Dutton Brock LLP

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" Winter is on my head, but eternal spring is in my heart. "
Victor Hugo (1802 - 1885)

Fun in the Sun: Working with Experts – Have the Rules Changed?

Expert evidence is a necessary component of the civil trial. Doctors explain complex injuries to the court and actuaries quantify future care costs. As the Honourable Coulter Osborne, QC, former Associate Chief Justice of the Court of Appeal for Ontario once noted, "It is difficult to contemplate a serious personal injury case being presented (or defended) without more than three expert witnesses."

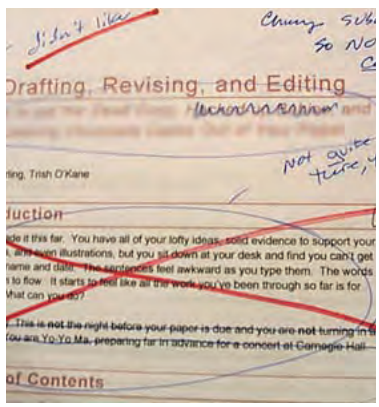
In preparing a case for trial, it is common for lawyers and experts to discuss the contents of an expert report before it is finalized. However, *Moore v Getahun*, a recent trial decision of the Ontario Superior Court suggests that this practice can undermine the independence and integrity of the expert and recommends an outright ban on such discussions.

Blake Moore was involved in a single-vehicle motorcycle accident and suffered, among other things, a broken wrist. It was alleged that the emergency room doctor applied a full cast that did not accommodate the swelling anticipated. Moore alleged that the cast aggravated the underlying injury and that he developed compartment syndrome. The trial judge held that the defendant did not meet the standard of care and had caused Moore's injuries.

Central to the trial judge's analysis was her decision to minimize the weight given to one of the defendant's experts.

In support of their position, the defendants relied on the expert report and testimony of an orthopaedic surgeon. In assessing the weight of his evidence, the trial judge noted that the expert had minimal clinical experience and no teaching or publications in the specific field. More importantly, the trial judge questioned his independence and neutrality given the expert's interactions with defence counsel during the preparation of his report.

During his testimony, it became known that the expert had submitted a draft of his final report to defence counsel "for comments", counsel provided "suggestions" and he made "corrections" to his report. The trial judge found that these changes were more than superficial changes as content that helped the plaintiff was altered or removed. She held that it was "*inappropriate* for defence counsel to make suggestions to shape [the expert's] report" and that to do so undermines the expert's credibility and neutrality.



Rule 53.03 of the *Rules of Civil Procedure* was revised in January 2010 to ensure the independence and integrity of expert witnesses. One of the most important aspects of these changes was the expert's duty form. This form requires experts to acknowledge that their primary duty is to provide fair, objective and non-partisan evidence and that this duty prevails over any other obligation.

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Given the expert's paramount duty to the court, the trial judge concluded that counsel should not review drafts of expert reports and that if an expert's report requires clarification then counsel's input should be in writing and disclosed to opposing counsel.

There is some appeal to an outright ban on discussions between experts and counsel as it ensures neutrality. However, to do so may cause more harm than good. For example, it has the potential to significantly increase expert costs and delay trials. Counsel may prefer to retain a new expert after reviewing a report rather than risk labelling an expert as partisan by suggesting changes.

Ultimately, experts must stand behind the contents of their report. In addition to their express duty to the court, many experts are members of self-regulating professions with their own codes of conduct.

The trial judge's decision in Moore brings the relationship between lawyer and expert into question. However, as Moore was a single trial judge's decision, it will be interesting to see whether other judges will adopt this perspective. For now, it is prudent for counsel to steer clear of anything more than superficial revision of expert reports, unless they are prepared to disclose those changes to the other side.

This case is being appealed.

Stephen Libin is an associate at Dutton Brock . He joined the firm in 2013 and was called to the Ontario bar in 2009.

Sun Doesn't Set on Limitation Period for Underinsured Claims

Schmitz v Lombard General Insurance Company of Canada, 2014 ONCA 88 – a recent case out of the Ontario Court of Appeal – answers the question of when the limitation period begins to run for an indemnity claim under the underinsured motorist coverage provided by the OPCF 44R. The action arose from a motor vehicle accident which occurred on July 19, 2006, and for which the Plaintiffs sued the driver of the other car in June 2007. The Plaintiffs were insured by Lombard General at the time of the accident. In June 2010, the driver's insurance coverage was limited to $1,000,000.00, which was less than what the Plaintiffs had claimed. They then brought an action against Lombard for indemnity under the OPCF 44R for any amounts found owing to them that were in excess of the $1,000,000.00.

In *Schmitz*, the Court held that the *Limitations Act, 2002* (the Act), with its 2 year limitation period (section 5), superseded section 17 of the OPCF 44R, which has a limitation period of 1 year. Further, and possibly more importantly, the Court found that the limitation period begins to run from the date that a plaintiff demands payment from his or her insurer under the OPCF 44R.

Lombard argued that the definition of discoverability in section 17 of the OPCF 44R, and not section 5 of the *Act*, applies to loss transfer claims. Lombard argued that section 22 of the *Act*, which states that the *Act* cannot be contracted out of, does not include agreements that deal with the start of the limitation period. The Court rejected this argument. As Lombard had already acknowledged that section 4 of the *Act* applied, then, as a matter of statutory interpretation, the two provisions must be read together, meaning section 5 of the *Act* also applies.

The Court then considered their application of the discoverability principles of the *Act* to loss transfer matters in *Markel Insurance Co of Canada v ING Insurance Co of Canada,* 2012 ONCA 218. In that decision, the Court found that the "loss" in a loss transfer matter can only be discovered once the first party insurer has asserted the loss transfer claim against the second party insurer. The Plaintiff must know that the loss suffered is a direct result of the omission of the person against whom he or she claims. It is then that the loss is discovered, and time can begin to run. Therefore, once a valid claim is made under the OPCF 44R, the underinsured insurer is under a legal obligation to respond to it. So, the limitation period of 2 years begins to run the day after the demand for indemnification is made. However, the Court went on to find that there is no limit on when this demand can or should be made. Effectively, this could mean that there no longer exists a limitation period on claims under the OPCF 44R.

The Court did leave an avenue of defence open for insurers. The Court looked to section 14 of the OPCF 44R, which provides that the findings of a court are not binding on an insurer unless that insurer has had the opportunity to participate in the proceedings. They also suggested a provision which would require the insured to provide notice in a timely manner to the insurer that he or she would be underinsured.

The bottom line is that the 2 year limitation period for an indemnity claim under the underinsured motorist coverage begins to run the day after the demand for indemnity is made, but there is no limit on when such a demand must be brought forth. It is expected that Lombard will appeal this decision to the Supreme Court of Canada. Stay tuned.

Lauren Chen is a student at Dutton Brock.

California Dreamin'

In the spring of 2006, Angela Haufler was injured while participating in an all-terrain vehicle ("ATV") excursion in Mexico. As a result of the incident, she commenced litigation, Haufler v. Hotel Riu Palace Cabo San Lucas, 2013 ONSC 6044 (CanLII), against the ATV excursion operator and the hotel at which she was vacationing. The operator, Rancho Tours, was presumed to be bankrupt and did not participate. The hotel, which alleged it had nothing to do with the excursion, brought a motion to stay the action on the basis that an Ontario court has no jurisdiction over the case. The court agreed with the hotel, declined to exercise jurisdiction, and stayed the case.

The landmark Supreme Court of Canada decision of C*lub Resorts Ltd. v. Van Breda,* 2012 SCC 17 (see eCounsel #41) articulated a new test that requires a plaintiff to demonstrate the existence of one of four rebuttable presumptive connecting factors before a Canadian court will assume jurisdiction over an action involving a foreign defendant. In Haufler, the parties agreed that three of the four factors did not apply. The factor that was contested was whether the foreign defendant carried on business in Ontario.

Justice Quigley, writing for the court, looked at two post-*Van Breda* decisions which also considered the meaning of "carrying on business", as per the Supreme Court's test. (One of those decisions, *Colavecchia v. The Berkely Hotel,* 2012 ONSC 4747 (CanLII) was successfully argued by Dutton Brock in 2012). Ultimately, the court concluded that the hotel did not carry on business in Ontario to a sufficient degree to allow Ontario to assume jurisdiction.

While the Plaintiff raised a number of issues attempting to establish that the hotel carried on business in Ontario, the court was not convinced. Important considerations that led to the court's conclusion included that the hotel had not carried out any advertising on its own in Ontario; rather all marketing was carried out by arms-length international travel wholesalers that were not agents of the hotel. Likewise, occasional marketing trips to Ontario by a representative of the hotel chain were found not to amount to significant commercial activities in Ontario nor was website advertising. Importantly, at paragraph 39, the court distinguished between "doing business with an Ontario-based corporation" as compared to "carrying on business in Ontario". The hotel may have been engaging in the former, which is not sufficient to establish a rebuttable presumptive factor, but it was not carrying on business in Ontario.

Considering the hotel's jurisdiction argument was accepted, the court did not need to consider the hotel's next line of attack, namely whether Ontario was the more convenient jurisdiction to hear the case as compared to Mexico.

This decision is yet another clarification of the four-part test established in *Van Breda.* The trend, since the seminal Supreme Court decision, in cases where plaintiffs are injured abroad appears to be in favour of declining jurisdiction or ruling that the foreign country is the more appropriate forum. However, the law is still developing, and insurers would be wise to continue to monitor Ontario courts' treatment of the four presumptive factors as more decisions are reported.

Elie Goldberg is an associate in the tort litigation group, called to the bar in 2011.

Are you Checking One Bag or Two?

Absent a clear rule to the contrary, relevant evidence obtained by one party must be disclosed to the other in a civil action. A recent decision, Arsenault-Armstrong v. Burke 2013 ONSC 4353, reinforces this view, this time in the context of surveillance evidence.

Prior to this decision, production of surveillance was clearly required in two scenarios: a party who intends to rely on surveillance evidence for substantive purposes must disclose their surveillance report and any accompanying video; and, a party who wishes to rely on surveillance evidence for impeachment purposes only must disclose the existence of surveillance evidence and the particulars of what was observed, but they do not have to produce the actual report or video.*Arsenault-Armstrong v. Burke* raised the question of whether surveillance evidence must be produced by a party when they do not intend to rely on that evidence at all.

The facts of the case itself are relatively straightforward. The plaintiff was injured in a motor vehicle accident in 2007. She commenced an action against all of the drivers and owners of the vehicles involved. One of the defendants obtained surveillance evidence of the plaintiff. They disclosed the existence of surveillance evidence of the plaintiff, but declined to produce further particulars of the surveillance because they did not intend to rely on this evidence at trial.

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The motion judge held that the defendant was obligated to produce full particulars of the surveillance evidence obtained even if they did not intend to rely on this evidence at trial. The reasoning was that it would be unfair to allow one party to know the particulars of that evidence without disclosing it to the other. Justice Hambly, who decided the motion, said that:

The surveillance evidence will assist the plaintiff in evaluating the strength of her case and arriving at her settlement position prior to trial. Even if the defendant will not be able to use the surveillance evidence for impeachment purposes, as a result of its non-disclosure, the defence will gain knowledge of the plaintiff from the surveillance evidence which it will be able to use to its benefit.

Justice Hambly went on to note that the evidence could have an impact on a plaintiff's assessment of the case, assist with settlement, reduce exposure to costs and prevent an unfair advantage.

This decision reinforces the rule that courts require broad, fulsome disclosure in civil actions prior to trial. Defence counsel and their clients will need to consider both the need and the timing of surveillance. Withholding particulars of surveillance evidence from the other side where the evidence does not assist – a common practice amongst defence counsel in the past – no longer appears to be an option.

Josiah T. MacQuirre is an associate in Dutton Brock's tort group.

Do You Like Pina Coladas? A Primer on a Recent Food Poisoning Class Action

Tourlos v. Tiffany Gate Foods Corp., 2008 CarswellOnt 4337, 66 C.P.C (6th) 14

This food poisoning decision concerns a motion, on consent, by the plaintiff, Nickie Tourlos, for certification of an action as a class proceeding and for the approval of a class proceeding settlement.

In this case, Tourlos represented a class of individuals who became ill with food poisoning after consuming the defendant's product. The allegation was that a Greek style pasta salad contained shigella sonnei bacteria, which caused hundreds of consumers to become ill after ingesting it.

The severity of illness varied from individual to individual, ranging from symptoms that lasted for one day to in excess of twenty two days.

Certification

Justice Lax ultimately determined that the action was appropriate for a class proceeding. *The Class Proceedings Act* sets out various criteria in section 5(1), that if met, a court shall grant certification.

The claim on behalf of the class was in negligence and for breach of implied warranties in the *Sale of Goods Act*. In that regard, it was determined that the Statement of Claim disclosed a cause of action and that it was not plain obvious that the action would not succeed.

The plaintiff proposed that the class be defined as:

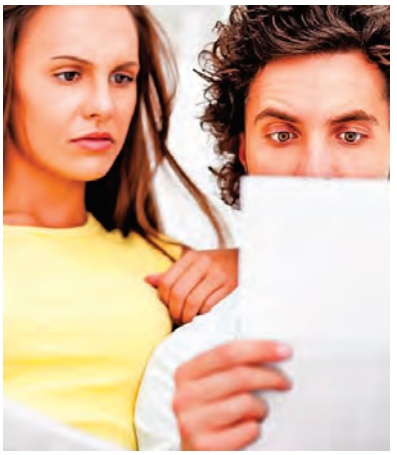
a)all persons who consumed the Greek style pasta salad manufactured by Tiffany Gate Foods Corporation between May 1, 2002 and May 31, 2002 and who became ill as a consequence of the contamination of this salad with shigella sonnei bacteria; and

b)all living parents, grandparents, children, grandchildren, siblings and spouses (within the meaning of s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3, as amended) of class members.

This definition was acceptable to Justice Lax as it described an identifiable class of two or more persons and was not unnecessarily broad.

Further, there were various common issues within the class and a class proceeding was determined to be the preferable procedure with reference to the policy objectives advanced by the *CPA*.

Justice Lax concluded that the requirements for certification were met.



Settlement

In class proceedings, the court must approve any proposed settlement and find that it is fair, reasonable and in the best interests of the class.

In this case, class counsel and defence counsel were able to come up with a grid for quantifying

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damages for individual class members. The amount of damages depended on how long the illness lasted. There was also consideration for FLA claimants; however, the quanta were to be assessed. The general damages for those who became ill was agreed to as following:

1.Illness of 1 to 3 days $1,000
2.Illness of 4 to 9 days $2,000
3.Illness of 10 to 15 days $4,000
4.Illness of 16 to 22 days $6,000
5.Illness transpiring over a period in excess of 22 days $8,000

Settlement negotiations were guided by the outcome of previous class proceedings in food poisoning cases litigated in Ontario and the damages agreed to represent the midpoint in the cases reviewed. In that regard, the decision serves as a good starting point for quantifying general damages in cases of this nature. Of course, the figures above represent compensation for pain and suffering only, and greater awards may be warranted for individuals who suffered income or other pecuniary loss.

One might wonder if damages would be higher if this was not a class proceeding. The answer to that question is unknown; however, there is no doubt that the settlement structure will be used as a guideline at the very least.

What does all of this mean for individual plaintiffs? If you get food poisoning and are thinking about suing the producer, in most cases the juice probably isn't worth the squeeze.

What does all of this mean for insurers? Unless it's a class proceeding with a substantial class, food poisoning cases shouldn't cause you too much worrying.

Andrew Punzo is an associate in the tort practice group and was called to the bar in 2013.

Vacation Pay: Court Says Mediation Must be Taken Seriously

In Ross v. Bacchus, 2013 ONSC 7773, a case commenced in Hamilton, the plaintiff was awarded $248,000 in damages and $217,000 in costs, in a case that could have settled for under $100,000 at mediation. Justice Ramsay's endorsement with respect to costs provides that even if the parties attend mediation, failing to participate in meaningful settlement discussions, pursuant to ss. 258.5 and 258.6 of the Insurance Act, can result in significant penalties.

The plaintiff had been injured when the defendant drove his car into the rear of the plaintiff's motorcycle. The plaintiff's injuries prevented him from returning to work as a sheet metal technician.

The two parties participated in settlement discussions throughout the course of litigation but failed to meet in the middle at a number agreeable to both parties. The defendant offered $40,000, which was countered by $94,064 plus pre-judgment interest and costs by the plaintiff. The defendant offered $30,001++, with the plaintiff countering with $79,065++.

Hamilton is a jurisdiction that does not have mandatory mediation. Section 256.8 of the *Insurance Act*, however, provides that the parties are to attend mediation on the request of one party. At the plaintiff's request, the two parties attended a short and unsuccessful mediation where the defendant's insurer made it clear that they were not interested in settling the case.

Following a six-day trial, the jury awarded the Plaintiff $248,000 in damages, composed of $145,000 in general damages, $47,000 for loss of income and $56,000 for loss of earning capacity.

In assessing costs, Justice Ramsay considered the defendant's failure to mediate. He did not appreciate the insurer's "litigation strategy" to proceed to a six-day trial, stating:

This is a litigation strategy that the defendant could well afford, but the plaintiff could not. I infer that the insurance company conducted itself this way in the hopes of intimidating the plaintiff and deterring other plaintiffs who have meritorious cases. It did not attempt to settle the action expeditiously as required by s. 258.5 of the *Insurance Act.*

Though the parties participated in mediation, the court concluded that the defendant's unwillingness to participate in fruitful settlement discussions at mediation constituted a "sham" and as such did not comply with s. 258.6 of the *Insurance Act.*

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Justice Ramsay awarded $140,000 in costs plus $17,000 in disbursements to the plaintiff; he further awarded $60,000 in costs as a penalty for refusing to mediate. Keep in mind, the parties attended mediation!

This is not the first time the court has doled out harsh costs awards as a consequence for failure to mediate pursuant to the *Insurance Act*. The issue has been considered twice by the Ontario Court of Appeal, first in *Keam v. Caddey*, 2010 ONCA 656, and again in Williston v. Gabriele, 2013 ONCA 296.

In *Caddey*, the insurer outright refused to mediate, reasoning that the plaintiff's injuries did not meet threshold under the *Insurance Act*. Justice Feldman, writing for a unanimous court, found that the *Insurance Act* requires all parties to take part in mediation where one party is willing. The court reminded counsel and insurers that the legislation provides no exceptions to this policy or to the obligation to mediate, and therefore the insurer must participate, stating: "[an] effect of requiring insurers to attend mediation is to prevent them from playing hardball without first participating in serious settlement endeavours, including through the mediation process."

With respect to cost consequences, the court asserted that where an insurer breaches s. 258.6(1) of the *Insurance Act*, s. 258.6(2) requires the trial judge to determine the appropriate costs penalty in light of the circumstances. In *Keam*, the Court of Appeal awarded the plaintiff an additional $40,000 in costs. *Keam* was upheld in a more recent Court of Appeal decision, *Gabriele*, where the court awarded an additional $20,000 in costs, as a result of the insurer refusing to attend mediation.

Ontario courts are clearly committed to the legislature's goals of promoting a fair and expeditious action, and attempting to resolve disputes through meaningful mediation. *Ross v. Bacchus* serves as a reminder to insurers and insurance defence lawyers alike that simply attending mediation is not sufficient. Serious attempts must be made to resolve the case in an expeditious and efficient manner.

Joanna Reznick is an associate in the tort litigation group and was called to the bar in 2013.

WEB-CONTEST

Last issue's trivia contest was tough, but not as tough as a 20 hour bus trip to Daytona during reading week at university. There were only 6 correct answers and the winner was Jennifer Massie of Chubb Insurance who knew that Chris Martin of Coldplay not only is married to Gwyneth Paltrow, but also made a cameo in the British film, Sean of the Dead. The others who correctly answered were Jennifer Smith, Jessica Larrea, Sarah Henderson, Ashley McNown and Jonathan Barker.

This issue's trivia question is what pretty little liar character was played by a former "Six Chick" actress who also featured prominently in a spring break gal-pal movie featuring a former actor who co-hosted the Oscars with Catwoman, and whose L.A. home was the main set for an end of the world movie featuring these two Canadian actors where everyone was playing themselves. To answer this quiz correctly you need to provide the female character's name as well as the names of both Canuck actors.

Email your answers to dlauder@duttonbrock.com. Do NOT email answers by hitting reply to this email address, as it will get lost in spam-limbo. A draw will be held in the event of multiple correct answers.

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