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As of January 1, 2010, a number of changes were introduced to Ontario's Rules of Civil Procedure. The push for implementing these changes was spearheaded by the former Associate Chief Justice of Ontario, the Honourable Coulter Osborne in his Justice Reform Project Summary of Findings and Recommendations. In this issue, eCounsel focuses on those changes that have had an impact on the insurance defence industry.

MEGA ISSUE

RULE 53.03: THE NEW RULES AND THE NEW "EXPERT DILEMMA"

Rule 53.03 was a new Rule that was intended to clarify an expert's duty to the Court and to set out certain content requirements. However, recent decisions of the Ontario Superior Court of Justice have created a great deal of confusion over who may or may not give expert opinion evidence at trial. This confusion can make it impossible for clients and counsel to predict, with any certainty, what may happen at a trial.

This confusion has arisen because there has been a failure to recognize that there is a dramatic difference between *fact* witnesses and *expert* witnesses.

The problem begins at the threshold question of who is governed by the Rule? Is it that person who is retained by a party to provide evidence to the court on matters on which the court may require expert opinion testimony? Does it also include a person who has the ability and qualifications to provide opinions, and who has done so, in an important and relevant way in the underlying case? I suggest that it is the former only.

It is useful to consider why this rule was created. For many years, lawyers, judges and observers of the judicial process criticized the role of experts in the courtroom as being out of control. In particular, there were valid complaints that often, experts were "hired guns" who failed to be objective and did not understand that their primary obligation was to provide assistance to the triers of fact. As a result, many trials devolved into unnecessarily expensive and time-consuming battles between experts.

It is important to emphasize that the concern was over those "experts" who were hired by one side or another in the course of litigation to provide expert opinion evidence to the court that many saw as one-sided and adversarial. None of these quite proper criticisms related, in any way, to those individuals who provide relevant opinions to a court in a factual context.

In a personal injury case, the individuals that may be called to provide opinion evidence can include every medical practitioner that treats or examines an injured plaintiff outside of the litigation process. Each of these individuals forms an opinion because it is their duty to do so. These opinions necessarily involve an important medical process that requires the taking and review of the patient's medical history, an examination,

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Other topics

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"Rules are mostly made to be broken and are too often for the lazy to hide behind."
Gen. Douglas MacArthur (1880-1964)

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possibly diagnostic tests and their interpretation, and the formation of an opinion that is the basis for a course of treatment, if any is recommended. If a surgeon says that the patient will need a knee replacement within two years and afterwards will not be able to work at a particular job, should that opinion be excluded from a trial because it does not fit within Rule 53.03? I would say "No" because this type of opinion, and the individual who provided it, is not the type of "expert" at which Rule 53.03 was directed.

The current confusion begins with the court's decision in *Beasley v. Barrand* (2010 CarswellOnt 2172 (Ont. S.C.J.) and is, I suggest, compounded by the subsequent decision of *Anand v. Belanger and State Farm* ((Unreported) Oral Ruling: April 23, 2010, Court File No: 04-CV-266354CM1), which relied upon *Beasley.* In each, I submit respectfully, the court erred in applying Rule 53.03 to exclude the evidence of witnesses.

It should be noted that even if a party complies in every way with Rule 53.03 and Form 53, trial judges should and do have the ability to exclude expert evidence by virtue of their roles as evidentiary gate keepers. A trial judge may decide to do so because the issue being spoken to does not require expert assistance, the evidence proffered is "junk science", the expert is not properly qualified, the prejudicial effect of the evidence may outweigh its probative value, or as the court held in *Beasley*, its rebuttal or response may lengthen, delay or complicate the evidence and thereby unfairly disadvantage one side.

In *Beasley*, a motor vehicle case, the defence sought to call as witnesses three physicians (a neurologist, a psychologist, and a physiatrist) who saw the plaintiff at the routine request of the plaintiff's accident benefits insurer in order to assess whether the plaintiff was disabled from working, and accordingly entitled to claim income replacement benefits. Each took a history, reviewed the reports of others, conducted an examination and formed an opinion that was set out in a report.

The defence tried - and failed - to have these witnesses execute a form 53. That the defence failed is not surprising. Form 53 contains the distinct language:

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

The three witnesses in question could never successfully complete this form or comply with the spirit of the Form and Rule 53.03 because they were not engaged by or on behalf of a party to the litigation (but rather the auto insurance carrier) and their purpose was not to provide evidence in relation to the *court* proceedings (but rather to an AB dispute).

In excluding all three reports and barring the doctors from testifying, the court in Beasley examined in detail the contents of the reports and found them wanting when compared to the requirements of Rule 53.03. Again, that is not surprising since these reports were not the type of expert reports contemplated by this rule. The court also commented on how these reports were generated, the relationship between an insured and insurer, and the fact that the reports were not created by any party to the case.

It is unclear if this type of background review will now be a prerequisite to the testimony of every fact witness who provided a relevant opinion before the start of the trial. Recognizing that Rule 53 is designed to ensure that engaged opinion experts approach their task in a fair and balanced way, a court may be concerned that experts who do not fulfill the requirements of the Rule may not be even-handed. If, however, this background review is a fresh consideration to be undertaken by a court in exercising its gatekeeper function, I suggest that even more confusion will result.

The overriding issue, first and foremost, if such a witness has relevant information or evidence to provide. If the witness' opinion appears to be one-sided, then the approach to such evidence simply fits into the approach used in all such cases. The background and bias of such a witness is for counsel to examine and test, as has been done for years.

The court in *Beasley* did allow the evidence of treating physicians who provide "treatment related opinions", presumably because they are fact witnesses with relevant information to provide to the court. Clearly, like the accident benefits examiners, such treating doctors could not, and likely would not, complete a Form 53. Why would their evidence be received when that of others, who did not provide treatment but similarly formed

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relevant historical opinions in the course of their professional work, is excluded? While the court did consider the issue of fairness, the principal basis for the court's decision appears to be the application of Rule 53.03 and Form 53.

In *Anand v. Belanger and State Farm*, the court relied heavily on the analysis of Rule 53.03 in *Beasley*. It too rejected the evidence of the accident benefit examiners, agreeing with the Beasley analysis of the application and the principles underlying Rule 53.03, and the "inappropriateness of statutory accident benefit assessment reports being used at trial as expert reports". The court in *Anand* did rule that these examiners would be allowed to give evidence at trial of their "factual observations" but not evidence on the opinions they reached based on those facts. This exclusion and limitation of the facts about which they could testify seems to be the opposite of the position historically taken by judges with respect to treating physicians and the opinions which they express based upon the same collection of facts. What, one might ask, is the difference?

Not all decisions of the Superior Court of Justice are in line with *Beasley and Anand. Slaght v. Phillips & Wicaartz* ((Unreported) Voir Dire Ruling: May 18, 2010, Court File No.: 109/07), another motor vehicle accident case, appears to be in substantial disagreement with those decisions. In this case, the plaintiff wanted to call as a witness a vocational consulting and counseling expert who had provided care to her at the instance of the accident benefit insurer. The plaintiff argued that this information, on which she had acted in changing jobs, was important and relevant to all of the issues in the case. The evidence was permitted to go forward.

The court in *Slaght* considered the *Beasley* decision and Rule 53.03 and although agreeing with Beasley that experts must comply with Rule 53 as a general rule, the court recognized that "there are classifications of experts which come before the court". The court reviewed the various ways in which opinions can be generated, including those of experts who are retained by a party to an action to express opinions but who are not treating specialists, and held that Rule 53.03 clearly applied to such experts. The court concluded that experts who engage with a plaintiff, not for the purpose of expressing an opinion to the court, but for the purpose of expressing opinions related to the need for treatment, fall within a different category of expert.

The *Slaght* court noted that this view was shared by the court in *Burgess v. Wu* ([2005], 137 A.C.W.S. (3d) 962 (Ont. S.C.J.)). In that decision, the court recognized the difference between "treatment opinions" and "litigation opinions". An attending physician typically makes a diagnosis, formulates a treatment plan, and makes a prognosis, each of which involves the forming of a "treatment opinion". Those are different from "litigation opinions" because litigation opinions are formed for the purpose of assisting the court at trial, not for the purpose of treatment. The court in *Burgess* concluded by stating that the purpose of Rule 53.03 is directed at "litigation opinions" rather than "treatment opinions".

We are, I suggest, in for some interesting times. As I have said, it is far more difficult to realistically consider the outcome of cases if one cannot have some confidence as to what evidence will be accepted by a court. This uncertainty is regrettable and it will continue until some consensus emerges, hopefully along the lines suggested in *Slaght and Burgess*. It may be that a decision by the Court of Appeal or a statement by the Rules Committee will clarify Rule 53.03 so that there is no confusion as to which experts and what opinions this Rule is intended to address. This clarity is absolutely required and it is required quickly.

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Attend Mediaton or Risk Paying

Keam v. Caddey (2010 ONCA 565) was decided by the Ontario Court of Appeal in August 2010. It is only the second decision to interpret the provisions at section 258 of the *Insurance Act*, which were enacted for Bill 59 (1996). This section is rarely referred to, but as a result of this case, plaintiff's counsel can be expected to refer to this provision more frequently.

In this case, which arose from a motor vehicle accident, the defendant's insurer took a "no threshold" position and for that reason refused to mediate the case. After the plaintiff won at trial

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(meeting the threshold and recovering $100,000), the judge awarded costs in the normal course to the plaintiff, finding that the plaintiff was not entitled to substantial indemnity costs because the insurer's refusal to go to mediation was a genuinely available position. The plaintiff appealed the costs order.

The Court of Appeal overturned the trial judge's finding on costs and awarded an additional $40,000 in costs against the defendant's insurer because of its failure to participate in mediation.

In its reasons, the Court of Appeal noted that prior to trial, the defendant's insurer did actually offer $17,500 net of deductible, plus interest and costs, prompting the Court to say "this offer effectively acknowledged that Mr. Keam's claim could meet the statutory threshold test, and therefore a mediation would not necessarily have been futile". Aside from this practical consideration, the Court bluntly stated that "There can be no legitimate reason to refuse to participate because to elect not to participate constitutes a breach of the insurer's statutory obligation."

In addition to the duty to mediate, the Court noted the "insurer's duty to settle as expeditiously as possible" and the obligation to make advance payments, suggesting that the failure to fulfill those duties could also be the grounds for a costs award. In a further caution to insurers, the Court of Appeal stated that even if the plaintiff had not won at trial, a successful defendant might be "deprived of all or part of its costs" if that defendant refused to participate in mediation.

This is a very important case which insurers and their counsel must bear in mind in defending motor vehicle tort claims.

Susan Gunter is a partner at Dutton Brock LLP.

Seven Hour Time Limit

The new Rules on time limits for examinations for discovery encourage meticulous use of a stopwatch. In *J.P. Leveque Bros. v. Ontario* (2010 ONSC 2312), the issue arose as to if and when the new time limit on oral discovery should be extended. That limit is set out in Rule 31.05.1(1) which provides that "no party shall, in conducting oral examinations for discovery, exceed a total of seven hours of examination, regardless of the number of parties or other persons to be examined, except with consent of the parties or with leave of the court".

In this case, a motion was brought by the plaintiff who sought leave to exceed the seven hour time limit. The underlying action involved five parties, a range of damages exceeding two million dollars, 8,950 documents, a counterclaim, multiple jurisdictions and a failed mediation.

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The motion judge stated that where a party seeks leave to exceed the seven hour time limit, the court must consider the factor set out in Rule 31.05.1(2), including effective representation, cost efficiency and expediency. The motion judge found, after consideration, that the interests of justice required that leave should be granted. The plaintiff's total time for examinations for discovery was increased to 19 hours.

This decision includes important holdings for less complicated cases. Foremost, the court interpreted the limit of seven hours to mean seven hours of "actual discovery" on the record. This time limit does not include breaks, adjournments, a party's bad conduct or unreasonable interference in the questioning process by opposing counsel, the effect of which interference is to unduly shorten the examination time.

The court further emphasized the need for flexibility, stating that: "…in circumstances in which the time limit agreed upon in the Discovery Plan has expired and counsel is at a crucial point in his/her examination on an issue central or germane to the case, flexibility ought to be brought to bear and that further time to a maximum of one hour to continue and conclude the examination would not be unreasonable in the circumstances".

In cases with multiple parties, this extra hour should be deducted from the time available to examine another party. In this case, the court was of the view that this flexibility allowed counsel to be effective and to prioritize but at the same time cost-efficient in the overall process.

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Relevancy

One of the changes to the *Rules of Civil Procedure* involved an attempt to curb the spiraling costs of uncontrolled discovery by narrowing the scope of permissible discovery. This was attempted by a change to the wording of the standard.

The language used to establish the standard for documentary discoverability was changed from "*relating* to any matter in issue" to "*relevant* to any matter in issue". Taking the simple meaning of the words, the new standard of "relevance" would seem to be more restrictive than the old standard of "related". However, practically speaking, it is difficult to distinguish between what is "relevant" from what "relates" to an issue. Three decisions have looked at the practical implications, if any, of this change.

Although *Benatta v. The Attorney General of Canada et al* (2009 CanLII 70999 (O.N. S.C.J.)) was decided prior to the new Rules taking effect, Master Short nonetheless analyzed the consequences of the post January 1, 2010 amendments. Master Short expressed concern that the rule changes would be seen as a license by some counsel to exclude documents clearly relating to matters in dispute which they regard as inaccurate or not reliable and, thus, not "relevant". While the Master conceded that "patently extraneous material can be ignored", true and plain disclosure of documents having "any bearing on issues in a case ought to continue to be the court's expectation".

In *Filanovsky v. Filanovsky* ([2009] O.J. No. 919), Master MacLeod analyzed the changes to the Rules and stated that under the new *Rules*, the "test is relevance and not a remote possibility of relevance…unnecessary discovery should be avoided". Defining "unnecessary discovery" is, however, easier said than done. Master Short, in *Benatta,* stated that counsel should err on the side of disclosure until or unless case law establishes a different direction.

A subsequent case, *Brand Name Marketing Inc. v. Rogers Communications Inc.* (2010 ONSC 1159, [2010] O.J. No. 978) determined that at examinations for discovery, the appropriate standard for determining relevance is simply whether the question asked is relevant to any matter in issue as defined by the pleadings.

Ultimately, it is unclear what practical changes, if any, will occur as a result of the new standard of "relevant to". Competing interests are at play. On the one hand, changes to the *Rules* were enacted to curb the costs of documentary discovery; on the other hand, as Master Short states, it is prudent for counsel to err on the side of disclosure. Going forward, counsel should continue to determine relevancy by looking to the pleadings as this new legal issue continues to develop.

Elie Goldberg is a student at law who will soon be starting his legal career as a first year lawyer at Dutton Brock.

MEGA ISSUE

Summary Judgment Motion Rule 20

Rule 20, the rule governing motions for summary judgment, underwent a significant change when the *Rules of Civil Procedure* were amended. The purpose of the Rule remains to dispose of an action where it is shown that a trial is not necessary. However, the changes to the Rules brought in a new test as to when summary judgment would be granted that, it was hoped, would make it easier to achieve that purpose: now, the test is whether or not there is "a genuine issue *requiring* a trial", whereas previously the test was whether or not there was "a genuine issue *for* trial".

In addition, new powers were given to judges hearing Rule 20 motions akin to those of trial judges. A motion judge may now exercise any of the following powers: weigh the evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence relied upon in support of the motion, unless it is in the interest of justice for such powers to be exercised only at trial. Clearly, these expanded powers were intended to allow more latitude to judges hearing summary judgment motions to make final determinations where a trial is not necessary.

The case law since the changes came into effect suggests that the "new" Rule is very similar to the "old" Rule.

In the first decision commenting on the new test, *Onex Corporation v. American Home Assurance* (2009 CarswellOnt 2864 (Ont. S.C.J.)), the motion judge commented on suggestions that the changed wording indicated a changed test. The motion judge did not think that the different wording altered the test. To this judge, the major change brought on by the new Rule is the increased array of powers granted to judges in deciding such motions and to shape trials that follow unsuccessful motions.

In *Healey v. Lakeridge Health Corp.* (2010 ONSC 725 (CanLII)), the motion judge noted that the test under the old Rule was thought to be too strict, frustrating its purpose, and that the utility of the Rule has been impaired by the inability of a motion judge to find facts. He also recognized that the changes to the Rule ought to be interpreted with a view to achieving the overall purpose of making summary judgment more readily available. The motion judge did not say if he thought the new Rule contained a new test, however, he did recognize that the new Rule was not as clear as the old Rule in that there was no "bright line" as to when a summary judgment motion ought to be granted. The motion judge concluded by stating that, to succeed on a motion for summary judgment, a moving party must provide a level of proof that demonstrates that "a trial is unnecessary to truly, fairly, and justly resolve the issues". Although this judge's statement of the test under the new Rule is more elaborate than the wording of the old Rule, it is difficult to see this as a change.

In *Hino Motors Canada Ltd. v. Knell* (2010 ONSC 1329), the motion judge succinctly stated that "the test remains largely the same". The impact of the changes to Rule 20 is that a judge hearing a summary judgment motion now has "more tools to determine if this test is met".

Despite these new "tools", the case law appears to indicate that judges hearing summary judgment motions continue to defer to trials as being the best venue to resolve disputes. In *Valemont Group Ltd. v. Philmour Goldplate Homes Inc.* (2010 ONSC 1685), the judge emphasized that a summary judgment motion was not a substitute for trial and that the new powers granted to judges hearing such motions did not include a new general power to fashion an individually-crafted trial process.

In summary, the case law to date suggests that the new test for summary judgment motions under Rule 20 remains the same. The major change brought about by the new Rule lies in the greatly-expanded powers granted to judges hearing summary judgment motions which are akin to those of a trial judge. Even so, the case law indicates that motion judges continue to recognize trials as the proper place to resolve multi-issue disputes, suggesting that the purpose behind the changes to Rule 20 will be realized without motion judges overstepping their role.

Roseanna Ansell-Vaughan's defence-oriented practice includes a wide variety of general insurance liability issues.

BIG WINNER

Last issue we ran a contest on St. Patrick. The answers were Scotland and Sir Sean Connery.
Out of the number of correct entries, the names of Iain Convery at Crawford & Company and Linda Heggarty at McLarens Canada were pulled from a hat. Each received some cool Dutton Brock swag (fleece pullover and baseball cap) for their efforts. Cheers to both and all who entered the contest!

Editors' note

E-Counsel reports on legal issues and litigation related to our institutional, insured and self-insured retail clients. Dutton Brock LLP practices exclusively in the field of civil litigation. Any comments or suggestions on articles or E-Counsel generally can be directed to David Lauder or Paul Martin. You can find a copy of this issue, our contact information and more at www.duttonbrock.com.

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