opinions for sale" was repeatedly identified as a problem and recommended that there be a specific rule of procedure to expressly impose on experts an overriding duty to the court rather than to the parties who pay or instruct them. Its purpose was, at a minimum, to "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."
>
> 19 The new rule amendments and certification requirement impose no higher duties than already existed at common law on an expert to provide opinion evidence that is fair, objective and non-partisan (See for example, *National Justice Compania Naviera SA v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68(Eng. Comm. Ct.), at 81-82, aff'd on this point, [*"Ikarian Reefer" (The)*] [1995] 1 Lloyd's Rep. 455 (Eng. C.A.) at 496; *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Ont. Gen. Div.)). The purpose of the reform was to remind experts of their already existing obligations.
>
> 20 Accordingly, adopting the principles enunciated in the *Gallant* case, I find that the question of lack of institutional independence on the part of Mozessohn is best left to be a matter of weight and not admissibility. This is re-enforced by the fact that the nature of the relevance between the bankruptcy of Timeless (and Page's conduct as Trustee) to the matters in issue are not crystal clear at this stage and, therefore, the importance of the connection between Mozessohn and Page requires further contextual assessment.[18]

This interpretation is regrettable in suggesting that the amendments do not intend to impose a new “higher” level of duty and responsibility on experts to fix the problem, but rather that Rule 53 was no more than a reminder to hired-gun experts regarding their existing duties. In my view, a more hard-line interpretation of the changes with a warning of consequences, might have proven more beneficial in addressing the problem. Whether as a result of *Henderson*, or just the inertia against meaningful change, examples of hired-gun experts acting as advocates remain all too common.

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[18] *Henderson v Risi*, 2012 ONSC 3459.

Consider *DeBruge v Arnold*[19], a recent case where the plaintiff's counsel called a medical expert to testify in respect of the plaintiff's ability to satisfy the threshold imposed by the Regulation. The doctor had attended on the plaintiff, at request of plaintiff's counsel, for purposes of a medical legal assessment, and conducted a physical examination. In respect of his proffered evidence, the court stated:

> 41 Doctor Fern struck me as a witness who sought to justify his opinion at every opportunity regardless of other evidence that might call his opinion into question. To suggest, as Doctor Fern did by implication, that he was in a better position to assess the plaintiff than anyone else who saw her, even her treating doctors, flies in the face of reality.
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> ...
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> 52 Where a medical legal expert like Doctor Fern is retained to provide the only opinion evidence on the threshold it will, in my opinion, be a rare case where that opinion evidence will carry the day on a threshold motion. This is particularly so where there is evidence of treating doctors that conflicts with the evidence of the expert who many might call a "hired gun".
>
> 53 Trial judges are constantly reminded about the gate-keeper function which we must perform when dealing with the evidence of experts. We are also constantly reminded about how experts have, in many respects, become the "life-blood" of personal injury litigation. The facts of yesterday's motor vehicle claim are no different than the facts of today's motor vehicle claim. A broken bone 25 years ago is the same broken bone today. A whiplash injury 25 years ago is the same whiplash injury today.
>
> 54 **The biggest difference in trials today is the time now required to try a personal injury claim that twenty-five years ago took four or five days. The same trial today is now four to five weeks. The reason for the length of trials today is often multi-faceted, but much of the blame for the length of trials today are the experts called by both the plaintiff *and* the defence bar. In many cases this evidence is both reasonable and necessary. However, where there are treating doctors, many of whom are more than qualified to give opinion evidence (provided the provisions of rule 53.03 are complied with), it is difficult to understand why a medical legal expert is required as well**.
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> ...
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> 56 For reasons best known to Doctor Fern he believed that he was in a better position to assess the plaintiff and give an opinion to the court than the plaintiff's treatment providers. **Doctor Fern was not the unbiased and objective witness that the court expects of an expert. Doctor Fern, in my view, did not understand his role**. The Rule 53 Acknowledgement of Expert Certificate that Doctor Fern signed says, amongst other things:

[19] *DeBruge v Arnold*, 2014 ONSC 7044.

> I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:
>
> a) To provide opinion evidence that is fair, objective and non-partisan...
>
> 57 **Doctor Fern did provide opinion evidence but his opinion was neither fair, objective nor non-partisan. Doctor Fern, unfortunately, like so many other experts that this court sees both in court and in reports filed in pre-trial memorandums, completely failed to understand the role of an expert, that being to assist the court in an unbiased objective manner**. I do not make this statement lightly and it applies equally to both sides of the bar — Plaintiff and Defence.
>
> 58 **Fundamentally, if an expert does not present his evidence in a fair, objective and non-partisan fashion the court can have little comfort in accepting such opinion**. Having rejected the opinion evidence of Doctor Fern, the plaintiff has failed to meet the requirements of the Regulation. The plaintiff chose to call the evidence mandated by the Regulation through a physician who saw her for one hour. The Regulation requires the evidence of a physician to support a claim that the plaintiff has suffered a permanent serious impairment of an important physical, mental or psychological function. There is a heavy onus on that medical legal physician. If that onus is not discharged, as it was not in this case, the results are fatal.[20]
> (emphasis added)

Thus, the court in this case opined that the major identifiable problem with trials today is that they remain a "battle of the experts", which means that nothing has really changed, since this is the very thing the Rule amendments were intended to ameliorate. Further, the court in this case considered that the expert had not truly understood his duty to be partisan and objective, despite having signed a form to that effect.

The sentiment that trials today remain as much a battle of experts as they ever were, is also echoed in the recent decision of *Berfi v Muthusamy*[21], where court noted that:

> 17 The parties' expert medical witnesses disagreed about the cause of the defendant's left shoulder problem. As between those two witnesses, there was some common ground regarding certain matters. Where they disagreed, however, I preferred the evidence of the plaintiff's expert, because I found him to be more objective and less of an advocate for the party who called him.[22]

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[20] *DeBruge v Arnold*, *ibid*, at paragraphs 41, 52 – 58.
[21] *Berfi v Muthusamy*, 2015 ONSC 981.
[22] *Berfi v Muthusamy*, *ibid*, at paragraph 17.

This statement is confirmation that the courts are still in the same position as they were prior to the amendments, which is to say that they must still evaluate all expert witnesses, and defer to that testimony which they find to be more objective. Following this argument through to its logical conclusion, it is clear that not all experts are uniformly objective, or objective at all, which is precisely the opposite outcome of that intended by the amendments.

Perhaps the strongest confirmation that the Court's problems with hired-gun experts and assessment centres as advocates remain, is the 2014 decision of *Burwash v Williams*[23], in which the defendant retained Riverfront to co-ordinate the medical examinations of the plaintiff, following which the plaintiff only received partial disclosure. (You will recall Riverfront was the same assessment centre that has judicially censored in *MacDonald v. Sun Life*.) The plaintiff alleged in *Burwash* that the disclosure it had received, indicated that Riverfront had been involved in the review, drafting, and editing of expert reports. It brought a motion for disclosure of all documents, which Riverfront resisted on grounds that it was not a party to the action, which in turn prompted the plaintiff to bring a new motion to compel third party production. The court noted the behaviour of Riverfront in the *MacDonald* case, and, in addition to ordering the disclosure of all materials in Riverfront's possession, also noted the importance of an expert maintaining independence and providing unbiased evidence:

> 28 Rule 53.03 of the *Rules of Civil Procedure* is designed to ensure the independence and integrity of the expert witness. The duty of the expert witness is to be of assistance to the court. Each expert witness is required to sign an acknowledgement that they are providing an independent and unbiased opinion. If there is reason to believe that the expert's report or opinion has been influenced by unknown third parties and is therefore not entirely the expert's opinion, the fundamental rationale for accepting expert opinion evidence is no longer present and hence the report is not only not helpful to the court but may become misleading. This is an issue that is directly related to trial fairness.[24]

As this is at the disclosure stage, it is unclear whether the reports themselves have been modified in any improper way. The fact that the Court is ordering non-party

[23] *Burwash v Williams*, 2014 ONSC 6828.
[24] *Burwash v Williams*, *ibid*, at paragraph 28.

production supports the conclusion that there remains judicial concern that these sorts of nefarious practices may be continuing.

The extreme tension and potential conflict regarding the modification of medical reports is most evident in the recently commenced Ontario law suit of *Platnick v. Bent and Lerners LLP.*[25] At the conclusion of an accident benefits arbitration, lawyer Bent posted a confidential internal communication on the OTLA chat-line which somehow came to Dr. Platnick's attention. According to Dr. Platnick's Statement of Claim, that post said,

> Dear Colleagues,
>
> I am involved in an Arbitration on the issue of catastrophic impairment where Sibley aka SLR Assessments did the multi-disciplinary assessments for TD Insurance. Last Thursday, under cross-examination the IE neurologist, Dr. King, testified that large and critically important sections of the report he submitted to Sibley had been removed without his knowledge or consent. The sections were very favourable to our client. He never saw the final version of his report which was sent to us and he never signed off on it
>
> He also testified that he never participated in any "consensus meeting" and he never was shown or agreed to the Executive Summary, prepared by Dr. Platnick, which was signed by Dr. Platnick as being the consensus of the entire team.
>
> This was NOT the only report that had been altered. We obtained copies of all the doctor's file and drafts and there was a paper trail from Sibley where they rewrote the doctors' reports to change their conclusion from our client having a catastrophic impairment to our client not having a catastrophic impairment.
>
> This was all produced before the arbitration but for some reason the other lawyer didn't appear to know what was in the file (there were thousands of pages produced). He must have received instructions from the insurance company to shut it down at all costs on Thursday night because it offered an obscene amount of money to settle, which our client accepted.
>
> I am disappointed that this conduct was not made public by way of a decision but I wanted to alert you, my colleagues, to always get the assessor's and Sibley's files. This is not an isolated example as I had another file where Dr. Platnick changed the doctor's decision from a marked to a moderate impairment.[26]

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[25] *Platnick v Bent and Lerners LLP*, Ontario Superior Court, CV-15-520683.
[26] *Platnick v Bent and Lerners LLP*, *ibid*, at paragraph 6.

Dr. Platnick disputes the narrative contained in his email. Lawyer Maia Bent stands by every word on her posting. The result is that Dr. Platnick has commenced a $16M lawsuit against Ms. Bent and her law firm. While, of course, all of the allegations of either side have yet to be proven in Court, it is a fair conclusion that there must have been some concern on the part of the insurance company defendant which prompted favourable settlement after this evidence came out at the hearing. In any event, this case highlights the fact that there remain significant concerns, and that we remain unable to have confidence that all expert evidence presented at trial or arbitration is neutral, unbiased, and accurate. Some experts, for both sides, are clearly meeting that obligation; however, too many do not. The very fact that lawyers and judges in Ontario courts are having the same discussions today as they were having five years ago, with respect to admissibility of expert testimony and how much weight it should be assigned, suggests that the matter remains very much unresolved, and further suggests that the Rule 53 amendments have done little, if anything, to remedy the problem.

MOORE V GETAHUN **– HOW MUCH INVOLVEMENT IS TOO MUCH?**

The previous discussion makes it clear there are lines which must not be crossed in guiding and consulting with an expert in preparation for a trial. But how much is too much? Fortunately, guidance has been provided by the Ontario Court of Appeal in the recent decision of *Moore v Getahun*[27], a medical malpractice action involving treatment in an emergency room. At trial, the judge preferred the evidence of the plaintiff's expert witness over that of the defendant's expert witness, and allowed the claim. The defendant appealed on several bases, the most relevant for purposes of this paper being that the trial judge erred in ruling that it was improper for counsel to assist an expert witness in the preparation of the expert's report.

[27] *Moore v Getahun*, 2014 ONSC 237, aff'd on appeal at 2015 ONCA 55.

The court began by noting the impact the trial decision had on the legal community, namely, that lawyers in Ontario now felt that they could not speak with their experts at all, lest they run afoul of the court in "assisting" in preparation of a report or opinion. In reality, much of such communication went "underground" and was conducted in only a very surreptitious manner, with cautious lawyers staying out of the fray entirely by not speaking with their experts in any manner:

> 46 The trial judge's statements as to the propriety of counsel reviewing draft expert reports have caused considerable concern in the legal profession and in the community of expert witnesses. Both The Advocates' Society and the Canadian Institute of Chartered Business Valuators struck task forces to develop a response. Both of these organizations have intervened in this appeal to provide their perspectives. The Advocates' Society presented the court with its *Principles Governing Communications with Testifying Experts* (Toronto: The Advocates' Society, June 2014) as well as its *Position Paper on Communication with Testifying Experts* (Toronto: The Advocates' Society, June 2014).
>
> ...
>
> 49 It is apparent from the submissions of the parties and the interveners representing both sides of the bar that, if accepted, the trial judge's ruling would represent a major change in practice. It is widely accepted that consultation between counsel and expert witnesses in the preparation of Rule 53.03 reports, within certain limits, is necessary to ensure the efficient and orderly presentation of expert evidence and the timely, affordable and just resolution of claims.[28]

Fortunately, the court then continued to provide clear guidelines as to what, exactly, *does* constitute permissible communication between counsel and expert:

> 62 I agree with the submissions of the appellant and the interveners that it would be bad policy to disturb the well-established practice of counsel meeting with expert witnesses to review draft reports. Just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case.
>
> 63 Consultation and collaboration between counsel and expert witnesses is essential to ensure that the expert witness understands the duties reflected by rule 4.1.01 and contained in the Form 53 acknowledgment of expert's duty. 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. Counsel need to ensure that the expert witness understands matters such as the difference between the legal burden of proof

[28] *Moore v Getahun* ONCA decision, *ibid*, at paragraphs 46 and 49.

> and scientific certainty, the need to clarify the facts and assumptions underlying the expert's opinion, the need to confine the report to matters within the expert witness's area of expertise and the need to avoid usurping the court's function as the ultimate arbiter of the issues.
>
> 64 Counsel play a crucial mediating role by explaining the legal issues to the expert witness and then by presenting complex expert evidence to the court. It is difficult to see how counsel could perform this role without engaging in communication with the expert as the report is being prepared.
>
> 65 Leaving the expert witness entirely to his or her own devices, or requiring all changes to be documented in a formalized written exchange, would result in increased delay and cost in a regime already struggling to deliver justice in a timely and efficient manner. Such a rule would encourage the hiring of "shadow experts" to advise counsel. There would be an incentive to jettison rather than edit and improve badly drafted reports, causing added cost and delay. Precluding consultation would also encourage the use of those expert witnesses who make a career of testifying in court and who are often perceived to be hired guns likely to offer partisan opinions, as these expert witnesses may require less guidance and preparation. In my respectful view, the changes 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.[29]

Thus, lawyers in Ontario are once again free to communicate, pre-trial, with the experts they have engaged, in order to gain a greater understanding of the expert's testimony and to ensure that the expert fully understands his or her duty under Rule 53 and, indeed, to serve as better counsel for their clients.

Of course, this does not allow a lawyer free rein to simply write the report on behalf of the expert (see *Whiten v Pilot*[30]), nor to amend or alter a report to suit their purposes (as in *MacDonald v Sun Life*, *Burwash v Williams*, or *Platnick v. Bent,* all discussed above). What this case does indicate, though, is that collaboration between experts and lawyers is not only permissible, but necessary to a well-considered outcome for the client.

Note that on March 30th, 2015, counsel filed for leave to appeal Moore to the Supreme Court of Canada. The permissible bounds for communicating with your own expert may, therefore, be subject to further judicial comment.

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[29] *Moore v Getahun*, *ibid*, at paragraphs 62 – 65.
[30] *Whiten v Pilot*, 2002 SCC 18.

WESTERHOF V GEE – TREATING DOCTOR VERSUS HIRED GUN

One of the areas that Rule 53 did not, perhaps, fully consider was the role of the treating expert. Rule 53 is intended to reign in the hired-gun expert and to make it clear to that expert that her task is, first and foremost, to assist the Court in finding the truth. What about experts – like treating physicians – who have expertise but are not hired guns?

The scope to which they should be allowed to give expert evidence has been the subject matter of considerable debate in Ontario. Until recently, there were two competing and contradictory lines of authority. The first line of cases, including *McNeill v Filthaut*[31], *Slaght v Phillips*[32], and *Kusnierz v Economical Mutual Insurance Co.*[33], stand for the proposition that treating medical witnesses, including family doctors, rehabilitation specialists, physiotherapists, insurer examination assessors, etc., are exempt from Rule 53 because they are not experts per se, but rather are providing opinion evidence relating to their direct treatment of their patient. Those cases recognized that these "treating experts" should be placed in a special category. They possess specialized expertise and intimate knowledge of their patient, and should be able to assist the court with their knowledge and opinions related to same. The second line of cases follows *Beasley v Barrand*[34], which concluded that there are no acceptable exemptions to Rule 53. Treating doctors and medical professionals were like every other expert and should be forced to comply rigidly with Rule 53. This would place massive challenges before any lawyer attempting to get those treating experts to give their opinions in the Court room.

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[31] *McNeill v Filthaut*, 2011 ONSC 2165.
[32] *Slaght v Phillips*, 2010 CarswellOnt 11181 (OSCJ).
[33] *Kusnierz v Economical Mutual Insurance Co.*, 2010 ONSC 5749, appeal all'd on other grounds at 2011 ONCA 823.
[34] *Beasley v Barrand*, 2010 ONSC 2095.

The trial judge in the *Westerhof v Gee Estate*[35] decision elected to follow the *Beasley v Barrand* line of authority, stating that:

> 21 The important distinction is not in the role or involvement of the witness, but in the type of evidence sought to be admitted. If it is opinion evidence, compliance with rule 53.03 is required; if it is factual evidence, it is not.
>
> 22 Based on this distinction, it is not difficult to see that, where the expert has not been, qualified to give the opinions to be tendered or where the report relied on to advance the opinion does not comply with rule 53.03, it is correct for the trial judge to refuse to admit the evidence.[36]

Accordingly, it was ruled that the evidence of the plaintiff's treating medical and rehabilitation specialists was inadmissible, since it did not comply with Rule 53. This decision was affirmed by the Divisional Court. It is fair to say that in the wake of the Divisional Court decision in *Westerhof*, chaos reigned in Ontario. The immediate result was that counsel scrambled to hire more litigation experts, who, in turn, came to completely dominate personal injury trials. Lawyers feared that treating health professionals would be barred from providing evidence and thus, significantly weaken the plaintiff's position. Defence lawyers feared that they would not be allowed to call the assessors who had provided opinions for the accident benefits case. Few were happy with the situation.

Fortunately, the plaintiff appealed *Westerhof*, and the much anticipated appeal judgment was released only weeks ago by the Ontario Court of Appeal. The Court of Appeal overturned the trial court's decision. The Court of Appeal disagreed with the trial court's characterization of evidence as either fact or opinion as being the demarcation between whether Rule 53.03 was applicable, and provided a framework for how to assess the applicability of that rule going forward:

> 59 As I have said, I do not agree with the Divisional Court's conclusion that the type of evidence - whether fact or opinion - is the key factor in determining to whom rule 53.03 applies.

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[35] *Westerhof v Gee Estate*, 2013 ONSC 2093.
[36] *Westerhof v Gee* trial decision, *ibid*, at paragraphs 21, 22.

> 60 Instead, I conclude that **a witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents 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**.
>
> 61 Such witnesses have sometimes been referred to as "fact witnesses" because their evidence is derived from their observations of or involvement in the underlying facts. Yet, describing such witnesses as "fact witness" risks confusion because the term "fact witness" does not make clear whether the witness's evidence must relate solely to their *observations* of the underlying facts or whether they may give *opinion* evidence admissible for its truth. I have therefore referred to such witnesses as "participant experts".
>
> 62 Similarly, I conclude that **rule 53.03 does not apply to the opinion evidence of a non-party expert where the non-party expert has formed a relevant opinion based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than the litigation**.
>
> 63 If participant experts or non-party experts also proffer opinion evidence extending beyond the limits I have described, they must comply with rule 53.03 with respect to the portion of their opinions extending beyond those limits.
>
> 64 As with all evidence, and especially all opinion evidence, the court retains its gatekeeper function in relation to opinion evidence from participant experts and non-party experts. In exercising that function, a court could, if the evidence did not meet the test for admissibility, exclude all or part of the opinion evidence of a participant expert or non-party expert or rule that all or part of such evidence is not admissible for the truth of its contents. The court could also require that the participant expert or non-party expert comply with rule 53.03 if the participant or non-party expert's opinion went beyond the scope of an opinion formed in the course of treatment or observation for purposes other than the litigation.[37]
> (emphasis added)

This decision restores a measure of calm to civil trials in Ontario as it makes it clear that the only parties to whom Rule 53.03 applies are the so-called hired-gun experts, and not treating medical professionals.

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[37] *Westerhof v Gee*, 2015 ONCA 206, at paragraphs 59 – 64.

Despite being "hot off the press", the decision has already been followed, in *Ozerdinc Family Trust v Gowling Lafleur Henderson LLP*[38], where the court clearly stated that the opinions of treating physicians are permissible, and need not be compliant with Rule 53:

> Moreover as the Court of Appeal has now made clear, the evidence and opinions of "participant experts" such as treating physicians is admissible and need not be Rule 53.03 compliant. The question of treating physician bias goes to weight.[39]

Hopefully, this decision signifies a beginning of the end of the confusion surrounding whether and when a treating medical professional will be permitted to testify at trial, and in what capacity. In addition, *Westerhof* appears to have gone a long way toward resolving the problematic "three expert" rule, which posed so many constrictions on a plaintiff who bears the burden of proving his or her case. Since treating professionals are no longer considered "experts" within the confines of Rule 53, so this provides some assistance to the challenge of presenting a complex civil case while, on the face of it, being limited to calling only three experts. In practice, the courts normally allow a party to call more than three experts, but this remains an area of concern that is lessened somewhat by the finding that treating experts are not "experts" as contemplated by the three expert rule.

COMPARISON OF ONTARIO'S RULE 53 TO NOVA SCOTIA'S RULE 55

Ontario's Rule 53 has been set out above and, by way of comparison, Nova Scotia's Rule 55 follows:

> Rule 55 - Expert Opinion
> 55.01(1)
> Scope of Rule 55

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[38] *Ozerdinc Family Trust v Gowling Lafleur Henderson LLP*, 2015 ONSC 2366.
[39] *Ozerdinc Family Trust v Gowling*, *ibid*, at paragraph 29.

This Rule provides procedure about expert opinion, and it does each of the following:

(a) requires disclosure of an expert opinion to be offered on a trial or hearing;

(b) provides for exclusion of expert opinion evidence that is not disclosed as required;

(c) requires experts to make written representations to the court about the independence of the expert and the expert's participation in the proceeding;

(d) limits discovery of experts.

(2) This Rule does not affect the rules of evidence by which expert opinion is determined to be admissible or inadmissible.

A party may offer an expert opinion as evidence, in accordance with this Rule.

(3) Report required

A party may not offer an expert opinion at the trial of an action or hearing of an 55.02 application unless an expert's report, or rebuttal expert's report, is filed in accordance with this Rule.

Deadline for filing report

55.03(1) A party to an action who wishes to offer an expert opinion, other than in rebuttal of an expert opinion offered by another party, must file the expert's report no less than six months before the finish date, or by a deadline set by a judge.

(2) A party to an action who receives an expert's report stating an opinion the party contests, and who wishes to offer a rebuttal expert opinion, must file a rebuttal expert's report no more than three months after the day the expert's report is delivered to the party, or by a deadline set by a judge.

(3) A party to an application who wishes to offer an expert opinion, or a rebuttal expert opinion, must file an expert's report, or a rebuttal expert's report, before the deadline set by the judge who gives directions and appoints a date for the hearing of the application.

Despite Rules 55.03(1) to (3), in a family proceeding reports must be filed at

(4) either of the following times, unless a judge directs otherwise:

(a) an expert's report, the day before a conference at which a judge appoints the date for the hearing of the proceeding;

(b) a rebuttal expert's report, no more than thirty days after the day of the conference.

Content of expert's report

55.04(1) An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:

(a) the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party;

(b) the witness is prepared to testify at the trial or hearing, comply with directions of the court, and apply independent judgment when assisting the court;

(c) the report includes everything the expert regards as relevant to the expressed opinion and it draws attention to anything that could reasonably lead to a different conclusion;

(d) the expert will answer written questions put by parties as soon as possible after the questions are delivered to the expert;

(e) the expert will notify each party in writing of a change in the opinion, or of a material fact that was not considered when the report was prepared and could reasonably affect the opinion, as soon as possible after arriving at the changed opinion or becoming aware of the material fact.

The report must give a concise statement of each of the expert's opinions and
(2) contain all of the following information in support of each opinion:

(a) details of the steps taken by the expert in formulating or confirming the opinion;

(b) a full explanation of the reasons for the opinion including the material facts assumed to be true, material facts found by the expert, theoretical bases for the opinion, theoretical explanations excluded, relevant theory the expert rejects, and issues outside the expertise of the expert and the name of the person the expert relies on for determination of those issues;

(c) the degree of certainty with which the expert holds the opinion;

(d) a qualification the expert puts on the opinion because of the need for further investigation, the expert's deference to the expertise of others, or any other reason.

The report must contain information needed for assessing the weight to be given
(3) to each opinion, including all of the following information:

(a) the expert's relevant qualifications, which may be provided in an attached resumé;

(b) reference to all the literature and other authoritative material consulted by the expert to arrive at and prepare the opinion, which may be provided in an attached list;

(c) reference to all publications of the expert on the subject of the opinion;

(d) information on a test or experiment performed to formulate or confirm the opinion, which information may be provided by attaching a statement of test results that includes sufficient information on the identity and qualification of another person if the test or experiment is not performed by the expert;

(e) a statement of the documents, electronic information, and other things provided to, or acquired by, the expert to prepare the opinion.

Content of rebuttal expert's report
55.05 A rebuttal expert's report must be signed by the expert and provide all of the following:

(a) representations and information required in an expert's report;

(b) the name of the expert with whom the rebuttal expert disagrees and the date of that expert's report;

(c) a quotation of the statement of opinion with which the rebuttal expert disagrees;

(d) a statement that the rebuttal opinion is strictly confined to the same subject as the quoted opinion;

(e) the rebuttal opinion and no further opinion.

Reports in an application
55.06(1) An expert's report may be filed in an application as an exhibit to the expert's affidavit, or as a judge directs.

The affidavit and report stand as the entire direct evidence of the expert, except
(2) that in an application in which qualification is not admitted by the other party the judge may permit the party who files the affidavit to ask supplementary questions on qualification.

The party who files an expert's report in an application must arrange to have the
(3) expert present at the hearing if another party gives notice that the party disputes qualification or requires cross-examination.

Expert jointly retained by adverse parties
55.07(1) Parties who are adverse to one another in a proceeding may agree to jointly retain an expert, and jointly file the expert's report.

The parties may agree that they will admit to the opinion when it is delivered, and,

(2) if they agree to make such an admission, the opinion may be proved against a party as an admission.

Parties who file a joint expert's report may not file the report of another expert on

(3) an issue about which an opinion is given in the joint report, unless a judge permits.

(4) Despite the deadline for filing a report provided in Rule 55.03(1), a party to an action may file a joint expert's report anytime before the finish date.

Consequential disclosure
55.08(1) A party who files an expert's report or a rebuttal expert's report must disclose, by supplementary affidavit of documents or the applicable method of disclosing electronic information, a document or electronic information considered by the expert that is in the control of the party.

(2) The disclosure must be made no later than the day the report is filed.

(3) The party must also disclose any real or demonstrative evidence considered by the expert that is in the control of the party.

(4) The expert must provide a copy of the document or electronic information, or provide disclosure of another thing, that was considered by the expert and is in the control of the expert but not the party.

How expert proposed to be qualified
55.09 A party who files an expert's report, or a rebuttal expert's report, must also file a statement of the qualification to be sought from the court at the trial or hearing, which statement may take the form, "[name of party] will ask that [name of expert] be found to qualify as an expert in the field of [field], capable of giving opinion evidence on the subject of [describe the subject of the opinion]."

Objection to report and advance ruling
55.10(1) A party who receives a report and who wishes to have the opinion evidence excluded at the trial or hearing on the basis that the report does not sufficiently conform with this Rule must, in a reasonable time, notify the party who delivers the report of the deficiency.

(2) A party may make a motion for an order determining whether a report sufficiently conforms with this Rule to permit the purported expert to testify at a trial or hearing.

(3) An order under this Rule is binding at the trial of an action or hearing of an application only on the issue of conformity with Rule 55.04 or 55.05.

Questioning expert in writing
55.11(1) A party may not obtain a discovery subpoena for or deliver interrogatories to an expert witness, but a party may interview or discover an expert if the expert and the party who delivers the expert's report agree.

(2) A party who receives an expert's report, or a rebuttal expert's report, may, no more than thirty days after the day the report is delivered, deliver to the other party written questions to be answered by the expert.

(3) The questions may only call for information that is not privileged and is relevant to one of the following:

(a) the expert's qualifications;

(b) a factual assumption made by the expert;

(c) the basis for an opinion expressed in the expert's report.

(4) The party who receives written questions must deliver them to the expert immediately.

(5) The expert must fully answer the questions in writing, sign the answer, and deliver it to each party no more than thirty days after the day the questions are delivered to the expert.

(6) A party may not submit supplementary questions, unless the parties agree or a judge allows otherwise.

(7) A party who receives written questions may make a motion to set aside or limit the questions.

(8) The opinion of an expert who fails to answer questions in compliance with this Rule 55.11 is inadmissible, and the party who asks the questions may make a motion for an order that the opinion is inadmissible on that ground.

Court expert
55.12(1) A judge who is satisfied on both of the following may appoint a person to formulate an opinion, and report the opinion to the court:

(a) the person is qualified to give the opinion;

(b) the opinion is likely to be admissible.

(2) An order appointing an expert may contain any of the following terms:

(a) the appointment and a statement of the subjects about which an opinion is required;

(b) a requirement that the expert prepare an expert's report;

(c) directions to the expert on the contents of the report and whether the expert must answer written questions;

(d) a requirement that the expert file the report and immediately deliver a copy to each party;

(e) a deadline for filing the report;

(f) permission for a party to question the expert in writing or a direction that there will be no questions before the expert gives evidence;

(g) terms for payment of the expert by a party or the parties, which may provide for payment of fees for a custody or access assessment in accordance with the Costs and Fees Act;

(h) any other term the judge requires.

(3) Questions under an order that permits questioning of a court appointed expert must be asked and responded to in accordance with all of the following, unless the order provides otherwise:

(a) a party to whom the court appointed expert's report is delivered may, no more than thirty days after the day the report is delivered, submit questions directly to the court appointed expert;

(b) the expert must answer the questions in writing, sign the answer, and deliver it to each party as soon as possible;

(c) a party may not submit a supplementary question, unless all parties and the expert agree, or a judge permits.

(4) A party may not obtain a discovery subpoena for a court appointed expert, deliver interrogatories to the expert, or obtain an order for discovery of the expert.

(5) The court must arrange for a court appointed expert to be called for cross-examination by a party who gives reasonable notice that the party wishes to cross- examine the expert.

Testimony by expert
55.13(1) A party to whom an expert's, or rebuttal expert's, report is delivered must determine whether to admit or contest the proposed qualification, and the admissibility of the opinion, by no later than the finish date.

(2) A party may not call an expert whose qualifications, and the admissibility of whose opinion, are admitted, unless one of the following applies:

(a) the expert is also a fact witness and the direct examination is confined to the facts;

(b) the party is notified, before the finish date, that another party requires the expert to be called for cross-examination;

(c) the presiding judge is satisfied that justice requires that the expert testify.

(3) A party must call an expert whose qualifications are contested, prove the report through the expert, and conduct any supplementary direct examination on qualifications.

(4) A party must call an expert the admissibility of whose opinion is contested, prove the report through the expert for the purpose of obtaining a ruling on admissibility, and conduct no further direct examination unless the presiding judge permits.

(5) A judge who determines that calling an expert was clearly unnecessary may order the party who caused the expert to be called to indemnify another party for the expenses caused by the expert being called.

Treating physician's narrative
55.14(1) A party who wishes to present evidence from a physician who treats a party may, instead of filing an expert's report, deliver to each other party the physician's narrative, or initial and supplementary narratives, of the relevant facts observed, and the findings made, by the physician during treatment.

(2) A narrative, or initial and supplementary narratives, must be delivered within the following times:

(a) no more than thirty days after the day pleadings close in an action, of the treatment occurs before the action is started;

(b) within a reasonable time after treatment is provided during the course of an action and no later than the finish date;

(c) as directed by a judge in an application.

(3) A party who receives a narrative, initial narrative, or supplementary narrative expressing a finding may, within a reasonable time, file a rebuttal report that conforms with Rule 55.05.

(4) A party may not obtain a discovery subpoena for, deliver interrogatories to, deliver written questions to, or obtain an order for discovery of a treating physician who provides a narrative rather than an expert's report.

(5) A party who calls a treating physician at a trial, or presents the affidavit of a treating physician on an application, may not advance evidence from the physician about a fact, finding, or treatment not summarized in a narrative or covered in an expert's report.

(6) A judge who presides at the trial of an action, or the hearing of an application, or who makes a determination under Rule 55.15 must exclude expert opinion evidence of a treating physician who provides a narrative instead of an expert's report, unless the party offering the evidence satisfies the judge that the other party received information about the opinion, and about the material facts upon which it is based, sufficient for the party to determine whether to retain an expert to assess the opinion and prepare adequately for cross-examination of the physician.

> Advance ruling on physician's narrative
> 55.15(1) A judge may determine whether a narrative, initial narrative, or supplementary narrative contains sufficient information to permit a treating physician to testify to an opinion stated in the narrative without delivering an expert's report.
>
> (2) A judge who determines the sufficiency of a narrative may give directions on either of the following:
>
> (a) the conditions that must be fulfilled before a party may advance evidence from a treating physician about a subject mentioned in the narrative;
>
> (b) the redactions that must be made to the narrative before an opinion expressed in the narrative may be offered as evidence.
>
> (3) A determination that a narrative contains or does not contain sufficient information, and a direction that a condition must be fulfilled or a redaction must be made, is binding at a trial or hearing in which the expert opinion is offered.
>
> (4) Nothing in a determination or direction under this Rule 55.15 implies either of the following, and both are to be determined by the judge who presides at a trial or hearing in which the expert opinion is offered:
>
> (a) the qualification of a physician to express an opinion stated in a narrative;
>
> (b) the admissibility of the opinion as an exception to the rule of evidence against admitting opinions.[40]

Clearly, Nova Scotia's rule is far more extensive than Ontario's rule. Another distinction of note is that, while in Ontario an expert report is not necessarily admitted into evidence, and the expert testifies in chief, in Nova Scotia I understand that the default is that the report is tendered without hearing any direct evidence, and the expert is later cross-examined. Also, Nova Scotia has a specific rule which applies only to treating physicians, which Ontario does not have.

I note that even with what appear to be more robust expert rules, Nova Scotia appears to have its own struggles with "hired gun" experts, as evidenced by this passage from a relatively recent decision of Nova Scotia's lower court:

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[40] *Nova Scotia Civil Procedure Rules*, Royal Gaz Nov 19, 2008, Rule 55.

285 The Court has concern with respect to the independence and objectivity of Dr. Phillips. The importance of the independence of expert witnesses has been recently commented upon by the Newfoundland Supreme Court, Appeal Division in *Gallant v. Brake-Patten*, 2012 NLCA 23 (N.L. C.A.). There, Justice Hoegg writing for the court states as follows:

> [84] John D. MacIsaac, Q.C. underscores the importance of objectivity and independence in expert evidence in his article entitled "The Role of the Expert in the Courtroom: Objective Expert or Team Member?" (2001) 9 C.L.R. (3d) 84, at page 4, and suggests that these issues affect the weight a fact-finding body gives to the expert's evidence:
>
> > To be the neutral observer who assists the court in interpreting complicated factual matters, an expert witness must retain an air of objectivity and a semblance of independence from the hiring party. Objectivity can be attained if the lawyer hiring the expert understands that the expert owes a degree of neutrality to the court. The lawyer who refrains from drawing his or her own expert into the role of the "hired gun" will be rewarded in the long run because the court will be more inclined to give greater weight to expert testimony not tainted by advocacy. In the case of *Huerto v. College of Physicians & Surgeons (Saskatchewan)* Smith J., in quoting from the discipline committee, agreed that weight should be given to the expert witness's testimony "because of his qualifications and experience but less than might have been given if it were not for the bias that he brought to the proceedings."
>
> . . . . .
>
> [85] The importance of objectivity in an expert's evidence was also addressed by Thomas S. Woods in his article "Impartial Expert or Hired Gun? Recent Developments at Home and Abroad", (Mar. 2002) 60 Advocate (Van.) 205-209. At page 205, Mr. Woods reviews the reason why experts are permitted to give opinion evidence, and then cautions that partiality is likely to affect the weight such evidence is given:
>
> > ...<u>While not conclusive, evidence of a history on the expert's part of alignment with particular interests in litigation will generally affect credibility and weight in a negative way.</u> The opinion of an expert who is too eager to please, too keen to produce a report that is helpful, will almost always unravel on the stand... (Emphasis added.)

286 In my view, the Court must exercise caution in terms of the weight afforded to Dr. Phillips' evidence, given his past and present connection to the subject matter of this litigation. At the time he authored his report, the QE II hospital, the facility where Dr. Phillips has been on staff for many years, was a party to the litigation. Further, as is clear in his evidence, Dr. Phillips referenced and was clearly influenced by the findings and diagnosis reached by his colleagues at the QE II, particularly the finding that Ms. Anderson's stroke was due to her hypercoagulable state. Additionally, one of the Defendants, Dr. Gee,

> is also a staff member at the QE II, although the evidence suggests she and Dr. Phillips have little, to no contact in the course of their work.
>
> 287 Bias, even which is not consciously applied, must be carefully guarded against when considering the evidence of experts.[41]

Clearly the struggle to deal with the hired-gun expert as advocate or suffering from bias is not unique to Ontario.

WHERE DO WE GO FROM HERE?

Challenges related to the proper use of experts and civil trials, the dichotomy between the treating expert and of the hired gun expert, and the limits of permissible communication with experts as they prepare their opinions, have been clarified to some extent by the recent decisions of the Ontario Court of Appeal of *Moore* and *Westerhof.* It would be a mistake, however, to conclude that these two decisions, however welcome, have fully resolved the difficulties and challenges inherent in calling expert evidence to assist the court in civil trials. The problem of hired gun experts as advocates remains. The system has not been fixed by the adoption of Rule 53 in 2010.

There is widespread recognition that the Ontario court system is inaccessible to many citizens. There is a far-reaching dialogue currently underway involving government, the judiciary, the Law Society of Upper Canada and leading lawyers groups including the Advocates Society, the Ontario Bar Association and the Ontario Trial Lawyers Association. There is a recognition that trials need to be better, faster, simpler and less expensive. Chief Justice Strathy has opined that the very procedural protections that we put into place to ensure a proper functioning of the judicial system with procedural safeguards may, in fact, result in too many cases operating as barriers to access to justice.

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[41] *Anderson v Queen Elizabeth II Health Sciences Centre*, 2012 NSSC 360, at paragraphs 285 – 287.

Hired-gun experts who act as advocates in the courtroom are clearly part of the problem. Any meaningful reform of the court system will address the procedural, fairness and access to justice harm being caused by experts who are providing evidence that is of little assistance to the court.

As Justice Edwards noted in the *DeBruge v. Arnold* decision,[42] we should all be concerned that the trials which used to take four or five days, now they take 4 to 5 weeks. As he noted, there are many reasons why today's trials are longer, but one of those reasons is the proliferation of hired gun experts acting as advocates. Shorter, faster trials would go a long way toward improving access to justice for those who, simply, cannot afford to go to trial for a month to recover damages for injuries they have suffered in an accident, and who are forced to forego the opportunity.

I would advocate that there are some real steps that we could take to streamline the core processes and limit the use of hired gun experts as advocates. Contrary to what the court in Ontario suggested in *Henderson*, I would ask the judiciary to take the position that the new Rule represents a concerted attempt to go further than the pre-existing common-law position. To that end, I would suggest that the Rule be modified to specifically provide that professional witnesses who have been repeatedly found to be advocates, should potentially be prevented from giving expert testimony at all.

I would advocate further that the existing common-law restrictions and prohibitions against referencing prior negative judicial comment relating to a specific expert witness should be repealed by amendment to the Rule; that is, experts who have been found to be advocates should have to endure being cross-examined with respect to those prior findings. The law as it stands now holds that just because a person has been subject to negative judicial comment in the past, does not provide suitable grounds for cross-examination in a subsequent case[43]. The law says that it is improper to cross-examine a witness on such information, because the fact that they have been subject to such comment in the past does not, in and by itself, constitute discreditable

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[42] See note 20, supra.
[43] *Desbiens v Mordini*, 2004 CarswellOnt 4804 (OSCJ), at paragraphs 265 – 274.

conduct[44], and that such matters are better left to be studied by the Civil Rules Committee[45].

At a minimum, I would suggest that experts may be more careful with respect to the evidence that they provide if they realize that if they step over the line too far, and are censured for it, then those comments may come back to haunt them in the future. Being allowed to specifically reference prior negative judicial comment would potentially limit the effectiveness of professional experts and, in my opinion, would likely result in them striving to be more objective.

To conclude, as the review conducted in this paper makes clear, while Rule 53 was clearly well-intentioned, some elements of this rule have been problematic to lawyers and to the administration of justice. However, recent Ontario appellate authority has provided significant useful guidance and direction to us. Neither Rule 53 nor these recent cases, however, will be sufficient to eliminate hired-gun experts from acting as advocates in our system. Especially in Ontario, which continues to be dominated by the civil jury, it is fair to say that the trier-of-fact is more likely to come to an improper conclusion if the jury's ability to do their jobs properly is obstructed by experts acting in an improper fashion. A reasonable next step to address this problem, may be to consider amendments to the rule to either limit the testimony, or allow prior negative judicial comment.

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[44] *R v Ghorvei*, 1999 CarswellOnt 2763 (ONCA), at paragraph 31.
[45] *Adams v Cook*, 2010 ONCA 293, at paragraph 30.

Tables of Authorities

Cases

Whiten v Pilot, 2002 SCC 18.

Legislation

Nova Scotia Civil Procedure Rules, Royal Gaz Nov 19, 2008, Rule 55.

Rules of Civil Procedure, RRO 1990, O Reg. 1994, Rule 53.

Appendix "A"

Ontario Court Form – Form 53

FORM 53

Courts of Justice Act

ACKNOWLEDGMENT OF EXPERT'S DUTY

(General heading)

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is ..... (name). I live at ..... (city), in the ..... (province/state) of ..... (name of province/state).

2. I have been engaged by or on behalf of …..... (name of party/parties) to provide evidence in relation to the above-noted court proceeding.

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:

(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 my area of expertise; and

(c) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date ..... Signature……

NOTE: This form must be attached to any report signed by the expert and provided for the purposes of subrule 53.03(1) or (2) of the Rules of Civil Procedure.

RCP-E 53 (November 1, 2008)