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How To Use The New Expert Witness Rule To Negotiate A Good Deal

The new changes to the Rules regarding expert witness reports, as set out in Rule 53.03, has had a significant impact in personal injury litigation. Although about 99% of matters settle, the foundation of one's case is often based on expert witness reports. If it is determined that a pivotal accident benefits medical assessment, which assists the tort defendant, is not admissible at trial then the insurer has lost some settlement leverage. At the same time, if it is determined that a supporting treating specialist cannot provide an expert opinion at trial, then the claimant has lost a valuable negotiation tool. The recent decisions that have emanated to interpret Rule 53.03 have served to confuse rather then clarify whether an expert can testify, and the scope of their testimony.

Despite the fact that the law on this subject is in flux, some counsel have made general pronouncements about the cases which is either overly simplistic or wrong. Perhaps this is a negotiation tactic to challenge the other side's knowledge of the law, or perhaps they simply do not know. As a defendant insurer, we do not want a misapprehension of the law to result in us paying more money to settle a case or have a false sense of security regarding the strength of our position. We want to use our knowledge of the law in negotiation tactics as both a shield and a sword.

Background

Rule 53.03 that came into effect January, 2010, with the express purpose of imposing a duty on experts to be independent and impartial. The Rule sets out specific information that must be contained within a report and it also requires an expert to sign an "acknowledgment of expert's duty" form wherein they must recognize their duty to be impartial and to only provide evidence that is within their area of expertise.

In *Gutbir (Litigation guardian of) v. University Health Network* (2010) it was argued by counsel for the Plaintiff that the new changes to the law are simply a codification of the existing case law. The Court disagreed and found as follows:

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

As set out by Justice Osborne in a Civil Justice Reform Project at pages 75-76: "… An expressly prescribed overriding duty to provide the court with a true and complete professional opinion will, at minimum, cause experts to pause and consider the content of their reports and the extent to which their opinions may have been subjected to subtle or overt pressures. Matched with a certification requirement in the expert's report, it will reinforce the fact that expert evidence is intended to assist the court with its neutral evaluation

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of issues."

Rule 53.03 applies equally to accident benefits cases as it does to tort matters. Remember, this Rule addresses the obligations of the expert when giving evidence in Court, so it does not matter when in the life of a file that the expert wrote the report. If the expert is going to testify at trial, she must comply with this Rule. However, if the accident benefits matter is proceeding to FSCO, there is no requirement (yet) for this Rule to be followed.

Using Accident Benefits Reports In Tort Claims

At a recent mediation a senior Plaintiff counsel criticized me during an opening for including an accident benefits report in my memorandum to support the tort defence position. He cited the decision of *Beasley v. Barrand* (2010) for the blanket proposition that accident benefits reports are not admissible in a tort claim and that we cannot rely on such reports either at the mediation or at trial. He was wrong. Although in the *Beasley* decision the accident benefits reports were deemed inadmissible at trial, the facts of that case are specific. This is an example in which knowledge of the law should be used as a shield to challenge against such misstatements of the law.

In *Beasley*, the tort defendant sought to call three medical assessors who prepared reports on behalf of the accident benefits insurer at trial. The accident occurred in 2002, the medical reports were generated in 2003, and the trial was scheduled to proceed in 2010. These reports were considered to be "snapshots" of the Plaintiff's situation more then seven years ago. The court found that there can be little, if any help to the jury in assessing the Plaintiff's medical and vocational progress since that time.

The Court found that the new Rule 53.03 was in part designed to eliminate the practice of tendering opinion evidence of questionable value at trial. The three medical reports were commissioned by an accident benefits carrier who had no stake in the trial and their specific instructions are not entirely clear. At the request of tort defence counsel these three doctors completed the "acknowledgment of expert duty" form but the forms were not entirely accurate and the doctors appeared to have signed the forms without reading or understanding their content. It is for these reasons that the experts were not allowed to testify.

The Judge expressly stated in his reasons that this decision should not be understood as a bar for accident benefits assessors to testify at a tort trial. He indicated that counsel wanting to rely on these opinions should attempt to get them to write meaningful reports that are in compliance with Rule 53.03. He recognized that counsel may not be able to obtain Rule 53.03 reports from a stranger to a litigation, and in those circumstances, these experts may still be allowed to testify.

No guidelines have been generated to explain what a reasonable attempt to comply with Rule 53.03 would be, what is a meaningful report, to what extent an expert could change his report to comply with Rule 53.03, and in what circumstances would the report be admissible with non-compliance with Rule 53.03. Despite the confusion, it would be wrong to simply indicate that accident benefits reports are not admissible in a tort case in all circumstances.

In *Anand v. Belanger* (2010), the Court was again faced with the question of the admissibility of accident benefits reports in a tort trial. The Court followed much of the underlying reasoning as set out in *Beasley* but found that although these doctors could not provide opinion evidence, they would be permitted to testify as fact witnesses with respect to their observations of the plaintiff. It remains to be seen how an expert can testify about the factual observations made of the claimant in the course of their examinations, but then not provide his conclusion about what these observations mean (i.e. diagnosis and prognosis).

The Court has clearly not rejected the ability of the tort defendant to call an accident benefits expert witness at trial. Instead, (1) the Court has set-out certain substantive and procedural requirements that must first be met, and (2) in certain circumstances, the Court has limited the nature of the evidence that can be elicited.

Challenging Treating Practitioners Being Called As Expert Witnesses

There is a live debate as to whether a treating practitioner may be called as an expert witness on behalf of the claimant. A treating medical practitioner is required by her Hippocratic oath to treat and advocate for her patient. Yet, being an advocate for your patient is in complete contrast to the impartiality requirements now set out in Rule 53.03. Indeed, in the *Gutbir (Litigation guardian of) v. University Health Network* (2010) decision, the Court ruled in a medical malpractice case that a treating neonatologist lacked the impartiality necessary to give expert evidence. Instead, the doctor was entitled to give evidence simply as a treating doctor but not as an expert.

It would be a huge boon to the defence to be able to curtail the influence of a treating specialist at trial. By preventing a treating specialist from providing an expert opinion, an insurer has successfully used the law as a sword to carve-out perhaps the heart

and soul of the Plaintiff's case. Yet, this too is a misapprehension of the case law.

In *Gutbir*, the Court found that the doctor had written a report that was more consistent with that of an advocate rather than an objective expert. His report suggested that he had an interest in the court finding that his prior conclusion reached 26 years ago, as to the cause of the claimant's brain injury, was indeed the correct one. On this basis, the Court found that he lacked the necessary impartiality. The Court was not critical of the neonatologist acting as an advocate for his patient but did find that it called into question his ability to provide an expert opinion on causation.

However, the Court also said that this medical malpractice case is quite different from the typical personal injury case where an orthopaedic surgeon is asked to provide an expert opinion on the future prognosis for the plaintiff in terms of treatment and disability. The Judge indicated that the treating orthopaedic surgeon may be in the best position to opine on what the future holds for the patient. Accordingly, this case both challenges and supports the ability of a treating doctor to act as an expert at trial.

The decision of *Kusnierz v. Economical Mutual Insurance* (2010) is an accident benefits case in which the objectivity of the claimant's expert physiatrist was somewhat called into question. In that case a well respected physiatrist was retained by the Plaintiff on the issue of whether the Plaintiff was catastrophically impaired. It was found by the Court that the physiatrist "moved from the status of an independent expert to something close to a treating physician" and was described as a "passionate advocate". The defence challenged the doctor's ability to provide expert opinion evidence as per Rule 53.03. The Court found that the physiatrist's evidence should be considered as one would consider the evidence of a family doctor, and that such a witness does not fall within Rule 53.03. He was allowed to give relevant evidence about the patient but the Court took into account that he had formed a "therapeutic alliance" with him and therefore accepted his evidence with the "proverbial grain of salt that goes to weight".

Accordingly, the defence was not able to prevent the expert from testifying as to his opinion, but was able to call into question his impartiality and presumably limited the influence given to his opinion. If anything, this is certainly a way in which Rule 53.03 may be used to challenge the weight given to a treating expert's testimony.

The decision of *Slaght v. Phillips* (2010) is a case in which Rule 53.03 was used unsuccessfully to challenge the ability of a vocational rehabilitation counsellor to testify at trial. In that case, the vocational counsellor had assessed and provided counselling to the plaintiff. The defence objected to the proposed evidence on the basis that there was non-compliance with Rule 53.03 and therefore the witness could not testify as an expert. The Court made a distinction between a witness who is providing a "treating opinion" and one who is providing a "litigation opinion" as it relates to Rule 53.03.

A "treatment opinion" is evidence given by a treating witness who is defined as a person who provides treatment, forms opinions about treatment, and keeps clinical notes and records. The requirements of Rule 53.03 do not apply to these witnesses provided that they limit their evidence to treatment opinions. A "litigation opinion", on the other hand, is evidence given by an expert retained by the parties, and they are obligated to comply with Rule 53.03.

Accordingly, the vocational rehabilitation counsellor was able to testify at trial regarding his "treatment opinion" without being constrained or cross-examined about an obligation to be impartial and objective as per the requirements of Rule 53.03.

Conclusion

Knowledge about the law with respect to Rule 53.03 expert reports can be used as both a shield and a sword in negotiating settlements. It can be used as a shield to thwart attempts by Plaintiff's counsel to assert that accident benefits reports cannot be used in a tort claim. Similarly, it can be used as a sword to challenge the contention that a claimant's treating specialist can provide expert opinion evidence at trial. Knowledge that the law is in flux, and that your arguments may turn out to be wrong, is also good advocacy.

Notes:

Expert Evidence: Key Cases, New Rules and New Realities by Troy Lehman

Expert Reports: The "expert" dilemma under the current rules –Rule 53.03 by Brian Brock

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