EXHIBIT K1.1
March 10,2014

EB-2013-0268

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Sched. B);

AND IN THE MATTER OF an application by Dufferin Wind Power Inc. ("DWPI") for an Order or Orders pursuant to Section 99(5) of the *Ontario Energy Board Act, 1998* (as amended) granting authority to expropriate land for the purposes of constructing, operating and maintaining transmission and distribution facilities that will connect DWPI's planned Dufferin Wind Farm to the IESO-controlled grid.

BOOK OF AUTHORITIES OF THE APPLICANT DUFFERIN WIND POWER INC.

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Ontario Energy Board

Commission de l'Énergie de l'Ontario

EB-2013-0268

IN THE MATTER OF the *Ontario Energy Board Act 1998*, S.O.1998, c.15, (Schedule B);

AND IN THE MATTER OF section 99 of the Act;

AND IN THE MATTER OF an application by Dufferin Wind Power Inc. for authority to expropriate interests in certain lands for the purpose of constructing a new transmission line and associated facilities.

BEFORE: Ken Quesnelle
Presiding Member

Peter Noonan
Member

PROCEDURAL ORDER NO. 2
AND
DECISION ON MOTIONS TO STAY

December 16, 2013

In Ontario Energy Board (the "Board") proceeding EB-2012-0365, Dufferin Wind Power Inc. (the "Applicant" or "DWPI") obtained an order granting it leave to construct a new electricity transmission line and associated facilities to connect its planned Dufferin Wind Farm to the provincial power grid. DWPI has been unable to negotiate land agreements with all affected landowners along the entire route.
Accordingly, DWPI filed an application (the "Application"), dated July 19, 2013, with the Ontario Energy Board (the "Board") under section 99 of the *Ontario Energy Board Act*

1998, S.O. 1998, c. 15 (Schedule B) (the ”Act”) for authority to expropriate interests in certain lands. The Board assigned File No. EB-2013-0268 to the Application.

There are 52 properties over which DWPI is seeking approval of the Board to expropriate interests in the lands needed to build, operate and maintain the new transmission line and associated facilities. DWPI is seeking temporary construction easements and, for a term of 45 years, transmission easements, distribution easements, and access and maintenance easements.

Five property owners are affected and all are parties to this proceeding. The Board determined in Procedural Order No.1, issued on October 30, 2013, that all those property owners are also eligible to apply for cost awards. DWPI did not object to any of the intervention requests.

Two of the property owners, James Daniel Black and Marian Arlene Black (the “Blacks”) and the County of Dufferin (the “County”), filed preliminary motions with the Board for an order granting a stay of the Application. The grounds for the motions, and positions of the parties, are set out below.

In accordance with Procedural Order No.1, DWPI filed submissions on the motions on November 15, 2013. The Blacks and the County filed reply submissions on November 22, 2013. The remaining three property owners, Marc Atkinson, Atkinson Farms and David Coe, jointly filed a letter in support of the motions of the Blacks and the County. Board staff and Hydro One did not make any submissions.

THE BLACKS’ MOTION

The Blacks’ Position

The Blacks have been engaged in an arbitration proceeding with DWPI since November 2013 respecting two leases (collectively, the “Leases”) on farms that the Blacks own in the Township of Melancthon. For the reasons set out below, the Blacks requested, in their Notice of Application for Intervention, a temporary stay of this proceeding until after completion of the arbitration and delivery of the arbitral award.

In their submission, the Blacks advised that the arbitration proceeding is underway and that oral argument is scheduled for January 7, 2014. Based on these timelines, the Blacks submitted that DWPI may not be able to start construction on the Blacks' farms by January 31, 2014, which may lead to a situation where the Blacks may be in a position to give notice to terminate the Leases.

The Blacks submitted that the arbitration could also see a decision where the Leases are deemed void, resulting in no property interest. Alternatively, the Blacks argued that the arbitration could see a decision that upholds the validity of the Leases but would require some modification, which may trigger other regulatory adjustments, including possibly adjustments to the Renewable Energy Approval.

Finally, the Blacks submitted that the interests in land which DWPI seeks to expropriate may not be accurate since there were two materially different site plans relative to the locations of turbines, access roads and electrical supply cables that were filed in this proceeding and the arbitration.

DWPI's Position

In its submission, DWPI noted that the interests in land which it seeks to expropriate from the Blacks are in respect of portions of the same two properties that are currently disputed in arbitration. The Applicant submitted that while the two proceedings deal with the same properties, the outcome of the arbitration, which it anticipated would be decided by the end of January 2014, would only impact this proceeding in that the Blacks' properties would either remain under an expropriation request, or would be withdrawn if the outcome of arbitration is such that the Leases were found enforceable.

For these reasons, the Applicant asked that the Board deny the Blacks' request for a temporary stay of this proceeding until after completion of the arbitration proceeding.

Board Findings

DWPI is legally entitled to proceed with an expropriation application before the Board. Section 99(1) of the Act states:

> **99. (1)** The following persons may apply to the Board for authority to expropriate land for a work:
>
> 1. Any person who has leave under this Part or a predecessor of this Part.
>
> 2.Any person who intends to construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection and who is exempted from the requirement to obtain leave by the Board under section 95 or a regulation made under clause 127 (1) (f). 1998, c. 15, Sched. B, s. 99 (1).

With respect to the ongoing arbitration concerning the Leases, the Board notes that there is no statutory requirement that the Board temporarily stay the hearing of the Application until completion of the arbitration.

The Board may proceed to hear DWPI's expropriation application even while arbitration negotiations respecting necessary lands may be ongoing. The Board also notes that the arbitrator was appointed by both the Blacks and DWPI and that the arbitral award will not affect the current form or determine the outcome of this proceeding.

The Board finds that there is nothing determinative in the arbitration that would change the Board's expropriation process. The parallel progression of the two processes does not frustrate procedural justice.

The Board also finds that delaying this proceeding without legal reason would cause prejudice to DWPI as it might unnecessarily delay DWPI's Project timetable.

For the reasons set out above the Board denies the Blacks' motion to temporarily stay the Application until after completion of the arbitration proceeding.

THE COUNTY'S MOTION

The County's Position

The County filed a Notice of Motion (the "Dufferin Motion") asking for an order granting a stay of this Application pending a final determination of:

1. An appeal to the Divisional Court by Conserve Our Rural Environment ("CORE") of the Board's leave to construct approval in EB-2012-0365; and
2. Appeals to the Environmental Review Tribunal ("ERT") of six Renewable Energy Approvals ("REA") granted by the Ministry of the Environment to the Dufferin Wind project.

The County submitted that the ERT had broad powers to amend or entirely revoke an REA. The County noted that the ERT had done so in a prior case known *as Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*[1] in which it revoked the REA in its entirety. The County added that based on the grounds for appeal, it would not be unreasonable to suggest that the REA related to this Application could be revoked in its entirety, making this proceeding moot. The County anticipated that the ERT would render its decision on or prior to December 24, 2013.

In relation to CORE's appeal, the County submitted that the Divisional Court could overturn the granting of leave to construct, and/or require review and rehearing, which could change the nature of the leave to construct request or even result in its termination.

More generally, the County submitted that the appropriate test for granting a temporary stay pending the resolution of another related proceeding rested on some central considerations, including: "whether there is substantial overlap of issues in the two proceedings; whether the two cases share the same factual background; whether issuing a temporary stay will prevent unnecessary and costly duplication of judicial and legal resources; and whether the temporary stay will result in an injustice to the party resisting the stay."

[1] *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment [20131* O.E.R.T.D. No. 40

The County argued that it met the test for the Board to grant a temporary stay of this proceeding. In its submission the County stated that this proceeding, the leave to construct and all the appeals share the same factual background. The County also advanced that there was an overlap of issues, and that a temporary stay may prevent unnecessary judicial processes since the appeals before the Divisional Court and the ERT may have a material impact on outstanding issues in this proceeding. Finally, the County asserted that DWPI did not provide any evidence of injustice that would result from a temporary stay.

For these reasons, the County requested a temporary stay of this proceeding pending the outcomes of the appeals to the Divisional Court and the ERT.

DWPI's Position

With respect to CORE's appeal, DWPI submitted that the Board's Order in EB-2012-0365 had not been stayed and that there were no statutory limitations attached to the leave to construct order that restricted the right of DWPI to bring an expropriation application before the Board.

DWPI also argued that CORE's appeal would likely be determined before the conclusion of this proceeding, and in case it was not, the Board could render a decision on the expropriation matters conditional upon the leave to construct being upheld.

Finally, the Applicant submitted that the interconnection of CORE's appeal with this proceeding had to a large extent already been considered by the Board as demonstrated by DWPI's correspondence of August 21, 2013, and August 26, 2013 and by the subsequent issuance of a Notice of Application.

On November 27, 2013, DWPI confirmed to the Board that the Divisional Court dismissed CORE's appeal and upheld the Board's decision in EB-2012-0365.

As far as the REA appeals are concerned, DWPI submitted that even in the worst-case scenario where the ERT would revoke the REA, DWPI could appeal the decision and/or change its project or mitigate the issues in order to resubmit its REA application.

DWPI further argued that in the event the ERT required some modification, it did not expect any revisions to affect the entire transmission line as this would necessitate the ERT to find that the current line as approved by the Board in EB-2012-0365 would cause serious harm to human health, to plant life, to animal life or the natural environment along the entire length of the transmission line.

The Applicant also submitted that the ERT has not previously altered the conditions of any REA that has been the subject of an appeal. DWPI anticipated a decision on the appeals by mid-December 2013.

For these reasons, the Applicant asked that the Board deny the County's request for a temporary stay of this proceeding until after completion of the leave to construct appeal and appeals in front of the ERT.

Board Findings

The Board's decision in EB-2012-0365, granting the Applicant leave to construct a new electricity transmission line and associated facilities to connect its planned Dufferin Wind Farm to the provincial power grid was upheld by the Divisional Court on November 27, 2013. Based on the Divisional Court's dismissal of CORE's appeal, the Board finds that the grounds of the Dufferin Motion with respect to the CORE appeal to be moot.

With respect to the REA appeals, the Board notes that based on the ERT's standard timelines a decision is expected in December 2013. Several REAs have been appealed with varied outcomes. In this case, as presented by both parties, the outcome of the appeals may be such that it requires fundamental changes to the REA or not.

The Board notes that while an order granting leave to construct is conditional on the applicant obtaining an REA, an ongoing appeal at the ERT is not grounds for staying a live application before the Board for expropriation. Section 99(1) of the Act allows any person who "has leave under this Part" to bring an application for expropriation; that is, any person that has leave to construct even if it is conditional. The Board reiterates that DWPI continues to hold a valid leave to construct order, and is legally entitled to proceed with an expropriation application. The Board finds that there is no statutory

requirement that compels the Board to stay this proceeding pending the hearing of an appeal by the ERT.

Finally, the Board notes that it is well established that a regulatory tribunal should not postpone the determination of an application brought within its jurisdiction by matters not relevant to the proper discharge of its duty to make such determination. To do so could, in effect, amount to a declining of jurisdiction[2].

For the reasons set out above the Board denies the County's motion to temporarily stay the Application until after completion of the REA appeals.

PROCEDURAL STEPS

The Board will hold an oral hearing on the Application. The Board considers it necessary to make provision for the following procedural matters. Please be aware that further procedural orders may be issued from time to time.

THE BOARD ORDERS THAT:

1. Intervenors and Board staff who wish information from DWPI that is in addition to the evidence pre-filed with the Board and that is relevant to the hearing shall request the information by means of written interrogatories filed with the Board and delivered to DWPI, all intervenors and Board staff on or before **December 23, 2013**.

2. DWPI shall, no later than **January 10, 2014** file with the Board and deliver to all intervenors and Board staff, a complete response to each of the interrogatories.

3. Board staff shall file with the Board and deliver to DWPI and all intervenors a Draft Issues List on or before **January 17, 2014.**

[2] *Canadian Pacific Railway* v. *The Province of Alberta et al.*, [1950] S.C.R. 25 at p. 33.

4. DWPI and intervenors may file written submissions on the Draft Issues List with the Board and serve all parties on or before **January 24, 2014**.

5. A Pre-Hearing Conference on Issues and Process will be held on **January 24, 2014** beginning at 9:30 a.m. in the Board's West Hearing Room on the 25th Floor at 2300 Yonge Street, Toronto, ON.

6. An Oral Hearing will be held on **February 18, 2014 at 9:30 a.m.**, and will continue as necessary, in the Board's West Hearing Room on the 25th floor at 2300 Yonge Street, Toronto, ON.

All filings to the Board must quote the file number, EB-2013-0268, be made through the Board's web portal at https://www.pes.ontarioenergyboard.ca/eservice/, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary

E-mail: Boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (toll free)
Fax: 416-440-7656

DATED at Toronto, December 16, 2013

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

DAVIS LLP
LEGAL ADVISORS SINCE 1892

FROM THE OFFICE OF	David Crocker
DIRECT LINE	416.941.5415
DIRECT FAX	416.777.7431
E-MAIL	dcrocker@davis.ca

FILE NUMBER: 10530.00001

February 11, 2014

DELIVERED BY EMAIL

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
P.O. Box 2319, Suite 2700
Toronto ON M4P 1E4

Dear Ms. Walli:

Re: Dufferin Wind Power Inc. - EB-2013-0268

We are counsel to David Coe, Marc Atkinson and Atkinson Farms in the above matter.

On Friday afternoon we received Procedural Order No. 3 from the Board with the decision on the issues list which had been argued at the preliminary hearing of EB-2013-0268 on January 24, 2014.

We had proposed that issues be added to the draft issues list to act as notification of our intention to argue that it is in the public interest that the transmission lines crossing the farms of David Coe, Marc Atkinson and Atkinson Farms should be buried rather than be aboveground. The decision we received on Friday afternoon, February 7, 2014 has permitted us to argue that point.

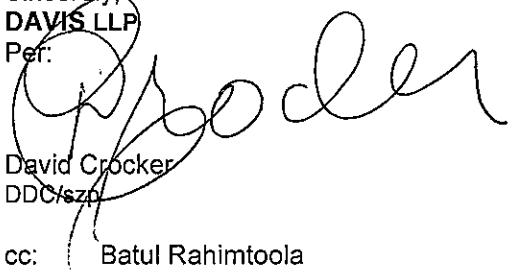
Because of the uncertainty as to whether the panel would accept these arguments, we have not gone very far, and to be candid incurred fees, in preparing our case. As we see it, it will be necessary for us to demonstrate that the aboveground transmission lines will interfere with agricultural operations. To do that, we need to provide evidence from our clients. As indicated above, we did not think it prudent to prepare those witnesses until we received the Board's decision. Similarly, we would like to provide evidence with respect to the feasibility of burying those transmission lines. For the same reasons, we have not prepared that evidence either.

I was in touch with Marc Atkinson on Monday, February 10. I had alerted him and David Coe to the Board's decision on Friday. He advises that he is away from February 28 to March 8, 2014. We will not be able to complete our work before he leaves.

In order to prepare as we feel we need to, therefore, this letter is to advise that we are seeking an adjournment from February 18, 2014. In light of the vacation plans just described, I would hope that we can proceed some time toward the middle of March, i.e., March 14 or thereafter on a date or dates convenient to the panel and counsel. We propose to produce witness statements and an expert report, should we decide to call an expert, two weeks before the date set for the hearing.

Thank you for your attention to this matter. If there are any questions, please contact us.

Sincerely,
DAVIS LLP
Per:



David Crocker
DDC/szp

cc: Batul Rahimtoola
Michael Millar
Jonathan Myers
Stephen Thom
Scott Stoll

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2013-0268

IN THE MATTER OF the *Ontario Energy Board Act 1998*, S.O.1998, c.15, (Schedule B);

AND IN THE MATTER OF section 99 of the Act;

AND IN THE MATTER OF an application by Dufferin Wind Power Inc. for authority to expropriate interests in certain lands for the purpose of constructing a new transmission line and associated facilities.

PROCEDURAL ORDER NO. 4
February 13, 2014

The Application

Dufferin Wind Power Inc. has applied to the Ontario Energy Board under section 99 of the *Ontario Energy Board Act* (the "Act") for authority to expropriate interests in certain lands. The purpose of the expropriation is to allow the Applicant to implement an authorization from the Board granting it leave to construct an electrical transmission line, and associated facilities, to connect its planned Dufferin Wind Farm to the provincial power grid. Dufferin Wind Power Inc. has negotiated easement agreements with many, but not all, of the landowners along the proposed route of its transmission line. In those instances where a negotiated agreement has been impossible to obtain Dufferin Wind Power Inc. has decided to seek authority from this Board to expropriate the interests in the affected lands that it requires to construct its transmission line. Dufferin Wind Power Inc. will be referred to by name, or as the Applicant, or DWPI.

Procedural Matters

Procedural Order No.3 and Decision on Issues issued on February 7, 2014 finalized the list of issues to be addressed in this proceeding and set dates for an oral hearing.

On February 11, 2014, the Board received a letter from DWPI advising that it is withdrawing its application for authority to expropriate insofar as it relates to Marian Arlene Black and James Daniel Black's (the "Blacks") properties. The Board accepts the withdrawal of the application to expropriate the lands owned by the Blacks and that expropriation process is terminated. However, the Blacks will remain parties to EB-2013-0268 for the purposes of cost claims, which will be dealt with at the conclusion of the entire proceeding.

The Board received, on February 11, 2014, a letter from Mr. Crocker, counsel for Atkinson and Coe, requesting an adjournment of the oral hearing from February 18, 2014 to mid-march 2014. Mr. Crocker argued that up until the Board's Decision on Issues, and the inclusion of the issues he brought forth, there was uncertainty as to whether he could argue those points. Mr. Crocker submitted that his clients need additional time in order to prepare evidence and also to provide expert evidence with respect to the feasibility of burying the transmission line.

On February 12, 2014, the Board received a letter from DWPI opposing the request for an adjournment of the oral hearing. DWPI submitted that prior to the letter of February 11, 2014, despite numerous opportunities to do so, and clear evidence at the outset of the proceeding as to the nature of their issues of concern, Atkinson and Coe did not signal any intention to file written evidence. DWPI also posed the question of procedural fairness that new evidence would bring and the financial and time implication of appropriately examining this new evidence, as well as the impact of added procedural steps on DWPI's overall project costs and schedule. In conclusion, DWPI advanced the view that an adjournment of the hearing would cause very significant delay to the proceeding and the project, and would cause prejudice to DWPI.

The Board has determined that some limited additional time to produce written evidence that is within the scope of the Final Issues List would be appropriate. The Board will therefore grant a brief adjournment of the hearing to March 10, 2014.

The Board understands that Atkinson and Coe have not yet determined if they will file expert evidence. All evidence, whether in the form of an expert report or a witness statement from any lay witnesses, must be filed on or before February 28, 2014. If Atkinson and Coe do intend to file expert evidence, they will advise the Board and DWPI of this as quickly as possible (and prior to February 21), so that the Board can make provision for any necessary pre-hearing discovery prior to the commencement of the oral hearing.

The Board considers it necessary to make provision for the following procedural matters.

THE BOARD ORDERS THAT:

1. Intervenors who wish to file evidence with the Board that relates to the Final Issues List and that is relevant to the hearing shall do so on or before **February 28, 2014.** If an intervenor wishes to file expert evidence the intervenor shall advise the Board and DWPI of that fact no later than February 21, 2014.

2. An Oral Hearing will be held on **March 10, 2014 at 9:30 a.m.**, and will continue as necessary, in the Board's North Hearing Room on the 25th floor at 2300 Yonge Street, Toronto, ON.

All filings to the Board must quote the file number, EB-2013-0268, be made through the Board's web portal at www.pes.ontarioenergyboard.ca/eservice/, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary

E-mail: Boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (toll free)
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DATED at Toronto, February 13, 2014

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

TORYS LLP

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March 3, 2014

EMAIL

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, Ontario
M4P 1E4

Dear Ms. Walli:

Re: EB-2013-0268

We are counsel for Dufferin Wind Power Inc., the applicant, in the above-noted matter.

We write in reply to Ms. Bisset's letter which responds to our letter of earlier today.

In substance, Ms. Bisset's concedes that Coe and Atkinson have not delivered an expert report as contemplated by the Board's *Rules of Practice and Procedure* and that no such report will ever be forthcoming. In other words, that Dufferin will have no ability to know the case that is being put against it prior to hearing from Mr. Kottelenberg in the witness stand. That is the definition of unfair and the circumstance the law, the Board's *Rules* and the *Rules of Civil Procedure* all protect against. It is irrelevant that Mr. Kottelenberg has refused to provide Coe and Atkinson with a written report. That is a situation entirely of their own making. Dufferin should not be prejudiced because, at the eleventh hour, months after this case was started and after they sought and obtained an adjournment on the express representation that a report would be provided, Coe and Atkinson selected an unwilling witness.

Yours truly,

Crawford Smith

CS
Enclosure

36215-2001 16708358.1

DAVIS LLP
LEGAL ADVISORS SINCE 1892

FROM THE OFFICE OF Laura K. Bisset
DIRECT LINE 416.941.5400
DIRECT FAX 416.777.7432
E-MAIL lbisset@davis.ca

FILE NUMBER: 10530-00001

March 4, 2014

DELIVERED BY EMAIL

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
27th Floor
2300 Yonge Street
Toronto, ON M4P 1E2

Dear Ms. Walli:

Re: Dufferin Wind Power Inc. - Application for Authority to Expropriate (EB-2013-0268)

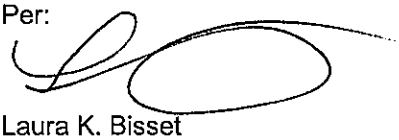
We write further to Mr. Smith's responding correspondence of yesterday's date.

We do not agree that the good faith efforts of our clients to deal with circumstances beyond their control prejudice Dufferin Wind Power Inc. ("**DWPI**"), or create an unfairness to DWPI. In any event, there is a reasonable solution to the problem that Mr. Smith perceives with our clients' inability to secure an expert report from Mr. Kottelenberg, that is that DWPI does not know the case it has to meet. The Board can hear from Mr. Kottelenberg, as scheduled, on March 10, 2014. If DWPI requires time to reply to the evidence that it hears from Mr. Kottelenberg, our clients will consent to an adjournment of the proceedings until DWPI is prepared to proceed. The solution is not to deprive the Board of the opportunity to hear evidence that is germane to the issues it must decide.

We write also to confirm our understanding of the conduct of these proceedings. It is our understanding that DWPI, as Applicant, will present any *viva voce* evidence it intends to call; the Interveners will then present their *viva voce* evidence; and DWPI will have the opportunity to present further evidence in reply to any new matters, that could not reasonably have been anticipated, raised during the Interveners' case. Legal submissions on the evidence will follow in the same order.

We note that if DWPI intends to call any *viva voce* evidence, we do not have notice of that intent, or of the substance of that evidence, as of the writing of this letter.

Sincerely,
DAVIS LLP
Per:



Laura K. Bisset
LKB/sxo

Davis: 15863581.1

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March 4, 2014

EMAIL

Kirsten Walli
Board Secretary
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2300 Yonge Street, 27th Floor
Toronto, Ontario
M4P 1E4

Dear Ms. Walli:

Re: EB-2013-0268

We are counsel for Dufferin Wind Power Inc., the applicant, in the above-noted matter.

We write in reply to Ms. Bisset's letter of today's date. It is not our intention to engage in a protracted letter writing campaign with Ms. Bisset. However, given the content of her letter we offer this short reply.

We understand Coe and Atkinson to suggest that Mr. Kottelenberg testify at length in chief after which Dufferin would be afforded the opportunity to request an adjournment. The suggestion does not resolve Dufferin's concerns. We say this for the following reasons.

First, it would defeat the intention of the Board as set out in Procedural Order #4 (page 3) to permit parties to seek pre-hearing discovery prior to the oral hearing. Coe and Atkinson were afforded this right in relation to Dufferin's evidence and exercised it.

Second, assuming Mr. Kottelenberg is willing or compelled and able to return, the suggestion defeats entirely Dufferin's right to conduct timely, meaningful cross-examination of Mr. Kottelenberg at the qualification stage and, in relation to the substance of his opinion, assuming he is qualified. If for some reason Mr. Kottelenberg cannot return, Dufferin will have no right to cross-examine at all.

Third, it would result in further delays in the proceedings. While it is impossible to say at this stage the length of adjournment which might be necessary (because, of course, we have received no disclosure) given witness availability, the intervening March break, prior hearing commitments and the Board's own schedule, it could be several weeks or more. This prejudices Dufferin substantially in increased project costs. No other party is similarly impacted.

Compliance with the Board's rules ensures fairness to all parties. As the Divisional Court held in

Westerhof, "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" (paragraph 22). Here, there has been no report and one will never be provided. The Board should exclude Mr. Kottelenberg.

Yours truly,

Crawford Smith

CS
Enclosure

36215-2001 16708358.1

Current to March 1, 2014

R.R.O. 1990, Reg. 194, r. 53.03

Courts of Justice Act

RULES OF CIVIL PROCEDURE

R.R.O. 1990, Reg. 194

Amended to O. Reg. 399/12

TRIALS

RULE 53 - EVIDENCE AT TRIAL

EXPERT WITNESSES

RULE 53.03

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 required under Rule 50, 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,

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

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.

53.03 on October 20, 1997, rule 53.03 as it read on October 19, 1997, continues to apply with respect to actions in which the trial commences before February 16, 1998. See O. Reg. 348/97, ss. 3, 7, 8.

** Editor's Table **

For changes prior to February 2001, please see the Ontario Gazette for in force information.

Provision	Changed by	Effective	Gazette Date
53.03	O. Reg. 438/08 s48	2010 Jan 1	2008 Dec 27

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R.R.O. 1990, Reg. 194, r. 53.03; O. Reg. 348/97, s. 3; O. Reg. 570/98, s. 3; O. Reg. 438/08, s. 48; O. Reg. 186/10, s. 4.

12.04 The Board may require the whole or any part of a document filed to be verified by affidavit.

13. Written Evidence

13.01 Other than oral evidence given at the hearing, where a party intends to submit evidence, or is required to do so by the Board, the evidence shall be in writing and in a form approved by the Board.

13.02 The written evidence shall include a statement of the qualifications of the person who prepared the evidence or under whose direction or control the evidence was prepared.

13.03 Where a party is unable to submit written evidence as directed by the Board, the party shall:

(a) file such written evidence as is available at that time;

(b) identify the balance of the evidence to be filed; and

(c) state when the balance of the evidence will be filed.

13A. Expert Evidence

13A.01 A party may engage, and two or more parties may jointly engage, one or more experts to give evidence in a proceeding on issues that are relevant to the expert's area of expertise.

13A.02 An expert shall assist the Board impartially by giving evidence that is fair and objective.

13A.03 An expert's evidence shall, at a minimum, include the following:

(a) the expert's name, business name and address, and general area of expertise;

(b) the expert's qualifications, including the expert's relevant educational and professional experience in respect of each issue in the proceeding to which the expert's evidence relates;

(c) the instructions provided to the expert in relation to the proceeding and, where applicable, to each issue in the proceeding to which the expert's evidence relates;

(d) the specific information upon which the expert's evidence is based, including a description of any factual assumptions made and research conducted, and a list of the documents relied on by the expert in preparing the evidence; and

(e) in the case of evidence that is provided in response to another expert's evidence, a summary of the points of agreement and disagreement with the other expert's evidence.

13A.04 In a proceeding where two or more parties have engaged experts, the Board may require two or more of the experts to:

(a) in advance of the hearing, confer with each other for the purposes of, among others, narrowing issues, identifying the points on which their views differ and are in agreement, and preparing a joint written statement to be admissible as evidence at the hearing; and

(b) at the hearing, appear together as a concurrent expert panel for the purposes of, among others, answering questions from the Board and others as permitted by the Board, and providing comments on the views of another expert on the same panel.

13A.05 The activities referred to in **Rule 13A.04** shall be conducted in accordance with such directions as may be given by the Board, including as to:

(a) scope and timing;

(b) the involvement of any expert engaged by the Board;

(c) the costs associated with the conduct of the activities;

(d) the attendance or non-attendance of counsel for the parties, or of other persons, in respect of the activities referred to in paragraph (a) of **Rule 13A.04**; and

(e) any issues in relation to confidentiality.

13A.06 A party that engages an expert shall ensure that the expert is made aware of, and has agreed to accept, the responsibilities that are or may be imposed on the expert as set out in this **Rule 13A**.

14. Disclosure

14.01 A party who intends to rely on or refer to any document that has not already been filed in a proceeding shall file and serve the document in accordance with the Board's directions.

14.02 Any party who fails to comply with **Rule 14.01** shall not put the document in evidence or use it in the cross-examination of a witness, unless the Board otherwise directs.

14.03 Where the good character, propriety of conduct or competence of a party is an issue in the proceeding, the party is entitled to be furnished with reasonable information of any allegations at least 15 calendar days prior to the hearing.

PART III - PROCEEDINGS

15. Commencement of Proceedings

15.01 Unless commenced by the Board, a proceeding shall be commenced by filing an application or a notice of appeal in compliance with these Rules, and within such a time period as may be prescribed by statute or the Board.

15.02 A person appealing an order made under the market rules shall file a notice of appeal within 15 calendar days after being served with a copy of the order, or within 15 calendar days of having completed making use of any provisions relating to dispute resolution set out in the market rules, whichever is later.

15.03 An appeal of an order, finding or remedial action made or taken by a standards authority referred to in section 36.3 of the *Electricity Act* shall be commenced by the Independent Electricity System Operator by notice of appeal filed within 15 calendar days after being served with a copy of the order or finding or of notice of the remedial action, or within 15 calendar days of receipt of notice of the final determination of any other reviews and

2000 CarswellOnt 4362, 51 O.R. (3d) 97, 138 O.A.C. 201, [2000] O.J. No. 4428, 43 C.P.C. (5th) 65

Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham

Joel Marchand, a minor by his litigation guardian Richard Allen Marchand, the said Richard Allen Marchand and Barbra Marchand (Appellants) and The Public General Hospital Society of Chatham (also known as The Public General Hospital), A. Olson, P. Colebrook, M. Want and G. Asher (Respondents)

Ontario Court of Appeal

Laskin, Goudge, Sharpe JJ.A.

Heard: November 22-25, 1999
Judgment: November 27, 2000[FN*]
Docket: CA C25915

Proceedings: varying *Marchand (Litigation Guardian of) v. Public General Hospital of Chatham* (1997), 33 O.R. (3d) 570, 1997 CarswellOnt 1778, 12 C.P.C. (4th) 373 (Ont. Gen. Div.); additional reasons to *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham* (1996), 1996 CarswellOnt 5562 (Ont. Gen. Div.); and affirming *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham* (1996), 1996 CarswellOnt 5562 (Ont. Gen. Div.)

Counsel: Barry A. Percival, Q.C., Martin Wunder, Q.C., Ronald D. Davis for Appellants

Joshua Liswood, Kathryn M. Frelick for Respondents, The Public General Hospital Society of Chatham, A. Olson, P. Colebrook, M. Want

W. Niels F. Ortved, J. Thomas Curry for Respondent, G. Asher

Subject: Public; Evidence; Civil Practice and Procedure; Torts; Family

Health law --- Health care professionals — Nurses — Negligence

Child suffered neurological injuries shortly after birth which resulted in child being totally dependent on others for care for rest of his life — Parents and child brought action for negligence against nurses — Action was dismissed on grounds that parents and child failed to prove negligence on balance of probabilities — Nurses' conduct met acceptable standard of care — Nurses proved on balance of probabilities that child's injuries arose from unforeseen placental abruption — Nurses did not cause or contribute to child's neurological injuries — Parents and child appealed — Appeal dismissed — There was ample evidence before trial judge to support his finding that acts of alleged negligence had not been established, and his determination of cause of tragedy.

Health law --- Physicians and surgeons — Malpractice — Causation

Child suffered neurological injuries shortly after birth which resulted in child being totally dependent on others for care for rest of his life — Parents and child brought action for negligence against obstetrician and nurses — Action was dismissed on grounds that parents and child failed to prove negligence on balance of probabilities — Obstetrician and nurses adduced positive evidence that their conduct met acceptable level of care and that child's injuries arose from unforeseen placental abruption — Parents and child appealed — Appeal dismissed — There was ample evidence before trial judge to support his finding that acts of alleged negligence had not been established, and his determination of cause of tragedy.

Health law --- Physicians and surgeons — Malpractice — Standard of care — Specialists

Child suffered neurological injuries shortly after birth which resulted in child being totally dependent on others for care for rest of his life — Parents and child brought action for negligence against obstetrician — Action was dismissed on grounds that parents and child failed to prove negligence on balance of probabilities — Obstetrician adduced positive evidence that conduct met acceptable level of care of obstetricians practising obstetrics at that time in Ontario and that child's injuries arose from unforeseen placental abruption — Parents and child appealed — Appeal dismissed — There was ample evidence before trial judge to support his finding that acts of alleged negligence had not been established and his determination of cause of tragedy.

Evidence --- Opinion — Experts — Expert reports

Child suffered neurological injuries shortly after birth which resulted in child being totally dependent on others for care for rest of his life — Parents and child unsuccessfully brought action for negligence against obstetrician and nurses — Trial judge decided pursuant to R. 53.08 of Rules of Civil Procedure that parents and child failed to comply with R. 31.07 and R. 53.03 but that their expert witness could testify — Trial judge ruled that expert could not testify on issue of bradycardia which was not mentioned in report — Parents and child contended that issue was related to issue in report and that trial judge too narrowly interpreted R. 53.03 regarding "substance" of expert's proposed testimony — Parents and child also challenged refusal to allow another expert witness to testify on her second report — Parents and child submitted that cumulatively, evidentiary rulings and their uneven application denied opportunity to fairly present their case — Parents and child appealed — Appeal dismissed — Expert's report merely stated his conclusion about standard of care but did not mention bradycardia, nor point at which fetal distress was determined, nor addressed reserve capacity that fetus might have had — Expertise was only on standard of care in Michigan — No prejudice arose from interpretation of R. 53.03 because expert was not qualified to give expert evidence on causation — Expert's testimony may explain and amplify his/her report but only on matters latent in or touched on by report — Allowing second expert to testify on her second report would open new field not covered in first report.

Practice --- Trials — Time of trial — Adjournment — Discretion of trial judge

Child suffered neurological injuries shortly after birth which resulted in child being totally dependent on others for care for rest of his life — Parents and child unsuccessfully brought action for negligence against obstetrician and nurses — Expert's report stated his conclusion that appropriate standard of care was to attach fetal heart monitor on admission to hospital to indicate fetal distress at earliest possible point — Report did not refer to bradycardia, nor state point at which fetal distress was determined, nor address reserve capacity that fetus might have had — Report dealt with topic of fetal distress in connection with his opinion on standard of care but his expertise was only on standard of care in Michigan — Trial judge ruled that expert could not testify on issue of

bradycardia because it was directed to issue not addressed in expert's report — Parents and child unsuccessfully requested adjournment to obtain supplementary reports from other proposed expert witnesses — Parents and child contended that taken cumulatively, evidentiary rulings and their uneven application denied opportunity to fairly present their case — Appeal dismissed — No injustice resulted — Trial judge clearly stated that ruling applied only to particular expert and that adequacy of other expert reports would be dealt with as need arose — Trial judge emphasized need to continue trial given that parties were several weeks into trial and there had already been substantial examinations for discovery — Permitting filing of more reports would require more discoveries and prolong trial.

Evidence --- Opinion — Experts — Weight of evidence — Based on hearsay

Child suffered neurological injuries shortly after birth which resulted in child's being totally dependent on others for care for rest of his life — Parents and child unsuccessfully brought action for negligence against obstetrician and nurses — Trial judge ruled that parents and child had to produce source documents listed in home care expert's report upon which expert based her opinion, failing which her opinion would lack probative value — Trial judge ruled that if report was based on reports of doctors, opinion of doctors must be proven — Refusal to prove those medical reports breached implied undertaking to prove opinions of medical doctors referred to in report — Counsel sought to rely upon videotapes as foundation for expert's opinion rather than upon medical reports that served as basis for opinion — Trial judge ruled that this was attempt to rely on different set of facts from facts that served as basis for experts' reports — Trial judge ruled that counsel must file list of expert witnesses they intended to call or whose reports would be filed and that before expert could testify there must be voir dire to determine facts or opinions that expert relied on in forming opinion — Parents and child contended that taken cumulatively, evidentiary rulings and their uneven application denied opportunity to fairly present their case — Parents and child appealed — Appeal dismissed — Party must prove foundational facts relied upon by expert in forming his/her opinion failing which expert opinion will be given little or no weight — Observations and conclusions could not be established in any other way than by adducing medical reports containing those observations and conclusions — Videotapes could only provide evidence of child's present capability but not about his future development.

Practice --- Discovery — Examination for discovery — Range of examination — Information subsequently obtained or recalled

Child suffered neurological injuries shortly after birth which resulted in child being totally dependent on others for care for rest of his life — Parents and child unsuccessfully brought action for negligence against obstetrician and nurses — After commencement of trial, obstetrician provided letter correcting answers given on examination for discovery — Parents and child contended that trial judge erred in permitting physician to correct his discovery evidence — Parents and child contended that taken cumulatively, evidentiary rulings and their uneven application denied opportunity to fairly present their case — Parents and child appealed — Appeal dismissed — No prejudice resulted — Obstetrician could explain his discovery answer in his testimony because original discovery answer was not formal admission — Rule 31.09 of Rules of Civil Procedure imposes continuing obligation to correct and complete answers given on discovery — Combined effect of R. 31.09 and R. 53.08 permitted evidence to be admissible — Original discovery answer and corrected answers and explanations were all before trial judge — Trial judge was entitled to weigh answers and explanation and decide which version to accept.

Evidence --- Opinion — Opinion evidence in particular matters — General

Child suffered neurological injuries shortly after birth which resulted in child being totally dependent on others for care for rest of his life — Parents and child unsuccessfully brought action for negligence against obstetrician and nurses — Action was discontinued against pathologist and two nurses on condition that they be available at trial for cross-examination — Trial judge ruled that compliance with R. 53.03 of Rules of Civil Procedure was required to elicit opinion evidence from physician — Since no R. 53.03 reports had been filed, leave was required — Trial judge ruled that unless notice was given or leave was granted, pathologist would not be permitted to give independent opinion evidence about conduct of others or to express opinion about cause of child's condition — Trial judge ruled that pathologist could give opinion evidence about his own reports if such evidence was limited to his own involvement in matter — Cross-examination was limited to pathologist's opinion of nature of placental abruption, if any, that occurred — Trial judge also ruled that nurse could not be asked about her opinion concerning conduct of other defendants — Parents and child contended that taken cumulatively, evidentiary rulings and their uneven application denied opportunity to fairly present their case — Parents and child appealed — Appeal dismissed — Ruling concerning pathologist was in error but did not result in prejudice — Nurse was to be regarded as lay witness because she was not qualified as expert at trial — Nurse was asked her opinion on conduct of other defendants but was not being asked to state opinion in order to more accurately express facts she perceived — Nurse's proposed testimony was not admissible and was properly disallowed.

Evidence --- Examination of witnesses — Cross-examination — Impeachment — Inconsistent statement

Child suffered neurological injuries shortly after birth which resulted in child being totally dependent on others for care for rest of his life — Parents and child unsuccessfully brought action for negligence against obstetrician and nurses — Counsel for parents and child attempted to cross-examine nurse on answers that he had read in from her discovery — Trial judge acknowledged that although R. 31.11(4) of Rules of Civil Procedure entitled counsel to rebut discovery evidence read into record, contradiction must be through another witness or by other admissible evidence apart from evidence of defendant who was examined for discovery — Parents and child contended that taken cumulatively, evidentiary rulings and their uneven application denied opportunity to fairly present their case — Parents and child appealed — Appeal dismissed — Rule does not limit party's right to rebut discovery answers — There is no reason in principle to prevent party from attempting to contradict adverse party's discovery answers by cross-examining adverse party — Trial judge erred in ruling that counsel could not attempt to contradict nurse's discovery answers by cross-examining her on those answers — However, ruling did not result in prejudice — Counsel objected only after question was asked and nurse reiterated her discovery answers — It was highly unlikely that further cross-examination would have elicited evidence helpful to parents and child.

Evidence --- Examination of witnesses — Cross-examination — Right to cross-examine

Child suffered neurological injuries shortly after birth which resulted in child being totally dependent on others for care for rest of his life — Parents and child unsuccessfully brought action for negligence against obstetrician and nurses — Obstetrician was permitted to cross-examine nurse called as expert witness by nurses and hospital — Trial judge ruled that cross-examination was permissible because statement of claim had pleaded that medical respondents were responsible for conduct of nurses — Statement of defence of nurses denied that physicians were responsible for their conduct and denied that they were negligent — Nurses stated that they had no knowledge of negligence alleged to have been committed by physicians — Hospital and nurses cross-claimed against medical defendants and relied upon allegations in statement of claim — Medical defendants in their statement of defence denied all allegations in statement of claim and cross-claimed against hospital and nurses

— Parents and child objected to cross-examination on ground that there was similarity of interest — Parents and child contended that taken cumulatively, evidentiary rulings and their uneven application denied opportunity to fairly present their case — Parents and child appealed — Appeal dismissed — Trial judge properly concluded on basis of pleadings that there was adversity of interest and properly allowed obstetrician to cross-examine nurse.

Practice --- Trials — Conduct of trial — Powers and duties of trial judge — General

Child suffered neurological injuries shortly after birth which resulted in child being totally dependent on others for care for rest of his life — Parents and child unsuccessfully brought action for negligence against obstetrician and nurses — Parents and child contended that trial judge's conduct of trial raised reasonable apprehension of bias towards them — Parents and child submitted that defence counsel were insulting, hostile, discourteous and rude to their counsel and to their client but that trial judge condoned this behaviour and failed to restrain or control it — Parents and child submitted that by itself, trial judge's refusal to restrain defence counsel raised reasonable apprehension of bias — Parents and child also submitted that trial judge showed hostility to their counsel, that he interfered in presentation of case and that in his reasons he unfairly judged credibility of female parent — Parents and child appealed — Appeal dismissed — Reasonably informed person, observing trial judge's conduct during entire trial and reading his reasons for judgment would have no difficulty in concluding that he remained impartial and that he demonstrated no actual or apprehended bias and that parents and child were not deprived of fair trial — Failure to do more to restrain or control defendants' counsel does not automatically indicate judicial bias — Neither individually nor collectively did trial judge's interventions support claim of judicial bias — Trial judge intervened when needed in order to try to control difficult trial and understanding evidence — Trial judge's rebukes of counsel were evenly distributed throughout trial and among all trial counsel — Overall, evidence reasonably supported trial judge's findings that evidence of female parent did not withstand scrutiny — Relentless acrimony between counsel did not prevent trial judge from conducting and judging case fairly and thoroughly.

Practice --- Disposition without trial — Discontinuance of action — With leave — Terms or conditions

Child suffered neurological injuries shortly after birth which resulted in child being totally dependent on others for care for rest of his life — Parents and child brought action for negligence against obstetrician and nurses — Parents and child included claim on behalf of provincial insurance plan to recover costs of insured services — Plan granted leave to discontinue its claim against defendants on condition that defendants could recover costs against plan — Plan's claim was never assessed and action was dismissed — Plan was sophisticated insurer and understood risks of litigation — Trial was devoted to issues of interest to plan until discontinuance — Defendants were awarded their party-and-party costs of trial and provincial insurer was ordered to pay small portion of those costs and remainder was responsibility of parents and child — Defendants' unsuccessfully brought motion to have counsel for parents and child pay 70 per cent of costs award — Parents and child appealed costs order — Order varied — Dismissal of action and dismissal of appeal were both without costs — In oral argument on appeal, counsel for all defendants undertook not to pursue parents and child for costs of trial and stated that they were not seeking costs of appeal — Concession and tragedy leading to case both rendered it appropriate to vary costs order at trial to relieve parents and child of obligation to pay for defendants' costs.

Practice --- Costs — Costs of particular proceedings — Miscellaneous proceedings

Child suffered neurological injuries shortly after birth which resulted in child being totally dependent on others

for care for rest of his life — Parents and child brought action for negligence against obstetrician and nurses — Parents and child included claim on behalf of provincial insurance plan to recover costs of insured services — Plan granted leave to discontinue its claim against defendants on condition that defendants could recover costs against plan — Plan's claim was never assessed and action was dismissed — Plan was sophisticated insurer and understood risks of litigation — Trial was devoted to issues of interest to plan until discontinuance — Defendants were awarded their party-and-party costs of trial and provincial insurer was ordered to pay small portion of those costs and remainder was responsibility of parents and child — Defendants' unsuccessfully brought motion to have counsel for parents and child pay 70 per cent of costs award — Parents and child appealed costs order — Dismissal of action and dismissal of appeal were both without costs — In oral argument on appeal, counsel for all defendants undertook not to pursue parents and child for costs of trial and stated that they were not seeking costs of appeal — Concession and tragedy leading to case both rendered it appropriate to vary costs order at trial to relieve parents and child of obligation to pay for defendants' costs.

Cases considered by *Laskin J.A.*:

Auto Workers' Village (St. Catherines) Ltd. v. Blaney, McMurtry, Stapells, Friedman (1997), 14 C.P.C. (4th) 152 (Ont. Gen. Div.) — referred to

Bachalo v. Robson (1995), 35 C.P.C. (3d) 230, 101 Man. R. (2d) 316 (Man. Q.B.) — distinguished

Burke v. Gauthier (1987), 24 C.P.C. (2d) 281 (Ont. H.C.) — distinguished

Capital Distributing Co. v. Blakey (1997), 147 D.L.R. (4th) 372, 33 O.R. (3d) 58, 10 C.P.C. (4th) 109, 37 O.T.C. 371 (Ont. Gen. Div.) — referred to

Christoyiannis (Litigation Guardian of) v. Benoit (December 10, 1998), Doc. Ottawa 59062/91 (Ont. Gen. Div.) — referred to

Collins v. Belgian Dry Cleaners, Dyers & Furriers Ltd. (1951), 4 W.W.R. (N.S.) 241, [1952] 1 D.L.R. 712 (Sask. C.A.) — considered

Draper v. Jacklyn (1969), [1970] S.C.R. 92, 9 D.L.R. (3d) 264 (S.C.C.) — applied

Iler v. Beaudet, [1971] 3 O.R. 644 (Ont. Co. Ct.) — referred to

Machado v. Pratt & Whitney Canada Inc. (1993), 17 C.P.C. (3d) 340 (Ont. Master) — referred to

Majcenic v. Natale (1967), [1968] 1 O.R. 189, 66 D.L.R. (2d) 50 (Ont. C.A.) — considered

McEachrane v. Children's Aid Society of Essex (County) (1986), 10 C.P.C. (2d) 265 (Ont. H.C.) — referred to

Ollett v. Bristol Aerojet Ltd., [1979] 1 W.L.R. 1197, [1979] 3 All E.R. 544 (Eng. Q.B.) — distinguished

Quantrill v. Alcan-Colony Contracting Co. (1978), 18 O.R. (2d) 333 (Ont. C.A.) — applied

R. v. Abbey, [1982] 2 S.C.R. 24, 138 D.L.R. (3d) 202, 43 N.R. 30, 39 B.C.L.R. 201, 29 C.R. (3d) 193, 68 C.C.C. (2d) 394, [1983] 1 W.W.R. 251 (S.C.C.) — distinguished

R. v. Graat, [1982] 2 S.C.R. 819, 18 M.V.R. 287, 31 C.R. (3d) 289, 2 C.C.C. (3d) 365, 144 D.L.R. (3d) 267,

45 N.R. 451 (S.C.C.) — applied

R. v. Grosse (1996), 19 M.V.R. (3d) 197, 107 C.C.C. (3d) 97, 91 O.A.C. 40, 29 O.R. (3d) 785 (Ont. C.A.) — distinguished

R. v. Lavallee, [1990] 4 W.W.R. 1, 67 Man. R. (2d) 1, [1990] 1 S.C.R. 852, 108 N.R. 321, 76 C.R. (3d) 329, 55 C.C.C. (3d) 97 (S.C.C.) — applied

R. v. S. (R.D.), 151 D.L.R. (4th) 193, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1, 218 N.R. 1, 161 N.S.R. (2d) 241, 477 A.P.R. 241, [1997] 3 S.C.R. 484, 1 Admin. L.R. (3d) 74 (S.C.C.) — applied

R. v. Scardino (1991), 6 C.R. (4th) 146, 46 O.A.C. 209 (Ont. C.A.) — applied

Shipman v. Antoniadis (1975), 8 O.R. (2d) 449, 58 D.L.R. (3d) 321 (Ont. C.A.) — applied

Thorogood v. Bowden (1978), 21 O.R. (2d) 385, 89 D.L.R. (3d) 604 (Ont. C.A.) — applied

Wade v. Sisters of St. Joseph (1976), 2 C.P.C. 37 (Ont. H.C.) — referred to

Statutes considered:

Evidence Act, R.S.O. 1990, c. E.23

s. 52 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 31.07(1) — referred to

R. 31.09 — considered

R. 31.09(1) — referred to

R. 31.09(2)(a) — referred to

R. 31.09(3) — referred to

R. 31.09(3)(a) — referred to

R. 31.11 — considered

R. 31.11(1)(a) — considered

R. 31.11(1)(b) — considered

R. 31.11(4) — considered

R. 51.05 — considered

R. 53.03 — considered

R. 53.03(1) — considered

R. 53.03(2) — considered

R. 53.08 — considered

R. 53.08(1)(d) — referred to

Words and phrases considered

formal admission

[Per Laskin, Goude and Sharpe JJ.A.:] First, [defendant's] original discovery answer was not a formal admission. As such, it was always open to him to explain his discovery answer in his testimony. In Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 3rd ed. (Toronto: Butterworths, 1999) at 1051-53, the authors distinguish between formal and informal admissions. A formal admission is conclusive as to the matter admitted, and cannot be withdrawn except by leave of the court or the consent of the party in whose favour it was made. *The Law of Evidence* states at 1051-52 that a formal admission may be made in the following ways:

1) by a statement in the pleadings or by failure to deliver pleadings;

2) by an agreed statement of facts filed at the trial;

3) by an oral statement made by counsel at trial, or even counsel's silence in the face of statements made to the trial judge by opposing counsel with the intention that the statements be relied on by the judge;

4) by a letter written by a party's solicitor prior to trial; or

5) by a reply or failure to reply to a request to admit facts.

In contrast, an informal admission does not bind the party making it, if it is overcome by other evidence. That is, a party making an informal admission may later lead evidence to reveal the circumstances under which the admission was made in order to reduce its prejudicial effect.

May rebut that evidence by introducing any other admissible evidence

[Per Laskin, Goude and Sharpe JJ.A.:] The wording of Rule 31.11(4) [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194], does not limit a party's right to rebut discovery answers. Rule 31.11(4) states that a party "may rebut *that* evidence by introducing *any other* admissible evidence." The words "that evidence" refer to the discovery answers read into evidence. In our view, the words "any other admissible evidence" must refer to any evidence other than the discovery answers read into evidence. We can see no reason in principle to prevent a party from attempting to contradict an adverse party's discovery answers by cross-examining the adverse party.

substance

[Per Laskin, Goude and Sharpe JJ.A.:] In our view, these cases indicate that the "substance" requirement of R. 53.03(1) [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194] must be determined in light of the purpose of the rule, which is to facilitate orderly trial preparation by providing opposing parties with adequate notice of opinion evidence to be adduced at trial. Accordingly, an expert report cannot merely state a conclusion. The report must set out the expert's opinion, and the basis for that opinion. Further, while testifying, an expert may explain and amplify what is in his or her report but only on matters that are "latent in" or "touched on" by the report. An expert may not testify about matters that open up a new field not mentioned in the report. The trial judge must be afforded a certain amount of discretion in applying R. 53.03 with a view to ensuring that a party is not unfairly taken by surprise by expert evidence on a point that would not have been anticipated from a reading of an expert's report.

APPEAL from judgment reported at *Marchand (Litigation Guardian of) v. Public General Hospital of Chatham* (1997), 33 O.R. (3d) 570, 1997 CarswellOnt 1778, 12 C.P.C. (4th) 373 (Ont. Gen. Div.), dismissing medical negligence action.

***Laskin J.A.*:**

1 In July 1990, Barbra and Allen Marchand were expecting their first child. Barbra's pregnancy had been relatively uneventful. However, by July 10 she was 16 days beyond her due date and her obstetrician, Dr. G. Asher, arranged for her to be induced the next day at the Public General Hospital in Chatham.

2 Mrs. Marchand was admitted to the Hospital at 1:05 a.m. on July 11. At 8:32 that morning her son Joel was delivered by emergency caesarean section performed by Dr. Asher.

3 Tragically, Joel was born profoundly disabled. He suffered asphyxia as a fetus with the result that the cells in the cortex of his brain were destroyed. He cannot walk or talk and will be entirely dependent on others for his care throughout his life.

4 In this action Joel and his parents sued Dr. Asher, the Hospital and three of the Hospital nurses claiming that their negligence caused Joel's condition.

5 The trial began on October 18, 1993. It was anticipated to run for six to eight weeks. In the end it took 165 court days to complete. The trial was characterized by an extraordinary level of rancour and hostility on the part of counsel all of whom were, regrettably, senior members of the bar of Ontario. It was not a trial of which the administration of justice can be proud.

6 On October 7, 1996 Granger J. released his reasons for judgment dismissing the action. This is the appeal by Joel and his parents from that decision.

7 The appellants make three broad attacks on the trial judgment.

8 First, the appellants argue that the trial judge erred in declining to find that the respondents were negligent in not properly monitoring Mrs. Marchand's pregnancy and in not delivering Joel earlier.

9 Second, the appellants argue that they did not receive a fair trial because of the erroneous and one-sided evidentiary rulings made by the trial judge.

10 Third, the appellants argue that the trial judge's conduct of the trial raised a reasonable apprehension of

bias towards them. They submit that the trial judge failed to restrain or control the unprofessional conduct of defence counsel throughout the entire trial.

11 We will deal with each of these issues in turn.

I. Were the respondents negligent?

12 In this Court the appellants relied on a series of acts and omissions by Dr. Asher and the Hospital nurses, which they argued, were negligent and which they claimed led to Joel's tragedy. These acts and omissions all relate to the final stages of Mrs. Marchand's pregnancy as it stretched beyond her due date into its forty-first and forty-second weeks.

13 The appellants described the four components of this "cumulative negligence" as follows:

> (a) failing to instruct Mrs. Marchand about the importance of fetal kick count as an indicator of fetal health;
>
> (b) improperly administering and interpreting the non-stress test given to Mrs. Marchand on July 5;
>
> (c) thereafter failing to retest, monitor, or induce Mrs. Marchand; and
>
> (d) failing to attach a fetal heart monitor once Mrs. Marchand was admitted to the hospital on July 11.

14 At trial, Granger J. considered and rejected each of these arguments.

15 The appellants also challenge the finding made by the trial judge that the tragedy which befell Joel was caused not by any act or omission of the respondents, but by a sudden abruption or rupture of the placenta pulling away from the uterine wall. The trial judge found that this began without warning at about 7:40 a.m. on July 11 resulting in cataclysmic oxygen deprivation to Joel's brain before his birth some 50 minutes later. On appeal the appellants raised no allegations of negligence relating to the treatment of Joel from 7:40 a.m. onwards.

16 We did not find it necessary to call on the respondents to respond to any of these arguments. There was ample evidence before the trial judge to support both his finding that none of the acts of negligence had been established and his determination of the cause of the tragedy that befell Joel. Nonetheless, we will briefly review each of the arguments.

1. Allegations of "Cumulative Negligence"

17 First, the appellants allege that Dr. Asher was negligent in failing to advise Mrs. Marchand of the significance of reduced fetal movement as her pregnancy went beyond term. However, the trial judge found as a fact that Dr. Asher did indeed have a complete discussion with her concerning fetal movement. Equally important, the trial judge found that Mrs. Marchand reported no significant reduction in fetal movement to Dr. Asher and that any reduction she experienced was a natural consequence of the fetus entering the birth canal and therefore of no moment. These findings are amply supported in the evidence and ought not to be disturbed.

18 Second, the appellants allege negligence in connection with the non-stress test ("NST") administered to Mrs. Marchand on July 5 to determine the health of her fetus. They say that Nurse Oslon was negligent in

administering the NST and in interpreting the results to show a healthy fetus and that Dr. Asher was negligent in failing to review the results himself or failing to have them reviewed by another professional.

19 Again, however, the findings of the trial judge are to the contrary and are well founded in the evidence. He found that Nurse Oslon administered the test properly. Indeed there was no evidence to the contrary. The trial judge also found that she was correct in interpreting the results of the test to indicate a healthy fetus, a conclusion which accorded with the predominant view of the expert witnesses called at trial. While several of the appellants' experts found the test results raised a suspicion, the trial judge correctly concluded that even this could render Nurse Olson's conclusion no more than an error in judgment falling short of negligence. Finally, although the trial judge found that Dr. Asher should have reviewed the NST results himself, he also found that the doctor would have reached the same conclusion as Nurse Olson (which he found to be the correct conclusion) that the test result was normal. Therefore the course of Mrs. Marchand's pregnancy would not have changed had Dr. Asher reviewed the NST results himself.

20 The appellant's third allegation of negligence is that Dr. Asher fell below the required standard of care in failing to intervene in Mrs. Marchand's pregnancy until July 10 when he scheduled an induction for the next day.

21 In addressing this argument the trial judge conducted a careful review of the expert evidence on standard of care called by both sides. He was careful to address himself to the standard required of obstetricians practising in Ontario in July and August 1990. He concluded on the basis of ample evidence that where, as here, the pregnancy was normal and there was no indication of fetal distress, it was entirely acceptable practice to do without serial anti-natal monitoring and to schedule the induction when Dr. Asher did. There is no basis to interfere with that conclusion.

22 Finally, the appellants allege negligence in the failure of nursing staff to attach a fetal heart monitor to Mrs. Marchand following her admission to the Hospital at 1:05 a.m. on July 11. Nurse Colebrook did not do this but monitored the fetal heart rate intermittently with the use of a stethoscope. That monitoring detected no abnormality before 7:40 a.m.

23 Once again the trial judge carefully reviewed and considered the expert evidence. He concluded that in the circumstances the nursing decision to monitor the fetal heart rate by stethoscope rather than by attaching a fetal heart monitor met an acceptable standard of care. This was particularly so given that the monitoring results indicated that the fetus was not in distress before 7:40 a.m. The record amply supports this finding and we would not interfere with it.

24 In summary, the trial judge concluded that none of the components of the cumulative negligence advanced by the appellants were made out on the evidence. In our view, this conclusion is unassailable.

2. Causation

25 The appellants also attack the finding of causation made by the trial judge. He rejected their assertion at trial that Joel's asphyxia was due to a long slow deterioration of the placenta, which could have been detected by proper care. Rather, he found that the fetus was assaulted by a sudden placental abruption, which commenced without warning about 7:40 a.m. and which resulted in critical oxygen deprivation to the fetus until Joel was delivered at 8:32 a.m.

26 Here, as well, the finding of the trial judge is well supported in the evidence. It cannot be said in any way

to be unreasonable. The trial judge carefully reviewed the evidence. He recognized that much of the evidence describing an abruption came from Dr. Asher himself. There was also, however, significant corroborating evidence, particularly the testing of the relevant blood gases. That clinical evidence supported the conclusion that an acute event, which had its onset at about 7:40 a.m. and evolved rapidly thereafter, caused Joel's profound injuries.

27 The conclusion about what happened to Joel was carefully drawn after a review of all the evidence. It is a reasonable conclusion, which we must accept. A severe spontaneous placental abruption, not anything done by the respondents, caused this tragedy.

II. Did the appellants receive a fair trial?

28 The appellants submit that, taken cumulatively, a number of evidentiary rulings by the trial judge as well as the trial judge's uneven application of his evidentiary rulings (a) denied the appellants the opportunity fairly to present their case or, (b) created a reasonable apprehension of bias on the part of the trial judge. In their factum, the appellants submit that the impugned rulings "distorted the trial process"; "impaired any reasonable attempt to achieve justice"; and "negated the Marchands' right to present their case fully." The appellant made similar oral submissions.

29 We do not understand the appellants to say that any one of the evidentiary rulings, standing on its own, would be sufficient to warrant interference by this court. Rather, it is their position that we must consider whether the overall, cumulative effect of these rulings denied the appellants a fair trial. We will review each impugned ruling individually to assess whether the cumulative complaint the appellants advance has any substance.

A. Evidentiary Rulings

1. Ruling limiting expert evidence to the "substance" of the report

30 During the examination-in-chief of Dr. Fields, an expert witness called by the appellants, their counsel asked about indications of late decelerations on the NST strip. Counsel for the respondents objected on two grounds: first, rule 31.07(1), which prevents a party from introducing information at trial where he or she has refused to furnish the information on discovery; and second, rule 53.03(1), which requires a party to serve an expert's report setting out the substance of the expert's proposed testimony. On examination for discovery, counsel for the respondents had asked that the location of late decelerations be identified on the NST strip. Appellants' counsel refused to provide that information. Although the appellants filed a report from Dr. Fields, the report merely described the NST strip as abnormal and suspicious.

31 The trial judge ruled that the appellants had failed to comply with both rules 31.07 and 53.03. However, applying rule 53.08, the trial judge allowed Dr. Fields to testify about indications of late decelerations on the NST strip on the ground that counsel for the respondents would have sufficient time to prepare their cross-examination of Dr. Fields. In making this ruling, he cautioned counsel for the appellants (and to a lesser extent counsel for the respondents) that, at some point, attempts to examine experts on matters outside their reports would cause prejudice to the other side requiring the exclusion of testimony.

32 The appellants' counsel proceeded to examine Dr. Fields extensively on the NST strip. He then began to examine Dr. Fields on the relationship between oxygen deprivation and fetal reserve, and specifically about

bradycardia (abnormally slow heart rate). Counsel for the respondents objected on the ground that the concept of bradycardia appeared nowhere in Dr. Fields' report. The appellants' counsel argued that the report dealt with the standard of care in treating an overdue mother, and that the questions went to signs of fetal distress some hours before the delivery. The trial judge ruled that the appellants' counsel could not pursue the "bradycardia" line of questioning because Dr. Fields' report made no mention of when fetal distress was determined.

33 The appellants submit that Dr. Fields should have been permitted to explain what bradycardia means because bradycardia is a sign of fetal distress, and fetal distress appeared in the report. They contend that the trial judge erred in adopting an unduly narrow construction of rule 53.03, specifically with respect to the phrase "the substance of his or her proposed testimony." In particular, the appellants submit that the trial judge erred in equating "substance" with "summary". Indeed, in their factum, the appellants submit that "the Marchands' expert witnesses were constrained to testifying *verbatim* from the contents of their reports." It is the appellants' submission that this ruling set an erroneously high standard for what is required in an expert report and impeded the presentation of their case.

34 Rule 53.03 governs expert opinion evidence. At the time of trial, rule 53.03 provided:

> 53.03 (1) A party who intends to call an expert witness at trial shall, not less than ten days before the commencement of the trial, serve on every other party to the action a report, signed by the expert, setting out his or her name, address and qualifications and the substance of his or her proposed testimony.
>
> (2) No expert witness may testify, except with leave of the trial judge, unless subrule (1) has been complied with.[FN1]

Unless a party has fully complied with the requirements set out in rule 53.03(1), an expert witness called by that party may not testify except with leave.

35 This court considered the meaning of the "substance" of the proposed testimony of an expert in *Thorogood v. Bowden* (1978), 21 O.R. (2d) 385 (Ont. C.A.). A medical expert retained by the plaintiff in a personal injury action submitted a report indicating that the injuries would manifest in more intensive symptoms later in life. At trial, the plaintiff's medical expert gave evidence about the possibility of arthritis and the future need for an artificial hip. On appeal, the defendant argued that the trial judge ought to have declared a mistrial, as the matters raised by the expert had not been included in his medical reports. The court dismissed the appeal. Lacourcière J.A., writing for the majority, reasoned as follows at 386:

> We interpret the law with respect to medical reports to be that a medical expert is not to be narrowly confined to the precise contents of his report, but he has a right to explain and amplify. What was done here, in our view, . . . was to expand on what was latent in the medical report, and it did not open a new field. In our view, the trial Judge properly concluded that there was no prejudicial surprise here and, therefore, exercised his discretion and properly refused to declare a mistrial.

36 *Thorogood* was applied in *Auto Workers' Village (St. Catherines) Ltd. v. Blaney, McMurtry, Stapells, Friedman* (1997), 14 C.P.C. (4th) 152 (Ont. Gen. Div.). The plaintiff alleged, among other things, that the solicitors were negligent and caused the plaintiff damages in connection with a condominium project. The plaintiff called a lawyer to give expert opinion evidence in the area of condominium development. During examination in-chief, the witness opined that a clause in an agreement might be void. The defendants objected to this line of questioning on the ground that it went beyond the expert's report. Quinn J. ruled that the expert could

not testify about the validity of the clause, as that opinion was not stated in his report. Quinn J. relied on *Thorogood* and found, at 157 that the impugned questioning entered a new field:

> The opinion, [by the expert], as to the voidness of the price-escalation clause, creates a discrete instance of solicitors' negligence: one which had never before been raised by the plaintiff. In other words, it opens up a new field. It is neither touched upon nor latent in the report of [the expert]. Therefore, the report does not contain "the substance" of the "proposed testimony" on the issue of voidness, as required by subrule 53.03(1).

See also *Iler v. Beaudet*, [1971] 3 O.R. 644 (Ont. Co. Ct.); *McEachrane v. Children's Aid Society of Essex (County)* (1986), 10 C.P.C. (2d) 265 (Ont. H.C.)

37 *Ollett v. Bristol Aerojet Ltd.*, [1979] 3 All E.R. 544 (Eng. Q.B.), dealt with an action for personal injuries suffered in connection with some machinery. An expert witness filed a report merely setting out a factual description of the machine and the alleged circumstances in which the accident happened. Ackner J. considered the English equivalent of rule 53.03 and found that the report failed to comply with the requirement that the parties exchange the substance of the expert's proposed testimony. He interpreted the term "substance" in light of the function of expert evidence, stating at 544:

> . . . An expert, unlike other witnesses, is allowed, because of his special qualifications and/or experience, to give *opinion* evidence. It is for his opinion evidence that he is called, not for a factual description of the machine or the circumstances of the accident, although that is often necessary in order to explain and/or justify his conclusions. When the substance of the expert's report is to be provided, that means precisely what it says, both the substance of the factual description of the machine and/or the circumstances of the accident and his expert opinion in relation to that accident, which is the very justification for calling him.

38 In our view, these cases indicate that the "substance" requirement of rule 53.03(1) must be determined in light of the purpose of the rule, which is to facilitate orderly trial preparation by providing opposing parties with adequate notice of opinion evidence to be adduced at trial. Accordingly, an expert report cannot merely state a conclusion. The report must set out the expert's opinion, and the basis for that opinion. Further, while testifying, an expert may explain and amplify what is in his or her report but only on matters that are "latent in" or "touched on" by the report. An expert may not testify about matters that open up a new field not mentioned in the report. The trial judge must be afforded a certain amount of discretion in applying rule 53.03 with a view to ensuring that a party is not unfairly taken by surprise by expert evidence on a point that would not have been anticipated from a reading of an expert's report.

39 We are unable to conclude that the trial judge erred in his ruling. Although we do not have a copy of his report, it appears from the transcripts that Dr. Fields' report merely stated his conclusion that the appropriate standard of care was to attach a fetal heart monitor on admission to indicate fetal distress at the earliest possible point. Dr. Fields' report did not refer to bradycardia, did not state the point at which fetal distress was determined, and did not deal with the "reserve capacity" that the fetus might have had.

40 Moreover, the trial judge had ruled that Dr. Fields had expertise only with regard to the standard of care in Michigan. Dr. Fields' report dealt with the topic of fetal distress in connection with his opinion on the standard of care. The appellants' counsel, however, sought to elicit from Dr. Fields, through the bradycardia questions, evidence going to causation. Thus, the bradycardia evidence was directed to an issue not addressed in the report. Accordingly, even if the trial judge erred in his interpretation of rule 53.03, no prejudice arises from

that error as Dr. Fields had not been qualified to give expert evidence about causation.

2. Denial of request for adjournment

41 In the light of the trial judge's ruling restricting Dr. Fields to the "substance" of his report, the appellants requested an adjournment for a "couple of weeks" to obtain supplementary reports from other witnesses they intended to call to give expert evidence. In particular, the appellants sought to obtain a supplementary report from Dr. Silver, whose original report was less than one page and dealt only with the issue of abruption. Counsel for the respondents opposed the request, arguing that the appellants were seeking an opportunity to "re-do the liability case", and that if the request was allowed, the respondents were entitled to a further examination for discovery.

42 The trial judge refused the appellants' request for an adjournment. He clarified the effect of his ruling concerns Dr. Fields' report, stating that it "is not a general ruling throughout the trial. It does not apply to all the reports. It only replies to the evidence that I heard from Dr. Fields yesterday and the way the evidence was developed." The trial judge emphasized the need to proceed with the trial, noting that counsel for the respondents would be entitled to a further examination for discovery if the experts were allowed to file further reports, thus unduly delaying the completion of the case.

43 Although the appellants did not specifically address the reasons why the denial of their request for an adjournment was in error, they submit that the Fields ruling required them to revisit every report submitted by their liability experts. The denial of an adjournment, they say, prevented them from fully and fairly presenting their case.

44 In our view, the trial judge did not act improperly in refusing to grant the request for an adjournment. The trial judge made it clear that the Fields ruling applied only to Dr. Fields, and that he would deal with issues concerning the adequacy of other expert reports as they arose. The trial judge emphasized the need to continue with the trial. This need was properly emphasized, given that: the parties were then several weeks into the trial; there had been substantial discovery prior to the trial; and the filing of additional reports would necessitate further examinations for discovery, thus prolonging the trial. The denial of an adjournment did not cause any injustice in this case.

3. Ruling preventing Dr. Silver from testifying on her second report

45 The appellants called Dr. Silver, a pathologist at the Toronto Hospital for Sick Children, as an expert witness. Dr. Silver had prepared a report dated April 22, 1993. Following the Fields ruling, the appellants obtained a further report from Dr. Silver. Dr. Silver's second report was served on November 24, 1993. The respondents were not advised of the substance of Dr. Silver's additional evidence before being served with this report. The respondents objected to Dr. Silver testifying on matters raised in the second report on the grounds that: (a) the second report set out a new theory of causation; and (b) allowing Dr. Silver to testify in accordance with the second report would cause prejudice to the respondents as Dr. Manning, an expert in fetal medicine called by the appellants, had already testified and the respondents would be denied to opportunity to cross-examine him on the new theory.

46 The trial judge ruled that he would not grant leave for Dr. Silver to give evidence about matters set out in the second report. The trial judge described the first report of Dr. Silver, which stated that the presence of meconium within the fetal membrane provided evidence of fetal distress, as extremely short. In contrast, the

second report was over three pages long, and largely devoted to explaining the reasons for Dr. Silver's opinion about why a placental abruption could not have resulted in severe birth asphyxiation.

47 The trial judge commented on the two reports as follows:

> . . . . I simply do not accept the argument that the report of April 22nd, 1993 would allow Dr. Silver to give the evidence as set out in her report dated November 23, 1993. Mr. Wunder is attempting to do with Dr. Silver exactly what I had ruled he could not do with Dr. Fields, which is, to just state a conclusion in a report and attempt to explain in the evidence the reason for the conclusion. The reason should be in the report so opposing counsel will know such reasoning and can test it by cross-examining other expert witnesses.

48 The trial judge then considered whether rule 53.08 obliged him to grant leave for Dr. Silver to give evidence as proposed. The trial judge agreed that the respondents would suffer prejudice if Dr. Silver was allowed to give the proposed testimony. Dr. Manning had completed his testimony, and the respondents would be unable to cross-examine Dr. Manning on Dr. Silver's second report. Accordingly, the respondents' right to a full and fair defence would be impaired. The trial judge found that requiring Dr. Manning to return for further cross-examination would result in undue delay. Given these considerations, the trial judge refused to grant leave.

49 We do not agree that the trial judge erred in denying leave to permit Dr. Silver to testify about matters in her second report for three reasons.

50 First, the appellants sought to elicit Dr. Silver's opinion that severe birth asphyxiation could not have resulted from an abruption. The first report did not deal with abruption; this report concerned the presence of meconium as an indication of fetal distress. Accordingly, testimony on abruption would certainly "open up a new field" not covered in the first report.

51 Second, the trial judge found that the respondents would be prejudiced as they had been unable to cross-examine Dr. Manning about Dr. Silver's second report and that requiring Dr. Manning to re-attend would cause undue delay. This was a matter within the discretion of the trial judge and we see no basis to interfere.

52 Third, Dr. Silver, ultimately, did testify about her opinion that an abruption was not the cause of Joel Marchand's injuries.

53 We add that the appellants could have avoided the very problem they encountered with respect to the evidence of Dr. Silver. They had gone to trial on a one-page report from a witness they considered important and should not have been surprised when it proved inadequate. When it did, they took no steps to advise the respondents to expect the amplified report they had asked Dr. Silver to prepare.

4. "Foundational facts" rulings

54 On November 4, 1993, the appellants entered as Exhibit 47 ("Ex. 47") a report written by two home care experts, Ms. Kelly and Ms. Snell, dated August 19, 1993. Ex. 47 listed various source documents, including numerous reports from medical practitioners involved in the care of Joel Marchand. Counsel for Dr. Asher stated that he understood the appellants to be undertaking to call the authors of Ex. 47 and also to prove the source documents. The trial judge responded that the appellants would have to produce their source documents. The appellants' counsel gave no indication that he would not prove the source documents.

55 On November 24, 1993, the appellants served a letter advising that Ms. Kelly and Ms. Snell would no longer be relying on the medical reports referred to in Ex. 47; instead, the two witnesses would be relying on videos filed at trial. The respondents objected to Ms. Kelly giving opinion evidence on a basis other than the medical reports. The respondents' counsel argued that the appellants had undertaken to prove the medical opinions contained in these reports. The respondents' counsel further argued that Ms. Kelly's evidence was of no probative value as there was no admissible evidence proving the factual foundation of her opinion.

56 The trial judge accepted the respondents' submissions and ruled that Ms. Kelly's opinion lacked probative value unless the appellants proved the facts on which she based her opinion (the "foundational facts ruling"). The trial judge acknowledged that the appellants might prove Joel's disability in a number of ways, but noted that "if [Ms. Kelly's] opinion is based on the opinions of doctors then the plaintiff must attempt to prove the opinions of such doctors . . . ". The trial judge also found that the appellants' counsel's refusal to prove the medical reports referred to in Ex. 47 breached an implied undertaking to prove the opinions of the medical doctors referred to in Ex. 47.

57 Given the breach of this implied undertaking, the trial judge stated that he did "not intend to give Ex. 47 any weight whatsoever." As the respondents did have notice of the substance of Ms. Kelly's evidence, the trial judge was prepared to allow Ms. Kelly to testify. However, he stated that he would insist that all of the facts on which Ms. Kelly relied be proved by some admissible evidence before he would permit Ms. Kelly to state her opinion.

58 A similar issue arose later on May 19, 1994. The appellants proposed to call Ms. Staub to give opinion evidence regarding the future care costs for Joel Marchand. Ms. Staub had written a report dated September 13, 1993, which had been filed as an exhibit on an implied undertaking that the appellants would prove the facts on which the report was based. The respondents objected to Ms. Staub being allowed to give evidence on the ground that the appellants had failed to prove the foundational facts. The appellants' counsel suggested that the earlier foundational facts ruling was unclear, and submitted that the foundational facts ruling allowed him to prove the foundational facts upon which Mr. Staub's opinion was based in a manner different than that set out in her written report. The trial judge reiterated that the effect of the foundational facts ruling was that if a report was based on the reports of doctors, the opinion of the doctors must be proven.

59 The trial judge also referred to an earlier ruling requiring counsel to file a list of the expert witnesses they intended to call or whose reports would be filed under s. 52 of the *Ontario Evidence Act*. He also ruled that before an expert could testify a voir dire be held in order to determine the facts or opinions that the expert relied on in forming his or her opinion.

60 In *R. v. Lavallee* (1990), 55 C.C.C. (3d) 97 (S.C.C.), the Supreme Court of Canada reviewed the circumstances in which expert opinion evidence may be admitted, notwithstanding that the opinion is based upon hearsay evidence. Wilson J. reviewed the Supreme Court's prior decision in *R. v. Abbey* (1982), 68 C.C.C. (2d) 394 (S.C.C.), and at 127-128 interpreted *Abbey* as standing for the following propositions:

> 1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.
>
> 2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.
>
> 3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be

attributed to the opinion.

4. Before any weight can be given to an expert's opinion, the facts on which the opinion is based must be found to exist.

Thus, *Lavallee* establishes that an expert opinion based upon hearsay will be admissible; however, the weight to be attached to that opinion is an issue.

61 Wilson J. clarified the fourth proposition, and rejected the proposition that every fact relied upon by the expert must be independently proven before any weight could be attached to an expert opinion. She stated at 130-131:

> . . . *Abbey* does not, in my view, provide any authority for that proposition. The court's conclusion in that case was that the trial judge erred in treating as proven the facts upon which the psychiatrist relied in formulating his opinion. The solution was an appropriate charge to the jury, not an effective withdrawal of the evidence. In my view, as long as there is some admissible evidence to establish the foundation of the expert's opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony. The judge must, of course, warn the jury that the more the expert relies on facts not proven in evidence the less weight the jury may attribute to the opinion.
>
> . . .
>
> Where the factual basis of an expert's opinion is a mélange of admissible and inadmissible evidence the duty of the trial judge is to caution the jury that the weight attributable to the expert testimony is directly related to the amount and quality of admissible evidence on which it relies.

62 Sopinka J., in a concurring judgment, noted that the principles underlying *Abbey* give rise to a contradiction: an expert opinion based entirely on hearsay will be admissible, but will be entitled to no weight. He provided the following resolution at 132-133:

> The resolution of the contradiction inherent in *Abbey*, and the answer to the criticism *Abbey* has drawn, is to be found in the practical distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise (as in *City of St. John*,) and evidence that an expert obtains from a party to litigation touching a matter directly in issue (as in *Abbey*.)
>
> In the former instance, an expert arrives at an opinion on the basis of forms of enquiry and practice that are accepted means of decision within that expertise. A physician, for example, daily determines questions of immense importance on the basis of the observations of colleagues, often in the form of second or third-hand hearsay. For a court to accord no weight to, or to exclude, this sort of professional judgment, arrived at in accordance with sound medical practices, would be to ignore the strong circumstantial guarantees of trustworthiness that surround it, and would be, in my view, contrary to the approach this court has taken to the analysis of hearsay evidence in general, exemplified in *Ares v. Venner* (1970), 14 D.L.R. (3d) 4. In *R. v. Jordan* (1984), 11 C.C.C. (3d) 565 (B.C.C.A.), a case concerning an expert's evaluation of the chemical composition of an alleged heroin specimen, Anderson J.A. held, and I respectfully agree, that *Abbey* does not apply in such circumstances: see also *R. v. Zundel* (1987), 31 C.C.C. (3d) 97 at p. 146 (Ont. C.A.), where the court recognized an expert opinion based upon evidence "... of a general nature which is widely used and acknowledged as reliable by experts in that field".

> Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with *Abbey* , have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point. But it must be recognized that it will only be very rarely that an expert's opinion is entirely based upon such information, with no independent proof of any of it. Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight. . . . [parallel citations omitted].

63 This Court considered the weight to be given to an expert opinion based solely upon hearsay evidence in *R. v. Scardino* (1991), 6 C.R. (4th) 146 (Ont. C.A.). The accused appealed from his conviction for second degree murder. At trial, the accused led expert evidence from a psychiatrist, who testified that the accused suffered from a psychiatric disorder that would have prevented him from appreciating the nature and quality of his acts. Among the evidence relied upon by the expert in forming his opinion was a factual account of the events recounted by the accused. The trial judge instructed the jury that these matters had not been established in evidence, and thus the "degree to which [the expert's] opinion is dependent upon those statements attributed to the accused is of no weight . . . ". Finlayson J.A. found that the trial judge had not erred in her charge to the jury, stating at 153 that "[a]n expert's opinion is admissible in evidence, notwithstanding the absence of proof in some areas relied upon by the expert. However, the weight to be given to the opinion in such cases is diminished, sometimes to the point where the opinion can be given no weight at all." This general proposition was reaffirmed by this Court in *R. v. Grosse* (1996), 29 O.R. (3d) 785 (Ont. C.A.), where this Court indicated that an expert opinion based entirely upon inadmissible evidence would itself be entitled to no weight and therefore could not be accepted by the trial judge.

64 It is clear from the Supreme Court's decision in *Lavallee* that proof of foundational facts goes to the weight to be accorded to the opinion rather than its admissibility. It follows that, taken in isolation, the appellants' unwillingness to prove in evidence the medical reports upon which they had relied was not a sufficient reason to preclude Ms. Kelly and Ms. Staub from testifying.

65 The trial judge based his refusal to admit the evidence on his finding that the evidence would have no weight. Ordinarily, this is not the appropriate approach. The question of weight can only be assessed at the close of a party's case; it cannot be assessed prior to an expert witness giving testimony. Further, it is not the law that a party must prove the identical factual foundation relied upon by an expert in formulating an opinion. Indeed, the Supreme Court clearly rejected that proposition in *Lavallee*.

66 However, it appears to us that the issues in the case at bar were more complex. The appellants sought to rely upon videotapes as the foundation for the opinions of Ms. Kelly and Ms. Staub rather than the medical reports that served as the basis for the Kelly and Staub reports. The trial judge characterized the matter as an attempt by the appellants to rely upon a different set of facts from the facts that served as a basis for the experts' reports.

67 While a party might prove the *same* set of facts from alternative sources, it must also be the case that a party cannot rely upon a *different* set of facts. This proposition is merely a variation of the basic rule articulated in *Lavallee*: in so far as a party fails to prove those facts relied upon by an expert in forming his or her opinion, the expert opinion will be entitled to little or no weight.

68 We are not persuaded that, in light of all the factors before the trial judge, he erred in his approach to the problem he faced. The foundational facts ruling has to be considered in the context of a long and difficult trial and in relation to the trial judge's efforts to manage that trial in an efficient manner. The appellants were in breach of an undertaking and were refusing to prove in evidence the factual foundation of the opinion. It was open to the trial judge to conclude that the observations and conclusions could not be established in any way other than by adducing the medical reports containing those observations and conclusions. The videotapes could only provide evidence of Joel Marchand's *present* capabilities; they could say nothing about Joel Marchand's future development. The appellants' refusal to prove the medical reports provided a sufficient basis for the trial judge to conclude that the experts' opinions would be entitled to no weight. Given the protracted nature of the trial and the explicit position taken by the appellants as to what they would and would not prove, we would not interfere with the trial judge's decision not to hear evidence that would be given no weight.

69 Even if the trial judge did err, the error resulted in no substantial wrong or miscarriage of justice. The opinions of Ms. Kelly and Ms. Staub were entitled to little or no weight, given that the factual foundations of their reports had not been proved in evidence. Even if the trial judge had heard the proposed testimony, he could not have accepted it. Finally, this evidence pertained only to damages and would have had no impact on the trial judge's liability findings.

5. Ruling allowing the respondents to correct Dr. Asher's discovery admission

70 On examination for discovery, the appellants' counsel asked Dr. Asher a number of questions relating to his observations of amniotic fluid during Mrs. Marchand's caesarean section. The relevant questions and answers are reproduced below. The most important is Q. 596 and Dr. Asher's "admission" of oligohydramnios.

> 594 Q. Am I correct that at birth this child was observed to suffer the symptoms of oligohydramnios?
>
> A. At birth there was very little amniotic fluid.
>
> 595 Q. So am I correct, that's a diagnosis of oligohydramnios?
>
> A. That is the diagnosis, but you said symptoms, didn't you?
>
> 596 Q. Sorry. Am I correct this child showed oligohydramnios at birth?
>
> A. Yes.
>
> . . .
>
> 792 Q. . . . May I take it there was some amniotic fluid?
>
> A. Yes.
>
> 793 Q. You have told me very little?
>
> A. I said scant I believe.
>
> . . .
>
> 801 Q. Would you describe the amount of amniotic fluid? Your report says "very little". You told me today,

"scant". Are you able to give me some graphic description of how much? Just a couple of drops ...

A. No, it would be approximately 300 *c.c.* 's.

802 Q. And what would the normal amount be?

A. It would be as much as 800 cc.

. . .

810 Q. Am I correct, your record - your Operative Record does not disclose that there was 300 *c.c.* 's of amniotic fluid?

A. No, that's a recollection.

811 Q. Okay, so I suggest to you that it could have been 150.

A. You can suggest what you want. My recollection is approximately 300 *c.c.* 's.

812 Q. No, you're the one who is testifying and yes, I can suggest what I want as long as it's not irresponsible ...

A. Yes.

813 Q. ... and I just want ...

A. Well, I think it's a little - 150 is a big difference at that level.

814 Q. I understand. Could it have been 200, sir?

A. It wasn't measured so I can't tell you absolutely.

815 Q. So we can't be absolute about the 300.

A. No.

816 Q. And so I suggest to you it could have been 200.

A. No.

817 Q. You think it was more than that.

A. Yes.

71 After the trial had commenced, counsel for the respondents sent the appellants' counsel a letter correcting a number of the answers given by Dr. Asher on discovery, and withdrawing the "admission" of oligohydramnios. The corrections relevant for present purposes are as follows:

596 Q. Sorry. Am I correct this child showed oligohydramnios at birth?

A. There was no oligohydramnios at birth. For a 42 week gestation the amniotic fluid would normally be

approximately 250 to 300 cc.

. . .

801 Q. You reported very little, you told me today scant. Are you able to give me some graphic description of how much, just a couple of drops?

A. No, it would be approximately 300 cc.

802 Q. And what would the normal amount be?

A. An amniotic fluid volume of 800 cc's would be normal for approximately 40 weeks gestation.

72 The appellants' counsel objected to the trial judge granting leave for Dr. Asher to correct the answers that he gave on discovery. The appellants argued that they relied on Dr. Asher's "admission" of oligohydramnios and would be prejudiced in the presentation of their case if Dr. Asher changed his admission. The appellants' counsel submitted that Rule 31.09(1) requires a party to correct any incorrect or incomplete answers "forthwith", and that the respondents had failed to comply with this requirement. The appellants' counsel also argued that Dr. Asher's corrections would have affected the examination in-chief of Dr. Manning (who had finished testifying) and would affect the examination in-chief of Dr. Johnson (who had been sent a number of Dr. Asher's discovery answers for consideration).

73 The trial judge reserved his ruling, but did observe that Dr. Asher's discovery answers would in any event have been subject to clarification by him on either examination-in-chief or on cross-examination. He also noted that, even if the corrections were allowed, the appellants' counsel would be able to cross-examine Dr. Asher extensively on any putative mistake. The trial judge did not make an explicit ruling allowing Dr. Asher to correct his answer on discovery, but he did allow the trial to proceed on the basis that Dr. Asher was free to testify that there was no oligohydramnios.

74 On cross-examination, Dr. Asher gave the following explanation of his discovery answers and of his corrections:

A. I was under the mistaken idea that 800 cc of amniotic fluid was, was normal for 42 weeks, and I was actually thinking of a term pregnancy which was 40 weeks, or a pregnancy at the due date which was 40 weeks as - and actually that's - the average volume at 40 weeks would be 800 cc, the average volume at 42 weeks would be somewhere between 250 and 300 cc.

75 The appellants submit that the trial judge erred in allowing the respondents to correct the admission made by Dr. Asher during his examination for discovery and that prejudice inevitably flowed as the appellants' case was premised on an admission of oligohydramnios. The appellants also submit that they suffered prejudice in being required to cross-examine Dr. Asher on his admission and then the subsequent correction.

76 In our view, the trial judge committed no error in permitting Dr. Asher to correct his discovery evidence for three reasons.

77 First, Dr. Asher's original discovery answer was not a formal admission. As such, it was always open to him to explain his discovery answer in his testimony. In Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 3rd ed. (Toronto: Butterworths, 1999) at 1051-53, the authors distinguish between formal and informal

admissions. A formal admission is conclusive as to the matter admitted, and cannot be withdrawn except by leave of the court or the consent of the party in whose favour it was made. *The Law of Evidence* states at 1051-52 that a formal admission may be made in the following ways:

> 1) by a statement in the pleadings or by failure to deliver pleadings;
>
> 2) by an agreed statement of facts filed at the trial;
>
> 3) by an oral statement made by counsel at trial, or even counsel's silence in the face of statements made to the trial judge by opposing counsel with the intention that the statements be relied on by the judge;
>
> 4) by a letter written by a party's solicitor prior to trial; or
>
> 5) by a reply or failure to reply to a request to admit facts.

In contrast, an informal admission does not bind the party making it, if it is overcome by other evidence. That is, a party making an informal admission may later lead evidence to reveal the circumstances under which the admission was made in order to reduce its prejudicial effect.

78 Dr. Asher's original discovery answer does not constitute a formal admission in the sense described in *The Law of Evidence*. We note as well that Rule 51.05, governing the withdrawal of admissions requiring leave of the court, does not apply to an admission made on examination for discovery.

> 51.05 An admission made in response to a request to admit, a deemed admission under rule 51.03 [failure to respond to a request to admit] or an admission in a pleading may be withdrawn on consent or with leave of the court.

See Holmested and Watson, *Ontario Civil Procedure* (Toronto: Carswell, 1984) at 31 § 26.

79 Second, Rule 31.09 outlines a party's obligations with respect to information obtained subsequent to an examination for discovery. At the time of trial, rule 31.09 provided:

> 31.09 (1) Where a party has been examined for discovery or a person has been examined for discovery on behalf or in place of, or in addition to the party, and the party subsequently discovers that the answer to a question on the examination,
>
> (a) was incorrect or incomplete when made; or
>
> (b) is no longer correct and complete,
>
> the party shall forthwith provide the information in writing to every other party.
>
> (2) Where a party provides information in writing under subrule (1),
>
> (a) the writing may be treated at a hearing as if it formed part of the original examination of the person examined; and
>
> (b) any adverse party may require that the information be verified by affidavit of the party or be the

subject of further examination for discovery.

(3) Where a party has failed to comply with subrule (1) or a requirement under clause (2)(b), and the information subsequently discovered is,

(a) favourable to the party's case, the party may not introduce the information at the trial, except with leave of the trial judge; or

(b) not favourable to the party's case, the court may make such order as is just.

80 Holmested and Watson, *supra*, describe at 31 § 25 the obligation under rule 31.09 as an ongoing duty to correct and complete the answers given. In general, parties are entitled to correct their discovery answers. The impact of corrections is a matter to be decided by the trial judge, who is entitled to examine both the original and the amended answers: See *Machado v. Pratt & Whitney Canada Inc.* (1993), 17 C.P.C. (3d) 340 (Ont. Master); *Capital Distributing Co. v. Blakey* (1997), 33 O.R. (3d) 58 (Ont. Gen. Div.).

81 Third is the combined effect of rules 31.09 and 53.08. Subrule 31.09(3)(a) provides that, where a party has failed to correct a discovery answer "forthwith", the party may not introduce the evidence except with leave. As noted above in the discussion of the ruling with respect to Dr. Silver, subrule 53.08(d) provides that, where evidence is admissible only with leave under subrule 31.09(3), the trial judge *shall* grant leave unless to do so will cause prejudice or undue delay. Accordingly, notwithstanding non-compliance with subrule 31.09(3), a trial judge must grant leave unless to do so would cause prejudice that could not be overcome by an adjournment or costs.

82 With respect to the correction, subrule 31.09(2)(a) provides that a correction "may" be treated as forming part of the original examination. As there was no ruling on the correction, it is unclear whether the correction was, in fact, treated in that manner.

83 There are circumstances in which a party will not be permitted to correct their discovery answers. In *Burke v. Gauthier* (1987), 24 C.P.C. (2d) 281 (Ont. H.C.), a personal injury action, the plaintiff sought to adduce evidence that his physical condition had substantially changed since his examination for discovery. The plaintiff had given no notice of the new evidence, and the respondents objected to its admission. Campbell J. began by describing the purpose of rule 31.09 at 285:

> The purpose of the provision is obvious. The parties prepare for trial on the basis of the evidence given at the discoveries. They assume that the answers given on discovery continue to be correct and complete, unless they are given information to the contrary. They figure out what they have to meet, decide how to prepare their own case, what investigations if any to undertake, what witnesses to call, what instructions to seek, and what kind of settlement might be reasonable, on the basis of evidence given at the discoveries. If that evidence changes then there is a different case to meet. If the changes are not brought to the attention of the adverse party before trial he has no time or opportunity to investigate and prepare and consider the need for fresh medical examination and must meet a case different from the one that his opponent has led him to expect.

Campbell J. found that the new evidence changed the nature of the case the respondents had to meet. In considering whether to grant leave, he found that the plaintiff was well aware of the change, and that he had made no attempt to bring the new evidence to the defendant's attention. Accordingly, Campbell J. declined to

grant leave. See also *Bachalo v. Robson* (1995), 35 C.P.C. (3d) 230 (Man. Q.B.).

84 The present case is distinguishable. The respondents did not put forward a different case at trial. Dr. Asher's testified, both on discovery and on cross-examination, that there were approximately 300 *c.c.* of amniotic fluid. The respondents led evidence at trial that indicated 300 *c.c.* of amniotic fluid did not constitute oligohydramnios for a pregnancy of 42 weeks. Dr. Asher's original discovery answer, that he thought the "child showed oligohydramnios at birth" even if not corrected or explained, did not require the trial judge to find that there was oligohydramnios. There was ample evidence before the trial judge for him to find, as he did, that there was no oligohydramnios at birth.

85 Accordingly, we do not accept the argument that the appellants were prejudiced by this ruling. The discovery answer did not amount to a formal admission. Even if the trial judge had not allowed Dr. Asher to correct his discovery answers, Dr. Asher was still entitled to give a different answer at trial and explain the reason for the change in his evidence. The trial judge was entitled to decide which version he accepted. The original discovery answers, the corrected answers, and Dr. Asher's explanations were all before the trial judge. The trial judge was entitled to weigh the differing answers and the explanation in deciding the matter. It is clear from his reasons that he accepted Dr. Asher's explanation and the corrected discovery answer. In our view, it was open to the trial judge to reach this conclusion, and there appears to be no basis to interfere with his ruling on this matter.

86 We see no error in the manner in which this issue was dealt with by the trial judge.

6. Ruling restricting the cross-examinations of defendants to elicit opinion evidence.

87 The appellants discontinued their action against three respondents - Nurse Brown-Davidson, Nurse Kroeker and Dr. Awad - on the condition that they be available at trial for cross-examination. The appellants attempted to lead opinion evidence from these witnesses. On appeal the appellants complained about their inability to lead opinion evidence from Dr Awad.

88 The trial judge ruled that the appellants were required to comply with rule 53.03 if they intended to elicit opinion evidence from Dr. Awad. As no rule 53.03 reports had been filed, the appellants were required to seek leave of the court. The trial judge further noted that he was required to give leave unless prejudice would result.

89 Dr. Awad was the pathologist involved in the treatment of Joel Marchand. The respondents objected to counsel for the appellants leading any opinion evidence from Dr. Awad that was not covered by the reports he had prepared as a treating physician. The trial judge ruled that, unless notice was given or leave was granted, Dr. Awad would not be permitted to give independent opinion evidence concerning the conduct of others, or to express his opinion on the cause of Joel's condition. However, the trial judge stated that there could be no objection to Dr. Awad giving opinion evidence concerning his own reports, provided such evidence was limited to his involvement in the matter.

90 As the cross-examination proceeded, this ruling was applied to limit the right of the appellants to cross-examine Dr. Awad on his opinion of the nature of the abruption, if any, that had occurred. Before this court, the respondents do not attempt to support this ruling. The respondents conceded before us that as Dr. Awad was a treating physician, this was a permissible line of questioning, and that the trial judge erred in his ruling on the point. In our view, this error did not result in any significant prejudice to the appellants. The appellants presented their own evidence on the nature of the abruption. The trial judge fully considered the appellants'

theory and we are not satisfied that Dr. Awad's evidence would have made any difference.

91 Appellants' counsel sought to cross-examine Nurse Olson with respect to her opinion about the conduct of other respondents - Nurse Colebrook and Nurse Want - regarding the use of a fetal heart monitor on July 11, 1991. The respondents objected, arguing that the questions called for inadmissible opinion evidence, and that the respondent could not be qualified as an expert for the purpose of giving opinion evidence.

92 The trial judge ruled that appellants' counsel was "not entitled to ask Nurse Olson, a party defendant, her opinion concerning the conduct of other defendants." Accordingly, he restricted appellants' counsel to cross-examining Nurse Olson regarding events on July 5, 1991, when she administered the NST to Mrs. Marchand. The trial judge relied on the proposition that a plaintiff cannot on discovery ask one defendant about the conduct of another defendant, and concluded that "if such questions cannot be asked on an examination for discovery I fail to see how such questions can be asked at trial." He then provided the following rationale for his ruling:

> A defendant takes the witness box to defend his or her actions as set out in the pleadings, not to give opinion evidence on issues between the plaintiff and other respondents. The opinion of Nurse Olson on issues between herself and the plaintiffs is relevant to the pleaded issues. Here Mr. Wunder proposes to ask Nurse Olson her opinion on issues which are not pleaded between herself and the plaintiffs.

93 There is support for the proposition that on an examination for discovery a party cannot obtain an expert opinion from the opposite party about the conduct of another party to the action: See *Wade v. Sisters of St. Joseph* (1976), 2 C.P.C. 37 (Ont. H.C.); *Christoyiannis (Litigation Guardian of) v. Benoit* (December 10, 1998), Doc. Ottawa 59062/91 (Ont. Gen. Div.). As the scope of examination for discovery is wider than cross-examination, as a matter of logic, the proposition ought to apply equally to cross-examination.

94 Nurse Olson was not qualified as an expert at trial. Like Dr. Awad, Nurse Olson was called to testify about her own involvement in the case. It is necessary, then, to regard Nurse Olson as a lay witness for the purpose of assessing the trial judge's ruling.

95 As a general proposition, lay witnesses may not testify as to their opinion. However, in *R. v. Graat* (1982), 2 C.C.C. (3d) 365 (S.C.C.), at 378, Dickson J. noted that the "line between 'fact' and 'opinion' is not clear." As such, he found "no reason in principle or common sense why a lay witness should not be permitted to testify in the form of an opinion if, in doing so, he is able more accurately to express the facts he perceived." He stated at 379 that a lay witness would be permitted to give opinion evidence in the following circumstances:

> I accept the following passage from *Cross on Evidence* as a good statement of the law as to the cases in which non-expert opinion is admissible (at p. 448):
>
> > When, in the words of an American judge, "the facts from which a witness received an impression were too evanescent in their nature to be recollected, or too complicated to be separately and distinctly narrated", a witness may state his opinion or impression. . . .

96 The rationale for admitting opinion evidence in such circumstances is that "it may be difficult for the witness to narrate his factual observations individually." Thus, witnesses are allowed to state their opinions because they "had an opportunity for personal observation," and "were in a position to give the court real help."

97 The impugned line of questioning went beyond Nurse Olson's personal involvement in the case. She was

asked for her opinion on the conduct of other respondents. Nurse Olson was not being asked to state an opinion in order to "more accurately to express the facts [she] perceived." The proposed testimony fell outside of the basis for admissibility set out in *Graat*, *supra*, and, in our view, was properly disallowed.

7. Rulings preventing impeachment of witnesses on read-ins

98 Nurse Colebrook was asked a number of questions on examination for discovery about her ability to reach Mrs. Marchand's cervix during her vaginal examination on admission to hospital. Nurse Colebrook stated that she was unable to reach Mrs. Marchand's cervix because it was posterior. She also stated that Mrs. Marchand was tense. These questions and answers were read in as part of the appellants' case.

99 On cross-examination, counsel for the appellants suggested that Nurse Colebrook was unable to reach Mrs. Marchand's cervix because Mrs. Marchand was tense and not because her cervix was posterior. Nurse Colebrook testified that while Mrs. Marchand was in fact tense, she could not reach her cervix because it was posterior. Counsel for the respondents objected to this line of questioning on the ground that appellants' counsel was attempting to contradict the answers he had read in from Nurse Colebrook's discovery.

100 The trial judge acknowledged that rule 31.11(4) entitled appellants' counsel to rebut discovery evidence read into the record, but interpreted the rule to mean "that such contradiction must be through another witness or by other admissible evidence apart from the evidence of the defendant who was examined for discovery." He ruled as follows:

> In my view the evidence read into the record cannot be contradicted by cross-examining the author of the statement that was read into the record in an attempt to discredit the very evidence which [counsel] made part of the plaintiff's case.

101 Rule 31.11 governs the use of examination for discovery at trial. The relevant portions of rule 31.11 provide as follows:

> 31.11 (1) At the trial of an action, a party may read into evidence as part of the party's own case against an adverse party any part of the evidence given on the examination for discovery of,
>
> (a) the adverse party; or
>
> (b) a person examined for discovery on behalf or in place of, or in addition to the adverse party, unless the trial judge orders otherwise,
>
> if the evidence is otherwise admissible, whether the party or person has already given evidence or not.
>
> (4) A party who reads into evidence as part of the party's own case evidence given on an examination for discovery of an adverse party, or a person examined for discovery on behalf or in place of or in addition to an adverse party, may rebut that evidence by introducing any other admissible evidence.

102 It is clear from the wording of rule 31.11 that a party may read any part of an adverse party's examination for discovery into evidence as part of his or her own case. Moreover, it is also clear that that party is entitled to rebut that evidence by introducing any other admissible evidence. In their discussion of the predecessor to rule 31.11, Holmested & Gale, *Ontario Judicature Act and Rules of Practice*, (Scarborough:

Carswell, 1983) at 1767, affirm this last proposition:

> If a party, as part of his own case, puts in evidence unfavourable to him from the discovery of the opposite party and does not contradict it, he may be bound by it, but he may contradict that which is unfavourable by other evidence and in the circumstances of the particular case may accept or reject such portions as he shall see fit, including the evidence given on discovery. . . . There is no general rule that a party putting in discovery is bound by the answers. If a party, as part of his own case, puts in unfavourable evidence from the discovery of an opposite party, he may contradict it by other evidence . . . .

103 There appears to be no case directly deciding whether a party is entitled to contradict discovery answers read into evidence during cross-examination of the declarant. This is hardly surprising as, for obvious tactical reasons, it will be rare for a party to read in an answer and then seek to impeach the declarant on that very answer.

104 The wording of rule 31.11(4) does not limit a party's right to rebut discovery answers. Rule 31.11(4) states that a party "may rebut *that* evidence by introducing *any other* admissible evidence." The words "that evidence" refer to the discovery answers read into evidence. In our view, the words "any other admissible evidence" must refer to any evidence other than the discovery answers read into evidence. We can see no reason in principle to prevent a party from attempting to contradict an adverse party's discovery answers by cross-examining the adverse party.

105 In our view, the trial judge erred in ruling that appellants' counsel could not attempt to contradict Nurse Colebrook's discovery answers by cross-examining her on those answers. However, it is also our view that no prejudice flowed from the trial judge's erroneous ruling. Counsel objected only after the question was asked and Nurse Colebrook reiterated what she had said on discovery. It is highly unlikely that further cross-examination would have elicited evidence helpful to the appellants.

106 The real source of prejudice, if any, to the appellants was the tactical decision to read in the answers that Nurse Colebrook gave on discovery. Having read those answers in, the appellants risked that a finding would be made unless they could contradict those answers by other evidence. It was unlikely, as a practical matter, that those answers could have been effectively contradicted by cross-examining the declarant. Justice Gordon's comment in *Collins v. Belgian Dry Cleaners, Dyers & Furriers Ltd.* (1951), 4 W.W.R. (N.S.) 241 (Sask. C.A.) at 244 is apposite:

> It is perfectly true that . . . a party has been permitted to adduce evidence contradicting parts of the examination for discovery of his opponent put in at the trial. I still cannot understand why counsel still persist in tendering in evidence questions and answers from their opponent's examination for discovery which are diametrically opposed to their client's contention.

8. Ruling prohibiting demonstrative evidence

107 In the course of his examination in-chief of Dr. Fields, appellants' counsel sought to refer the witness to an enlargement of the test strip produced by the NST administered on July 5, 1990. Counsel for Dr. Asher objected to its use on the grounds that (a) the enlargement was of poor quality and omitted essential details, and (b) the observations that Dr. Fields might make about the enlargement would likely differ from the observations the defendant nurses could make about the originals. Counsel for the nurses and the hospital endorsed those objections, and made the further objection that (c) Dr. Fields was precluded from testifying about the NST strip

by the trial judge's ruling limiting Dr. Fields' testimony.

108 The trial judge ruled that Dr. Fields could comment on the original NST strip, or a copy the same size as the original, but that he could not comment on the enlargement. The rationale for the ruling was that the respondent nurses did not have the enlargement, and that it would not assist the court if Dr. Fields were able to observe something on the enlargement not observable from the original.

109 It is well established that a decision whether to admit demonstrative evidence is within the discretion of the trial judge: see *Draper v. Jacklyn* (1969), [1970] S.C.R. 92 (S.C.C.), and *Shipman v. Antoniadis* (1975), 8 O.R. (2d) 449 (Ont. C.A.). We see no basis for interfering with the trial judge's ruling.

110 In any event, the ruling could not have affected the outcome of the trial. The original NST strip was already before the court. Dr. Fields was permitted to comment on the original NST strip and the appellants were not prevented from adducing evidence on the matter. This was not a case where a party sought to enter demonstrative evidence to assist a jury in their fact-finding function. The trial was being heard by judge alone, and the trial judge had a copy of the NST strip before him.

9. Ruling permitting cross-examination of Mrs. Kwolek

111 Mrs. Kwolek, a registered nurse, was called by counsel for the respondent nurses and the hospital as an expert witness. The appellants objected to counsel for Dr. Asher cross-examining witnesses called by counsel for the other respondents on the ground that there was a similarity of interest between the respondent nurses, the hospital, and Dr. Asher.

112 The trial judge ruled that counsel for Dr. Asher had the right to cross-examine Mrs. Kwolek. He stated that paragraphs 14 and 27 of the statement of claim were a complete answer to the objection, as the statement of claim pleaded that the medical respondents - i.e., Dr. Asher - were responsible for the conduct of the nurses.

113 The right to confront and interrogate an adverse witness is regarded as a fundamental right of parties to a trial. However, in certain circumstances a party will not be permitted to put leading questions in cross-examination to a witness called by an adverse party. *The Law of Evidence* sets out these circumstances at 940:

> In cases where there are co-defendants with similar interests who have pleaded separately and are represented by different counsel, a trial judge has discretion to refuse to allow counsel for one defendant to cross-examine a co-defendant's witnesses. If, however, the interests of the parties are not similar, separate counsel are usually allowed to cross-examine a co-defendant or that co-defendant's witness.

114 It is necessary, then, to determine whether the respondent nurses were adverse in interest to Dr. Asher.

115 The statement of claim pleads that the respondent doctors were responsible for the conduct of the nurses. The doctors would undoubtedly seek to establish that they were not negligent; rather, any negligence was the sole responsibility of the nurses. The nurses would undoubtedly seek to establish that they were not negligent and that any negligence was the sole responsibility of the doctors. Accordingly, based upon the appellants' statement of claim, the respondent nurses and Dr. Asher were adverse in interest.

116 In their statement of defence, the nurses denied that the doctors were responsible for their conduct, and denied that they were negligent. The nurses stated that they had no knowledge of the negligence alleged to have been committed by the doctors. The hospital and nurses crossclaimed against the medical respondents, and

relied upon the allegations contained in the appellants' statement of claim. Similarly, the medical respondents, in their statement of defence, denied all allegations contained in the statement of claim, and crossclaimed against the hospital and nurses.

117 In view of the pleadings, the trial judge properly concluded that there was an adversity of interest and he properly allowed counsel for Dr. Asher to cross-examine Nurse Kwolek.

B. Uneven application of evidentiary rulings

118 The appellants submit that the uneven application of certain evidentiary rulings provides further indication of bias on the part of the trial judge.

1. Ruling relating to Dr. Tithecott

119 The respondents called Dr. Tithecott, a treating physician, as a witness. Dr. Tithecott was asked questions regarding the cord gases, and the inferences he drew from them for the purpose of resuscitating Joel Marchand. He was also asked about the significance of the "marked metabolic acidosis" that Joel Marchand's cord gases displayed. Dr. Tithecott testified that the acidosis "indicated to me that the child had suffered a severe event a short time before delivery." Counsel for the appellants objected on the grounds that (a) Dr. Tithecott was being asked to give opinion evidence, (b) no notice of that opinion had been given to the appellants, (c) counsel for the respondents was obliged to comply with rule 53.03, and (d) Dr. Tithecott ought to be confined to the "four corners of his report". Appellants' counsel was particularly concerned about Dr. Tithecott giving evidence about the timing of the severe event.

120 The trial judge allowed the examination to proceed. The appellants contends that this ruling is inconsistent with the Awad ruling. Like Dr. Awad, Dr. Tithecott was not a "rule 53.03 witness". Dr. Tithecott was called as a witness of fact, not as an expert witness. Thus, in so far as Dr. Tithecott was testifying about the facts of his own involvement, or the opinions that went to the exercise of his judgment, rule 53.03 was not engaged. We have found that the trial judge erred in applying rule 53.03 to limit the cross-examination of Dr. Awad. However, it is our view that a number of factors distinguish the situation with respect to Dr. Tithecott sufficiently to explain any difference in the manner the trial judge dealt with his evidence. The appellants had substantial notice of this area of questioning by way of: Dr. Tithecott's examinations for discovery, his responses to requests to admit, and the report that he made contemporaneously with his examination of Joel Marchand. Another distinguishing point is that the trial judge took into account the appellants' right of reply in assessing whether there was any prejudice. In our view, there is no merit to the submission that the trial judge's ruling on this issue indicates bias or an unwillingness to apply the same standard to the respondents as he had applied to the appellants.

2. Rulings relating to Dr. Smith

121 The appellants complain of two rulings with respect to Dr. Smith. Dr. Smith prepared three reports. The first ruling concerned his third report, filed by the respondents 10 months before Dr. Smith testified, and some 4 months after Dr. Manning had testified. The report dealt with different blood gas orders. The trial judge ruled that Dr. Smith could testify about his third report. The second ruling permitted counsel for Dr. Asher to ask Dr. Smith to comment on testimony given by Dr. Whyte in cross-examination. The first ruling is said to be inconsistent with the Silver ruling and the second with the Fields ruling.

122 In our view, there is no merit to these submissions. The trial judge distinguished the Silver ruling on several grounds. It became apparent that appellants' counsel was aware that there were two different blood gas orders and could have raised the matter with Dr. Manning. Accordingly, the trial judge ruled that he was not taken by surprise and that Dr. Smith could give evidence about the contents of the third report. The trial judge also differentiated the Silver ruling from the present situation noting that Dr. Smith's third report was delivered 10 months before the defence started. Moreover, even if something new was raised by the defence it could be addressed through the appellants' right of reply.

123 The second ruling concerning Dr. Smith was also correct. It is well-established that an expert witness can be asked to comment on the opinion of another expert: see *Quantrill v. Alcan-Colony Contracting Co.* (1978), 18 O.R. (2d) 333 (Ont. C.A.).

3. Ruling relating to Dr. Eyman

124 Dr. Eyman was called by the respondent, Dr. Asher, to give expert evidence on the issue of Joel Marchand's life expectancy. Dr. Eyman had prepared two reports on the issue of damages. The first report was dated November 12, 1993 and was prepared on the basis of materials sent to Dr. Eyman by the respondents. The second report was dated May 5, 1994 and was prepared after Dr. Eyman attended a physical examination of Joel Marchand conducted by two other physicians, and viewed four hours of videotapes of Joel Marchand. The second report was based upon Dr. Eyman's own observations and the observations of the two other physicians.

125 During the *voir dire* on the foundational facts issue, Dr. Eyman was asked what materials he was sent and what materials he relied upon. He could not recall precisely what materials he relied upon. The appellants submitted that, in accordance with the foundational facts ruling, the respondents were required to prove all the documents Dr. Eyman had been given. The trial judge rejected this argument.

126 The trial judge differentiated his ruling with respect to Dr. Eyman from his rulings with respect to Ms. Kelly and Ms. Staub. He characterized his rulings with respect to Ms. Kelly and Ms. Staub as a response to the appellants' attempts to rely upon a *different* set of facts from those relied upon by Ms. Kelly and Ms. Staub. In contrast, his ruling with respect to Dr. Eyman was based on the respondents having proven the *same* set of facts relied upon by Dr. Eyman, albeit through different means.

127 Dr. Eyman's reports appeared to be based on factual observations; for example, whether Joel Marchand could crawl. Observations of this nature would be capable of proof through various sources. It appears to us that in the Eyman ruling, the trial judge characterized the appellants' position concerning Ms. Kelly's and Ms. Staub's reports as an attempt to rely upon "X, Y, Z" rather than "A, B, C" where the experts had relied upon "A, B, C" in preparing their reports. We have already found that to the extent the trial judge limited the right of the appellants to establish the same foundational facts relied on by Ms. Kelly and Ms. Staub through different means, he erred. However, as the Eyman ruling indicates, the trial judge was endeavouring to be consistent. If he erred in the application of the Kelly and Staub rulings, any error he committed falls well short of an indication of bias or a predisposition to favour the respondents.

C. Conclusion on the evidentiary rulings

128 We conclude that the evidentiary rulings of the trial judge and the manner in which they were applied do not support the contention that the appellants were denied the opportunity to fairly present their case, nor did these rulings create a reasonable apprehension of bias on the part of the trial judge. The trial judge's rulings were

carefully considered and reflect, in our view, a sincere and diligent effort to conduct a fair trial. We have concluded that virtually all of the impugned rulings were correctly decided. The very few errors we have identified were inconsequential and even viewed cumulatively did not result in any significant prejudice to the appellants. Accordingly, this ground of appeal is dismissed.

III. Did the trial judge's conduct of the trial raise a reasonable apprehension of bias?

129 The appellants' main contention on the appeal is that the trial judge's conduct of the trial raised a reasonable apprehension of bias towards them. They submit that throughout the trial defence counsel were insulting, hostile, discourteous and rude to their counsel, Mr. Wunder, and indeed to Mrs. Marchand, and yet the trial judge condoned this behaviour, never restraining or controlling it. The appellants submit that, by itself, the trial judge's refusal to restrain defence counsel raises a reasonable apprehension of bias. The appellants also submit that the trial judge showed hostility to Mr. Wunder, that he interfered in Mr. and Mrs. Marchand's presentation of the case, and that, in his reasons, he unfairly judged the credibility of Mrs. Marchand. All of this conduct, the appellants contend, further supports their claim of judicial bias.

130 The trial judge's conduct, which the appellants submit cumulatively amounts to judicial bias, can conveniently be discussed under the following six categories, of which the first is by far the most serious:

> (1) the trial judge refused to restrain defence counsel's repeated attacks on Mr. Wunder's integrity and competence;
>
> (2) the trial judge refused to control defence counsel's inappropriate treatment of Mrs. Marchand;
>
> (3) the trial judge prevented the appellants from fairly presenting their case by his one-sided interventions;
>
> (4) the trial judge on one occasion talked with defence counsel in the absence of appellants' counsel;
>
> (5) the trial judge unfairly criticized Mr. Wunder; and
>
> (6) the trial judge showed antipathy to Mrs. Marchand in his reasons for judgment.

131 Before considering this ground of appeal, we will briefly review the principles that apply to a claim of judicial bias. These principles, now well established, have recently been summarized by the Supreme Court of Canada in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.). They are as follows:

> 1. All adjudicative tribunals owe a duty of fairness to the parties who appear before them. The scope of the duty and the rigour with which the duty is applied vary with the nature of the tribunal. Courts, however, should be held to the highest standards of impartiality.
>
> 2. Impartiality reflects a state of mind in which the judge is disinterested in the outcome and is open to persuasion by the evidence and submissions. In contrast, bias reflects a state of mind that is closed or predisposed to a particular result on material issues.
>
> 3. "Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. If the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer, this will render the trial unfair." (at p. 524)

4. The test for bias contains a twofold objective standard: the person considering the alleged bias must be reasonable and informed; and the apprehension of bias must itself be reasonable. In the words of de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394, approved of by the Supreme Court of Canada in *R.D.S.*, *supra*:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. [The] test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. . . . "

5. The party alleging bias has the onus of proving it on the balance of probabilities.

6. Prejudgment of the merits, prejudgment of credibility, excessive and one-sided interventions with counsel or in the examination of witnesses and the reasons themselves may show bias. The court must decide whether the relevant considerations taken together give rise to a reasonable apprehension of bias.

7. The threshold for a finding of actual or apprehended bias is high. Courts presume that judges will carry out their oath of office. Thus, to make out an allegation of judicial bias, requires cogent evidence. Suspicion is not enough. The threshold is high because a finding of bias calls into question not just the personal integrity of the judge but the integrity of the entire administration of justice.

8. Nonetheless, if the judge's words or conduct give rise to a reasonable apprehension of bias, it colours the entire trial and cannot be cured by the correctness of the subsequent decision. Therefore, on appeal, a finding of actual or apprehended bias will ordinarily result in a new trial.

132 The respondents deny that either the words or the conduct of the trial judge gave rise to a reasonable apprehension of bias. They submit, in the alternative, that the appellants waived their right to claim judicial bias and should be precluded from doing so on appeal. In support of their submission on waiver, they say that an allegation of bias should be raised at the first available opportunity, and that instead the appellants waited until 19 months after the completion of the evidence and 3 months after the release of the reasons for judgment. They also point out that the appellants opposed four mistrial motions brought by the defence during the trial and that the appellants insisted the trial judge hear their own motion for a mistrial (because of the alleged perjury of a witness) even while their motion to recuse the trial judge for bias was pending.[FN2] It is unnecessary for us to consider this alternative submission of waiver in the light of our conclusion that the appellants' claim of judicial bias fails on its merits.

133 We therefore turn to the appellants' allegation of judicial bias, applying the legal principles we summarized to the six categories of bias raised by the appellants.

1. The trial judge refused to restrain defence counsel's repeated attacks on Mr. Wunder's integrity and competence

134 This is the appellants' main submission in support of their allegation of judicial bias. They submit that throughout the 165 days of trial, defence counsel repeatedly accused their counsel, Mr. Wunder, of manipulating evidence; of deliberately misinforming witnesses and feeding them answers through objections during cross-examination; of deliberately flouting, subverting and ignoring the rules of practice; and of showing contempt for the trial judge and his rulings. They contend that the trial judge failed to restrain defence counsels' repeated

attacks on Mr. Wunder's integrity and competence, and by not restraining it, the trial judge condoned it and lent the weight of his office to the defence position. Thus, the appellants argue that the trial judge's failure to restrain defence counsels' attacks on Mr. Wunder gave rise to apprehended bias.

135 The record shows that from early on in the trial, any degree of trust between Mr. Wunder, on the one hand, and Mr. Tait, counsel for Dr. Asher, and Mr. Liswood, counsel for the hospital and nurses, on the other, had completely vanished, to be replaced by a level of rancour and hostility rarely, if ever, seen in an Ontario courtroom. The record also amply supports the appellants' contention that Mr. Tait repeatedly attacked Mr. Wunder's integrity and competence. Comments about counsel that have no place in any courtroom infected this trial from start to finish. The following examples should adequately give the flavour of what took place.

136 Mr. Tait accused Mr. Wunder of "a complete lack of integrity"; of cheating and intentionally defying the rules of practice; of using the right to object to cross-examination "to suggest answers to every witness who has come into this courtroom"; of abuses of the *Rules of Civil Procedure*; of using and abusing solicitor-client privilege as a "mask for deception", to "conceal misconduct", "as a manipulative device", "to conceal the devices by which the evidence of witnesses is manipulated" and as a "shield for deceit"; of "manipulating" the evidence and facts; of deliberately misinforming an expert witness; of "flatly lying" to the court; of deliberately misleading the court, showing contempt for the court, defying and deceiving the court about the evidence of Dr. Whyte; of "trickery" and "sleight of hand"; and of committing an outrage on the court. Mr. Tait told the trial judge that he (Mr. Tait) wrong to assume Mr. Wunder was competent and would comply with the *Rules of Civil Procedure*, and he even suggested that Mrs. Marchand made a mistake in choosing Mr. Wunder as her counsel.

137 The following two passages typify the tenor of Mr. Tait's verbal attacks on Mr. Wunder:

> I don't want to leave today [. . . without at least indicating to Your Honour, the sense of total outrage, that a deceitful, legal mind could possibly invent so preposterous a distortion of the judicial process; a complete violation of every principle of *Ashmore* that he has so freely adopted.
>
> [. . .]
>
> This is a profound disgrace. I invite Your Honour to reread *Ashmore* tonight and I invite you to tell Mr. Wunder to take this argument to the Court of Appeal if he wishes, but it will not be heard in this court.
>
> [. . .]
>
> It wasn't for me to say that I disagreed with the ruling. We accept it and we went on. But to come forward with this kind of scurrilous manipulation, of which - of what, for Mr. Wunder was essentially a break, a break that he so genuinely didn't expect that he invited you to rule last week.
>
> [. . .] This is scurrilous and this is disgraceful and I ask Your Honour not to countenance it.
>
> . . .
>
> Mr. Wunder has abused the rules of practice and his obligations as counsel in respect of this particular witness at every turn. And the rules of practice and the relief they provide for honest counsel are not there as an excuse to permit unchecked grossly improper manipulation of the whole litigation process.

138 Mr. Tait was not alone in his criticisms of Mr. Wunder. Mr. Liswood, too, maligned the appellants'

counsel. He accused Mr. Wunder of manipulating, abusing and making a mockery of the judicial system; of using the *Rules of Civil Procedure* as an "excuse to permit unchecked grossly improper manipulation of the whole litigation process"; of "flagrantly subverting" the *Rules of Civil Procedure*; of "suppressing" facts and information from the defence; of "contrivance and manipulation" in the delivery of expert reports; of continually withdrawing from his commitments; and of violating Rule 10 of the *Rules of Professional Conduct* by knowingly attempting to deceive the court and by knowingly misstating the contents of documents.

139 We do not intend to suggest that this conduct was all one-sided. On occasion, Mr. Wunder acted in a similar way. But Mr. Tait and Mr. Liswood must accept most of the responsibility for conduct that by any reasonable standards of civility was unacceptable for any counsel, let alone senior counsel who should know better.

140 In this Court, Mr. Ortved and Mr. Curry, who acted for Dr. Asher, made no attempt to defend Mr. Tait's conduct or to substantiate any of Mr. Tait's many allegations against Mr. Wunder. Instead, they candidly acknowledged that Mr. Tait's conduct toward Mr. Wunder had fallen below an acceptable standard. Mr. Liswood also acknowledged that his own conduct at trial had been unacceptable. We have little doubt that the appellants must have found the repeated maligning of their counsel unsettling, to say the least.

141 The unprofessional conduct of counsel is a matter for the Law Society of Upper Canada. The issue before us, however, centres not on the conduct of counsel but its impact on the fairness of the trial. Our focus centres on the conduct of the trial judge. The question we must answer is whether an informed person viewing the matter realistically would conclude that the way the trial judge dealt with defence counsels' attacks on Mr. Wunder created a reasonable apprehension of bias and thus deprived the appellants of a fair trial. We are not persuaded that the trial judge's conduct supports a finding of bias.

142 There are three answers to the appellants' submission that a reasonable apprehension of bias arises from the trial judge's refusal to restrain or control defence counsel. First, the trial judge did not remain silent about counsels' conduct. He intervened in the trial. On the fifteenth day of the trial, November 16, 1993, Mr. Tait accused Mr. Wunder of manipulating the schedule of witnesses to give one of the appellants' experts, Dr. Fields, time to repair his evidence. Mr. Wunder objected to this characterization of his conduct. The trial judge responded:

> Look, he says a lot of things and you say a lot of things. I do not pay a whole lot of attention to what you are saying on those matters. Now, let us just proceed with this.

143 The following day, Mr. Tait protested that in his 27 years of practice he had "never been so badly treated by any other counsel". He added that he had "never met the equal of Mr. Wunder for ignoring his obligations". This time, the trial judge replied at length, in an attempt to change the atmosphere of the trial. He urged counsel to stop their "interminable fighting" and he emphasized the need for civility in the courtroom:

> Let me say this that it struck me last night as I reflected upon what I considered to be a rather lengthy day. We had some rather strenuous debates about certain matters that we should never lose sight of why we are here. It strikes me that what we are here to do is to try this issue fairly, make sure we try it fairly to all parties, and to achieve that there has to be full and complete disclosure. Having practiced in those days when you did not make disclosure unless you had to, I know what it is like. But those are not what we are doing today. These cases are far too complex for that.

I am also struck, as I read in the latest issue of the *Canadian Lawyer*, somebody was interviewing the former Attorney General, Ian Scott, and he said that the only thing that makes litigation is good manners. Somehow there's a lack of manners in this trial and I do not suggest to point a finger at anyone. I think it is important, we are going to be here for another few weeks. We are into our fifth week and there is no reason why we cannot all act like gentlemen in the courtroom. We can stop sniping at each other. If anybody thinks that there has been prejudice as a result of a lack of disclosure, they can politely argue strenuously, but politely argue rule 53.08 and 31.07, all deal with the matter. If anybody thinks that as a result of the lack of disclosure that they have been prejudiced and they want an adjournment, I am going to grant it. I make it abundantly clear right now that I am going to do my utmost to make sure that this matter is fairly dealt with. We have a plaintiff here who is entitled to have her action heard before this court. She wants to have it heard whether she is right or wrong. We will not know until the case, but she will have heard, and so will Dr. Asher and so will the nurses. They are entitled to that. So I just urge you all, let us get along. Let us try and move along with this case. It is going to be long enough without this interminable fighting.

. . .

Let us move on but let us not conduct ourselves in a manner in which it really does not place the legal profession in a good light. We have a tough enough issue as it is to try now. Let us move forward.

144 Unfortunately, the trial judge's exemplary words seemed to have had little effect. Soon after, Mr. Tait again disparaged Mr. Wunder's ability:

. . . Mr. Wunder is a counsel who lectures the profession and writes books about trial preparation. He's a senior counsel. He's entitled to style himself a Queen's Counsel and while I have a dim view as to his appreciation of the contents of the *Rules of Practice*, that is no excuse for adjourning a trial.

145 The appellants complain that though the trial judge's intervention on November 17, 1993 was salutary, after that day and indeed for the rest of the trial, the trial judge never tried to restrain defence counsel. This complaint is not entirely correct because on February 9, 1994 during an interchange with Mr. Percival (acting for Mr. Wunder on a motion), the trial judge again commented on counsels' conduct:

Mr. Percival: I am sorry, I wish I could be more helpful to you on that issue, but as I said, I felt that that was the address because I saw, I thought to a certain extent there was some very, I thought, intemperate and rather strong language utilized by Mr. Liswood, condemning the conduct of Mr. . . .

The Court: There has been a lot of strong language in this trial . . .

Mr. Percival: Well, I'm not going to try to get into it.

The Court: . . . Mr. Percival on both sides, and I keep reminding counsel of what the former Attorney General said, that only good manners makes litigation bearable.

Mr. Percival: I understand.

The Court: And that falls on deaf ears from time to time in this trial.

Mr. Percival: And I know that this has been a very difficult trial. I've seen some of the transcripts. I certainly have not had the opportunity to do it all, and as I said to you before, this has been a very difficult

case I think for everybody, quite apart from your Honour.

146 Although the appellants say that the trial judge should have done more, his observations both in November 1993 and in February 1994 at least show that he was not oblivious to what was taking place and that he tried to control counsels' conduct.

147 Second, the failure of the trial judge to do more to restrain or control defence counsel does not automatically indicate judicial bias. We recognize that other trial judges might well have dealt with the acrimony in the courtroom differently, and, perhaps more effectively. This trial judge chose to be relatively passive, indeed, probably too passive. He was well aware of the acrimony and chose largely to ignore.

148 Just as civility in the courtroom is very much the responsibility of counsel, it is also very much the responsibility of the trial judge. It is shared responsibility of profound importance to the administration of justice and its standing in the eyes of the public it serves. Unfortunately, we have no doubt that the failure to satisfactorily discharge this responsibility in this case tarnished the reputation of the administration of justice. This case underlines the importance being given by leaders of the bench and bar to improving civility in the courtroom.

149 However for this court, the question must be whether in light of what went on in the courtroom there was a reasonable apprehension of bias on the part of the trial judge, thus depriving the appellants of a fair trial. Nothing in the trial record or in the trial judge's reasons suggests that he condoned defence counsels' conduct or lent the weight of his office to the defence position. A review of the transcripts establishes that counsels' conduct had no effect on the trial judge's efforts to fairly judge the case before him. The trial judge's reasons are thorough and present a fair and balanced consideration of all the contentious issues in the trial. In short, we do not think that an informed and reasonable observer looking realistically at the trial unfolding would apprehend from the trial judge's conduct that he was biased, or unfair in adjudicating this case.

150 Third, and admittedly a less important answer to the appellants' submission is that most of the acrimonious language and most of the attacks on Mr. Wunder, occurred during submissions on motions, not during the presentation of evidence. This, in our view, is one reason why defence counsels' conduct had no impact on the appellants' fair presentation of their case.

151 To conclude this ground of appeal, although we deplore the conduct of defence counsel, the appellants have not shown that the way the trial judge dealt with defence counsels' attacks on Mr. Wunder gave rise to a reasonable apprehension of bias.

2. The trial judge refused to control defence counsels' inappropriate treatment of Mrs. Marchand

152 The appellants submit that defence counsels' conduct towards Mrs. Marchand was inappropriate and went unchecked by the trial judge. The appellants rely on five examples of inappropriate conduct. The first two examples show defence counsel in an unflattering light. However, none of the examples suggest judicial bias. We will deal briefly with each of them:

> (a) During Mrs. Marchand's first day of testimony, Mr. Tait commented to Mr. Liswood "she's a liar". This unfortunate comment was said loud enough for Mrs. Marchand to hear it and loud enough for the court reporter to record it. However, the trial judge did not hear the comment and, once apprised of it, he neither condoned nor accepted it.

(b) The appellants submit that Mr. Tait and Mr. Liswood taunted Mrs. Marchand with deprecating facial expressions from the counsel table. The record suggests that defence counsel rolled their eyes, smiled and laughed out loud during parts of Mrs. Marchand's cross-examination. Defence counsels' conduct again was unprofessional but, in our view, did not affect the fairness of the trial.

(c) The appellants contend that Mr. Tait taunted Mr. and Mrs. Marchand by gratuitously reminding them again and again that their son Joel had almost no brain tissue. We find no merit in this contention. Throughout the trial, Mr. Tait accepted that Joel Marchand had suffered a tragic injury. In our view, neither the phrasing nor the tone nor the content of his cross-examination of Mr. and Mrs. Marchand was objectionable. The issues in the case required the defence to explore Joel's brain function, his ability to see and whether he could play with a computer. As the trial judge pointed out to Mrs. Marchand, questioning on these issues was relevant to Joel's life expectancy and to the appellants' damages claim. The absence of any objection to this questioning from the appellants' counsel is perhaps the best evidence that the cross-examination was not unfair.

(d) The appellants also submit that on cross-examination defence counsel harassed Mrs. Marchand for being unable to remember her last menstrual period in September 1989. The defence undoubtedly conducted a tough, aggressive cross-examination but, in our view, not a harassing cross-examination. Joel's expected due date and its relationship to Mrs. Marchand's menstrual period was an important issue at trial, and Mrs. Marchand had previously given five different answers about when her last menstrual period occurred. Again, Mr. Wunder did not object either to the tone or to the length of the cross-examination on this issue. In a trial where both sides made frequent objections and interjections, the lack of an objection on this issue is a good indicator that this complaint now made has little substance.

(e) Finally, the appellants submit that defence counsel insulted and belittled Mrs. Marchand during their cross-examination of her. As we have said, the cross-examination was at times aggressive, apparently even loud. But we do not consider it to have been unfair. Mr. Wunder did at one point ask the trial judge to ask Mr. Tait to "keep his tone down and not be rude to the witness". The trial judge refused, commenting that he did not think Mr. Tait had been rude but that if Mrs. Marchand was being intimidated he would intervene. In the light of this observation and our review of the entire cross-examination of Mrs. Marchand, we cannot find anything in the words or the conduct of the trial judge that would reasonably suggest that he was biased.

3. The trial judge prevented the appellants from fairly presenting their case by his one-sided interventions

153 The appellants submit that the trial judge intervened excessively during Mr. Wunder's cross-examination of witnesses and by doing so, prevented the appellants from fairly presenting their case. Before discussing the interventions the appellant rely on, we will briefly review the legal principles that apply to this submission.

154 A trial judge is not required to sit mute and listen to evidence without commenting or interjecting. A trial judge has the right, indeed the duty, to intervene to clarify and understand the evidence or to control the trial, provided that in intervening, the trial judge does not interfere with the fair presentation of the evidence and does not prejudge the issues in dispute or the credibility of the witnesses. The limits on the trial judge's right to intervene were concisely set out by Evans J.A. in *Majcenic v. Natale* (1967), [1968] 1 O.R. 189 (Ont. C.A.), at

203:

> . . . I can appreciate that on occasion it is not only desirable but necessary that the trial Judge question the witnesses for the purpose of clarification of the evidence and I do not consider that he is solely an umpire or arbitrator in the proceedings. There is a limit however to the intervention and when the intervention is of such a nature that it impels one to conclude that the trial Judge is directing examination or cross-examination in such a manner as to constitute possible injustice to either party, then such intervention become interference and is improper.

155 The appellants submit that the trial judge in this case crossed the permissible limits of intervention. We disagree. The appellants gave several examples of what they claimed were one-sided interventions by the trial judge during Mr. Wunder's cross-examination. These examples were put forward to show that the trial judge unfairly intervened to articulate a defence position or that he disrupted the appellants' presentation to a degree that raised a reasonable apprehension of bias. We will review the most salient examples, most of which were not objected to at the time and none of which, in our view, supports the appellants' submissions.

156 The appellants point to an intervention by the trial judge during the cross-examination of Dr. Asher. Mr. Wunder was trying to impeach Dr. Asher on his discovery evidence, and defence counsel objected that Mr. Wunder had not done so properly. The trial judge intervened, appropriately, to point out that Mr. Wunder had not covered the topic on Dr. Asher's discovery:

> The Court: But you did not ask.
>
> Mr. Wunder: I'm sorry, sir?
>
> The Court: You did not ask him, how much did you take out after.
>
> Mr. Wunder: Well. . . .
>
> The Court: I think the important point is, Mr. Wunder, you said, "You didn't tell me this on discovery."
>
> Mr. Wunder: Yes, sir.
>
> The Court: And he did tell you about taking them about after and I do not appreciate you suggesting to a witness that "you don't tell me something on discovery" when he does in fact tell you something on discovery.
>
> Mr. Wunder: Your Honour, well - you are the final arbiter of that, as to whether or not it's . . . .
>
> The Court: No, but you were - you were suggesting to this witness that this evidence about him taking the clots out of the uterus was brand new evidence which you had never heard of before.

157 Mr. Wunder eventually accepted that he had not adequately dealt with the topic on discovery when he said: "And I guess I can be faulted for not asking you in greater detail the quantity or how it was removed."

158 The appellants also point to an incident that arose during an argument over the late disclosure of Dr. Kirsch's medical records. Defence counsel suggested an adverse inference might be drawn on a particular point. Mr. Wunder questioned what the adverse inference might be. Instead of allowing defence counsel to answer, the

trial judge responded:

> The Court: Well, suppose that the adverse inference he proposes to advance is that I find as a fact that Barbra suffered severe pain.
>
> Mr. Wunder: If that is my friend's position, if you articulate it adequately I would like to hear it from him.
>
> Mr. Liswood: Joe, may I . . .
>
> Mr. Wunder: Excuse me, wait, could I have Mr. Colangelo - I'd like to know from Mr. Colangelo . . .
>
> The Court: Well, he would extend that I would think. On his argument he would extend it that that would alter the opinions of Dr. Fields, Manning, Johnson. He would say the same thing with regard to the use of the hands and scooting.
>
> Mr. Wunder: I would just like my friend to articulate what adverse inference that he is talking about so that I can meet the argument, sir, and appreciate his argument.
>
> The Court: Well, I am not absolutely sure that he has to because what he is saying is that that is a possibility and he says that I cannot deal with that until we get to the end of the trial.
>
> Mr. Wunder: I understand, sir. He did not complete the sentence. He is going to argue an adverse inference. I would like to know what adverse inference, that's all, from him.
>
> The Court: Well, he is going to argue it at some later date.

159 In our view, the trial judge did not act improperly in intervening to set out the defence position. This was probably done with a view to moving the trial along. Moreover, counsel for all the parties fully argued whether an adverse inference should have been drawn without any inappropriate intervention by the trial judge.

160 The appellants also point to an intervention by the trial judge during Mr. Tait's cross-examination of the appellants' expert, Dr. Fields, on his qualifications to give opinion evidence. Mr. Wunder objected to the questioning and the trial judge responded:

> Mr. Wunder: Your Honour, aren't all these questions really designed to go to a matter of weight? The doctor is really qualified to give opinion evidence.
>
> The Court: I suspect that I may hear some argument as to the ability of this witness, or whether or not I should allow this witness to give expert evidence as to the standard of care which might be expected in Ontario if he is not familiar with it. He makes a bald statement. He makes a bald statement as I understand it. I am only anticipating what I think Mr. Tait might say, that he makes a bald statement that the standard of practice is the same.
>
> Mr. Wunder: Well, the . . .
>
> The Court: That is quite a different question than saying that he does not have expertise.
>
> Mr. Wunder: Expertise evidence Is expert evidence received by courts without regard to geographical barriers, and often . . .

> The Court: Well, let us let Mr. Tait press on and we will come back to you, Mr. Wunder, when we argue this whole issue.
>
> Mr. Wunder: Thank you, sir.

The trial judge's comments are innocuous and no possible apprehension of bias can arise from them, particularly because the trial judge permitted Dr. Fields to give expert evidence.

161 Finally, the appellants submit that the trial judge especially interfered with their presentation of the case during the cross-examination of Dr. Asher on his withdrawal of the admission of oligohydramnios. A lengthy argument took place during this cross-examination, much of it over an excerpt from a textbook on obstetrics. During the argument, covering 44 pages of transcript, the trial judge intervened many times and put a few questions to the witness. However, as we read these pages, the trial judge was simply trying to control, as he was entitled to do, a heated exchange between counsel. As well the few questions the trial judge asked were not obviously helpful to the defence.

162 The appellants cite other examples from Mr. Wunder's cross-examination, which they say also demonstrates that the trial judge's interventions were one-sided. We do not think that individually or collectively these other examples support the appellants' claim of judicial bias. The trial judge intervened when needed in order to try to control this difficult trial and to understand the evidence, including intervening during defence counsels' cross-examination.

4. The trial judge spoke with defence counsel in the absence of Mr. Wunder

163 On one occasion in April 1995, respondents' counsel telephoned the trial judge to find out whether he would sit 2 days previously scheduled as non-sitting days to accommodate an out-of-town witness. Mr. Wunder was not party to the call, apparently because he was ill and was home recovering. The appellants now contend that the trial judge exhibited bias by speaking to respondents' counsel alone.

164 We see no merit in this contention. The telephone call was limited to scheduling. Moreover, it was disclosed immediately to Mr. Wunder in writing and the next day in open court. Mr. Wunder accepted the trial judge's explanation for the telephone call.

5. The trial judge unfairly criticized Mr. Wunder

165 The appellants submit that not only did defence counsel unfairly criticize their counsel, so too did the trial judge. The contend that the trial judge showed "a deeply critical attitude, perhaps outright hostility" toward Mr. Wunder. In our view, the trial record does not substantiate this contention. We will refer briefly to the two examples relied on by the appellants during oral argument to show that their contention has no merit.

166 The appellants pointed to an exchange between the trial judge and Mr. Wunder over the contents of expert reports, which took place during the examination-in-chief of the appellants' expert, Dr. Geisler. The exchange was as follows:

> Mr. Wunder: Your Honour, I cannot believe that my friends' cross-examination is limited to and dependent upon what is in the plaintiff's reports. I just can't believe it. Surely they bring much more to this trial than that and surely they can't complain that they chose not to cross-examine people on issues that relate clearly to life expectancy.

The Court: Now wait a second. Let me get something straight, Mr. Wunder. If I am defending a case and I have your medical reports which identifies the areas that your experts are going to talk on or give evidence on or render opinions on, why would I venture into areas that could be just a mine field, to discuss with the doctor when I know that your other experts are allowed to give evidence about those matters?

Mr. Wunder: Because under our jurisprudence every expert is allowed to expand on his report.

The Court: Well because you see - where you and I are parting company is that you want to play by the rule - sort of the ambush rules as your experts get in the box . . .

Mr. Wunder: I resent that remark, Your Honour.

The Court: Well, you know, that is what it is coming down to.

Mr. Wunder: That's what my friends have persuaded you it's coming down to, sir.

The Court: No, they have not persuaded me of anything, Mr. Wunder. I will make up my own mind.

We see nothing unfairly critical in the trial judge's comments, which indeed reflect our views on the issue being debated.

167 The appellants also rely on an exchange between the trial judge and Mr. Wunder over the "Colebrook ruling", which took place during the cross-examination of Dr. Asher. The relevant part of what was a rather innocuous exchange is as follows:

The Court: You keep saying burdened with the ruling in Colebrook. I am satisfied that the ruling, the Colebrook Number Two Ruling is correct. You say burdened with it. I would have thought you would have known that. Maybe you did not know that principle.

Mr. Wunder: I certainly didn't, Your Honour.

The Court: Well, there you go.

Mr. Wunder: If I may continue my representations to Your Honour. Here is a statement by you and by me. One, that I didn't want to be taken to vouch for the truthfulness of what Dr. Asher says and I wanted to be able to challenge his credibility. So that was clearly stated on the record. And secondly, you assuring me that I would be able to cross-examine him on that correction, as you said, almost forever. Now . . .

The Court: And you have got that right.

Mr. Wunder: I'm sorry, Your Honour. When someone has a right to cross-examine, Your Honour, you recall from Sopinka, where they lead the simplest fact, one can cross-examine on all issues and I want - I want to exercise that right. We've been on that before. Do you need the reference from Sopinka, sir?

The Court: No. I know what Sopinka says.

Mr. Wunder: I'm sure you do, sir.

The Court: But you are talking about having read something into the record, making it part of the plaintiff's

> case, and then are you entitled to cross-examine the author of that statement that you read into the record to prove that it is not true? You and I seem to part company on that. You seem to think that you can. I have said that you cannot.

Again, we find nothing unfair in the trial judge's observations, and certainly none of his observations reflect any animosity or hostility toward Mr. Wunder.

168 As we have said before, the trial judge presided over a long and difficult trial, marked by open hostility and lack of trust among counsel, and by frequent interruptions by all counsel to the flow of evidence. The trial judge cannot be criticized, let alone be found guilty of judicial bias, for his occasional mild rebuke to counsel. We add that those occasional rebukes were quite evenly distributed throughout the trial and among all trial counsel. The appellants' claim that the trial judge showed "outright hostility" to Mr. Wunder is not substantiated on this record. In sharp contrast to this claim, the trial judge praised Mr. Wunder's dedication to his clients' case, in a ruling on June 3, 1994 dismissing a defence motion to refer Mr. Wunder's conduct to the Official Guardian for review:

> I assume that Mr. Liswood and Mr. Colangelo are suggesting that Mr. Wunder who acts on behalf of the Litigation Guardian, is not protecting the best interests of Joel Marchand and accordingly his conduct of this action on behalf of Joel Marchand required review by the Official Guardian.
>
> This trial commenced on October 18th, 1993 and I am told that as of this day, the court has been convened approximately 90 days and the Plaintiffs' case is not complete. I am doubtful that the Plaintiffs' case will be completed by the end of June 1994. Mr. Wunder has appeared at trial on all of the days that court has been convened and although I have not agreed with all of his submissions or the manner in which parts of the Plaintiffs' case has been presented, it would be unfair of me prior to hearing all of the evidence to second guess Mr. Wunder on the presentation of the Plaintiffs' case. Mr. Wunder has been a dedicated counsel who has attempted to present his clients' case in a manner which he feels is most favourable to his client. It would be wrong for me at this time in this trial to say that Mr. Wunder has not acted in the best interests of his clients. In my opinion, the actions of Mr. Wunder in this trial indicate that he perceives that his strategy in presenting his clients' case is in the best interests of his clients and at the end of the trial when I have heard all of the evidence, he may be right.
>
> Mr. Wunder enjoys an exceedingly high reputation in the person injury field in Ontario and I must take his reputation of excellence into account when I consider the Motion of the Respondents to have this matter referred to the Official Guardian for review. There is absolutely no doubt in my mind that Mr. Wunder has dedicated himself to the presentation of this action and the suggestion that his conduct of this action should be reviewed by the Office of the Official Guardian is totally unfounded and is not warranted in this action. I want the record to indicate that although I have not agreed with many of the submissions of Mr. Wunder, and have ruled against him on some occasions in this trial, I see no reason to alter my views that Mr. Wunder is attempting to act in the best interests of his clients and perceives that his actions are in the best interests of his clients.

6. The trial judge showed antipathy to Mrs. Marchand in his reasons for judgment

169 The appellants submit that the trial judge's reasons reflect his antipathy towards Mrs. Marchand. They argue that the trial judge rejected her evidence except where it bolstered the respondents' defence abruption theory and that he suggested in his reasons Mrs. Marchand "sought success in this case in priority to Joel's well-

being". The appellants gave three examples of the trial judge's alleged antipathy. We will briefly review each example. None of them supports the appellants' submission.

170 First, the appellants point to the trial judge's discussion of Joel's life expectancy. In that discussion, the trial judge expressed reservations about Mrs. Marchand's beliefs concerning her son's abilities and her reaction to professional advice for Joel's care.

171 The trial judge thoroughly considered the question of Joel's life expectancy, devoting nearly 200 pages of his reasons to it. He praised Mrs. Marchand as a devoted, loving and caring mother who was trying to do the best for her son. The trial judge, however, was concerned about the divergence between Mrs. Marchand's evidence and the expert evidence, especially on the key issue of Joel's mobility. On that issue, everyone accepted the importance of the evidence of Dr. Richard Eyman, a defence expert in epidemiology and biostatistics, who had developed a scale to predict life expectancy based on physical skills. In assessing Joel's mobility, the trial judge took into account the optimistic beliefs expressed by Mrs. Marchand and two of her friends, and compared them with the $4\ ^{1}/_{2}$ hours of videotapes of Joel, the evidence of Joel's physiotherapist and the evidence of a doctor who participated in the defence medical (examination of Joel).

172 The trial judge concluded that he could find no acceptable evidence that Joel could crawl, scoot or roll, which are key Eyman criteria. The trial judge was concerned that the appellants' efforts to suggest otherwise had their genesis in the Eyman criteria, a concern that was heightened by the apparently overstated information Mr. and Mrs. Marchand gave to Dr. MacGregor, who assessed Joel's mobility just before trial. The beliefs that Mrs. Marchand maintained about Joel's ability are entirely understandable but the trial judge was entitled to discount those beliefs when they clashed with the expert evidence. In our view, the trial judge's unwillingness to accept Mrs. Marchand's evidence on Joel's mobility does not reflect antipathy toward her but a fair weighing of all the evidence presented to him.

173 The second example that the appellants rely on is the trial judge's finding on reduced fetal movements. The appellants argued at trial that Dr. Asher was negligent because he failed to tell Mrs. Marchand to count her baby's movements. This argument could succeed only if the evidence showed a significant reduction in fetal movements. There was no such evidence. The trial judge accepted Mrs. Marchand's testimony that some reduction in fetal movements had occurred but he did not elevate her testimony to support a finding of significant reduction. This does not substantiate a claim of bias.

174 Finally, the appellants complain that the trial judge accepted Dr. Kirsch's evidence about a discussion he had with Mrs. Marchand after Joel was born. Dr. Kirsch said that during an office assessment Mrs. Marchand told him that at the time of abruption she had suffered pain concurrently with a fall in the fetal heart rate. This evidence was adverse to Mrs. Marchand's interests and she was not asked about it in examination-in-chief or in re-examination. Nonetheless, the trial judge accepted Dr. Kirsch's evidence. Doing so cannot be equated with antipathy towards Mrs. Marchand.

175 Overall, we are satisfied that the evidence reasonably supports the trial judge's findings of credibility. Mrs. Marchand overstated her evidence, albeit understandably, and the trial judge was justified in concluding that her evidence did not withstand scrutiny.

7. The Cumulative effect

176 The appellants submit that the trial judge's conduct, as described in the six categories above,

cumulatively amounts to judicial bias. We reject this submission.

177 We have dealt with the appellants' submissions relating to individual complaints in each of the six categories and found that none of the conduct complained about established judicial bias. However, the principles in *S. (R.D.)* call for a consideration of the cumulative effect of the allegations of bias. For this reason, we must consider whether the totality of the appellants' complaints give rise to a reasonable apprehension of bias. We do not think that they do.

178 In our opinion the relentless acrimony between counsel in this complex and lengthy case did not prevent the trial judge from conducting and judging the case fairly and thoroughly. We are satisfied that a reasonably informed person, observing the trial judge's conduct during the entire trial and reading his reasons for judgment, would have no difficulty in concluding that he remained impartial and that he demonstrated no actual or apprehended bias.

179 We therefore also dismiss this ground of appeal.

IV. Costs

180 The trial judge awarded the respondents their party-and-party costs of the trial, which he fixed in the total amount of $2,154,447.85 ($1,233,791.25 payable to Dr. Asher and $920,656.60 payable to the other respondents). The trial judge ordered that O.H.I.P. pay a small portion of those costs and the appellants the remainder. He also dismissed a defence motion to have Mr. Wunder pay 70% of the cost award.

181 The appellants appeal the costs order. They submit that we should deny the respondents their costs of the trial even if we dismiss the appellants' appeal. In their factums filed on appeal, the respondents sought to maintain the trial judge's costs award. In oral argument, however, counsel for all respondents undertook not to pursue the appellants for the costs of the trial and stated that the respondents were not seeking costs of this appeal. In light of this concession and the tragic event that led to this case we think it appropriate to vary the costs order at trial to provide that the appellants have no obligation for the respondents' costs.

V. Conclusion

182 For the foregoing reasons, paragraphs 2 and 3 of the judgment at trial are set aside, to be replaced by an order that the dismissal of the action is without costs. This appeal is dismissed without costs.

Appeal dismissed without costs; action dismissed without costs.

FN* Leave to appeal refused 2001 CarswellOnt 3412, 2001 CarswellOnt 3413, *(*sub nom. *Marchand v. Public General Hospital Society of Chatham)* 282 N.R. 397 (note), *(*sub nom. *Marchand v. Public General Hospital Society of Chatham)* 156 O.A.C. 358 (note) (S.C.C.).

FN1 Rule 53.03 has since been amended to require earlier service of the report, and to allow supplementary reports.

FN2 The trial judge dismissed both of the appellants' motions.

END OF DOCUMENT

Case Name:

Ault v. Canada (Attorney General)

Between
Margaret Ault, Robert Collier, Robert Temple, Rod Shepherd, Richard Findlay, David Luck, Lucie Nobert, Marie-France Dufour, Bryan C. Armstrong,
Plaintiffs, and
Attorney General of Canada, Defendant, and
Sylvain Parent, Laura Burnside, Welton Parent Inc., Loba Limited and Raymond Jemus, Third Parties

[**2007] O.J. No. 4925**

65 C.C.P.B. 95

50 C.P.C. (6th) 316

2007 CarswellOnt 8191

163 A.C.W.S. (3d) 409

Court File Nos. 04-CV-026378A, 04-CV-026588A,

04-CV-026986A, 04-CV-028197A, 05-CV-031616A,

05-CV-031747A, 06-CV-34480A, 07-CV-37376A and

07-CV-37377A

Ontario Superior Court of Justice

C.D. Aitken J.

November 23, 2007.

(41 paras.)

Civil evidence -- Witnesses -- Examination -- Cross-examination -- Limitations -- Range of examination -- Ruling respecting scope of defendant's cross-examination of plaintiffs' expert witness

-- Plaintiffs hired actuary to prepare calculations respecting pension loss -- In cross-examination, defendant sought to adduce expert opinion evidence relating to standard of care owed by actuaries to their clients to establish that third parties breached the standard of care owed to plaintiffs -- Expert evidence from actuary that went beyond areas in which he had been qualified as an expert or beyond the substance of expert's report was inadmissible -- Allowing proposed cross-examination was contrary to notice requirements and avoidance of trial by ambush.

Ruling respecting scope of defendant's cross-examination of plaintiffs' expert witness -- Plaintiffs sued for damages based on pension loss -- Plaintiffs hired actuary to prepare calculations respecting pension loss -- In cross-examination, defendant sought to adduce expert opinion evidence from actuary relating to standard of care owed by actuaries to their clients to establish that third parties, actuaries consulted by plaintiffs, owed a duty of care to plaintiffs and breached the standard of care applicable to Canadian actuaries -- Plaintiff's expert was qualified to give expert evidence relating to valuation of pension benefits and estimation of losses from reduced pension service -- Expert not qualified by court to give evidence in regard to professional standards and ethics for actuaries -- HELD: Defendant could not adduce expert evidence from actuary that went beyond areas in which he had been qualified as an expert or beyond the substance of expert's report -- Defendant could question expert regarding existence of rules or standards of professional conduct within actuarial profession as this provided a backdrop to assist in assessment of expert's evidence -- For policy reasons relating to issue of notice and avoidance of trial by ambush, proposed evidence regarding standard of care owed by actuaries to plaintiffs was inadmissible -- Scheme of Rule 53.03 made it clear that a party was not expected to guess about whether an opposing party would be able to adduce expert opinion evidence favourable to its case in regard to issues in the litigation -- Allowing defendant to elicit proposed evidence deny plaintiffs and third parties opportunity his opportunity to decide how best to respond -- Plaintiffs and third parties would be prejudiced by allowing defendant to introduce expert opinion evidence without advance notice.

Statutes, Regulations and Rules Cited:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 1.04, Rule 30, Rule 33, Rule 53.03(1), Rule 53.03(2), Rule 53.03(3) (a), Rule 53.03(3)(b)

Counsel:

No counsel mentioned.

RULING RE SCOPE OF DEFENDANT'S CROSS-EXAMINATION

OF PLAINTIFFS' EXPERT WITNESS

C.D. AITKEN J.:--

Background

1 John Christie is an actuary whom the Plaintiffs retained to prepare calculations relating to their claim for damages based on pension loss. Mr. Christie prepared a report for each of the Plaintiffs. The report for each Plaintiff, other than David Luck, was served on the Defendant and Third Parties. Each report provides a comparison of (1) the value of the pension benefits under the *Public Service Superannuation Act* that the Plaintiff will receive assuming the Plaintiff terminated employment in October 2000 and started to receive his or her pension on the actual date that the pension was or will be payable, and (2) the value of the pension benefits under the same plan that the Plaintiff would have received had he or she continued to work with the Public Service until a hypothetical retirement date chosen by the Plaintiff.

2 Mr. Christie was called to testify on behalf of each Plaintiff for whom a report was served. The Plaintiffs' counsel asked that Mr. Christie be qualified to give expert opinion evidence in regard to the valuation of pension benefits and the estimation of losses from reduced pension service. He was qualified as requested, with no objections being raised by opposing counsel. During his examination-in-chief, Mr. Christie's evidence was restricted to these topics.

3 During her cross-examination of Mr. Christie, the Defendant's counsel sought to adduce expert opinion evidence from Mr. Christie relating to the standard of care owed by actuaries to their clients. The Defendant's counsel proposed to ask Mr. Christie hypothetical questions in this regard with the goal of establishing that Sylvain Parent and Welton Parent Inc. owed a duty of care to the Plaintiffs and breached the standard of care applicable to Canadian actuaries. Counsel for the Plaintiffs and counsel for Sylvain Parent and Welton Parent Inc. objected to this line of questioning.

Argument of Defendant

4 The Defendant argues that the liability of Sylvain Parent and the other Third Parties is squarely in issue in the main party action, as well as in the Third Party action. Mr. Christie is eminently qualified as an expert in the field of the professional ethics and standards that apply to actuaries in Canada. The Court needs the assistance of an expert to understand the professional standards applicable to actuaries. There is no exclusionary rule which would prevent this evidence being adduced through Mr. Christie. The scope for cross-examination of an expert is wide and is not restricted to the four corners of the expert's report. Mr. Christie was called to testify on behalf of the Plaintiffs, not the Defendant, and therefore the Defendant was under no obligation to provide the Plaintiffs or the Third Parties with any notice of areas outside of the scope of Mr. Christie's report on which the Defendant would seek his expert opinion during cross-examination.

Basic Requirements for the Admissibility of Expert Evidence

5 Expert evidence is admissible if (1) it is relevant, (2) it provides information which is likely to be outside the experience and knowledge of the fact finder (in this case the judge), (3) it is not subject to any exclusionary rule, and (4) the evidence is given by a properly qualified expert. (*R. v. Mohan*, [1994] 2 S.C.R. 9)

Relevance

6 In each Statement of Defence, the Defendant pleads: "... if any damages were suffered by the Plaintiff, which is not admitted but is expressly denied, those damages were caused in whole or in part by the actions of Sylvain Parent, Laura Burnside, Loba, Welton Parent Inc. and Raymond Jemus". In their Third Party Claims, the Defendant pleads that, if it is held liable for any loss or damages suffered by the Plaintiffs, those damages and losses were caused or contributed to by the conduct of the Third Parties, which included the failure of one or more of the Third Parties to advise the Plaintiffs of various facts or circumstances. The Defendant goes on to plead that (1) at all material times Sylvain Parent, Welton Parent Inc. and Raymond Jemus held themselves out to the Plaintiffs as independent professional advisors, (2) the Plaintiffs sought professional advice from them, (3) these three Third Parties knew that the Plaintiffs would be relying on their advice, (4) the Plaintiffs did in fact rely on their advice in making their decisions regarding a transfer of pension funds to the Loba pension plan, (5) as professional advisors these three Third Parties owed a duty of care to the Plaintiffs, and (6) these Third Parties breached that duty.

7 Sylvain Parent is an actuary and Welton Parent Inc. is an actuarial firm. Evidence has been adduced that one or more Plaintiffs knew this and that one or more Plaintiffs sought advice from Mr. Parent in regard to pension issues.

8 I conclude that evidence relating to the standard of care expected of actuaries and how certain actions or inactions fit with that standard of care is relevant to a fact in issue in the trial and may tend to prove that fact. At the stage of relevance, I find that its probative value outweighs its potential prejudicial effect, leading to the conclusion that the value of the evidence would make it worth receiving.[1]

Necessity in Assisting the Trier of Fact

9 Expert opinion evidence would be of assistance to the Court in understanding the rules of professional conduct and the rules of professional ethics applicable to actuaries, matters outside the Court's experience. This evidence would assist the Court in determining the standard of care to be met by Sylvain Parent or Welton Parent Inc. as actuaries when dealing with the Plaintiffs, assuming the Court determined that in the circumstances of this case, as actuaries, they owed a duty of care to the Plaintiffs. Again, at this stage, the need for expert opinion evidence regarding the professional standards expected of actuaries outweighs any concerns about potential prejudice.[2]

Absence of an Exclusionary Rule

10 The Plaintiffs and Third Parties have not referred me to any exclusionary rule of evidence that specifically deals with the admissibility of the proposed evidence. Nevertheless, they rely on the underlying policy objectives inherent in r. 53.03 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194 in arguing that the proposed evidence should be inadmissible in the circumstances of this case. More will be said of this shortly.

Properly Qualified Expert

11 John Christie has ample professional qualifications that would have supported a finding that he is an expert in the area of professional standards and ethics for actuaries. As a Fellow of the Canadian Institute of Actuaries since 1969, Mr. Christie was a member of the Discipline Committee from 1990 to 1997 and was its Chair from 1992 to 1997. He has been a member of the Institute's Committee on Rules of Professional Conduct from 2004 to the present.

12 That being said, Mr. Christie was not qualified by the Court to give expert opinion evidence in regard to professional standards and ethics for actuaries, as the Plaintiffs did not seek to have him qualified in this area. The Defendant argues that this is irrelevant and that, regardless of the qualification given by the Court, the Defendant should be able to elicit expert opinion evidence from Mr. Christie regarding other areas in which the Court would have qualified Mr. Christie if the Court had been asked to do so. The Defendant relies on the following cases.

13 In *R. v. Marquand,* [1993] 4 S.C.R. 223, a number of medical experts provided evidence beyond the areas of expertise in which they had been qualified. Defence counsel did not object to the witnesses' giving evidence in the expanded areas, but did object to the judge charging the jurors that they could rely on that evidence. The trial judge instructed the jury that the opinions outside the expertise of the witnesses were to be weighed along with all the other evidence.

14 On appeal in part on this basis, McLachlin, J. at para. 37 stated:

> Important as the initial qualification of an expert witness may be, it would be overly technical to reject expert evidence simply because the witness ventures an opinion beyond the area of expertise in which he or she has been qualified. As a practical matter, it is for opposing counsel to object if the witness goes beyond the proper limits of his or her expertise. The objection to the witness's expertise may be made at the stage of initial qualification, or during the witness's evidence if it becomes apparent the witness is going beyond the area in which he or she was qualified to give expert opinion. In the absence of objection, a technical failure to qualify a witness who clearly has expertise in the area will not mean that the witness's evidence should be struck. However, if the witness is not shown to have possessed expertise to testify in the area, his or her evidence must be disregarded and the jury so instructed.

15 Although McLachlin J. disapproved of the procedure adopted at the trial regarding the expert

opinion evidence, the fact that the witnesses all clearly possessed expertise sufficient to permit them to testify as they did led her to conclude that it was not an error in law to allow the jury to consider their evidence in its entirety.

16 In the case at hand, the Plaintiffs and the Third Parties did object when the Defendant sought to elicit expert opinion evidence from Mr. Christie beyond the area in which he was qualified to provide expert opinion evidence. That differentiates this case from *Marquand*.

17 In *R. v. D.R.*, [1996] 2 S.C.R. 291 a children's therapist was qualified as an expert in the behavioural, social and emotional characteristics of sexually abused children. She had been present during the videotaped interviews of the children conducted by the police. Defence counsel sought to cross-examine the expert on the interview techniques employed during those interviews. The trial judge did not allow this line of questioning. The Supreme Court held that, given the importance of the right to cross-examine witnesses, and the fact that the issue of the children's credibility was central to the allegations against the accused, the trial judge had erred in restricting the cross-examination. The Court considered it immaterial whether the therapist was an expert in interview techniques as the scope of cross-examination of an expert is not restricted to his or her area of expertise. (See paras. 44-45)

18 The case of *R. v. D.R.* can be distinguished from the case at hand. First, the priorities in a criminal case are different from those in a civil case. In the former, enabling the accused to make full answer and defence is the overarching concern. In a civil case, the primary consideration is to secure a just, expeditious and cost-effective determination of the action on its merits. Secondly, the excluded evidence in *R. v. D.R.* related to observations which the therapist had been in a position to make during the interviews with the children and did not necessarily involve any opinion evidence based on expertise. For these reasons, this case is not of particular relevance to the issue before me.

19 In *Caputo v. Imperial Tobacco Ltd.*, [2002] O.J. No. 3767 (Sup. Ct. Master), Master MacLeod stated at para. 25:

> Experts are only entitled to give opinion evidence in areas within their accepted expertise and wandering from that expertise will render the extraneous opinion inadmissible. ... There seems no reason this principle should not operate in reverse. If the expert is qualified to answer additional opinion questions, they may be admissible. At trial, questions could be asked in cross examination to widen the scope of the expert's expertise and then to elicit a relevant opinion on a point other than that provided in chief. If this is appropriate on a motion then the expert may be asked questions about experience in other related areas and then could be asked an opinion. That opinion would be admissible only if the judge accepts it after finding this new area of expertise meets the criteria in *R. v. Mohan, supra.*

20 In *Caputo*, the Plaintiffs in a contemplated class action brought a motion to compel answers to

questions refused on cross-examinations on experts' affidavits filed by the Defendants on the certification motion. Master MacLeod noted that any proper questions on a cross-examination that have a semblance of relevance to the determination of the motion must be answered. A deponent may be cross-examined on any fact in his or her knowledge which is relevant to the determination of the motion, even if it is not in his or her affidavit. Master MacLeod went on to draw a distinction between the role of a judge or master hearing a refusals motion and the role of the judge hearing the actual motion or trial. The latter determines whether or not expert evidence will be admitted and the weight to attach to it. A master hearing a refusals motion is providing a screening function to determine what evidence will be before the motions judge or trial judge when he or she is deciding on the admissibility of evidence. As such, relevance on the refusals motion should be determined broadly so as not to usurp the function of the motions judge or trial judge. It is in this context that Master MacLeod made the comment above regarding the scope of cross-examination of experts. As he acknowledged, this is a very different context than a ruling on admissibility of evidence at trial.

21 The Plaintiffs pointed me to the case of *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97 (C.A.). The Court of Appeal held that one reason why the trial judge in that case had not been in error in ruling that a medical expert could not be examined in chief on an area of expertise reasonably assumed to be within his area of special skill and knowledge was that the trial judge had not been asked to and had not in fact qualified the expert to give expert evidence in regard to that topic.

22 I have not been referred to any case law or other authority which has specifically dealt with the question of whether in a civil trial an expert *on cross-examination* can be asked for *expert opinion evidence* in regard to a subject falling outside the areas in which the expert has been formally qualified by the Court. In any event, I do not find it necessary to decide whether the limited qualification I granted at the commencement of Mr. Christie's evidence, and at the request of the Plaintiffs, precludes his being cross-examined regarding his expert opinion relating to other possible areas of his expertise. For policy reasons relating to the issue of notice and the avoidance of trial by ambush, I find that the proposed evidence regarding the standard of care owed by actuaries to persons such as the Plaintiffs, in the circumstances of this case, is inadmissible.

Analysis

23 Rule 53.03 reads as follows:

> *Experts' Reports*
>
> 53.03(1) A party who intends to call an expert witness at trial shall, not less than 90 days before the commencement of the trial, serve on every other party to the action a report, signed by the expert, setting out his or her name, address and qualifications and the substance of his or her proposed testimony.

(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 commencement of the trial, serve on every other party to the action a report, signed by the expert setting out his or her name, address and qualifications and the substance of his or her proposed testimony.

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.

...

24 This rule sets out the protocol to be followed in civil trials before this court when a party wishes to rely on expert opinion evidence to advance an issue in the case. The rule complements rules 30 to 33 dealing with productions, discovery of documents, examinations for discovery of parties, discovery of non-parties and medical examinations. All of these rules have as their underlying purpose the early identification of evidence relevant to all issues in the litigation. It is through this early identification of evidence that issues can be resolved at the earliest possible time. This in turn helps to minimize the costs associated with litigation and reduces the demand on limited judicial resources through shortening required trial times. Of equal importance, the early and full disclosure of evidence enables all parties to properly prepare for trial so that the trial unfolds in an orderly, efficient and fair fashion. There is no room for "trial by ambush" in our civil justice system.

25 It must be remembered that r. 1.04 of the *Rules of Civil Procedure* states that the rules must be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. Rule 53.03 must be interpreted with these overarching priorities in mind.

26 The Defendant argues that the Plaintiffs cannot claim prejudice when their expert is cross-examined to elicit expert opinion evidence on an issue not dealt with in his report but within his area of expertise, even if that area is not included in the area of expertise for which he was

formally qualified at trial. The Defendant argues that presumably the Plaintiffs accept the expertise of Mr. Christie as stated in his *curriculum vitae*, since they retained him and his *curriculum vitae* makes it clear his area of expertise is broader than the limited issues dealt with in the report he prepared for the Plaintiffs. Further, the Defendant argues that the Plaintiffs were aware of the pleadings in the Statement of Defence and the Third Party claims; therefore they knew that the standard of care owed by actuaries was a live issue and that Mr. Christie might have some useful insight in that regard. Implied in this line of reasoning is the argument that, if the Plaintiffs were reckless enough to put on the stand an expert who has expertise in an area of interest to the Defendant, and whose opinion in regard to that issue might bolster the Defendant's position, too bad for them. They should have foreseen this possibility and should have prepared for it, possibly by not calling Mr. Christie to provide his expert opinion in regard to the calculation of pension loss (even though such evidence is necessary to pursue their case), possibly by broadening Mr. Christie's retainer to cover the issue of standard of care (even if this evidence would not be something which the Plaintiffs would initially seek), or possibly by retaining another professional who could quantify pension loss but would not be able to opine on the standard of care applicable to actuaries (an unlikely scenario). I reject these arguments. They in no way respect the goals of early resolution of issues and the just, most expeditious and least expensive determination of civil proceedings.

27 In any event, this line of argument has no application to the Third Party claim, which is a separate proceeding from the main action. The Third Parties did not retain Mr. Christie and did not serve any report prepared by Mr. Christie. Their knowledge of Mr. Christie's expertise and his expert opinion, as it relates to the main action and the Third Party claim, comes from Mr. Christie's report and *curriculum vitae*. If the Defendant retained another expert to opine on the issue of the standard of care owed to the Plaintiffs by Sylvain Parent and Welton Parent Inc. - one of the central issues in the Third Party claim - the Third Parties would have received notice of that expert's opinion in this regard at least 90 days prior to trial, and would have had the opportunity of retaining their own expert or experts to advise them in this regard and to prepare a responding opinion, if necessary. Why should the Third Parties be denied this opportunity because the Defendant wants to adduce expert opinion evidence through Mr. Christie, the Plaintiffs' expert, rather than through another expert? The same policy considerations that lead to the requirement of a party providing appropriate notice regarding expert opinion evidence it seeks to adduce through its own expert witness, applies to expert opinion evidence it seeks to adduce against one party through cross-examination of another party's expert witness. Rule 1.04(2) states that, where matters are not provided for in the Rules, the practice shall be determined by analogy to them.

28 Notice must also be taken of r. 53.03(3), which provides that 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 report or supplementary report served within certain time limits prior to trial. In *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham, supra* at para. 38, the Ontario Court of Appeal stated:

> In our view, these cases indicate that the "substance" requirement of rule

> 53.03(1) must be determined in light of the purpose of the rule, which is to facilitate orderly trial preparation by providing opposing parties with adequate notice of opinion evidence to be adduced at trial. Accordingly, an expert report cannot merely state a conclusion. The report must set out the expert's opinion, and the basis for that opinion. Further, while testifying, an expert may explain and amplify what is in his or her report but only on matters that are "latent in" or "touched on" by the report. An expert may not testify about matters that open up a new field not mentioned in the report. The trial judge must be afforded a certain amount of discretion in applying rule 53.03 with a view to ensuring that a party is not unfairly taken by surprise by expert evidence on a point that would not have been anticipated from a reading of an expert's report.

29 In *Marchand*, a medical malpractice case, the Court determined that causation was a separate issue from standard of care, and before a party could adduce evidence from his or her expert in regard to causation, the substance of the expert's opinion in that regard had to be included in a medical report served on the other party; a medical report dealing with the issue of standard of care did not suffice to meet that requirement. As well, the trial judge's qualification of the expert in the area of standard of care was not broad enough to also render the expert qualified in the area of causation. For both of these reasons, the Court of Appeal concluded that the trial judge had not erred in refusing to allow the expert to opine on issues of causation.

30 The most relevant case in regard to the issue before me is that of *Stribbell v. Bhalla* (1988), 32 C.P.C. (2d) 272 (Ont. H.C.). In that case, a medical practitioner who was called to testify at trial had undertaken an independent medical examination of the plaintiff on behalf of the defendant. The plaintiff served the medical report and the expert's *curriculum vitae* and then read portions of the report into evidence. The defendant's counsel sought to cross-examine the expert on a variety of issues of relevance in the case. Osborne J. observed that the clear policy underlying the rules relating to discovery and to the production of experts' reports is one of disclosure. He would not let the defendant's counsel ask the medical practitioner for an expert opinion that was not the product of his report. In making this ruling, Osborne J. stated at paras. 10, 15:

> I recognize that in so ruling I am in some respects limiting the extent to which, in these unusual circumstances this medical witness may be cross-examined. I do not take the view that cross-examination must be contained within the four corners of the report. My judgment is that cross-examination cannot indirectly elicit from the witness expert opinions which should have been the subject matter of earlier disclosure. There was no such disclosure in this case, as required by r. 53.03(1).
>
> ...

> I am of the opinion that to do so indirectly under the guise of the so-called right to full cross-examination, defeats the very purpose of the disclosure provisions of the rules. The rules have statutory effect. It seems to me that had it been intended that the disclosure provisions of the rules be virtually obliterated by this process, that some specific provision would have been found in the rules that would suggest that the course of action [the defendant's counsel] wishes to embark upon is to be permitted. ...

31 The *Stribbell* case can be distinguished from this case in one respect, which I consider a very minor factor. In *Stribbell*, the defendant had initially retained the medical practitioner to conduct an independent medical examination, but then, seeing the report, had decided not to rely on it. The plaintiff served the report on the defendant as if the practitioner had been retained by the plaintiff and had prepared a report at the plaintiff's request. At trial, the practitioner was presented as the plaintiff's witness, with the defendant having the right of cross-examination. The only difference in the case at hand is that Mr. Christie was retained by the Plaintiffs. I fail to see why the reasoning used by Osborne J. should not apply equally to the circumstances of this case.

32 The Defendant picks up on the comments made in *Stribbell* and in other cases, such as *R. v. D.R.*, [1996] 2 S.C.R. 291 at paras. 44-45 reinforcing the importance of the right to cross-examine witnesses. I accept that the Defendant may cross-examine Mr. Christie in a rigorous and thorough fashion in regard to the evidence he provided to the Court. That includes an exploration of the nature of his retainer, the information on which he relied and the assumptions he made in formulating his opinion, the source of that information or those assumptions, the investigations he undertook, the calculations he made, the methodology he used, any authorities on which he relied, and any factors which impact on his credibility and his status as an independent expert. The right of cross-examination cannot be relied upon, however, to enable the Defendant to elicit expert opinion evidence from Mr. Christie in a manner that would render the trial process unfair.

33 The Defendant chose not to serve an expert's report in regard to the issue of the standard of care owed to the Plaintiffs by Sylvain Parent and Welton Parent Inc. Service of such a report would have put the Plaintiffs and Third Parties on notice of the nature of the evidence that the Defendant could and likely would adduce relating to this issue. This would have amounted to the disclosure expected under the *Rules of Civil Procedure*, the purpose of which is to enable all parties to understand the strength of the opposing parties' case, to facilitate the early resolution of as many issues as possible, and to enable all parties to prepare for trial in an efficient and cost-effective manner. Had the Plaintiffs and Third Parties been put on notice that the Defendant had an expert opinion dealing with the issue of the standard of care owed by actuaries, they would have had the choice of seeking their own expert opinion evidence in response. They would have been in the position of determining whether there was a difference of opinion amongst experts as to the rules of professional conduct applicable to actuaries, whether a professional duty of care applied in the circumstances of this case and, if so, what standard of care applied. They would have been able to choose the expert to retain in regard to this type of evidence. They would have been in a position to

elicit evidence from the Plaintiffs, and possibly other witnesses, to provide the appropriate factual foundation for the opinion to be offered by their chosen expert.

34 The scheme of r. 53.03 makes it clear that a party is not expected to guess about whether an opposing party will be able to adduce expert opinion evidence favourable to its case in regard to one or more issues in the litigation. All parties are to receive adequate notice of such possible evidence so that they have the opportunity of deciding how best to respond. Allowing the Defendant to elicit expert opinion evidence from Mr. Christie regarding the standard of care would deny both the Plaintiffs, but even more importantly, the Third Parties, this opportunity.

35 In those situations specifically covered by r. 53.03(1)(2) and (3), even if an expert's report dealing with the substance of his testimony with respect to an issue has not been served as provided under the rule, the expert may still be able to testify with leave of the trial judge. Rule 53.08(1) provides that, if evidence is admissible only with leave of the trial judge under r. 53.03(3), leave *shall* be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial. The Plaintiffs and Third Parties argue that I should not rely on this provision by way of analogy in the circumstances of this case to grant the Defendant leave to elicit from Mr. Christie expert opinion evidence regarding the standard of care. I accept this argument.

36 For all of the reasons already stated, the Plaintiffs, and again, most importantly, the Third Parties, would be prejudiced by allowing the Defendant to introduce expert opinion evidence without advance notice. Neither an adjournment, nor an award of costs, would be of assistance. Mr. Christie has already testified on behalf of the Plaintiffs. The Plaintiffs have not had an opportunity of informing themselves of Mr. Christie's opinion in regard to the standard of care applicable in the circumstances of this case, and to make tactical decisions regarding the use of Mr. Christie as their expert, the scope of his report, the method of adducing his evidence, and the need to consult and obtain a report from any other expert. All of these decisions needed to be taken before the commencement of the trial. Of significance is that the Plaintiffs in the Findlay, Shepherd and Temple actions had already testified prior to Mr. Christie testifying. There may have been areas which the Plaintiffs' counsel would have explored with these Plaintiffs had he had notice of the expert opinion evidence to be adduced through Mr. Christie.

37 In regard to the Third Parties, what the Defendant's counsel seeks to do is an end run around the normal rules of disclosure regarding expert opinion evidence. The Third Parties would be completely blind-sided through the introduction of critical expert evidence concerning the standard of care applicable to actuaries. They have now missed the opportunity of cross-examining the Plaintiffs who have already testified. In order to be able to adequately deal with the potential evidence to be adduced through Mr. Christie, they would require adequate notice of what that evidence would entail. They could require a lengthy adjournment in order to consult their own expert or experts and serve their responding reports on the other parties.

38 This trial has been scheduled for eight weeks, and counsel have advised that it likely will take one to two weeks longer than anticipated. There are seven counsel representing the parties. The trial date was scheduled months ago. Adjourning the trial to a later date would be a serious scheduling challenge, to put it mildly.

Disposition

39 The Defendant cannot adduce expert opinion evidence from Mr. Christie that goes beyond the areas in which he has been qualified as an expert or that goes beyond the substance of Mr. Christie's report that was served under r. 53.03. The substance of the report includes what is reasonably required to explain or amplify aspects of the report.

40 Mr. Christie was qualified to give expert opinion evidence relating to the valuation of pension benefits and the estimation of losses from reduced pension service. Mr. Christie's reports served by the Plaintiffs under r. 53.03 deal with these topics. The topics in regard to which the Defendant seeks to cross-examine Mr. Christie and adduce his expert opinion evidence relate to the issue of liability, namely whether the Third Parties owed the Plaintiffs a duty of care and, if a duty of care existed, the appropriate standard of care and whether the Third Parties failed to meet that standard of care in their dealings with the Plaintiffs. This is an entirely different area from that in which Mr. Christie was qualified to provide expert opinion evidence. It is an entirely different area from those topics covered in Mr. Christie's report. Undue prejudice would be caused - to the Third Parties in particular - if this line of questioning were allowed.

41 The Defendant may question Mr. Christie regarding the existence of rules or standards of professional conduct within the actuarial profession as this provides a backdrop to assist in my assessment of Mr. Christie's evidence. His evidence in regard to the existence of such rules and standards is simply factual and does not require his giving expert opinion evidence beyond the scope of what I have ruled as being admissible.

C.D. AITKEN J.

cp/e/qlkxl/qlpxm/qljxl/qltxp/qlbrl

1 See *R. v. K.(A.)* (1999), 45 O.R. (3d) 641 (C.A.) at paras. 77-89.

2 Ibid, at paras. 90-101.

Case Name:

Smith v. Inco Ltd.

RE: Ellen Smith, and
Inco Limited

[2009] O.J. No. 6270

Court File No. 12023/01

Ontario Superior Court of Justice

J.R. Henderson J.

October 26, 2009.

(24 paras.)

Counsel:

K. Baert, E. Gillespie, C. Poltak, for the Plaintiff.

A. Lenczner, L. Lowenstein, L. Fric, for the Defendant.

RULING
(Opinion Evidence of Robert Maughan)

1 **J.R. HENDERSON J.**:-- During the course of the direct examination of Robert Maughan ("Maughan"), an expert witness called by the plaintiff, the defendant objected to a question asked of Maughan. The defendant submitted that the question was objectionable for two reasons; namely, (1) the defendant had not received written notice of the proposed testimony pursuant to the rules, and (2) the question called for an answer that was outside of the scope of Maughan's expertise.

BACKGROUND

2 Maughan is a manager at Teranet who is responsible for some of the Teranet products and

services that provide calculations of current property values. Specifically, I found that Maughan was qualified to give opinion evidence in three areas: (1) the land registry system in Ontario, (2) real property sales data analysis, including land registry system data, MLS data, and assessment data, and (3) Automated Valuation Modeling ("AVM") technologies, data, and analysis.

3 In an earlier ruling I referred to Maughan's area of expertise as the analysis of real property sales data and valuation methods.

4 Teranet operates and manages the Electronic Land Registry System ("ELRS") for the Province of Ontario. As part of its agreement with the Province, Teranet has the right to use the ELRS database for the development and sale of certain products and services. Some of those products and services involve the calculations of current property values for properties that are registered in the ELRS.

5 Maughan prepared two written reports for this case, dated February 2008 and June 2009 respectively. As well, he prepared certain charts and calculations that were used on his November 2008 examination for discovery.

6 In his reports and in his oral testimony at this trial Maughan has provided calculations as to the changes in property values in Port Colborne, Fort Erie and Welland over various periods of time. He has done so using two valuation methods known as the AVM and ASP methods. These calculations were performed using the ELRS database, some additional, data obtained from the MLS, and the Teranet software.

7 Some of Maughan's calculations involved the use of a base year. In his initial report Maughan performed ASP calculations using a base year of 1997. In his charts prepared in November 2008 he did further ASP calculations using base years of 1997, 1998, 1999, and 2000.

8 After testifying as to these calculations in court Maughan was asked the question, "Now that we have looked at a number of base years, in your opinion, what is the appropriate base year to use?" At that point counsel for the defendant objected on the grounds set out above.

CLARIFICATION OF THE QUESTION

9 After I requested clarification, counsel for the plaintiff requested that I make a ruling as to whether Maughan has the ability to express an opinion as to the appropriate base year that should be used for the purpose of calculating the plaintiff's damages. I note that the plaintiff alleges, on behalf of the class members, that the quantum of damages should be measured by the decrease, or lack of increase, in the property values in Port Colborne from September 20, 2000 onward.

10 I accept that this is a logical way to define the scope of my ruling. Therefore, my ruling will deal with whether Maughan is capable of giving opinion evidence on this topic, as clarified by plaintiff's counsel.

LACK OF NOTICE

11 It is well known that an expert is not required to set out in his written report a verbatim version of his proposed evidence. Rather, the written report is intended to give the opposing side notice of the expert's opinion, and the basis for the opinion, so that the opposing side will not be taken by surprise by the evidence adduced at trial. In that respect see the case of Marchand v. Public General Hospital Society of Chatham, 51 O.R. (3d) 97 at para. 38.

12 During submissions on this point plaintiff's counsel demonstrated that Maughan had, in his original report, referred to the concept of the selection of the base year. Moreover, an expert retained by the defendant, Integris Real Estate Counsellors ("Integris"), also referred to the concept of the selection of a base year, and Maughan's reply report of June 2009 responded to the comments by Integris about a base year.

13 Counsel for the defendant conceded that the defendant was not surprised that the concept of the selection of a base year is an issue in this trial. Therefore, the defendant is no longer raising an objection to the proposed testimony on the basis of surprise.

14 Therefore, I find that the proposed testimony is not objectionable because of lack of notice to the defendant.

EXPERTISE OF MAUGHAN

15 The defendant takes the position that Maughan does not have the expertise to express an opinion in an area that is properly within the realm of real estate appraisal. The defendant points out that Maughan does not have a degree in economics or statistics; does not have any post-secondary degree at all; and is not a certified real estate appraiser.

16 The defendant describes Maughan as merely a "data gatherer", and not qualified to give an opinion as to the best way to value a real property.

17 In my opinion Maughan's expertise goes beyond that of a "data gatherer". It is true that Maughan collects and manages a large database, but Maughan also has experience with the analysis of that data in order to determine present values for real properties using both the ASP and AVM methods.

18 Maughan does not appraise properties in the traditional sense. That is he does not go to the property, walk through the property, observe certain physical aspects of the property, research the neighbourhood, and then come up with a value.

19 Instead, Maughan uses computer software to extract information out of a large database in order to calculate a current value for the property. It is the use of this database and software that is Maughan's area of expertise.

20 Counsel for the defendant correctly points out that there must be a connection between the selection of a base year and the use of the Teranet software/database before Maughan can be permitted to give this opinion. In that respect I note that in Maughan's June 2008 report at page 54 he writes, "In order to demonstrate the change in the property market values over time the property value data ... is shown as the percentage change between the *base period* for each method and subsequent chronological periods." [Emphasis added.]

21 Therefore, in my opinion, it is an inherent part of the use of Teranet software/database for Maughan to select a base period, or base year, for the purpose of performing his calculations. The court can assume that the base year is not selected at random, but that Maughan must have some expertise in determining the selection of an appropriate base year. Clearly, Maughan uses that expertise to select a base period as part of his analysis of the ELRS data.

22 Counsel for the defendant also submitted that the plaintiff appears to be asking this court to license a debate between Maughan, who is not a certified real estate appraiser, and the defendant's expert David Atlin of Integris, who is a certified real estate appraiser. I accept that is the case.

23 However, I find that Maughan and Atlin approach the issue of real estate valuation from different areas of expertise. In my view, this does not mean that one of these experts should not be permitted to give an opinion in court. Rather, this dissonance in the relative expertise goes to the weight that the court will give to the evidence of each of these witnesses.

24 In conclusion, I find that Maughan is capable of providing opinion evidence with respect to the appropriate base year that should be used for the purpose of calculating the plaintiff's damages as it relates to the calculations he has done using the Teranet database and software.

J.R. HENDERSON J.

cp/s/qllxr/qlvxw

Case Name:

Smith v. Inco Ltd.

RE: Ellen Smith, and
Inco Limited

[2009] O.J. No. 6271

Court File No. 12023/01

Ontario Superior Court of Justice

J.R. Henderson J.

November 17, 2009.

(15 paras.)

Counsel:

K. Baert, E. Gillespie, C. Poltak, for the Plaintiff.

A. Lenczner, L. Lowenstein, L. Fric, for the Defendant.

RULING
(Opinion Evidence of Peter Tomlinson)

1 **J.R. HENDERSON J.**:-- During the plaintiff's case, the plaintiff requests leave to permit an expert witness, Peter Tomlinson [hereinafter called "Tomlinson"], to testify with respect to information contained in a one-page update to his previous reports.

2 The one-page update was served on the defendant on November 11, 2009, approximately 4 weeks after this trial began. Service is therefore well in default of the time limits set out in Rule 53.03(1) and the case management order of Justice Cullity.

3 Tomlinson's update contains calculations as to the plaintiff's damages set out in three different

tables. Table 1 calculates damages by comparing property values in Port Colborne to those in Fort Erie; table 2 calculates damages by comparing Port Colborne to Welland; and table 3 is a combination of table 1 and table 2.

4 Tomlinson served two earlier written reports dated September 2008 and September 2009. The difficulty for the plaintiff now is that both previous reports referred to Welland as the most comparable community to Port Colborne. Nowhere in either of the first two reports did Tomlinson suggest that Fort Erie should be used as a comparable community for the purposes of calculating the plaintiff's damages.

5 Therefore, I accept the defendant's submission that Tomlinson's update is an attempt to introduce an issue that Tomlinson had never previously addressed; namely, the calculation of damages based on a comparison of Port Colborne property values to those in Fort Erie.

6 At the start of the trial, if not well before, the defendant is entitled to know the case it has to meet. As part of that concept the defendant is entitled to written notice of all expert opinion evidence that the plaintiff intends to rely upon at trial. In this case, at the start of the trial the defendant would have properly assumed that Tomlinson would be giving opinion evidence based upon his comparison of property values in Port Colborne and Welland.

7 At this point, four weeks have gone by since the start of the trial. The plaintiff has called five witnesses, including four expert witnesses. Those witnesses have been cross-examined, and their testimony has been completed. Cross-examination of those witnesses was conducted by counsel for the defendant knowing that Tomlinson would testify as to the opinions contained in his written reports.

8 In my view it would be grossly unfair to permit the plaintiff to introduce expert evidence from Tomlinson now that would radically change the opinions set out in Tomlinson's previous written reports. Defendant's counsel relied on Tomlinson's previous reports for the purpose of organizing and preparing his cross-examination of the plaintiff's witnesses. If I were to permit the plaintiff to introduce this new evidence, there would be no way to cure the prejudice to the defendant without starting the trial over again.

9 I disagree with the plaintiff's submission that the present situation is similar to the one that occurred with respect to another plaintiff expert witness, Robert Maughan, who delivered an updated damages calculation approximately five days before the start of the trial. In that situation I permitted Maughan to testify as to his update, but I created a process of examinations and productions that I felt cured any possible prejudice to the defendant. Moreover, Maughan's new evidence was delivered before any witness was called to the witness stand and before the defendant engaged in any cross-examination.

10 I also disagree with the plaintiff's submission that Tomlinson's update is a response to a late report delivered by the defendant's expert, Frank Clayton [hereinafter called "Clayton"]. In fact, it

was Tomlinson who delivered the first late report on September 25, 2009, and it was Clayton's report of October 8, 2009 that responded to Tomlinson's late report.

11 I also disagree that Clayton's report makes a comparison between Port Colborne and Fort Erie, thus opening the door for Tomlinson's response. Clayton's report only compares Port Colborne to Welland, as did Clayton's earlier report. If the plaintiff believes that the data in Clayton's report can be used to make a case for using Fort Erie as a comparator, the plaintiff can cross-examine Clayton on this point if and when he testifies.

12 In summary, I find that Tomlinson's proposed evidence has been served very late and raises a new issue. It would be highly prejudicial to the defendant to permit Tomlinson to testify as to this new proposed evidence.

13 The defendant does not object to receiving Tomlinson's updated calculations comparing Port Colborne to Welland, and therefore I will allow Tomlinson to testify as to table 2 in his updated report. I will not permit Tomlinson to testify as to tables 1 or 3.

14 Further, the plaintiff has requested leave to permit Tomlinson to give viva voce evidence commenting on the contents of Clayton's most recent report. In my view that request is governed by the case of Marchand v. Public General Hospital Society of Chatham, 51 O.R. (3d) 97. That is, Tomlinson may give viva voce evidence with respect to matters that he set out in his previous reports, and he may amplify or explain those matters that are latent in or touched on by his earlier reports.

15 That completes my ruling.

J.R. HENDERSON J.

cp/s/qllxr/qlvxw

Case Name:

Andreason v. Thunder Bay (City)

Between
Danielle Andreason, Sarah Andreason, Kimberley Andreason and Deanna O'Neill, and The Corporation of the City of Thunder Bay, William Kosoris, Joanne Kosoris, Jeanette Meservia as Executrix of the Estates of Paul Chicoine and Olga Chicoine, John Bodnieks and Roach's Taxi (1988) Ltd.

[2014] O.J. No. 366

2014 ONSC 580

Court File No. CV-09-0044

Ontario Superior Court of Justice
Thunder Bay, Ontario

D.C. Shaw J.

Heard: January 13, 15, 16 and 21, 2014.
Judgment: January 24, 2014.

(39 paras.)

Civil litigation -- Civil evidence -- Admissibility -- Procedure -- Opinion evidence -- Expert evidence -- Admission of reports -- Criteria for admissibility -- Motion by plaintiff to abridge time for service of expert reports and for leave to call expert evidence allowed -- Plaintiff was injured when her bike collided with taxi -- She provided late service of expert reports by occupational therapist and vocation rehabilitation specialist -- Late service of reports did not give defendants enough notice of opinions plaintiff would seek to adduce -- Plaintiff would be relying on reports to support claim for damages -- Trial was adjourned.

Motion by the plaintiff to abridge the time for service of expert reports and for leave to call expert evidence. The plaintiff was injured when her bike collided with a taxi. She provided late service of four expert reports by an occupational therapist and one by a vocation rehabilitation specialist. The

reports, three of which were served during the week before the trial was scheduled to begin, concerned a life care plan.

HELD: Motion allowed. The late service of the reports did not give the defendants enough notice of the opinions the plaintiff would seek to adduce. The plaintiff would be relying on the reports to support her claim for damages. The trial was adjourned. It would prejudice the defendants to permit the experts to give opinion evidence based on the reports without giving the defendants a chance to consider the reports.

Statutes, Regulations and Rules Cited:

Evidence Act, R.S.O. 1990, c. E.23, s. 12

Rules, Rule 53, Rule 53.03, Rule 53.03(1), Rule 53.03(2.1), Rule 53.08, Rule 53.08(1)

Counsel:

Christopher D.J. Hacio, for the Plaintiffs.

Dawne A. Latta, for the Defendant The Corporation of the City of Thunder Bay.

Alex W. Demeo, for the Defendant, Jeanette Meservia as Executrix of the Estates of Paul Chicoine and Olga Chicoine.

Reasons on Motion

1 **D.C. SHAW J.**:-- The plaintiff, Danielle Andreason was injured in an accident on June 1, 2007 in the City of Thunder Bay.

2 She was riding a bike at night when she came into collision at an intersection with a taxi. She was 15 years of age at the time. She sustained a traumatic brain injury, several fractures, a pulmonary contusion to her left lung and multiple abrasions and lacerations.

3 An action was brought against the City of Thunder Bay, William and Jeanne Kosoris, who owned a home on the northeast corner of the intersection, Paul and Olga Chicoine, who owned a home on the northwest corner of the intersection, Roach's Taxi, which owned the taxi and John Bodnieks, the driver of the taxi. The action has been settled as against the Kosoris defendants, Roach's Taxi and Mr. Bodnieks.

4 The trial as against the City of Thunder Bay and the Chicoine defendants was scheduled to

begin on January 13, 2014, for six weeks. Liability and damages are in issue.

5 On the opening of trial, the plaintiffs and the City brought several motions, both in writing and orally. One of the motions was the plaintiffs' motion for an order that the time for service of nine expert reports be abridged and that pursuant to rule 53.08 leave be granted allowing the plaintiffs to call experts' evidence. These are the reasons on that motion.

6 The dates of the reports, dates of service and authors of the reports are as follows:

1. November 15, 2013. Served November 18, 2013. Angie Maidment - occupational therapist and treatment team coordinator.
2. November 18, 2013. Served November 19, 2013. Justin Berubé - architectural technologist.
3. November 30, 2013. Served December 2, 2013. Don Middleton - psychological counsellor.
4. December 3, 2013. Served December 4, 2013. Dr. Bakhtiar Moazzami - economist
5. December 16, 2013. Served December 23, 2013 - Angie Maidment
6. December 17, 2013. Served December 23, 2013. Dr. Norman Goldberg - pediatric consultant to the Winnipeg's Children's Hospital Pediatric Brain Injury Team
7. December 4, 2013. Served January 6, 2014 - Angie Maidment
8. January 7, 2014. Served January 9, 2014. Lona Beazley - vocation rehabilitation specialist
9. January 10, 2014. Served January 10, 2014. Angie Maidment

7 Submissions on the several motions, including this motion, were heard January 13, 15, 16 and 21, 2014. The parties filed 12 volumes of materials - motion records, responding motion records, factums, and casebooks. Because of the various motions, no evidence has yet been introduced on the trial.

8 During submissions, the defendants agreed that they would no longer contest the late filing of reports of Dr. Goldberg, Mr. Berubé, and Dr. Moazzami. Also during submissions, the plaintiffs agreed that they would not tender Mr. Middleton as an expert, but rather as a fact witness in his capacity as a treating health practitioner. Because Mr. Middleton will not be tendered as an expert, a Rule 53 report is not required as a condition to the admissibility of his evidence. These agreements between counsel left only the late service of the reports of Ms. Maidment and Ms. Beazley in issue.

9 Rule 53.03 provides that a witness to be called as an expert must be qualified as to their expertise and that they must produce a report conforming to certain criteria.

> 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 required under Rule 50, 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,

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
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. O. Reg. 438/08, s. 48.

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. O. Reg. 348/97, s. 3.

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. O. Reg. 570/98. s. 3; O. Reg. 186/10, s. 4.

10 Rule 53.08 (1) deals with the failure to serve an expert report in accordance with Rule 53.03:

> 53.08 (1) If evidence is admissible only with leave of the trial judge under a provision listed in subrule (2), leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial. O. Reg. 284/01, s. 13.

11 All parties agree that Ms. Beazley would testify as an expert, on a life care plan for Ms. Andreason and the costs of future care. Ms. Maidment also has been tendered by the plaintiffs as an expert. On a separate motion by the plaintiffs under s. 12 of the Evidence Act for leave to call more than three expert witnesses, the defendants have submitted that Ms. Maidment should not be permitted to give expert evidence. I am not deciding that issue at this time. I proceed on the basis that the question on this particular motion is only whether the plaintiffs should be given leave under Rule 53. 08 arising out of the late service of both Ms. Beazley's report of January 7, 2014 and late service of Ms. Maidment's reports of November 15, 2013, December 4, 2013, December 6, 2013 and January 10, 2014.

12 Ms. Beazley first delivered a report dated July 29, 2010, described by the plaintiffs as a "Future Care Costing Report". This was served by the plaintiffs on the defendants in the summer of 2010, approximately 3 1/2 years ago. The affidavit of Lizanne Bienvenue, a law clerk in the office of the plaintiffs' counsel, dated January 14, 2014, states that Ms. Beazley had no contact with Ms. Andreason since the early months of 2010. Ms. Beazley had been advised that she would be called as an expert at trial and believed it would be important to meet with Ms. Andreason prior to the trial. She travelled to Portage La Prairie on New Year's Day, January 14, 2014 to the home of Ms. Andreason's mother, the plaintiff, Deanna O'Neill, and met with Ms. Andreason and Ms. O'Neill. In another affidavit sworn January 12, 2014, Ms. Bienvenue deposes that plaintiffs' counsel understood that Ms. Beazley had had little or no contact with Ms. Andreason since she completed her report of July 29, 2010. "We thought it was important for this Honourable Court to have the most current information concerning Danielle Andreason's present status so the Honourable Court could accurately determine Ms. Andreason's future care needs."

13 Ms. Beazley's report of January 7, 2014 is 24 pages long. Under the heading "Conclusion", is the following:

> "Conclusion
>
> After review of medical documentation since my LCP report dated July 29, 2010 and recent conversations with Danielle and her mother, Deanna, on January 1, 2014, it is apparent that Danielle's functional ability , namely in her ability to sustain steady employment even with the assistance of others. (sic.) Unfortunately at the time of my original assessment, it was my conclusion that Danielle demonstrated abilities at that time plateaued, as per medical documentation, and conversations with her treatment team. And while it seemed that she made significant gains, in actuality, she did not improve anywhere near the degree projected. Danielle is no doubt a person who desperately wanted to project herself as "normal". In her desperate attempt to be "normal" she disbanded her treatment team and negated her rehabilitation; illustrating her inability to understand "cause and effect" - a trait repeatedly noted in her life.
>
> To reiterate, the life care plan should:
>
> * Maximize independence;
> * Enable the individual to live in the least restrictive environment;
> * Minimize medical complications (cost effectiveness of preventative measures); and
> * Plan for productive employment activity, if applicable.

> Danielle's functional abilities have, in many areas, deteriorated, and her independence has been minimized".

14 The report of Ms. Maidment of November 15, 2013, and the reports of Mr. Middleton of November 20, 2013 and of Dr. Goldberg of December 17, 2013, were prepared for the purpose of compliance with Rule 53.03. Plaintiffs' counsel had understood that, as treating health practitioners, it was not necessary for Ms. Maidment, Mr. Middleton and Dr. Goldberg to comply with Rule 53.03. However, that understanding was contradicted by the Divisional Court decision of *Westerhof v. Gee Estate* 2013 ONSC 2093 (Div Ct.), released on June 20, 2013.

15 *Westerhof* held that opinion evidence, including opinion evidence from treating health practitioners, required compliance with Rule 53.03; factual evidence did not.

16 The November 15, 2013 report of Ms. Maidment and the reports of Mr. Middleton and Dr. Goldberg were basically identical in format. Under the heading of "instructions", they state "To assess and treat Ms. Andreason". Under the heading "opinion" they state, "As set out in my reports, indexed and attached as Schedule A". Under the heading "reasons", they state "My opinion is based on my expertise, my assessment of Ms. Andreason and my review of the medical reports indexed and attached as Schedule "B".

17 In the case of Ms. Maidment, Schedule "A" refers to "Case Reports", "School Recommendations" and "Team Meetings" totalling 78 pages. There is nothing listed in Schedule "B".

18 The documents listed in the Schedules of these reports of Ms. Maidment, Mr. Middleton and Dr. Goldberg had been produced to the defendants during the litigation. The names of Ms. Maidment , Mr. Middleton and Dr. Goldberg had not been listed in the plaintiffs' pre-trial brief filed at a pre-trial conference held in May 2012. However, the plaintiffs did state in their pre-trial brief that they intended to call "Several specialists from Winnipeg who treated her (Danielle) over the past 5 years (3 of them)."

19 Ms. Maidment's December 4, 2013 report expressed an opinion as to the life care plan required by Ms. Andreason. The December 16, 2013 report comments on the July 29, 2010 life care plan of Ms. Beazley and a May 9, 2012 life care plan prepared by Sandra Vellone, a rehabilitation vocation expert retained by the City. The January 10, 2014 report expresses an opinion as to the life long supports required by Ms. Andreason.

20 Counsel for the plaintiffs advised in his submissions that he wanted Ms. Maidment to look at the reports of Ms. Beazley and Ms. Vellone and to give her opinion, as an occupational therapist and treatment co-coordinator, on what would work and what would not. Counsel also wanted Ms. Maidment to update her findings on Ms. Andreason because she had not seen Ms. Andreason since

2012. Ms. Maidment interviewed Ms. Andreason and her mother on January 6, 2014 in connection with her report of January 10, 2014. The report was served on that same date, the Friday before the trial was scheduled to begin on Monday, January 13, 2014.

21 The thrust of the plaintiffs' submissions about the late served reports is that there is no prejudice to the defendants.

22 The plaintiffs submit that they will not seek future care damages at trial beyond the costs originally set out in Ms. Beazley's report of July 29, 2010 and that they will not rely on the costing for a life care plan set out in Ms. Maidment's reports. The plaintiffs submit that Ms. Beazley does not recommend anything in her January 7, 2014 report that differs from her July 29, 2010 report. The plaintiffs point to the April 12, 2012 report of Dr. Hawryluk, a neuropsychologist, who will testify at trial, which they say confirms Ms. Beazley's findings. They submit that because the defendants have had Dr. Hawryluk's report for almost two years, nothing which Ms. Beazley states in her January 7, 2014 report should come as a surprise.

23 The plaintiffs submit that Ms. Vellone will be able to comment at trial on Ms. Beazley's new report which they describe as simply updated information.

24 The defendants submit that if it is important for the court to be apprised of the most current information on the plaintiff, it is also important for the defendants to be apprised, in accordance with the Rules, so that the trial can proceed in an orderly manner.

25 The defendants submit that there is no explanation as to why the new reports served shortly before trial could not have been served sooner.

26 The defendants submit that the cumulative effect of service of nine expert reports in the weeks and days before trial, together with the plaintiffs' motions on the opening of trial, combined with the plaintiffs' failure until the last minute to respond to the defendants' requests to provide a witness list and the order in which the plaintiffs' witnesses will testify, has made concentration on the trial difficult and that the defendants have had to react rather than prepare for trial.

27 The Chicoine defendants advise that they wish to refer the new reports of Ms. Beazley and Ms. Maidment to a neuropsychologist and a future care specialist for a paper review, which they have been advised will take approximately three to four weeks. A responding report will be available in approximately six weeks. The Chicoine defendants request that the action be case managed, with the matter returning in eight weeks to be spoken to on issues of further medical examinations of Ms. Andreason and further discoveries and to set a new date for trial.

28 The City requests an adjournment for one or two weeks so that it can present the reports of Ms. Beazley and Ms. Maidment to Ms. Vellone for her review and response.

29 The plaintiffs respond that the trial should not be adjourned, but that if it is, then strict

conditions should be imposed, including allowing the Chicoine defendants, who have filed no expert reports and who have not required any medical examinations of Ms. Andreason during the litigation, to file only a future care cost report, responsive to Ms. Beazley's report. The plaintiffs submit that there should be no defence medical examinations of Ms. Andreason nor any further discovery of Ms. Andreason

Discussion

30 As stated by the Court of Appeal in *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham* [2000] O.J. No. 4428 (C.A.), at para. 38, the purpose of Rule 53.03(1) is "... to facilitate orderly trial preparation by providing opposing parties with adequate notice of opinion evidence to be adduced at trial."

31 In my opinion, the late service of Ms. Beazley's report, on the Thursday before trial, and the late service of Ms. Maidment's reports, the most recent of which was on the Friday before trial, has not given the defendants adequate notice of the opinions that the plaintiff will seek to adduce at trial. Late service has not allowed the defendants to prepare for trial in an orderly manner.

32 I also agree with the submission of the defendants that this late service of the Beazley and Maidment reports has to be reviewed in the context of the cumulative effect of (a) the late service of reports of Dr. Goldberg, Mr. Middleton, Dr. Moazzami and Mr. Berubé, (b) the motions on the morning of the trial and (c) the failure of the plaintiffs to provide a witness list until just before the trial.

33 Although the defendants have agreed that Dr. Goldberg may testify as an expert, and I will accept that agreement, I do not believe that the "report" of Dr. Goldberg or the November 15, 2013 "report" of Ms. Maidment or the "report" of Mr. Middleton comply with the requirements of Rule 53.03 (2.1). These "*pro forma*" documents, which were prepared in an attempt to comply with the decision in *Westerhoff*, in my view fall well short of the letter and purpose of the Rule. In accepting, as agreed by the defendants, that Dr. Goldberg may testify as an expert, I am not to be taken as approving the form and substance of his "report" as being Rule 53 compliant.

34 The plaintiffs, understandably, believed that it was important for the court to have information from Ms. Beazley that was more current than set out in her July 29, 2010 report and that it was important for the court to have information from Ms. Maidment that was more current than what she knew in 2012. However, I agree with the defendants that if it was considered important to the plaintiffs' case that this evidence be adduced, it was also important to the defendants that they have reasonable notice of that current information to be able to fairly answer the plaintiffs 'case.

35 I accept that in much of Ms. Beazley's report she appears to be confirming her 2010 findings and the 2012 findings of Dr. Hawryluk and that the defendants have had Dr. Hawryluk's report and notice of Ms. Andreason's' employment difficulties. However, Ms. Beazley's conclusions in her January 7, 2014 report are, in my view, of justifiable concern to the defendants in preparing to meet

the plaintiffs' case.

36 In comparing her July 29, 2010 conclusions with those after meeting with Ms. Andreason on January 1, 2014, Ms. Beazley clearly states that things have not developed as she had expected for Ms. Andreason; "and while it seemed that she made significant gains, in actuality, *she did not improve anywhere near the degree she projected*." (emphasis added). And further, "Danielle's functional abilities have, in many cases, deteriorated, and her independence has been minimized." If this is the evidence of Ms. Beazley that is now to be adduced in support of the plaintiffs' claims, it is evidence of which the defendants should have had reasonable notice under Rule 53.

37 The plaintiffs submit that the evidence in the reports of Ms. Beazley and Ms. Maidment will not increase the plaintiffs' claim for damages. However, their evidence will most certainly be relied upon to support of the existing claim for damages. Ms. Beazley projects future care costs in her 2010 report at between $1,548,168.22 and $3,584,985.42, dependent on whether the costs are assessed for Manitoba or Ontario and whether they include or do not include Canadian Health Care paid attendant care. The defendants are facing a significant claim for damages based on the evidence of Ms. Beazley and Ms. Maidment.

38 The evidence that the plaintiffs seek to adduce from Ms. Beazley and Ms. Maidment is relevant and probative to the damages. Rule 53.08 is mandatory. Leave "shall" be granted on such terms as are just and with an adjournment if necessary, unless an adjournment would, in this case, cause prejudice to the defendants or cause undue delay in the conduct of the trial. I am satisfied that it would be prejudicial to the plaintiffs to exclude the evidence of Ms. Beazley based on her new findings. It would also be unworkable for her to testify without referencing the recent information she has acquired and her recent conclusions. But, I am also satisfied that it would cause prejudice to the defendants to permit Ms. Beazley and Ms. Maidment to give opinion evidence based on their recent findings and conclusions without an opportunity for the defendants to consider the new reports and to consult with their own experts. I am concerned about the undue delay of a trial that was scheduled far in advance. However, the defendants are not seeking to exclude the evidence on the basis that the trial will be unduly delayed. Rather, they seek the less draconian, and in my view, not unreasonable, remedy of an adjournment, with case or trial management to get this trial back on track.

39 An order shall go:

1. Abridging the time required under Rule 53.03 for service of those expert reports of Lona Beazley, Angie Maidment, Dr. Norman Goldberg, Justin Berubé and Dr. Moazzami to which reference has been made in these Reasons.
2. Granting the plaintiffs leave under Rule 53.08 to tender Lona Beazley, Angie Maidment, Dr. Norman Goldberg and Justin Berubé and Dr. Moazzami as expert witnesses at trial, subject to any ruling on the

plaintiffs' motion to call more than three expert witnesses under s. 12 of the *Evidence Act*.

3. Requiring the defendants to serve within six weeks any expert report on future care costs that they intend to rely upon, responding to those reports of Lona Beazley and Angie Maidment to which reference has been made in these Reasons.
4. Adjourning the trial to a date to be fixed with the Trial Coordinator. If by Thursday, January 30, 2014 the parties are unable to agree on a new trial date they shall attend before me on Monday, February 3, 2014 at 10:00 am to speak to the matter.
5. No further motions may be brought and no further expert reports may be served, other than the future care costs reports referred to in paragraph 3 of this order, without my leave, such leave to be requested on 10 days notice to the other parties.
6. A trial management conference shall be scheduled before me to be held not less than 60 days before commencement of trial.
7. Costs of this motion are reserved, to be spoken to on a date not less than 30 days after the release of my Reasons on the plaintiffs' motion to call more than three expert witnesses under s. 12 of the Evidence Act and the City's motion requesting production of the files of each of the experts that the plaintiffs intend to call at trial and directing the plaintiffs to produce their witness list and order of witnesses.

D.C. SHAW J.

Case Name:

Moore v. Getahun

Between
Blake Moore, Plaintiff, and
Dr. Tajedin Getahun, The Scarborough Hospital-General Division, Dr. John Doe, Jack Doe, Defendants

[2014] O.J. No. 135

2014 ONSC 237

Court File No. 06-CV-321339PD3

Ontario Superior Court of Justice

J.M. Wilson J.

Heard: October 15-17, 21-25 and December 23, 2013.
Judgment: January 14, 2014.

(534 paras.)

Health law -- Health care professionals -- Liability (malpractice) -- Negligence -- Causation -- Error in judgment -- Standard of care -- Particular professions -- Doctors -- Surgeons -- Action by plaintiff against physician to determine liability for personal injuries allowed -- Plaintiff went over handlebars of motorcycle and struck parked vehicle, fracturing wrist -- Defendant physician fitted plaintiff with full circumferential cast -- Following day, plaintiff attended emergency due to pain and swelling and underwent emergency surgery for compartment syndrome -- Physician who fitted cast failed to meet standard of care, as he should have applied splint or bi-valve cast cut to skin -- Circumferential cast caused development of compartment syndrome, as it could not accommodate anticipated swelling from high impact injury -- Ontario Rules of Civil Procedure, Rule 53.03.

Professional responsibility -- Self-governing professions -- Duties -- Duty of care -- Standard of care -- Negligence -- Liability -- Causation -- Professions -- Health care -- Doctors -- Surgeons -- Action by plaintiff against physician to determine liability for personal injuries allowed -- Plaintiff went over handlebars of motorcycle and struck parked vehicle, fracturing wrist -- Defendant physician fitted plaintiff with full circumferential cast -- Following day, plaintiff attended emergency due to pain and swelling and underwent emergency surgery for compartment syndrome

-- Physician who fitted cast failed to meet standard of care, as he should have applied splint or bi-valve cast cut to skin -- Circumferential cast caused development of compartment syndrome, as it could not accommodate anticipated swelling from high impact injury -- Ontario Rules of Civil Procedure, Rule 53.03.

Tort law -- Negligence -- Duty and standard of care -- Standard of care -- Causation -- Action by plaintiff against physician to determine liability for personal injuries allowed -- Plaintiff went over handlebars of motorcycle and struck parked vehicle, fracturing wrist -- Defendant physician fitted plaintiff with full circumferential cast -- Following day, plaintiff attended emergency due to pain and swelling and underwent emergency surgery for compartment syndrome -- Physician who fitted cast failed to meet standard of care, as he should have applied splint or bi-valve cast cut to skin -- Circumferential cast caused development of compartment syndrome, as it could not accommodate anticipated swelling from high impact injury -- Ontario Rules of Civil Procedure, Rule 53.03.

Action by the plaintiff, Moore, against the defendants, Dr. Getahun, Scarborough Hospital, and two unnamed doctors, to determine liability for personal injuries. In 2005, the plaintiff was injured when he lost control of his motorcycle and went over the handlebars, striking a parked vehicle. The plaintiff suffered a high impact fracture to his wrist and other minor injuries. He was taken to the emergency department of the defendant hospital, where the defendant physician applied a full circumferential cast after a partially successful closed reduction. The following day, the plaintiff went to emergency complaining that his cast was too tight and was causing pain and swelling. The attending physician suspected compartment syndrome and removed the cast. An orthopedic surgeon confirmed the diagnoses and performed emergency surgery. The plaintiff suffered permanent injuries to his right arm as a result of the compartment syndrome and the aftermath. The parties agreed on the quantification of damages. At issue was the defendant physician's liability in applying a full circumferential cast to the plaintiff's injury.

HELD: Action allowed. In applying a circumferential cast, the defendant did not meet the standard of care of a reasonably prudent general orthopedic surgeon in 2005 in a community hospital in Ontario. To meet the standard of care, the defendant should have applied either a splint or a bi-valve cast cut to the skin. Before discharging the plaintiff, the defendant failed to adequately educate or warn the plaintiff of the risk of developing compartment syndrome, and he treated his injury as routine. The failure to warn did not, however, impact the issue of causation, as the plaintiff attended hospital the following day. The expert evidence adduced on behalf of the plaintiff established that the application of the closed circumferential cast caused the development of compartment system, as the anticipated swelling from a high impact injury could not be accommodated by that type of cast.

Statutes, Regulations and Rules Cited:

Evidence Act, R.S.O. 1990, c. E.23, s. 52

Ontario Rules of Civil Procedure, Rule 20.05(2)(i), Rule 50.07(1)(c), Rule 53.03, Rule 53.03(2.1), Rule 53.03(3)

Counsel:

J.M. Regan, A.G. Sciacca, for the Plaintiff.

C.B. Kuehl, J.L. Hunter, for the Defendant, Dr. Tajedin Getahun.

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REASONS FOR JUDGMENT

J.M. WILSON J.:--

Overview

1 On November 12, 2005, the plaintiff Blake Moore's motorcycle careened out of control. The plaintiff flew over the handlebars. The plaintiff and the motorcycle hit a parked hummer vehicle causing it to move two feet. The plaintiff suffered a high impact fracture to his right wrist and other minor injuries. He was taken to the emergency department at Scarborough General Hospital - General Division.

2 The defendant, Dr. Tajedin Getahun, applied a full circumferential cast after a partially successful closed reduction.

3 On Sunday November 13, 2005, the plaintiff went to North York General Hospital emergency

department, complaining of increased pain, swelling, and that the cast was too tight. After some initial delay, he was seen by an emergency room physician, who immediately suspected compartment syndrome. He removed the cast and referred the plaintiff to an orthopedic surgeon, who confirmed the diagnosis and performed emergency surgery for the compartment syndrome that had developed.

4 The plaintiff has lasting permanent injuries to his right arm as a result of the compartment syndrome and its aftermath. The parties have agreed upon damages. The issue before me in this trial is the defendant's liability in applying a full circumferential cast to the plaintiff's injury.

5 In the context of this medical malpractice suit, several evidentiary issues arose concerning the admissibility of expert evidence under Rule 53.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Can the report of an expert treating doctor who has died be admitted into evidence for its truth? What are the limits of the admissibility of evidence of treating emergency room physicians? Can they express opinion evidence? Is it appropriate under Rule 53.03 for counsel to review draft reports of experts and provide input to shape expert reports? Can the facts of the case as disclosed in the evidence be put to the expert witness to test opinions? Can issues relating to liability be canvassed with an expert witness in his or her evidence if not explicitly contained in the expert report?

The Issues

6 There are two primary issues to determine liability:

* Whether the defendant met the standard of care of a general orthopedic surgeon in 2005 in a community hospital in Ontario, or whether he was negligent in the advice and treatment he gave and in applying a closed circumferential cast to the plaintiff's wrist in the circumstances of this case.
* Whether the plaintiff has met the onus of proof on a balance of probabilities that the closed circumferential cast caused the compartment syndrome to develop.

7 On these two issues the plaintiff's expert first testified that applying the full circumferential cast in the circumstances of this case fell below the acceptable standard of care. Second, he opined that applying the full circumferential cast to the plaintiff's underlying injury on a balance of probabilities caused the development of the compartment syndrome.

8 The defendant's two experts testified that the application of a full circumferential cast in this case met the standard of care in the community. Further, they testified that the cause of the development of the compartment syndrome was the underlying injury. The application of a full circumferential cast to the plaintiff's high impact injury could aggravate, or exacerbate, the development of compartment syndrome, but the cause of the condition was the plaintiff's underlying injury.

Description of Compartment Syndrome

9 The defendant filed a glossary of medical terms. Compartment syndrome is defined as "a painful condition resulting from the expansion of enclosed tissue within its anatomical enclosure, producing pressure that interferes with circulation and adversely affects the function and health of the tissue itself."

10 Dr. Richards described compartment syndrome as follows:

> The skeletal muscle in the limbs of the human body is contained within fascial compartments. If the pressure in the fascial compartment increases to the extent that the muscle no longer receives a blood supply, the muscle begins to die. The process is called compartment syndrome.

11 Dr. Taylor described the process of developing compartment syndrome and how it becomes irreversible at some point during its development:

> Because the initial injury, whatever the injury happens to be, bleeding or swelling or injuries to the tissues within the compartment, the muscles, that's what begins to impede the circulation of blood through the compartment and that becomes a sort of self-perpetuating process, because as the ... circulation is impeded, the pressure goes up and the veins - or, the capillaries especially dilate, fluid leaks out of the capillaries into the interstitial space which further causes swelling. Because there's more swelling, there's more impediment of the blood flow, so more fluid now leaks out of the capillaries and that's how the vicious cycle ... the muscles and tissues become anoxic, they break down ... and it becomes self-perpetuating. And the only way of stopping a true compartment syndrome is to alleviate that pressure that's built up that's causing the abnormal circulation, and that means doing a fasciotomy.

12 The evidence before me confirms that, once the process of developing compartment syndrome begins, at some point in time the process becomes irreversible. The only treatment to relieve the pressure in the compartment is a fasciotomy, which is cutting the fascia surrounding the compartment to relieve the compartment pressure to avoid muscle necrosis and potential muscle death. All of the experts confirm that time is of the essence once compartment syndrome is diagnosed.

Preliminary Motion as to the Admissibility of Dr. Orsini's Medical Reports

13 Dr. Emil Orsini performed the emergency surgery to treat the plaintiff's compartment syndrome at North York General on Sunday evening on November 13, 2005.

14 The plaintiff subsequently retained Dr. Orsini to provide his expert opinion on the issues of

negligence and causation. Dr. Orsini prepared an expert report dated July 27, 2006 with an addendum outlining his factual findings, observations, and the procedures followed. He was of the opinion that the defendant failed to meet the requisite standard of care in applying a closed circumferential cast for the plaintiff's high impact injury. Significant swelling was to be anticipated and could not be accommodated in a full circumferential cast. Dr. Orsini also gave the opinion that the application of a closed circumferential cast caused the development of the compartment syndrome.

15 Unfortunately, Dr. Orsini passed away prior to this trial. The plaintiff then retained Dr. Robin Richards to review the file and to provide opinions on standard of care and causation. He agreed with Dr. Orsini's opinions.

16 The plaintiff brought a motion at the opening of this trial seeking to admit Dr. Orsini's reports into evidence. The plaintiff made two alternative arguments on this motion. First, Dr. Orsini's reports were admissible under s. 52 of the *Evidence Act*, R.S.O. 1990, c. E.23. Second, the plaintiff argued that the reports were admissible under the principled approach to the hearsay rule. Necessity was met as Dr. Orsini is deceased. Reliability was met because Dr. Orsini examined the plaintiff at the material time, he prepared the reports in a professional capacity, and the defendant could test the reliability of his opinions through cross-examination of a different expert familiar with them.

17 The defence sought to exclude Dr. Orsini's reports which outline the facts and his observations, as well as his opinion as to standard of care and causation. First, the defendant argued that Dr. Orsini's reports were not admissible under s. 52 of the *Evidence Act*. Dr. Orsini's reports were "medical legal" reports because their primary purpose was to provide a legal opinion on negligence and causation. Second, the defendant argued that Dr. Orsini's opinion in his reports was not necessary because Dr. Richards could provide expert opinion evidence on negligence and causation. The defendant challenged the reliability of Dr. Orsini's report as the defence could not cross-examine Dr. Orsini, he was biased because he was the plaintiff's treating doctor, and his reports did not comply with Rule 53.03(2.1) of the *Rules of Civil Procedure*. His reports were written prior to the amendments to Rule 53.03.

18 Dr. Orsini's first report outlined facts that amplified the hospital notes and records as he was the treating surgeon who performed the surgery and he observed the plaintiff at the time these events unfolded. The two reports also contain opinion. I distinguished Dr. Orsini's account of the facts from his opinions in his reports.

19 I ruled at the commencement of the trial that the content of Dr. Orsini's first report outlining the facts and his observations were admissible for their truth. These statements supplement the hospital records admitted into evidence, and appear admissible pursuant to s. 52 of the *Evidence Act*. The defence did not object to this ruling, and during the trial relied on some of the supplemental facts contained in Dr. Orsini's first medical report.

20 I ruled that Dr. Orsini's opinions on standard of care and causation expressed in his reports

were not admissible for their truth as the requirement of necessity had not been met. Dr. Orsini was not available for cross-examination and the plaintiff had another qualified expert, Dr. Richards, available to testify on the issues of standard of care and causation. I conclude that there is no evidence of bias of Dr. Orsini.

21 The various expert reports comment on Dr. Orsini's opinion, as well as his surgical notes and observations. I concluded that Dr. Orsini's opinions on negligence and causation expressed in his reports are admissible as part of the *res gestae* and background, but not admitted for their truth.

22 Another issue arose with respect to the contents of conversations between Dr. Orsini, the plaintiff, and/or the plaintiff's father prior to and immediately following the surgery on November 13, 2005, long before Dr. Orsini was retained as an expert witness. During these conversations, Dr. Orsini clearly and unequivocally expressed his views as to the defendant's negligence and the issue of causation.

23 I conclude that aspects of these conversations containing opinions about negligence or causation are also admissible as part of the *res gestae* but are not admissible for their truth. The conversations about whether a bone graft was required are admissible for their truth as part of the facts and Dr. Orsini's observations, unrelated to opinions on liability.

24 After I outlined my conclusions on the preliminary motion excluding Dr. Orsini's opinion, the plaintiff proposed to call another expert witness who had filed an expert medical report, Dr. William Regan, from Vancouver. Dr. Regan is the brother of plaintiff's counsel. I concluded that his evidence would not help me assess negligence and causation as Dr. Regan was in a position of a potential conflict of interest. Counsel for the plaintiff did not press the issue.

25 In light of my rulings, the defence cannot argue that, as they have two expert witnesses confirming their point of view and the plaintiff only has one witness, the defence position is therefore stronger or should be accepted.

26 In summary, in assessing the issues of standard of care and causation, I will consider the evidence of the witnesses that testified at this trial who were available for cross-examination. I will also consider as evidence admitted for its truth the aspects of Dr. Orsini's reports that include the facts and his observations.

Other Evidentiary Issues that arose during Trial

Appropriate scope of the evidence of the emergency room physician

27 Dr. Russell Tanzer was the emergency room physician at North York General that initially saw the plaintiff on November 13, 2005 at approximately 1:15 p.m. The plaintiff called Dr. Tanzer as a fact witness. Based upon his observations of the tight cast, and after reviewing the X-rays, Dr. Tanzer ordered that the plaintiff's cast be removed at about 1:44 p.m., with the exception of a

supportive slab and the soft roll. He had made the preliminary diagnosis of compartment syndrome and immediately contacted Dr. Orsini to advise him of his diagnosis. Dr. Orsini was the orthopedic surgeon on call for the emergency department.

28 Dr. Tanzer expressed the opinion that the cause of the plaintiff's compartment syndrome was the full circumferential cast that was too tight. He gave evidence of the practice and teaching for emergency room physicians that casts are contraindicated in a high energy injury such as the plaintiff's.

29 He did not file a medical report. The defence challenges all of Dr. Tanzer's evidence including his evidence about practices taught to emergency room physicians in the case of a high impact acute radius fracture and his opinion about causation.

30 There has been considerable commentary over the amended Rule 53.03 and the appropriate scope of treating physician evidence as distinct from expert evidence and general fact evidence.

31 In *Burgess v. Wu* (2003), 68 O.R. (3d) 710, at paras. 80-81, Ferguson J. distinguished between treatment opinions and litigation opinions. Treating physicians provide treatment opinions, which include the diagnosis, treatment plan, and prognosis made at the time of treatment. Experts provide litigation opinions; they "usually involve a consideration of much more information from various sources and are formed for the purpose of assisting the court at trial": at para. 80.

32 In *Beasley v. Barrand*, 2010 ONSC 2095, 101 O.R. (3d) 452 (S.C.), the plaintiff claimed damages for injuries when his motorcycle collided with the defendant's car. The "experts" at issue were three Accident Benefits Assessors retained by an insurer and not by either party. Their reports were not Rule 53.03 compliant. Moore J. ruled that the witnesses must comply with the amended Rule 53.03 or their opinion evidence was inadmissible.

33 In contrast, in *McNeil v. Filthaut*, 2011 ONSC 2165, [2011] O.J. No. 1863, MacLeod-Beliveau J. found that Rule 53.03 must be read in conjunction with Rule 4.1.01. She concluded that both Rule 4.1.01 and Rule 53.03 apply only to experts engaged by or on behalf of a party. Since treating physicians are not engaged on behalf of a party, they are not subject to Rule 53.03 requirements.

34 In *Westerhof v. Gee Estate*, 2013 ONSC 2093, [2013] O.J. No. 3134, the Divisional Court expressly adopted *Beasley* and rejected *Filthaut*. The important distinction is not the witness' role or involvement, but the type of evidence to be admitted. If a party seeks to admit "opinion evidence, compliance with rule 53.03 is required; if it is factual, it is not": *Westerhof*, at para. 21.

35 The Divisional Court clarified at para. 24 that a treating physician's diagnosis may be fact, not opinion, if the purpose of the evidence is to explain the treatment provided. In that context, the diagnosis is a fact and the catalyst for the treatment.

36 In the aftermath of *Westerhof*, there is uncertainty about the appropriate scope of treating physician testimony. This uncertainty requires clarification from a higher court.

37 In her paper "Rule 53 and Treating Practitioners," D. Wilson J. states that there are two key questions in light of the clear disagreement between *Beasley* and *Filthaut*.[1] First, is the application of Rule 53.03 based on the nature of the individual and their relationship to the litigation, or rather the nature of the evidence? *Westerhof* suggests that compliance with Rule 53.03 is required by the nature of the evidence and all opinion evidence, including treating physicians' opinions, must comply with the rule. Second, does the legal distinction remain in Ontario between "treatment opinion" and "litigation opinion," and if it does, is it simply that "treatment opinion" must be fact evidence and "litigation opinion" is opinion evidence? D. Wilson J. confirms that the present caselaw does not provide clear answers to these questions.

38 Asher Honickman and M. Greg Abogado write in the Advocates' Society Journal that *Westerhof* "is currently binding authority in Ontario" but it is "unlikely to be the final word on the matter."[2] They suggest that "the Divisional Court in *Westerhof* took some important strides to restrict the use of opinion evidence, but it went too far in doing so." Treating physicians should be able to offer opinions for the truth of their contents when the opinions are based on the physicians' own observations and rely on the physicians' basic expertise.

39 Dr. Tanzer did not include any details in his notes as the consulting emergency room physician. His notes did not meet the expected standard of care for note-keeping. The defence challenges the reliability of Dr. Tanzer's evidence in its entirety due to the inadequate notes, and alleges that he was biased in favour of the plaintiff.

40 I accept that Dr. Tanzer had a clear, actual memory of the plaintiff's case. He communicated his observations and concerns immediately to Dr. Orsini, who examined the plaintiff and performed the emergency surgery.

41 Dr. Orsini in his inpatient operative report dictated on November 16, 2005 confirms the role played by Dr. Tanzer, as well as his own observations:

> The following day he had increasing pain and came to North York General Hospital and his cast was split by Dr. Russel Tanzer in the Emergency Department. He had really no significant relief of his pain. At this point he had significant pain, numbness and weakness of his entire right hand. He did have hand weakness and numbness following his injury but it had worsened with the tight cast.

42 I conclude that Dr. Tanzer, as the treating emergency room physician, must be able to give evidence in a fulsome, comprehensive manner about his recollection of the steps he took on November 13, 2005, including his observations, diagnosis at the time, the reasons for his diagnosis, and the steps that he took as a consequence of his observations and diagnosis. This fact evidence is

inevitably somewhat blurred with the issue of causation, but is necessary evidence to understand what Dr. Tanzer saw and what he did on November 13, 2005. This approach conforms to the principles in *Westerhof.*

43 I conclude that Dr. Tanzer's observations of the tight cast and the reasons why he cut off the cast are admissible facts for their truth. His diagnosis of compartment syndrome is also admissible for its truth and explains his actions, both cutting off the cast and calling Dr. Orsini to advise of his diagnosis of compartment syndrome and the need for immediate attention.

44 Dr. Orsini's summary of the facts and diagnosis prepared in the usual course and dictated three days after the surgery confirm the facts included in Dr. Tanzer's testimony as well as Dr. Orsini's observations. Both were relied upon by Dr. Richards in forming his opinion on causation.

45 As Dr. Tanzer did not serve a report pursuant to Rule 53.03 of the *Rules of Civil Procedure*, I conclude that he cannot provide opinions on the ultimate issue of causation or standard of care. Therefore, Dr. Tanzer's opinion evidence that the development of compartment syndrome was caused by the tight cast is not admissible.

46 Dr. Tanzer gave further evidence that the taught and established practice for emergency room physicians dealing with high impact fractures of the distal radius is to splint these injuries and never use a full circumferential cast. This evidence is not admissible to establish the standard of care in this case, as he did not file a report in compliance with Rule 53.03. In any event, the standard of practice for emergency room physicians may not be relevant to establishing the standard of care for orthopedic surgeons.

Whether it is appropriate for counsel to review experts' draft reports

47 The defence called Dr. Ronald Taylor to testify as an expert. He filed a first report dated February 10, 2009 and a second report dated September 9, 2013. During his evidence, plaintiff's counsel reviewed Dr. Taylor's file and found notes about a one-and-a-half-hour telephone call that took place on September 6, 2013 between defence counsel and Dr. Taylor. During that phone conversation, defence counsel reviewed Dr. Taylor's draft report dated August 27, 2013 and suggested changes for the final report. Dr. Taylor confirmed that he had sent his draft report "to Lerners for comments." Dr. Taylor said he was happy with his draft report but Lerners made "suggestions" and he made "the corrections over the phone."

48 The plaintiff submits that this phone meeting was improper. It was inappropriate for defence counsel to make suggestions to shape Dr. Taylor's report.

49 Defence counsel's written and oral submissions at the conclusion of the trial suggest that "experts are entitled to prepare draft reports and they are entitled to share those drafts with counsel for comment and discussion."

50 For reasons that I will more fully outline, the purpose of Rule 53.03 is to ensure the expert witness' independence and integrity. The expert's primary duty is to assist the court. In light of this change in the role of the expert witness, I conclude that counsel's prior practice of reviewing draft reports should stop. Discussions or meetings between counsel and an expert to review and shape a draft expert report are no longer acceptable.

51 If after submitting the final expert report, counsel believes that there is need for clarification or amplification, any input whatsoever from counsel should be in writing and should be disclosed to opposing counsel.

52 I do not accept the suggestion in the 2002 Nova Scotia decision, *Flinn v. McFarland*, 2002 NSSC 272, 211 N.S.R. (2d) 201, that discussions with counsel of a draft report go to merely weight. The practice of discussing draft reports with counsel is improper and undermines both the purpose of Rule 53.03 as well as the expert's credibility and neutrality.

Whether expert witnesses should be limited in their evidence to the contents of their reports, or whether they can be questioned as to the facts in the case to test their opinions

53 After completion of the plaintiff's case, but before any of the expert witnesses testified, there was a one-day scheduling delay in the trial. I suggested that the expert witnesses meet or telephone conference to discuss amongst themselves the issues based upon the facts that had emerged during the trial to assess their opinions on liability. The experts could canvass any factual disputes underlying their opinions to try to narrow and clarify issues. Counsel, particularly defence counsel, were reluctant to proceed in this manner.

54 It appears that there is clear authority for such an approach in a variety of interacting rules contained in the *Rules of Civil Procedure*, and in Osborne J.'s report *Civil Justice Reform Project: Summary of Findings & Recommendations* (Ottawa: Queen's Printer for Ontario, 2007).

55 The 2010 amendments to the *Rules of Civil Procedure* introduced the court's power to order opposing experts to meet and confer in order to clarify different interpretations and narrow issues. Osborne J.'s report, *Civil Justice Reform Project: Summary of Findings & Recommendations,* provides the rationale for this amended power at 76-77:

> Expert bias can, I think, best be reduced or somewhat controlled by a "meet and confer" requirement. In its Supplemental Report, the Discovery Task Force proposed this as a best practice where there are contradictory expert reports. The authority to require experts to meet and confer exists in other jurisdictions, including England and Wales, and in Australia under certain circumstances. In Alberta and New Brunswick the court may order experts to meet at the pre-trial stage. British Columbia's Civil Justice Working Group recommended that a case planning conference judge have the authority to order opposing experts to meet to identify areas of agreement or disagreement and narrow the issues.

56 As a result of these recommendations, Rules 20.05(2)(k) and 50.07(1)(c) were introduced to the *Rules of Civil Procedure*. Rule 20.05(2)(k) provides that, if a summary judgment is refused or granted only in part, the court may order the experts to meet to attempt to clarify and resolve issues:

> [T]hat any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,
>
> (i) there is a reasonable prospect for agreement on some or all of the issues, or
> (ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court.

57 Rule 50.07(1)(c) provides that, if the proceeding is not settled at the pre-trial conference, the presiding judge or case management master may "make such order as the judge or case management master considers necessary or advisable with respect to the conduct of the proceeding, including any order under subrule 20.05 (1) or (2)," which is the rule authorizing a court order requiring experts to meet to clarify and narrow issues.

58 Counsel did not wish to pursue my "meet and confer" suggestion, which may not have been realistic given time constraints. This approach is more of a trial management issue. Clearly in this case the parties would have benefited had such a meeting taken place.

59 In the alternative, I suggested to counsel that, if the experts did not meet or discuss matters amongst themselves, after the plaintiff's fact witnesses had testified, it would be helpful to put to each of the expert witnesses an agreed statement of fact or a statement containing factual differences prepared by both counsel to assess the expert opinion expressed in the medical reports in light of the evidence called at trial. The purpose of putting to each expert the facts as disclosed in the trial would be to ascertain whether the facts disclosed in the evidence in any way changed the expert's previous opinions on standard of care and causation as expressed in the reports.

60 Defence counsel strongly objected to this approach and asserted that the defendant was entitled to know the case he had to meet before testifying. If the experts, particularly Dr. Richards, were asked about issues or facts not specifically contained in their reports related to liability, defence counsel required an amended report from the plaintiff's expert and a trial adjournment to obtain further defence expert reports. The plaintiff did not want an adjournment. Therefore, based

upon defence counsel's objections, the plaintiff's counsel agreed that Dr. Richards would limit his testimony in chief to the four corners of his reports.

61 Is this approach limiting the expert evidence what is contemplated by Rule 53.03 of the *Rules of Civil Procedure*?

62 Rule 53.03(3) provides as follows:

> 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. [Emphasis added.]

63 Prior to the amendments to Rule 53.03, the Court of Appeal interpreted the phrase "the substance" of his or her testimony under the old Rule 53.03 in a fulsome, pragmatic manner. In *Thorogood v. Bowden* (1978), 21 O.R. (2d) 385 (C.A.), a personal injury action, the expert's report indicated that the injuries would manifest in more intensive symptoms later in life. At trial, the expert testified about the possibility of arthritis and the future need for an artificial hip. The defendant argued on appeal that the expert raised matters outside the substance of his report. The Court of Appeal dismissed the appeal and stated the following at p. 386:

> We interpret the law with respect to medical reports to be that a medical expert is not to be narrowly confined and limited to the precise contents of his report, but he has a right to explain and amplify. What was done here ... was to expand on what was latent in the medical report, and it did not open a new field. [Emphasis added.]

64 *Thorogood* was applied in *Auto Workers' Village (St. Catherines) Ltd. v. Blaney, McMurtry, Stapells, Friedman*, [1997] O.J. No. 2865 (Ct. J. Gen. Div.). The plaintiff argued that the solicitors were negligent and caused the plaintiff damages in connection with a condominium project. Quinn J. ruled that the expert on condominium development could not testify about whether a particular clause was void, as the opinion was not stated in his report. The opinion entered a new field that was not latent in the expert's report.

65 The Court of Appeal again considered the meaning of "substance" under Rule 53.03 in *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97. The Court of Appeal referred to *Thorogood* and *Auto Workers' Village* at para. 36 and stated the following at para. 38:

> [W]hile testifying, an expert may explain and amplify what is in his or her report but only on matters that are "latent in" or "touched on" by the report. An expert may not testify about matters that open up a new field not mentioned in the report. The trial judge must be afforded a certain amount of discretion in applying rule 53.03 with a view to ensuring that a party is not unfairly taken by surprise by expert evidence on a point that would not have been anticipated from a reading of an expert's report. [Emphasis added.]

66 After the amendments to Rule 53.03, *Auto Workers' Village* and *Marchand* were applied in *Klitzoglou v. Cure Estate*, 2012 ONSC 3411, 2012 CarswellOnt 7377, at paras. 7-8: see also *Lee (Litigation guardian of) v. Toronto District School Board*, 2012 ONSC 3266, [2012] O.J. No. 2480, at para. 28; *Elbakhiet v. Palmer*, 2012 ONSC 2529, [2012] O.J. No. 4470, at para. 106; and *Hoang (Litigation guardian of) v. Vicentini*, 2012 ONSC 1358, [2012] O.J. No. 889, at para. 8.

67 Inevitably, a report is a summary, and cannot be a complete rendition of all of the evidence. In this case, plaintiff's counsel capitulated to the defence arguments to avoid a possible adjournment. As a result, Dr. Richards' testimony was strictly limited, at least in chief, to the four corners of his report.

68 Interestingly enough, defence counsel did not follow the same rules when it came to questioning their own experts. Notwithstanding their position limiting the scope of Dr. Richards' evidence, I allowed defence counsel to explore facts and issues not directly contained in the defence expert reports that were latent in their reports, with a possible right of reply evidence by Dr. Richards.

69 In my view, the meaning of "substance of the report," "latent in a report," or "touched upon" must be interpreted in a robust, practical fashion to ensure the trier of fact has the full benefit of the expert's opinion, without raising completely unrelated, new issues that would take the opposing party by surprise. Certainly the facts as they evolve in a trial both agreed to or in dispute should be presented to the expert witnesses, whether or not they were specifically referred to by the expert in his or her report. If the factual underpinnings of the expert opinion are not born out in the evidence, the validity of the expert opinion is weakened or nullified.

70 I disagree with defence counsel's submissions strictly limiting Dr. Richards' evidence to the content of his written reports. I agree with their more liberal approach in questioning their own expert witnesses.

Should an expert's evidence-in-chief include his or her written reports?

71 Defence counsel also objected to the experts' written reports being admitted for their truth as exhibits in evidence. Copies of the reports were filed as lettered exhibits and available to me as an "aide" to assist in following the evidence, but not admitted into evidence as exhibits. The oral evidence was not necessarily as clear or complete as the written reports, making my task to fairly

summarize the expert evidence challenging. Does the common law rule, that an expert has the option of filing his report or testifying at the trial, continue after the amendments to the *Rules of Civil Procedure*? Should experts be allowed to prepare affidavits affirming their reports so the report can be admitted as evidence to both streamline trial process and assist the trier of fact in understanding and assessing the evidence? Are there different considerations in judge alone trials and jury trials? If there are differences or omissions between the expert report and the expert evidence, how are the differences or omissions to be treated?

72 I conclude that the defence approach dilutes the intended effect of Rule 53.03 to ensure that expert opinions are clearly and neutrally presented to the trier of fact. This issue is properly a matter for the Civil Rules Committee, or a higher court.

73 In any event, in light of defence counsel's insistence, I considered only the *viva voce* of the expert witnesses for its truth. However, where there was a conflict between the evidence at trial and the contents of the expert report, or if there were omissions in the expert report compared to the evidence given at trial, I conclude that the contents of the expert's report were admissible and relevant to assess the reliability and credibility of the expert's opinion.

Findings of Credibility of Witnesses other than Experts

The plaintiff

74 The plaintiff's actions performing wheelies on November 12, 2005 were admittedly stupid and irresponsible. However, the plaintiff presented as a quiet, stoic, young man. Evidently he has matured since the accident. He worked as a referee, completed first aid courses, and had experienced sports injuries before the date of this accident.

75 The plaintiff did not exaggerate and was not cross-examined in any significant way on his version of events. Some of his sequence of events or timing may not have been correct, and I will note these errors in my outline of the facts. However, I accept the substance of the plaintiff's evidence as to his condition, complaints, and conversations with the defendant on Saturday November 12, 2005. As well, I accept his evidence of his condition as it progressed on November 13, 2005. I accept his evidence of his interaction with the nurses and doctors at North York General Hospital on Sunday November 13, 2005.

76 Where there is a difference between the evidence of the defendant and the plaintiff, apart from perhaps the sequence of events, I accept the plaintiff's evidence as he remembers vividly this traumatic event in his life. As I will outline, the defendant's memories of treating the plaintiff are quite limited.

The plaintiff's father

77 The plaintiff's father was obviously devastated by the plaintiff's injury. The father blames

himself for not taking the plaintiff to the hospital sooner on November 13, 2005 and for not taking his son's complaints more seriously. Clearly nothing was his fault. The father was credible and straightforward in giving his evidence. The defence did not challenge the credibility of his evidence.

78 The father confirms the content of the conversations with the defendant on November 12, 2005, and the defendant's advice after the cast was applied. He also confirms that the plaintiff complained of continued pain, numbness, and swelling after the application of the cast. The father had a conversation with Dr. Orsini after the surgery. I accept his evidence on the content of that conversation as accurate and reliable and it is admissible as part of the *res gestae.*

The defendant

79 The defendant had recently qualified as an orthopedic surgeon in 2005. He received his certificate for practice as an orthopedic surgeon in August 2005, and was admitted by the Royal College of Physicians and Surgeons. The defendant's first job as a qualified orthopedic surgeon was at Scarborough General Hospital commencing August 5, 2005. The defendant was granted courtesy privileges effective August 5, 2005 at Scarborough General including emergency coverage and operating room time for both emergency and elective surgery.

80 The defendant presented as a pleasant, intelligent doctor who gave his evidence in a low-key manner and did not exaggerate what he actually recalled. The defendant had limited memory of meeting and interacting with the plaintiff, described as "flashes." He largely relied on his notes and his usual practice, which I accept as accurate evidence as to what he observed and what he did. It seems clear that the defendant treated the plaintiff's injuries as a routine matter, which may explain why he has limited memory of what transpired.

Dr. Tanzer

81 Dr. Tanzer was the emergency room physician at North York General Hospital. He has 30 years of experience. The defence challenges his evidence and alleges that he is biased in favour of the plaintiff. Counsel points out that Dr. Tanzer's emergency room notes were inadequate, which he acknowledged. Dr. Tanzer testified that he had clear memories of this case as compartment syndrome is an important diagnosis with potentially devastating consequences.

82 I criticize Dr. Tanzer for his inadequate note-taking at the time of these events. Had he taken careful notes, this would have aided both parties in assessing their case.

83 Dr. Tanzer confirmed that the diagnosis of compartment syndrome is one of the true medical emergencies, where correct early diagnosis can make a difference. He likened the importance of early diagnosis of compartment syndrome to the importance of early diagnosis of a heart attack, or an ectopic pregnancy. Dr. Tanzer explained that the time for making notes would be after the events at the end of the day. In this case, by that time, he had made his diagnosis of compartment syndrome, which Dr. Orsini had confirmed, and he knew that the plaintiff was booked for

emergency surgery. This does not excuse the absence of notes, but perhaps explains it.

84 Notwithstanding the limited note-taking, I accept Dr. Tanzer's evidence. He had clear memories of his interaction with the plaintiff and what transpired. As he said, emergency room physicians do not see compartment syndrome very often. He made his observations of a tight cast, sent the plaintiff to X-ray on an urgent basis, split the cast, and contacted Dr. Orsini immediately to confirm "we had a compartment syndrome." His evidence of the sequence of events and observations are confirmed in Dr. Orsini's hospital notes, prepared three days following the surgery, long before this lawsuit was contemplated. Dr. Tanzer did his job as an emergency room physician, in spite of inadequate note-taking. His evidence was credible, not exaggerated, and made sense.

85 I do not accept the defence suggestion that Dr. Tanzer was biased as a treating physician. He saw the plaintiff briefly over a 45-minute period and had never met the plaintiff before. The fact that Dr. Tanzer met with plaintiff's counsel in the presence of the plaintiff a few days before the commencement of this trial does not undermine Dr. Tanzer's credibility, and does not support a finding of bias.

Ms. Wilson

86 Ms. Mazie Wilson was the triage nurse who saw the plaintiff when he came to the emergency department of North York General on November 13, 2005. She has no recollection of seeing the patient and interpreted her notes for the court. I accept Dr. Tanzer's evidence that she missed the diagnosis of compartment syndrome as the patient was not moaning or writhing in pain.

Factual Events leading to the Application of the Cast

87 Dr. Richards testified that, when he interviewed the plaintiff, the plaintiff confirmed that at the time of the accident he had completed his grade 12 education, had studied for two years in the police foundation, and was an electrical apprentice.

88 On November 12, 2005, the plaintiff, age 21, and his friends were out on a fine day for a motorcycle ride from Hamilton to Toronto. At the end of their ride, one of the plaintiff's friends studying film wanted to videotape his other friends performing tricks on their motorcycles for a school project. They went to a parking lot behind a Scarborough hockey arena to perform stunts while being videotaped.

89 The plaintiff described doing slow "safe" wheelies on his motorcycle. Clearly, there is no such thing as a safe wheelie. As there was uneven ground, the plaintiff's motorcycle got caught in a rut while the plaintiff was on one wheel. He lost control of the bike. He fell on the accelerator of the motorcycle and it sped out of control, travelling at an estimated 40 to 50 km per hour with the plaintiff holding on to the handlebars. The plaintiff's motorcycle hit one of the two vehicles in the parking lot, a hummer, causing the hummer to displace two feet. The plaintiff turned his head to avoid injury and impacted the hummer primarily with his right wrist. He also experienced minor

injuries to his left shoulder and ankle. His motorcycle was a write-off for insurance purposes.

90 The observers in the parking lot called 911. The fire department and ambulance arrived shortly thereafter. The paramedic confirmed that the plaintiff had a right wrist injury. The plaintiff was placed on a stretcher, after his right wrist was put in a temporary support, and was taken to the Scarborough General emergency department. The paramedic's notes of the incident describe the accident and confirm that the right wrist was "swollen with altered sensations" (emphasis added).

91 A nurse at Scarborough General saw the plaintiff at 2:06 p.m. The plaintiff complained of pain and the nurse observed swelling in the wrist area.

92 While at the hospital, he was questioned by the police and charged with dangerous driving. The plaintiff acknowledged to his father later that day that his actions were stupid.

93 The plaintiff did not remember seeing another doctor before he met with the defendant. The plaintiff was probably mistaken. He probably met with the emergency room physician, Dr. Jyu, who called the defendant to come to the emergency department to see the plaintiff. Dr. Jyu prescribed various pain medication including intravenous morphine, gravol, and intramuscular torodol. Dr. Jyu's medical records were before the court but he did not testify. Dr. Jyu's notes do not indicate a time that he met with the plaintiff; whether the plaintiff or a nurse provided Dr. Jyu with the information recorded in the hospital record; or whether in the circumstances he may have directly contacted the defendant, who was the orthopedic surgeon on call.

94 The defendant was one of five orthopedic surgeons who performed call service for the Scarborough General emergency department. He was on call on November 12, 2005. The defendant confirmed that Dr. Jyu contacted him to come and see the plaintiff.

95 The defendant had very limited specific recollection of treating the plaintiff on November 12, 2005.

96 When asked in chief about his independent recollections of this meeting with the plaintiff, the defendant stated that he did "not remember all the details" but is assisted by his notes. His evidence was largely what he would have done, as opposed to a specific memory of what he did.

97 The defendant prepared notes of his involvement with the plaintiff on November 12, 2005 at 5:30 p.m. The defendant did remember what he described as flashes of detail, such as discussing motorcycles and cars and that the plaintiff waved goodbye after treatment with his hand elevated. The defendant relied upon his notes and his usual practice to provide evidence of what he would have done and the treatment rendered.

98 His notes of the initial contact with the plaintiff provide as follows:

> 20 yo (year old) (male) RHD (right had dominant) pHx (Past history): (R) (right)

shoulder stabilization meds (none) NKDA (No known drug allergies)

RFR (Reason for referral): (R) (right) DR (distal radius) # (fracture)

HPI (History Presenting Illness): Riding motorcycle today, collided with parked car, (no) L.O.C. (loss of consciousness), (no) HI (head injury) (no) bleeding, c/o (complaint of) (R) (right) wrist pain and left ankle pain.

O/E (on examination): NAD (no apparent or acute distress), A + O (alert and oriented) x3 (time, space & person)

Seen by ER (Emergency) physician and cleared

RUE (Right Upper Extremity) (no) shoulder tender, mild tender (R) (right) elbow

+ swollen, deformed (R) (right) wrist, global numbness fingers

Motor ulnar/median/radial, pulses vv, cap refill (capillary refill) v

X-ray: (R) (right) DR (distal radius) # (fracture), displaced

Procedure: Hematoma block, CR (closed reduction), SAC (short arm cast)

99 The plaintiff described the accident to the defendant. The plaintiff described a lump on the right side of his hand the size of a toonie, approximately one half inch high.

100 I accept that this lump was the distal radius that had been displaced. I also accept the plaintiff's evidence that, in addition to the lump of bone, there was noticeable swelling in the right wrist area as had been confirmed by the paramedic and the admitting nurse.

101 The defendant's notes confirmed that the plaintiff collided with a parked car and that he complained of right wrist pain. His initial observations confirm that the right wrist was described as "+ swollen" with "deformed" right wrist and "global numbness fingers."

102 The plaintiff testified that, when the defendant examined him, he complained of pain all

around his wrist, numbness, and pins and needles, particularly on the right side of his palm and his pinky and ring fingers. The plaintiff found these symptoms scary and alarming. The plaintiff testified that the defendant told the plaintiff that it was normal to have pain, numbness, and pins and needles with a high impact injury. The defendant suspected a broken wrist.

103 The defendant testified that this was a concussive type of injury from hitting the hummer vehicle, and the global numbness was not in keeping with nerve damage *per se*.

104 The defendant examined capillary refill to ensure that the blood supply to the fingers was normal.

105 The plaintiff was sent for X-rays. After the initial X-rays were done, the defendant confirmed that the wrist was broken, there were two major bone fragments, and the fracture was into the joint. The plaintiff testified that the defendant told him that the impact was so great that the plaintiff's hand had been pushed back into the wrist and that one bone had been pulverized into tiny fragments, almost like a crush to dust.

106 The experts relied on the X-rays to describe the injury as a dinner fork fracture. The radius bone was significantly displaced by over one centimeter. There were two large fracture fragments, including the styloid of the distal radius and the lunate facet.

107 The plaintiff complained of pain and asked for further medications. Pain medications were injected into the intravenous bag.

108 Next in the sequence of events, the defendant performed a closed reduction to the wrist. The reduction of displaced fractured bones involves a series of manipulations. The reduction ideally aligns the bones into the correct anatomical position, after injecting a hematoma block to freeze the joint area.

109 The plaintiff and the defendant disputed whether one or two attempts at the reduction took place.

110 The defendant acknowledged in his examination for discovery that he had no specific memory of the treatment that he gave, and testified as to his usual practice. He testified that there was only one reduction performed, but that given the manipulations on two planes the plaintiff could have mistaken it for two reductions.

111 The plaintiff remembered vividly that he was told that the reduction was going to "hurt like hell." He was told on two occasions to count to 20 as the defendant performed the maneuvers to perform the closed reduction. The first attempt was unsuccessful. The defendant was frustrated and winded after the first failed attempt. The plaintiff testified that the defendant said "you're going to hate me now, because we're going to have to do it one more time."

112 Dr. Taylor confirmed that it is not uncommon to have to perform more than one attempt for a closed reduction. The experts assumed in their reports that there was a difficult reduction with two attempts to perform the closed reduction to align the bones. The experts agree that to perform a closed reduction requires considerable force.

113 I accept the plaintiff's evidence that it was necessary to perform the closed reduction twice, as he has a clear memory of the events.

114 The plaintiff testified that the swelling and pain became significantly worse after the closed reduction. The plaintiff testified that his wrist was uniformly swollen and he was in a lot of pain.

Application of the Full Circumferential Cast after the Closed Reduction

115 After performing the closed reduction, the defendant told the plaintiff that his wrist was set, and that he was going to cast him. The defendant then applied a closed circumferential cast to the plaintiff's right lower arm. There is no evidence before me of the exact measurements of the cast, but it did not cover the entire forearm.

116 The defendant acknowledged in cross-examination that he applied a full circumferential cast in this case, as that was his standard practice in all situations:

> Q. All the fractures of this type you told us about all the fractures you saw coming out of the canal in Ottawa and all the fractures you have seen wherever you have been, you put casts on them?
> A. Yes.
> Q. Because that is the general way in which you do it?
> A. That's the way I have done it. That's the way I was trained. That's my experience yes.
> Q. Okay, so rather than look at the individual and what injury that person had individually and the type of complaints that person has individually, really what you're doing is putting that individual into your normal practice with everybody? Is that right?
> A. My normal practice is to cast distal radius fractures after I reduce them, so yes.
> Q. You wouldn't do anything different with say, a person under the age of 35 with a high energy injury that's male? You wouldn't reconsider that person compared to someone else?
> A. Not in this setting, no. [Emphasis added.]

117 The defendant acknowledged that his choice of the full circumferential cast did not take into account the plaintiff's age, sex, or the fact that this was a high impact injury.

118 Before the plaster was applied, the plaintiff confirmed that the defendant had wrapped a soft cottony material around his arm like a tensor bandage. The plaintiff described the cast application

like putting on pieces of paper mâché, with the application of strips followed by an Indian sunburn-type motion.

119 The defendant did not recall putting the plaintiff's cast on, but he knew that he did it. The defendant then described his usual procedure in applying casts. The defendant said that he normally would put on two rolls of web roll, but that he probably put on three rolls in this case. I find that he has no specific memory of how many web rolls he applied to the plaintiff.

The Second Set of X-rays taken after the application of the Cast

120 After the cast was applied, further X-rays were taken to review the status of the plaintiff's wrist after the closed reduction. It appears that the defendant correctly ordered two X-rays of both relevant views. Scarborough General Hospital initially produced only one X-ray. The radiologist's report dated November 12, 2005 however confirms that two views were taken once the cast had been applied.

121 The X-rays taken after the cast was applied clearly confirm that the distal radius styloid was successfully anatomically aligned after the closed reduction, but that the lunate facet fracture piece was not. The experts agree that the post-reduction X-rays after the cast was applied confirm that the lunate facet was not aligned, was depressed, and located in the articular area below its correct anatomical position. After the closed reduction, the lunate facet bone fragment was rotated 180 degrees.

122 The defendant testified that the lunate facet was comminuted, that is, the bone was compressed and crushed into many fragments.

Discussions of Treatment Options that took place after the Cast was applied and the Second Set of X-rays was Available

123 I accept the defendant's evidence that, after receipt of the second set of X-rays, the primary discussions about treatment options took place. Some discussions took place initially with the plaintiff alone, and later with the plaintiff and his father. There may have been some preliminary discussion between the defendant and the plaintiff alone about potential surgery options after receipt of the first set of X-rays before the cast had been applied.

124 This finding as to the sequence of events is not based specifically upon the defendant's actual memory. Rather, it is based on the defendant's notes and the experts' descriptions of the logical sequence of events that would take place.

125 Logically, the treatment options would be discussed after the results of the closed reduction were known. The father confirmed that treatment was discussed after he arrived at the hospital when his son was sitting in a wheelchair, after the cast had been applied. The X-rays were available and shown to him during this discussion.

The Defendant's Evidence about Treatment Options after the Cast was applied

126 The defendant's notes about treatment options discussed on November 12, 2005 are outlined as follows:

> Post - X-rays: Good alignment, comminuted lunate Fossa with lunate depression
>
> D/W (discussed with) Patient and Father diagnosis, recommended Ex-Fix (external fixator) and pins with +/- (possible) ICBG (iliac crest bone graft). Patient and Father would like to be treated at North York Hospital by Family orthopedic surgeon.
>
> P (Plan) - F/U (follow up) Dr. Ali 1/52 (1 week) or North York.
>
> Getahun
> Signature of Consultant

127 The defendant confirmed that he discussed with the plaintiff a procedure, apart from the external fixation, to take some bone from the hip to reconstruct the wrist to fill the void created by the crushed bone. The defendant testified that he could not know definitively whether the bone graft was necessary until the surgery began. The defendant did not have a specific memory of this discussion, but described "bits of memory." He remembered that they decided they did not want him to proceed with the surgery. The plaintiff and the father wanted Dr. Orsini to treat the plaintiff at North York General Hospital.

128 The defendant testified that he confirmed with the plaintiff that he was available to do the surgery the night of November 12, 2005. He had confirmed that the operating room and necessary machines were available.

129 The defendant testified that he advised, if the plaintiff was unable to get a second opinion or if he was unhappy with that opinion, that either he or his partner, Dr. Ali, could perform the surgery on Wednesday November 16, 2005.

The Plaintiff and the Plaintiff's Father's Evidence about the Recommended Surgery

130 The plaintiff testified that, after reviewing the second X-rays, the defendant confirmed that he was happy with how the wrist was set. However, the defendant told the plaintiff that he would need surgical fixation to stabilize the still displaced fracture in the wrist by wires and supports inserted on two planes: one horizontal and one vertical.

131 The defendant also told the plaintiff that he recommended taking a piece of bone out of the hip to insert into the wrist, and that the function of this bone graft was to increase mobility in the wrist.

132 The plaintiff was concerned about the defendant's youth and lack of experience. Before his father arrived at the hospital, the plaintiff asked the defendant how long he had been qualified as an orthopedic surgeon. The defendant told him that he was a first-year specialist with one year's experience, or that he was in his first year of practice as a specialist. In fact, the defendant had been working as a qualified orthopedic surgeon for less than four months.

133 The plaintiff understood that the defendant could do the surgery that night or the next day.

134 The plaintiff's evidence is that the recommended bone graft seemed like a "big ordeal." It was the recommendation for the bone graft that primarily caused hesitation and concern for both the plaintiff and his father. The plaintiff testified as follows:

> A. No, like I said, the surgery was discussed before he reduced my wrist.
> Q. Whenever it was discussed, the thing that stuck out in your mind was the possibility that you're going to have a graft done?
> A. What stuck out in my mind the fact that it seemed like a very big ordeal. I still am not too sure what bone graft means, but I just remember the idea of taking a bone out of my hip, placing it in my arm, then having all these other bars put on my arm. It seemed like a pretty serious ordeal.
> Q. Right. So, taking the bone from your hip and putting it in your arm, that possibility sticks out in your mind still today?
> A. Yes, it does.
> Q. Rather like the possibility that your arm might be amputated when you talked to Dr. Orsini, sticks out in your mind today.
> A. Yes, it does.

135 When the plaintiff's father arrived at the hospital, the plaintiff was having the cast applied. When the plaintiff returned to the waiting room with his cast before the defendant arrived, the father spoke briefly with the plaintiff about how the accident happened. The defendant arrived and introduced himself as "Dr. Tajedin," using his first name.

136 The father testified that the defendant told the father that he had been a doctor for about five years. The defendant recommended that his son have an operation taking a piece of bone from his hip to put into his wrist to give him a larger range of motion.

137 The father did not remember any discussion about surgery being necessary for external pinning. He remembered that the defendant told him that he had set the wrist. The father understood, from what he had been told by the defendant, that the bones were in place as well as they could be, and the suggested bone graft surgery was to increase the range of motion in the wrist.

138 I accept the evidence of the plaintiff and the plaintiff's father that the concerns triggering the request for a second opinion were the defendant's youth and inexperience, and the apparent "drastic" nature of the recommended bone graft. The father's brother has cancer. He has learned through helping his brother the importance of a second opinion about recommended treatment.

139 The father did not remember any discussion about the necessity of external fixation. This part of the conversation may well have taken place with the plaintiff alone. Alternatively, the father forgot this aspect of the recommended treatment as he was told that the wrist was set and the proposed bone graft was the primary concern generating the desire for a second opinion.

140 The plaintiff in his father's presence asked the defendant how much time he had to make a decision about the proposed surgery. The plaintiff wanted to get a second opinion from Dr. Orsini, who had performed surgery on the plaintiff's brother. The plaintiff had experienced other sports injuries and had been treated at North York General. He felt comfortable being treated there.

141 The defendant told the plaintiff in his father's presence that he had one week to get another opinion and proceed with the surgery.

The Recommended Bone Graft

142 There is a dispute between the evidence of the plaintiff, the plaintiff's father, and the defendant about whether a clear recommendation was made to have the bone graft surgery, or whether this was only a possible recommendation and an option to increase range of motion.

143 The defendant's notes about discussed treatment options stated, "recommended" external fixator "and pins with +/- ICBG (iliac crest bone graft)." The defendant indicated that the symbol "+/-" means "possible." The defendant has no recollection of the specifics of any conversation that took place.

144 I find that the plaintiff and his father understood that the recommended bone graft was a firm recommendation for treatment, but perhaps the defendant viewed the procedure as only a possible course of conduct.

145 I do not agree with the defence counsel's suggestion that the plaintiff's evidence was that the bone graft surgery was merely possible. The word "possibility" was in counsel's question, not in the plaintiff's response.

> Q. Whenever it was discussed, the thing that stuck out in your mind was the possibility that you're going to have a graft done?
> A. What stuck out in my mind the fact that it seemed like a very big ordeal. I still am not too sure what bone graft means, but I just remember the idea of taking a bone out of my hip, placing it in my arm, then having all these other bars put on my arm. It seemed like a pretty serious ordeal.

146 If the defendant viewed the bone graft as only a possible recommendation, I find that it was not adequately explained to the plaintiff and his father. It was this aspect of the procedure that seemed drastic and was the plaintiff's primary concern.

The Plaintiff's Symptoms at Discharge and the Instructions Received for Care

147 After putting on the cast, the defendant performed an examination to ensure adequate circulation by pressing down on the plaintiff's fingernails and releasing pressure. The plaintiff agreed in cross-examination that this examination was thorough.

148 The plaintiff complained of extensive pain both after the closed reduction and after the cast had been applied that was not diminished or relieved by putting on the cast. The plaintiff continued to complain of numbness after the cast was applied. When the plaintiff asked the defendant about the degree of swelling and pain he was experiencing, the defendant told him that this was normal or standard for high impact injuries, especially after reduction.

149 The defendant told him that continued numbness and pain were normal for two to three days after the cast had been put on. If the numbness and pain continued after two to three days, the defendant advised the plaintiff that he should get the situation checked out. The father confirmed that the defendant told the plaintiff to take pain killers. If there was still numbness and swelling by Wednesday, the defendant told the plaintiff to return to the emergency department.

150 The defendant acknowledged that a cast could become tight after it is applied due to increased swelling, and this was a very common occurrence. In the fracture clinic, complaints of casts being too tight are the most common presentation. The solution is to split or bivalve a cast that is too tight.

151 Before the plaintiff left the hospital, the cast technician asked him how the cast felt. The plaintiff responded that he was in a lot of pain and that he "couldn't really feel much of anything. It was just really sore." He could feel the cast, but did not know if the cast was too tight or not, as his focus was on the pain.

152 The plaintiff testified that the defendant told the plaintiff to ensure that the cast was kept clean and dry, to keep the arm elevated, and to read the pamphlet provided about cast care. The father confirmed this advice. The plaintiff did not remember being told to keep his fingers moving. The plaintiff did remember being told to keep the arm elevated, and to use pillows at night to support and elevate the arm.

153 The defendant confirmed the plaintiff's evidence, but added that he told the plaintiff to keep his fingers moving.

154 The plaintiff knew to be concerned if swelling got worse, but he was told to expect continued swelling and pain for two to three days. The plaintiff knew that if the cast was too tight he should go

to the emergency department to get it checked.

155 The plaintiff was given a pamphlet about cast care. He read the pamphlet, which provides as follows:

> Your cast is made either of plaster or fibre-glass (a special material that is stronger and more durable).
>
> * A plaster cast takes 2 days to dry.
> * If you have a plaster walking cast, DO NOT walk on it for 2-3 days.
> * You may walk on the fiberglass cast right after it has been applied.
> * Your cast may be left on anywhere from one to five weeks. Your doctor will tell you when it will be removed.
> * You may need aids such as a cane or crutches. These can be purchased at the hospital or through a local health care merchant.
> * Bring your walking aid with you to each clinic visit.
>
> CAST CARE
>
> * Keep your cast dry.
> * DO NOT put your cast into water.
> * DO NOT use anything to scratch under the cast. DO NOT stick anything inside your cast. This may damage your skin and could cause an infection.
> * DO NOT remove or adjust the padding under the cast.
> * Never trim the cast yourself.
>
> If you shower:
>
> * Wrap a towel around your cast, then wrap the cast in a double plastic bag, and tie the top end securely.
>
> TO PREVENT SWELLING
>
> * If you are sitting or lying down, raise your arm or leg with the cast as much as possible in the first few days.
> * Move your fingers or toes often to reduce swelling and to prevent your joints from becoming stiff.

CAST REMOVAL

The cast must be removed in the clinic unless you have been told otherwise by your doctor.

CALL THE FRACTURE CLINIC OR GO TO YOUR NEAREST EMERGENCY DEPARTMENT:

* If the swelling is severe or your fingers or toes are blue.
* If you have severe pain.
* If your fingers or toes are tingling or feel numb ("pins and needles"), or you are unable to move your fingers or toes.
* If you have a burning feeling and a foul smell or drainage from the cast.
* If the cast feels too tight or snug.
* If the cast breaks or becomes very loose.

156 The plaintiff testified that, when he left the hospital in the evening of November 12, 2005, he was in severe pain and he was experiencing swelling and tingling on the right side of his palm, pinky finger, and ring finger. He confirmed his symptoms with the defendant. The plaintiff testified that the amount of pain was alarming to him after the cast had been put on. However, the defendant told him on two or three occasions that the pain and swelling were normal for this kind of injury and that the symptoms would last for two to three days.

157 The plaintiff and his father waited for approximately one hour to get the disk with the hospital chart and X-rays to take to Dr. Orsini. The equipment for burning the disk was malfunctioning so the plaintiff and his father returned home without the disk. The father intended to return the next day to get the disk, in anticipation of an appointment with Dr. Orsini probably on Monday November 14, 2005.

No Specific Warning of Compartment Syndrome

158 Prior to leaving the hospital, the evidence is clear that there was no discussion between the defendant and the plaintiff about possible compartment syndrome, or the serious ramifications that could occur after a high impact injury such as his.

159 It is clear that the defendant gave the standard instructions about cast care to the plaintiff (to keep the cast clean and dry so it could do its job) and provided the hospital pamphlet. No one reviewed the pamphlet with him, but the plaintiff did read the pamphlet.

160 The plaintiff was not told that he was at increased risk of complications from his high impact

injury. The plaintiff's evidence was that, if he had been advised that he could or would have serious complications from delayed surgery, that information would or could have affected his decision not to have the surgery that night.

161 It is clear that the plaintiff and his father were not educated about any special risk applicable to the plaintiff's situation as a young man who had a high impact injury with surgery contemplated. The plaintiff was told in his father's presence to expect continued pain and swelling for two to three days. The plaintiff understood that he had a week to get a second opinion about the surgery. He did not understand that there was any urgency beyond the one-week limit to have the surgery.

Factual Events after the Plaintiff left the Hospital and on November 13, 2005

162 The father filled the prescription for Tylenol 3. As instructed, the plaintiff kept his arm elevated. His arm was buttressed by pillows to maintain the elevation. He took his medication and, with some difficulty after the medication came into effect, went to sleep.

163 The plaintiff slept through the night and awoke at 7:30 a.m. He was in significant pain that had increased from the night before. The swelling had also increased. The plaintiff testified that his hand was twice the normal size. He described a throbbing in his arm in time to his heartbeat. Taking the pain medication did not help.

164 The father had gone to the basement to not make any noise that might disturb his son. At around 9:30 a.m. the father saw his son who complained that his wrist was "really sore. Its really starting to swell and it was really numb."

165 Based upon the defendant's advice to expect pain and swelling for two to three days, and without any specific warning about the possible development of compartment syndrome, the plaintiff's father initially reacted that his son's pain and swelling were to be expected.

166 The plaintiff however felt that "something was not right." Thankfully, he asked to go to the hospital as he was experiencing excruciating, throbbing pain.

167 The father drove the plaintiff and his girlfriend to the hospital and dropped them off. The plaintiff and defendant gave evidence that they arrived at the hospital between 10:00 a.m. and 10:30 a.m. The first entry on the hospital records at registration, when the plaintiff's OHIP card was swiped, was at 11:26 a.m. with the nature of the problem described as "Cast problem." It appears that they probably arrived at the hospital some time before 11:26 a.m.

Meeting with the Triage Nurse

168 The plaintiff met with the triage nurse, Ms. Mazie Wilson, from 11:55 a.m. to 12:03 p.m. Ms. Wilson testified at the trial. She had no recollection of this case, but interpreted her notes for the court.

169 Ms. Wilson noted, "c/o [complains of] cast too tight, had mva yesterday seen at Scarborough General. c/o fingers swollen and painful, able to move fingers, warm to touch, wants to see ortho at NYG." Ms. Wilson's notes of her observations confirm that the plaintiff was a well-nourished, oriented person with "no acute distress and no obvious discomfort." When questioned on these notes, she said that no acute discomfort meant that he was not moaning or writhing in pain. The defence relies on the triage nurse's notes of "no acute distress and no obvious discomfort" in support of their argument that compartment syndrome developed after the cast had been removed.

170 The plaintiff testified that, in his meeting with the nurse, he was not crying or writhing in pain. However, he told the nurse that he was in a lot of pain and that it was severely painful. It appears that he was overly stoic in the circumstances. Had he been made aware of the potential complications of compartment syndrome from a high impact injury, he may have been less stoic and more insistent in his meeting with the triage nurse.

171 Ms. Wilson assessed the urgency of the situation as low-four out of a possible five. The emergency room physician who later saw the plaintiff, Dr. Tanzer, testified that in his view Ms. Wilson erred in assessing the urgency of the situation, and missed the diagnosis of compartment syndrome. He bluntly stated "this patient was not triaged properly." Her error may have been partly as a result of the plaintiff's low-key, stoic approach compared to the mainstay of patients attending the emergency department, coupled with his lack of insistence of the potential gravity of the situation, as he had not been educated about compartment syndrome.

Meeting with the Emergency Room Physician

172 The plaintiff testified that, after seeing the triage nurse, the pain and swelling got worse. He showed his wrist to another nurse in the area of the hospital where he had been directed to go. She told him that he had to wait his turn. According to the plaintiff, the hand at this point was greenish blue and the swelling had increased to three times its normal size.

173 The plaintiff did not sit back. He was very concerned and spoke to someone in an all-white jumpsuit who appears to have been a cast technician. The technician took one look at the plaintiff's hand and said that this was not right and immediately got hold of Dr. Tanzer, the emergency room physician on duty.

174 Dr. Tanzer saw the plaintiff at approximately 1:15 p.m. out of turn as a result of the cast technician's intervention. Dr. Tanzer had a memory of this patient and what transpired, but his written records of his interaction with the plaintiff are substandard.

175 Dr. Tanzer ordered X-rays which were available at 1:44 p.m. Dr. Tanzer said the injuries were so dramatic that he sent the plaintiff immediately to X-ray to see what he was dealing with before he split the cast. He acknowledged that he could have split the cast before sending the plaintiff to X-ray.

176 Dr. Tanzer observed in the X-rays that the lunate facet fragment was not aligned and was pushing into the volar space. He described the distal fracture piece that was not aligned as being "a significant piece of bone."

177 The plaintiff testified that, upon Dr. Tanzer reviewing the X-rays, Dr. Tanzer expressed that he was not happy with how the wrist was set. Upon his review of the X-rays, he observed that the fracture had not been properly anatomically reduced, and the bone piece was pressing on tissue which would cause added swelling.

178 The full cast caught Dr. Tanzer's attention because in his experience full casts are not used in Toronto:

> A. You are not just looking for one thing, you are looking at the whole picture of everything and <u>when I was a cylindrical cast one, I am -- my eyes just light up immediately</u>.
> Q. But this is why you take the cast off...
> A. Yeah.
> A. That's what I was -- that's why we -- that's why we split it. [Emphasis added.]

179 Dr. Tanzer also testified that he made the observation that the cast was too tight. Dr. Orsini's handwritten notes appear to indicate "sl tight." Dr. Tanzer could not interpret Dr. Orsini's notes, but Dr. Tanzer testified in cross-examination that "I would not have split the cast if it was slightly tight." Dr. Tanzer instructed the cast technician to split the cast to relieve the pressure, with the exception of a slab on the lower arm to continue to support the wrist. His working diagnosis was compartment syndrome. The cast technician did not cut off the soft roll.

180 I accept Dr. Tanzer's evidence about his observations when he interacted with the plaintiff between 1:15 p.m. and 2:00 p.m. on November 13, 2005. He confirmed that the plaintiff was in significant pain, had very little hand movement, and any movement caused pain. Dr. Tanzer did not check the pressure in the compartment and did not do a passive stretch to test for compartment syndrome as he was confident in his working diagnosis of compartment syndrome. The passive stretch test is very painful if compartment syndrome is present.

181 Based upon the preliminary working diagnosis that compartment syndrome was developing, Dr. Tanzer took steps to split the cast. Dr. Tanzer hoped that splitting the tight cast would reduce the symptoms so that the developing compartment syndrome would not become irreversible. Dr. Tanzer testified that, if the cast was just a little bit too tight, then splitting the cast and elevating the arm could relieve the pressure and pain, and stop the symptoms and the process.

182 Unfortunately there was no noticeable reduction in pain and swelling after the cast was split. Dr. Orsini happened to be on call and was in the operating room that day. Dr. Tanzer called Dr. Orsini to advise him that "we had a compartment syndrome" and he required immediate attention. Dr. Orsini was in surgery at the time, but Dr. Tanzer left the message for him directly to expedite

the process.

183 Dr. Tanzer testified that he recalled that the plaintiff's hand was bluish colour. This evidence was not in Dr. Tanzer's notes. He met with the plaintiff at the lawyer's office before the commencement of trial and this may have been discussed. I am not sure about this aspect of his evidence as it may have been discussed with the plaintiff prior to the trial. I am confident about accepting as accurate all of Dr. Tanzer's other observations based upon his clear memory of events.

184 However, I accept the plaintiff's evidence that, while he was waiting to see Dr. Tanzer, his hand was swelling abnormally and was turning bluish green in colour.

Meeting with Dr. Orsini and Subsequent Surgery

185 Dr. Orsini examined the plaintiff approximately one hour later after the cast was removed, somewhere between 2:00 p.m. and 3:00 p.m. on Sunday November 13, 2005. He again examined the plaintiff before the surgery sometime near 5:00 p.m.

186 Dr. Orsini advised the plaintiff at the initial meeting that he believed that the plaintiff had a compartment syndrome that would require surgical intervention in the form of a fasciotomy to relieve the pressure.

187 Dr. Orsini's inpatient operative report states the following:

> The following day he had increasing pain and came to North York General Hospital and his cast was split by Dr. Russel Tanzer in the Emergency Department. He had really no significant relief of his pain. At this point he had significant pain, numbness and weakness of his entire right hand. He did have hand weakness and numbness following his injury but it had worsened with the tight cast. [Emphasis added.]

188 Dr. Orsini's redacted expert report dated July 27, 2006 confirmed his observations pre-op that "he was noted to have decreased sensation in his radial, median and ulnar nerve distribution of his hand. He could move his digits but very minimally. His hand was warm and pink. He had some passive stretch pain."

189 It is unclear whether Dr. Orsini observed the hand being warm and pink when he first saw the plaintiff somewhere between 2:00 p.m. and 3:00 p.m., or when he later met the plaintiff around 5:00 p.m.

190 As the plaintiff stated, Dr. Orsini did not have a bedside manner. When Dr. Orsini initially met with the plaintiff, he warned him that there was a chance that he would wake up without his arm, as it may be necessary to amputate.

191 Dr. Orsini told the plaintiff prior to the surgery that the defendant's suggested bone graft

surgery was in his view premature and was only to be considered "down the road" as a "last ditch effort."

192 At 5:00 p.m. on November 13, 2005, the father got a call that the plaintiff was going to have emergency surgery. The father went immediately to the hospital but did not see his son before the surgery.

193 Dr. Orsini proceeded with the surgery at 6:30 p.m. until 9:13 p.m. on an urgent basis. On November 13, 2005. Dr. Orsini confirmed that the plaintiff was taken to the operating room with questionable nerve injury, fracture dislocation of his right wrist, and possible compartment syndrome.

194 Dr. Richards confirmed that a 100% diagnosis of compartment syndrome cannot be made until the compartment is exposed during the surgery.

195 Dr. Orsini's interim summary dictated after the surgery on November 16, 2005 confirmed his observations before the surgery:

> [The plaintiff was] seen at Scarborough General Hospital, assessed and discharged with a circular cast. He came to North York General Hospital the next day with numbness and increasing pain. The cast was split and I was asked to see him. At the time he had significant nerve injury with possible pressure from the boney fragment. He had minimal movement of his hand, passive stretch pain. He was taken to the Operating Room and forearm fasciotomy was performed, opened and external fixation reduction of his right wrist. [Emphasis added.]

196 Dr. Orsini's operative note provides as follows:

> Under general anesthesia and secure airway the right hand and forearm were prepped and draped. There is extreme swelling in his forearm particularly volarly. I was concerned about the compartment syndrome. After making the skin incision there was edema in the subcutaneous tissue. The area was eventually released up to elbow including the lacertus fibrosus. This was done using the right angle undermining the skin. Distally I went to the distal end of the carpal tunnel. The median nerve appeared to be intact. There was a bony fragment just on the ulnar side of it. The superficial and deep compartments were released within the volar compartment. Just at the end of the procedure the dorsal compartments were released using a dorsal incision. No tourniquet was used.
>
> The muscles seemed to be viable, red, bleeding and contractile.

> The fracture of the wrist itself was identified. The fragment had been rotated 180 degrees and I had to translocate the wrist dorsally to reduce the fragment. There also appeared to be a radial styloid fragment. The distal radioulnar joint soft tissues also were disrupted.
>
> Using the image intensifier, a small Hoffman frame was constructed and applied. The wrist was stable in volar flexion. Two K-wires were then used to secure the ulnar articular fragment of the radius. There was some mild comminution in the area. With this position, image intensification demonstrated a good reduction.
>
> The dorsal incision was closed leaving the volar incision for the most part wide open. Normal saline, gauze and dressing was applied.
>
> The patient tolerated the procedure well and left the operating room in stable condition.
>
> I spoke with his family regarding the issues of compartment syndrome and that hopefully a full recovery will be obtained although its hard to know how long the compartment syndrome was present complicated by his nerve injury.

Admissibility of the Conversation between Dr. Orsini and the Plaintiff's Father

197 After the surgery, the plaintiff was happy to wake up with his arm. His arm was completely bandaged and he could not see the extent of his injury.

198 Dr. Orsini spoke to the father after surgery. He explained the surgical procedures that had taken place, including the two incisions leaving scars measuring 27 cm long and 23 cm long on the top and bottom of the plaintiff's arm.

199 The defence objected to the admissibility of the conversation between Dr. Orsini and the father that touched upon standard of care or causation. I allowed the contents of the actual conversation to be included in the evidence, with arguments to follow about its admissibility and weight.

200 The following is the father's testimony about his conversation with Dr. Orsini immediately after the surgery:

Q. And then were you told at the hospital what the cause of that surgery was?
A. Yes.

MS. KUEHL: Your Honour, I think that the advice received about the cause is soliciting from this expert ...

THE COURT: I am allowing the doctor - I am going to allow the information about the conversation to go in and I will hear your arguments later about what is to be done with it.

MS. KUEHL: Thank you.

MR. REGAN: Q. What was the conversations you had with the doctor about why?

A. When he first came out, Dr. Orsini came out into the waiting area and I stood up and he said, "Mr. Moore?" And I said, "Yes." And he said - he told me that - about the surgery. He said he had to make the two incisions. He said - he said he had to make the top one, he said, which he could close to release the pressure, but the bottom one was just the result of that first picture and it has to stay open. It was going to be an awful scar. He said - I asked him what happened. He said - he said, "The cast never should have been put on, as it was far too tight." He told me that the swelling had nowhere to go." He says - so, he says, "It went in" and he said, "What happened", he says, "is it killed the flesh in your son's arm." I said, "Well, the doctor said he set the wrist." And he said, "No, he didn't set the wrist. He made it worse" and he said he managed to catch the nerve between the bones and damaged the nerve as well. He says, "I repaired the wrist." And I said, "Well, the other doctor said he was going to take a piece of bone out of his hip and repair his wrist with that." And he looked at me he says, "I never would have considered an operation like that for this kind of damage." And I said, "What's his prognosis?" And he said, "He's going to have permanent damage" and that - and he looked at me and he was all red-faced and he said, "I am sorry." He said, "Whoever did this", he said, "butchered your son." And that's what he told me.
Q. When you were at the Scarborough General, you told us what was said to you?
A. Yes.
Q. Had the - had you or your son been advised that there could be some complications if surgery was not done right away? What, if any, your answer had been to that?

A. No, we were told we were given a week. I was told that my son's wrist was set and he recommended that we have a surgery to increase his range of motion and that we had a week - and that we had until Wednesday, if he was experiencing pain, to come in on Wednesday. Dr. Orsini told me when I told him that, Dr. Orsini told me, he said, "Mr. Moore", he said, "when I looked at Blake", he said - he says, "I thought maybe I could wait to do the surgery until Monday morning" he said, "but then I realized it would be taking his arm off." He said - he said, "Blake probably wouldn't have woken up on Tuesday." He said, "He wouldn't have made it to Wednesday", he said. [Emphasis added.]

201 In cross-examination, the father responded to defence counsel's questions regarding this conversation as follows:

Q. And did - you told us about a conversation you had with Dr. Orsini after your son's surgery?
A. Yes, when he came out of the operating room.
Q. And you said Dr. Orsini talked about flesh on your son's arm, that there was killed flesh?
A. Yes, he used the word necrotizing, or something like that. That the - he told me that the arm was dying. The blood flow was cut off and the arm was dying.
Q. And are you aware that Dr. Orsini's operative note indicates the muscle in his arm was red viable and bleeding?
A. No, I don't know that, because I don't know his - I never read his notes.
Q. And are you aware that his operative note does not refer to killed flesh or necrotized flesh?
A. What he told us was that Blake was going to have his arm open and they were going to have to keep it open and anything was going to have to be cleaned out until they could close it.
Q. And you said Dr. Orsini told you that he thought he could do the surgery on Monday?
A. He said when he first saw Blake he thought he could do the surgery on Monday morning, but then he realized on Monday morning he would be removing Blake's arm, so he had to do it that night.
Q. So, your understanding was his initial plan was to do the surgery on Monday?
A. No, his initial plan was that he thought he could do it Monday, but that when he took a really good look at him, he realized he had to do it that night.
Q. When he took a second look at him?
A. No, when he took a really good look. He said when he first saw Blake, he thought that he could wait until Monday morning, but then when he took a look at him - a good look at him, he said he realized he had to do it that night. He couldn't wait until Monday morning, because he said on Monday morning he would be taking the arm off.

MS. HUNTER: Thank you. Those are all my questions.

202 The father was a credible witness. I accept the father's evidence as reliable and accurate with respect to his memory of the content of this very disturbing conversation with Dr. Orsini.

203 Unfortunately, Dr. Orsini is not available to testify about what he said and why. Whether this hearsay evidence of Dr. Orsini is to be admissible for its truth was a matter of dispute.

204 I conclude that the conversation is not admissible for its truth. The content of the conversation is very prejudicial, and goes to the heart of this lawsuit. Its prejudice outweighs any probative value. The evidence does not meet the test of necessity. It is admissible only as part of the *res gestae* to provide context for this lawsuit, as it was said immediately following the surgery as a spontaneous utterance.

This Lawsuit

205 The plaintiff initiated this lawsuit on October 31, 2006 alleging negligence against the defendant, Scarborough General Hospital, and others.

206 The parties have agreed on damages. Dr. Richards in his uncontested evidence confirmed the effect of the development of compartment syndrome with respect to damages. It is not disputed that the plaintiff is left with significant sequela. His range of motion in his right wrist is about half of his left, normal wrist. His elbow is stiff and pronation is limited. He has difficulties with his occupational activities, endurance, and simple daily living activities, such as brushing his teeth or opening a door. The plaintiff has extensive scarring from the compartment syndrome, including a 27 cm scar on the volar forearm and a 23 cm dorsal scar on the back of his arm. He was required to have plastic surgery and skin grafts to close the gap in his arm, by removing skin from his leg.

207 The only outstanding issue in this lawsuit is the liability of the defendant, Dr. Getahun.

Factual Issues

The defence submissions on the facts

208 Defence counsel submitted a version of the facts during their argument that in my view did not fairly reflect the evidence as it emerged, but that supports the defendant's theory of liability. These factual issues need to be clarified before reviewing the expert opinions.

209 First, counsel suggested that the plaintiff may not have required surgery after the cast was applied, relevant to Dr. Athwal's opinion on the standard of care.

210 Second, counsel suggested that the compartment syndrome may have developed after the

cast was removed, not before, relevant to the question of causation. Counsel appears to rely on the triage nurse's evidence to support this theory. No expert confirmed this theory.

Surgery was required

211 I find as a fact that the plaintiff had to have open reduction surgery with external fixation to remove the rotated and significantly displaced lunate facet bone fragment out of the right wrist joint. The X-ray report at North York General confirms that the distal fragment of the lunate facet was "markedly displaced and rotated" and that it appeared to be rotated 180 degrees.

212 Both Dr. Taylor and Dr. Richards confirmed that external fixation surgery was required. Dr. Taylor confirmed that the displaced lunate facet was intra-articular, that there was ligament damage evident. Dr. Taylor confirmed that the plaintiff needed external fixation surgery "with or without" the closed reduction.

213 The defendant in his evidence and notes did not dispute that surgery was necessary because the reduction was only partially successful. The issue was who would perform the surgery, not whether the surgery was to take place.

214 Dr. Orsini describes the surgery that he performed with respect to the displaced lunate facet.

215 Dr. Athwal testified that the plaintiff may choose to live with the deformity rather than undergo external fixation surgery. This understanding underpinned Dr. Athwal's opinion that it was not necessary to bivalve the cast pending surgery. I find that the evidence did not support Dr. Athwal's understanding that surgery was not required.

216 Whether or not the bone graft recommended by the defendant was going to take place was in question. I find the bone graft was the focus of the plaintiff's concern, and the focus of the request for the second opinion.

217 None of the experts confirmed the defendant's recommendation of the possible bone graft. Dr. Taylor was clear in his evidence that he recently reviewed the clear versions of the X-rays and made the correct diagnosis. Based upon his review of the X-rays, he testified that a bone graft was not required. Dr. Orsini told both the plaintiff and his father that a bone graft was treatment that would be considered only at a later point in time. Neither Dr. Richards nor Dr. Athwal commented on the appropriateness of the recommended bone graft.

218 I conclude that the evidence clearly establishes that the plaintiff needed external fixation surgery to deal with the lunate facet bone fragment that was located in the joint. It was an open question whether or not he needed a bone graft.

Compartment syndrome started to develop after the cast was applied and became irreversible before the cast was removed

219 The defence counsel suggested that the facts support a finding that the compartment syndrome developed after, not before, Dr. Tanzer removed the cast shortly after 1:44 p.m.

220 This assertion advances the defence position on causation. The defence wished to rely on the triage nurse's assessment of the situation. She had no memory of the case, but noted in her triage notes that that the plaintiff between 11:55 a.m. to 12:03 p.m. was in "no acute distress" and "no obvious discomfort." Therefore, the defence counsel argues that the plaintiff did not have compartment syndrome when the triage nurse assessed him.

221 The evidence does not support this theory about the timing of the development of the compartment syndrome. Neither defence expert suggested or confirmed this theory. No expert suggested that the diagnosis of compartment syndrome was not made until shortly before the surgery. To the contrary.

222 Dr. Richards' opinion is that the cast caused the development of the compartment syndrome, and that the compartment syndrome became irreversible before the cast was removed. Dr. Richards explicitly testified that the compartment syndrome began before the cast was removed. He stated that removing the cast "takes off the external pressure, which may or may not be enough, because in Mr. Moore's case, if that's what we're talking about, he has already developed a compartment syndrome."

223 Based on the plaintiff's symptoms, Dr. Athwal was critical of Dr. Tanzer for not immediately splitting the cast and waiting for X-rays. Implicit in this criticism is his view that the compartment syndrome had developed before the cast was removed and that the cast should have been removed immediately.

224 Dr. Taylor was asked about when in his view the compartment syndrome was developing. Plaintiff's counsel objected as this evidence was not contained in Dr. Taylor's report. I allowed the questioning. Dr. Taylor's evidence was that the compartment syndrome could have been developing at 7:30 a.m. when the plaintiff awoke, or it could have developed after the cast was removed.

225 His evidence at the trial did not conform with his opinion in his report. Notwithstanding the submissions of plaintiff's counsel that this evidence was not in Dr. Taylor's report, in fact the issue of when the compartment syndrome developed is contained in Dr. Taylor's report dated September 9, 2013. Dr. Taylor confirmed that "Mr. Moore began to develop compartment syndrome symptoms early in the morning of 13 November 2005; at about 07:30." The emergency operation commenced at 18:35 and "therefore, the ischemic process had gone on for an estimated 11 hours."

226 In his report summary, Dr. Taylor writes, "a compartment syndrome developed several hours after the initial accident." This statement indicates that perhaps the compartment syndrome began before the plaintiff awoke on November 13, 2005.

227 Dr. Taylor's report is available to me as an aide only. I do not accept Dr. Taylors suggestion

in his *viva voce* evidence that the compartment syndrome may have developed after the cast was removed. This suggestion is contradicted by the contents of his report.

228 Any suggestion that compartment syndrome developed after the cast was removed was a new theory of defence counsel that does not accord with the facts or the evidence.

229 For the reasons fully outlined in the findings of fact, I accept the plaintiff's evidence as to his symptoms confirming the presence of compartment syndrome by the time he was at North York General Hospital and probably well before, when he awoke on November 13, 2005. When he awoke the plaintiff was experiencing excessive, disproportionate pain and increased swelling - both cardinal symptoms of a developing compartment syndrome.

230 The only reasonable inference on the evidence is that the compartment syndrome had been developing well before the cast was removed. Unfortunately, the triage nurse missed the diagnosis. I accept Dr. Tanzer's evidence that she missed the diagnosis and improperly triaged the plaintiff as a non-urgent case.

231 Dr. Tanzer testified that the triage nurse's misdiagnosis had no effect, as the plaintiff continued to complain to nurses and ultimately to a person in a white jumpsuit (probably a cast technician), who intervened on the plaintiff's behalf. Dr. Tanzer confirmed that he saw the plaintiff quickly and out of turn.

232 I also accept Dr. Tanzer's evidence as to his diagnosis of compartment syndrome. I find that Dr. Tanzer correctly made the immediate working diagnosis of compartment syndrome when he first saw the plaintiff at 1:15 p.m. His diagnosis was confirmed shortly after he reviewed the X-rays at 1:44 p.m. and he then had the cast technician split the cast.

233 When the cast being split did not abate the symptoms of pain and swelling, Dr. Tanzer soon communicated to Dr. Orsini that "we had a compartment syndrome."

234 I use common sense to infer that the removal of the cast had some ameliorating effect on the blood supply to the hand. The plaintiff's bluish green hand colour (as it was before the cast was removed) returned to its more normal pink colour as Dr. Orsini observed (as reflected in his notes). Unfortunately, there is a point in the development of compartment syndrome where the process cannot be reversed. At that point, the only treatment available is a fasciotomy to reduce the pressure in the compartments.

235 Dr. Taylor testified that, at 2:00 p.m. on November 13, 2005 shortly after the cast was removed, "what you're left with is that the compartment syndrome has progressed to the point where it requires surgical treatment. It's ... a true compartment syndrome, you have the self-perpetuating escalating process that goes on and it can only be stopped by surgical treatment and incising the fascia and reducing the pressure by increasing the volume of the muscles." I accept this evidence. Development of compartment syndrome is a process. Once it becomes irreversible, if there is no

surgical intervention, the result would be muscle necrosis and muscle death eventually leading in the worst case scenario to an amputation.

236 Dr. Orsini saw the plaintiff between about 2:00 p.m. and 3:00 p.m. on November 13, 2005 presumably after finishing his other surgery. I accept the plaintiff's evidence that Dr. Orsini immediately confirmed in the initial meeting with the plaintiff that he would need surgery for compartment syndrome.

237 I find that the compartment syndrome started to develop after the cast had been applied and became irreversible by the time the cast was removed. Due to the continued pain and swelling after the cast was removed, it was clear that the development of the compartment syndrome had by that time become established, significant, and irreversible.

238 Removal of the cast had some ameliorating effect on blood flow, but the process was established and continuous. By the time it was removed, the damage caused by the cast had already been done. A fasciotomy was the only treatment available by the time the cast was removed.

239 Dr. Orsini did not begin the surgery on the plaintiff until 6:35 p.m. Dr. Richards opined that by that time there was muscle damage, but not muscle death. There is no evidence before me as to the reason for the delay for the surgery. It was a Sunday in an emergency department. Dr. Tanzer confirmed that, once he made the urgent referral to the orthopedic surgeon, the timing of the surgery was out of his hands.

240 I conclude that the evidence is clear that the compartment syndrome began after the cast was applied; it was established and irreversible by the time the cast was removed. There was some delay between Dr. Orsini's initial visit and the time the surgery started. There is no credible factual evidence or expert opinion supporting defence counsel's argument that the compartment syndrome developed after the cast was removed.

The Chronology of Experts retained by the Parties

241 I outline the sequence of experts retained by the parties to put the expert evidence into context.

242 The plaintiff retained Dr. Emil Orsini, the treating orthopedic surgeon, to give an opinion as to standard of care and causation. Dr. Orsini provided his first report dated July 27, 2006, prior to this lawsuit being commenced. In Dr. Orsini's opinion, the defendant had not met the applicable standard of care. The cause of the compartment syndrome was applying the closed circumferential cast that did not allow for swelling in this young man's high impact injury.

243 Dr. Orsini died on October 3, 2008. I admitted the factual aspects of his report for their truth as he was the treating physician, and the factual aspects simply supplement the admissible medical records. As previously outlined, Dr. Orsini's opinions on liability have been admitted only as part of

the *res gestae* in shaping this lawsuit, but not for their truth.

244 The defendant retained Dr. Ronald Taylor, an orthopedic surgeon from Orillia, to testify and respond to Dr. Orsini's opinions on negligence and causation. Dr. Taylor wrote a report dated February 10, 2009 refuting Dr. Orsini's conclusions.

245 The plaintiff retained Dr. Robin Richards in March 2009 to initially testify on the issue of damages caused by the compartment syndrome. The defence does not dispute the contents of that report as the parties have agreed on damages. After Dr. Orsini's death, the plaintiff retained Dr. Richards to give his opinion on the two issues of liability, standard of care and causation, as well as damages. Dr. Richards provided a report dated September 8, 2009. He agreed with Dr. Orsini's opinions. Dr. Richards provided a further report dated September 16, 2013 confirming the plaintiff's position with respect to the standard of care and causation.

246 The defendant retained Dr. George Athwal in July 2013. He filed a report dated September 16, 2013 shortly before the commencement of trial in October 2013. His report confirmed the defence position with respect to standard of care and causation.

247 Dr. Richards prepared a final report dated October 4, 2013 disagreeing with Dr. Athwal's opinions.

248 Dr. Regan, the brother of plaintiff's counsel and an orthopedic surgeon in Vancouver, was retained at some point. He prepared a report that was served just before trial but was not before me. Dr. Athwal's second report commenting on Dr. Regan's report was not filed.

249 At trial, Dr. Richards testified as the expert witness on behalf of the plaintiff. Dr. Taylor and Dr. Athwal testified as expert witnesses on behalf of the defendant.

The Qualifications of the Experts and Findings of Credibility

Legal principles

250 In *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 75, the Court of Appeal provides the four criteria for the admissibility of expert opinion evidence: (i) a properly qualified expert, (ii) absence of any exclusionary rule, (iii) relevance, and (iv) necessity in assisting the trier of fact.

251 Counsel have conceded that each expert is qualified to testify as an expert witness as to the standard of care of a reasonable and prudent medical practitioner with the same training and experience as the defendant in 2005 in a community hospital, as well as to the issue of causation applying the test in *R. v. Mohan*, [1994] 2 S.C.R. 9.

252 Expertise is a "modest status that is achieved when the expert possesses special knowledge and experience going beyond that of the trier of fact": David M. Paciocco & Lee Stuesser, eds., *The Law of Evidence*, 5th ed. (Toronto: Irwin Law, 2010) at 203.

253 *Dulong v. Merril Lynch Canada Inc.* (2006), 80 O.R. (3d) 378 (S.C.), at para. 21 provided a list of factors that judges regularly consider in determining if an expert is properly qualified. These factors are relevant to determining an expert witness' threshold reliability:

* The proposed expert's professional qualifications
* Actual experience
* Participation or membership in professional associations
* The nature and extent of his or her publications
* Involvement in teaching
* Involvement in courses or conferences in the field and his or her efforts to keep current with the literature
* Whether the expert has previously been qualified as an expert in the area

254 After determining that expert evidence is admissible, the next step in assessing expert evidence is to consider the credibility and quality of the expert report and oral evidence. As counsel conceded the three experts' threshold reliability, I did not rule on whether each expert was qualified to testify. However, the above noted list was useful in weighing each expert's comparative reliability and credibility.

255 In addition, the following questions may be useful in assessing the expert witnesses' comparative reliability and credibility:

* Is the witness fair and impartial in the report presented and in the evidence given?
* Is the expert's report and oral evidence consistent?
* Is the expert's opinion clearly set out in the report, including the facts and documents underpinning the opinion?
* Do the conclusions logically flow from the facts?
* Are alternative theories canvassed?
* Does the expert make concessions in the report where appropriate that may not be helpful to the party who retains him or her?
* Are the facts relied upon by the expert confirmed in the evidence at trial?
* Does the expert make reasonable concessions in his or her *viva voce* evidence if the facts are not as he or she assumed them to be?
* Does the witness provide balanced evidence that is neutral, or is he or she dogmatic and fixed in his or her opinion?
* Does it appear that the witness aligned with one party's position, assuming the role of an advocate, rather than act as a neutral witness with a duty to the court?
* Is there an appearance of bias, or is there evidence of actual bias?[3]

256 I am guided by these principles when assessing the expert evidence in this case.

<u>The defence position limiting the scope of the expert evidence</u>

257 As I outlined in paragraphs 59 to 70, I do not accept the defence counsel's approach as the proper or intended interpretation of Rule 53.03 of the *Rules of Civil Procedure*. However, in light of plaintiff counsel's concession, Dr. Richards' answers in chief were largely limited to the content of his reports. He was not permitted in chief to comment on trial evidence, or any issues arising from the evidence, unless they were referred to in his reports.

258 I note that defence counsel did not follow the same set of strict rules when questioning the defence experts. I allowed the expanded questioning of the defence experts, notwithstanding the defence counsel's approach limiting Dr. Richards' evidence.

Dr. Richards: qualifications, credibility, and reliability

259 Dr. Richards testified for the plaintiff. He opined that the defendant did not meet the standard of care when he applied a closed circumferential cast in the facts of this case. Dr. Richards personally would use, and teaches others to use, a splint to allow for swelling in high impact injuries. He opined that in the facts of this case a bivalved cast cut to the skin would also meet the standard of care. Dr. Richards also gave the opinion that, on a balance of probabilities, the underlying injury combined with the application of a closed circumferential cast caused the compartment syndrome to develop in this case.

260 Dr. Richards qualified as an orthopedic surgeon in 1982, completing his fellowship at the University of Toronto. His lengthy *curriculum vitae* confirms that Dr. Richards is a recognized expert in upper extremity orthopedic surgery. He was the Surgeon in Chief at Sunnybrook Health Sciences Centre from 2001 to 2012 and is now Surgeon in Chief Emeritus. From 1989 to 2000, he was the head Medical Director of the Mobility Program at St. Michael's Hospital in Toronto. In 2005, the date of this incident, he had been a full-time practicing orthopedic surgeon for years and had been promoted to senior positions in these two hospitals. Sunnybrook has a network of community hospitals, for which he assumed responsibility.

261 Dr. Richards has been appointed a professor in the faculty of medicine at the University of Toronto since 1984. He annually teaches the entire second and fourth-year medical class at the University of Toronto Medical School in their orthopedic education blocks on treatment and fracture care, as well as the importance of patient care and treatment when compartment syndrome may become an issue.

262 In addition, since 1984 Dr. Richards has taught medical students, residents in orthopedic surgery, and fellows in the hospital settings at Sunnybrook Hospital and St. Michael's Hospital.

263 His *curriculum vitae* outlines his many awards for teaching as well as his many publications. He has written extensively and lectured nationally and internationally based on his years of experience as an orthopedic surgeon, not as a researcher or scientist.

264 One publication is of particular note: Robin Richards, "Fractures of the shafts of the radius

and ulna" in Robert W. Bucholz & James D. Heckman, eds., *Rockwood and Green's Fractures in Adults*, 5th ed. (Philadelphia: Lippincott Williams & Wilkins, 2001).

265 As an example of his recognized expertise in the field, the University of Western Ontario and McMaster University retained Dr. Richards to conduct an external review of orthopedic standards in the department of surgery at all the different hospital settings in London and Hamilton, Ontario.

266 Dr. Richards has been qualified as an expert witness on many occasions: see e.g. *Shepstone v. Cook*, 2013 ONSC 418, [2013] O.J. No. 802; *Sabourin v. Dominion of Canada General Insurance Co.*, [2009] O.J. No. 1425, 2009 CarswellOnt 1880 (S.C.); *McGregor v. Crossland* (1999), 66 A.C.W.S. (3d) 368 (Ont. Gen. Div.); *Robinson v. Sisters of St. Joseph of the Diocese of Peterborough in Ontario* (1997), 69 A.C.W.S. (3d) 559 (Ont. Ct. J. (Gen. Div.)), aff'd (1999), 117 O.A.C. 331 (Ont. C.A.); *Guy v. Grosfield*, [1994] O.J. No. 1965 (Gen. Div.); and *Khoshmashrab v. Bent*, [2004] O.J. No. 1830 (S.C.).

267 It is clear based upon his wealth of practical experience, teaching, publications, and lectures that Dr. Richards is qualified to provide expert evidence on the standard of care and causation in this case.

268 Dr. Richards met with and examined the plaintiff as part of his initial retainer to assess damages. He was then retained to provide expert opinion on liability. He reviewed the medical records and X-ray radiology reports before writing his reports. He wrote several reports beginning March 23, 2009 after meeting with the plaintiff and examining him. The first report deals primarily with damages, which is not contested.

269 The defence counsel challenged Dr. Richards' ability to render an opinion in this case as he did not read the transcript of discovery of the plaintiff or the defendant. His review of the facts was limited to a review of the medical brief, the examination of the plaintiff, discussions with the plaintiff, and the various medical reports received from counsel.

270 In my view, Dr. Richards had ample material upon which to base his opinion. I make no negative finding about not reading the examinations for discovery. Dr. Richards had the benefit of examining and speaking with the plaintiff directly. The defendant did not remember specifics of this incident. He relied almost entirely on his notes, which Dr. Richards reviewed. The questions in this lawsuit do not require a review of the defendant's transcript as there is no dispute that he applied a full circumferential cast after the closed reduction, when there remained a significant displacement of the lunate facet and surgical intervention was required. Dr. Richards reviewed all of the hospital records.

271 Defence counsel challenged Dr. Richards' qualifications as he did not outline all of the literature that he relied upon in reaching his conclusions, compared to Dr. Athwal's report, which cites several articles and textbooks. Dr. Richards attached an excerpt from a Google search in support of his opinion on causation, which the defence suggests should undermine his academic

credibility.

272 Dr. Richards' *curriculum vitae* is lengthy and learned. He has published and lectured widely. I accept that he did not believe that it was necessary to refer to specific textbooks in his report. In his view, the contents of his testimony are known and common sense. He attached the Google search of compartment syndrome not to replace professional literature, but to illustrate that it is a known fact readily available to the public that a tight cast can cause compartment syndrome.

273 Dr. Richards referred to some extracts from standard textbooks in support of his evidence at the trial, despite defence counsel's objection. This was appropriate and properly admissible, even though his report did not specifically refer to these textbooks. Dr. Richards testified based upon years of personal experience and teaching, not based upon a literature review.

274 Dr. Richards was unequivocal about his teaching that the application of a full circumferential cast in high impact injuries such as this case is not appropriate. This is the clear message that he has taught to the students, residents, and fellows over the years.

275 Dr. Richards gave his evidence in a clear and straightforward manner. He was no nonsense in his approach. He was not defensive or rigid in his responses in cross-examination, but he was not to be pushed around by counsel. Although he did not teach or recommend using a cast for acute distal radius fractures, he conceded both in his reports and in his evidence that a bivalved cast was acceptable alternate treatment that met the standard of care in 2005 in Ontario. He was fair and balanced in the answers he gave, and was neutral in his approach.

Dr. Taylor: qualifications, credibility, and reliability

276 Dr. Taylor testified on behalf of the defence. Dr. Taylor wrote two reports dated February 10, 2009 and September 9, 2013. He testified that the defendant's treatment met the standard of care in applying a closed circumferential cast to the plaintiff's injury. Further, Dr. Taylor testified that the cause of the compartment syndrome was the underlying injury, and not the closed circumferential cast. He acknowledged that the closed circumferential cast could aggravate the development of compartment syndrome caused by the underlying injury.

277 Dr. Taylor obtained his medical degree at Queen's University in 1968. He did a one-year internship at St. Michael's Hospital in Toronto. To qualify as an orthopedic surgeon at Queen's University, students had the option to do a four-year residency or do one year of research, which would result in a master's of science, followed by a three-year residency. Dr. Taylor opted for the research. He received his Masters of Science for his study of tendon length and muscle strength. He then completed his residency at Queen's University to qualify as an orthopedic surgeon in 1974.

278 Dr. Taylor worked his entire professional career for 37 years as the sole orthopedic surgeon in Orillia at the Soldiers Memorial Hospital from 1975 to 2011, when he retired. He is a member of the usual Canadian orthopedic associations. There is no "house staff" at Soldiers Memorial Hospital

- no interns, residents, or fellows. There are some interns in family medicine, who want experience in a community hospital where family doctors perform a role in an emergency setting. Dr. Taylor has played a teaching role with this group of family practitioners.

279 Dr. Taylor has not lectured or written any papers during his long career as an orthopedic surgeon. In his words, it was not in his nature to write papers or do research. He reads journals and attends the orthopedic associations' annual meetings, lectures, and workshops to keep informed. Dr. Taylor claimed that "university people" look outward to international associations. He was a local orthopedic surgeon who looked inward to respond to his community's needs.

280 From 1975 to 2001, Dr. Taylor dealt with most of the distal radial or ankle fractures that came to the hospital, although the general surgeons had some involvement. Dr. Taylor was frequently involved with distal radial fractures - approximately three to four times per week. From 2001 to 2011, emergency room physicians primarily cared for distal radial fractures including reduction, casting, or splinting. If the emergency room physician was unable to successfully reduce the fracture, they would call Dr. Taylor.

281 Dr. Taylor acknowledged that he was infrequently involved in emergency treatment of distal radial fractures after 2001, and up to 2005 when this incident occurred, as the emergency room physicians "did a very good job." Dr. Taylor provided follow-up care for these patients at his fracture clinic.

282 Dr. Taylor has been qualified as an expert witness on three previous occasions, testifying on each of those occasions for the defence.

283 Dr. Taylor has seen 12 cases of compartment syndrome in the lower limb, all before any cast was applied. Dr. Taylor has never in his 37 years of practice seen compartment syndrome in the volar forearm, such as the plaintiff's injury. He has seen only one case of upper extremity compartment syndrome. In that case, the cast was split and, based upon the pressure measurements taken, surgery was not necessary after the cast had been removed. Evidently in that case, the developing compartment syndrome had not become irreversible. The symptoms abated after the cast was removed.

284 Dr. Taylor acknowledged in cross-examination that to prepare his reports he read about compartment syndrome to refresh his memory and confirm his reports were correct.

285 Dr. Taylor is of the old school. He is obviously a very competent general orthopedic surgeon. He has vast experience in one setting, and has served his community well for many years. However, his knowledge of procedures across Ontario is limited to his practical experience in one setting in Orillia, as well as what he has learned in annual meetings and journals.

286 From 2001 to 2005 in Orillia, emergency room physicians performed the primary care for acute distal radius fractures. Dr. Taylor would do the follow-up care in his fracture clinic. Aspects

of his evidence were fair and neutral. He conceded to the increasing use of splints to accommodate swelling and for ease of application and removal. On safe, non-contentious ground, Dr. Taylor provided helpful background to the court based on his years of practical experience.

287 Dr. Taylor was placed in a very awkward situation with respect to the contents of his second report. When plaintiff's counsel reviewed his file, counsel found various draft reports as well as notes of a one-and-a-half-hour telephone conference call between Dr. Taylor and defence counsel reviewing his draft report.

288 Dr. Taylor was obviously totally unaware that it may be improper to discuss and change a draft report, as a breach of his duty of impartiality. Counsel were responsible for this situation.

289 On October 23, 2013, when questioned about the notes of the telephone conversation, Dr. Taylor testified that his final draft report dated August 27, 2013 was sent to Lerners once he was happy with it. Lerners then made "suggestions ... of what to put in" his report. He adjusted his report to include "the corrections over the phone."

290 The trial evidence on the changes made to the draft report continued the next trial day, after defence counsel had the opportunity to analyze the changes.

291 I note that there was quite a dramatic difference in the tone and demeanor of Dr. Taylor's evidence given on October 23, 2013 and his evidence the next morning, which may not be evident by simply reading a transcript.

292 On October 24, 2013, Dr. Taylor stated that the changes were slight differences, such as headings and punctuation. There were no changes to his opinion. He was carefully questioned and he confirmed that the insertions were all his idea. They were not (as he had agreed the day before) "suggestions made by the lawyers of what to put in" his report. Dr. Taylor became noticeably flustered during this aspect of his evidence. He minimized all changes.

293 I conclude that the meeting between defence counsel and Dr. Taylor involved more than simply superficial, cosmetic changes. The conversation took place over a period of one and a half hours. Some content helpful to the plaintiff in the August 27, 2013 draft report was deleted or modified. I find that Dr. Taylor's opinion, although not changed, was certainly shaped by defence counsel's suggestions.

294 The defence relied on *Flinn* to argue that it is appropriate for counsel to review draft expert reports. In *Flinn*, plaintiff's counsel received a preliminary expert report and returned it to the expert with his comments. In response to those comments, the expert prepared a revised report. The plaintiff's counsel refused to disclose the preliminary report or the lawyer's comments, claiming they were privileged and involved discussions of "tactics and strategy": at para. 25. The Nova Scotia Supreme Court reiterated the independence of experts' opinions and ordered disclosure of the lawyer's comments.

295 In my view, *Flinn* does not assist the defendant for two reasons.

296 First, the Nova Scotia Supreme Court did not endorse counsel's reviews of the preliminary expert report. Rather, the court expressed concern about "the propriety of discussing with such an independent expert questions of 'tactics and strategy'": *Flinn*, at para. 29. The court ruled that the defendants were entitled to determine whether the plaintiff's lawyer had influenced the expert's opinion, as this would affect the weight of the opinion.

297 Second, I note that this decision dates from 2002. At that time, the Nova Scotia *Civil Procedure Rules* contained less strict requirements for the independence of expert evidence than the current Rule 53.03 of the Ontario *Rules of Civil Procedure*. The 2010 amendments to the Ontario rules were to address the hired "gun approach" to expert evidence, and to emphasize the importance of expert witness independence and integrity.

298 The practice formerly may have been for counsel to meet with experts to review and shape expert reports and opinions. However, I conclude that the changes in Rule 53.03 preclude such a meeting to avoid perceptions of bias or actual bias. Such a practice puts counsel in a position of conflict as a potential witness, and undermines the independence of the expert.

299 If counsel seeks clarification or amplification after receipt of an expert's final report, all communication should be in writing, and any communication should be disclosed to the opposing party.

300 In my view, Dr. Taylor's change in tone confirms that he viewed his obligations as being to the defence, and not to the court. His attitude change and obvious alignment affects his credibility.

301 I note as well in assessing the weight of his evidence that Dr. Taylor's experience is limited to one clinical setting over many years. His experience with compartment syndrome in the upper extremity is one case that did not require a fasciotomy. As well, the absence of teaching or publications in the field also affects the weight to be attributed to his evidence.

302 To his credit, I note in the September 16, 2013 report that Dr. Taylor acknowledges that the presence of a cast may be an aggravating factor in the development of compartment syndrome.

Dr. Athwal: qualifications, credibility, and reliability

303 Dr. Athwal testified as an expert witness for the defence.

304 He prepared two reports: one dated September 16, 2013 and one prepared October 11, 2013. The second report dated October 11, 2013 was withdrawn as it commented on Dr. Regan's report and Dr. Regan did not testify.

305 Dr. Athwal testified that the application of a full circumferential cast after the closed reduction with a hematoma block was appropriate. It followed the practice and the teaching at his

hospital. He also opined that the full circumferential cast did not cause the plaintiff's compartment syndrome. The underlying injury caused the compartment syndrome.

306 Dr. Athwal obtained his medical degree from the University of British Columbia in 1998. He qualified as an orthopedic surgeon in June 2003, two and a half years before the incident before the court. He completed a one-year fellowship at Cornell University in hand and elbow surgery in 2004. He completed another fellowship at the Mayo Clinic in shoulder and elbow surgery in 2005.

307 Dr. Athwal received his first full-time job as an orthopedic surgeon in August 2005, four months before the plaintiff's accident. Western University hired him as an associate professor in the department of surgery, and a consultant in the Hand and Upper Limb Center in London, Ontario. Since 2005, Dr. Athwal has had no experience as an orthopedic surgeon in a community hospital, although he completed his residency as an orthopedic surgeon at a community hospital in Kingston, Ontario.

308 Dr. Athwal was qualified as an expert on orthopedic surgery for the diagnosis, care, and treatment of acute distal radial fractures and on compartment syndrome in November 2005, without objection from plaintiff's counsel. This is the first time that Dr. Athwal has qualified as an expert witness in any trial.

309 In November 2005, at the time of the accident, Dr. Athwal had been working as an orthopedic surgeon, teacher, and scientist for four months. He has obviously accumulated experience since that time. However, his relative lack of experience is a factor for me to take into account in assessing his evidence about liability in 2005.

310 Since August 2005, he has taught medical students, residents, and fellowship students.

311 Based upon his evidence, Dr. Athwal works as an orthopedic surgeon about four to five days per month in a clinic, he is on call once a week, and he is on call for a further three days every five to six weeks. The rest of the time, he is teaching or conducting research. He acknowledged that he may be characterized as an academic. His lengthy *curriculum vitae* and his relatively modest number of years in practice confirm that Dr. Athwal spends a great deal of time teaching, researching, writing, and lecturing.

312 Dr. Athwal testified that he feels very comfortable managing compartment syndrome including its diagnosis and surgical treatment. In his practice, Dr. Athwal testified that he diagnoses compartment syndrome once a year or once every 18 months. As he has been an orthopedic surgeon since 2003, I estimate based on his evidence that by 2005 he had one or two cases involving compartment syndrome; to date he has perhaps made the diagnosis about 7 to 10 times. He confirmed that compartment syndrome is one of the most serious upper extremity injuries.

313 Dr. Athwal characterizes himself as a specialized surgeon consultant and a scientist. Dr. Athwal is clearly very intelligent and accomplished, and his *curriculum vitae* confirms that he is

primarily an academic, a scientist, and a teacher. He has not worked in the trenches in a community hospital except during his residency.

314 The plaintiff's counsel suggested in argument that Dr. Athwal was an advocate for the defence. I agree with this submission. I found Dr. Athwal's approach in this lawsuit to be one-sided and not neutral. He appeared to use facts selectively to support the defence's position.

315 Dr. Athwal's report confirmed that in his view the application of a full circumferential cast was appropriate. However, his report did not explain that the application of a full circumferential cast is merely the first step after a closed reduction, before assessing treatment options. His written report was incomplete and hence in my view misleading.

316 In his evidence, Dr. Athwal steadfastly maintained his view that a full circumferential cast was appropriate in this case. This opinion was founded on two important misapprehensions of the evidence.

317 First, Dr. Athwal misunderstood the plaintiff's symptoms on November 12, 2005 after the cast was applied. He testified that he understood that the plaintiff was "comfortable." This was not the evidence.

318 Second, Dr. Athwal misunderstood that, after the cast had been applied, the surgery may not take place. Dr. Athwal erroneously drew the inference that the plaintiff contemplated living with a deformity rather than undergoing surgery. His evidence conflicts with the evidence of the other two experts, the defendant, and the plaintiff.

319 When it became clear during Dr. Athwal's evidence that surgery was required and he confirmed he would have bivalved the cast prior to the surgery, he adapted his theory on the appropriate standard of care. He introduced a new theory in favour of the defence that was not canvassed in his report. He testified that, because other community orthopedic surgeons refer other patients to him for surgery and those pre-surgery patients have full casts, the standard of care has been met in this case. As this new theory was not contained in his report, therefore Dr. Richards did not comment upon it.

320 For reasons that I will outline, I find that the reasonableness of this suggestion to establish the standard of care is questionable.

321 Dr. Athwal has never been qualified as an expert witness before this case. It was clear on the issue of causation that Dr. Athwal did not understand the difference between scientific causation and the legal test for causation.

322 Dr. Athwal did testify that the application of a full circumferential cast, combined with the underlying injury, can exacerbate the development of compartment syndrome, and could cause the symptoms to develop more quickly. This important acknowledgement was not contained in his

report.

323 Dr. Athwal is a teacher. However, he did not give evidence about what he teaches students would be appropriate treatment in the facts of this case (a high impact injury of a young man with a partially successful reduction where surgery was contemplated). In my view, this is a serious omission in light of his role as a teacher.

324 For the reasons I have outlined, I approach Dr. Athwal's evidence with significant caution. I find that Dr. Athwal in 2005 had limited practical experience of community standards of care in Ontario. I had the impression during Dr. Athwal's testimony that he was sparring with counsel. He was concerned about providing answers to help the defence, as opposed to providing evidence as a neutral witness to assist the search for truth.

Conclusions on weighing the experts' opinions

325 The plaintiff's expert and the defendant's experts offer different opinions on important issues. Where there are differing opinions, I prefer Dr. Richards' evidence. I reach this conclusion based on his years of experience as an upper extremity orthopedic surgeon, his extensive history of teaching and lecturing, his numerous publications, and his vast experience in Ontario and internationally as a leading surgeon in his field. In assessing Dr. Richards' credibility, I emphasize the importance of his independence and neutrality. He is abrupt and no nonsense in giving his evidence, but he makes concessions both in his written reports and in his evidence where appropriate. He provided a consistent, fair, unbiased opinion. As well, his evidence makes sense in light of the facts of this case and is consistent with the medical literature.

326 I have outlined what I see to be the comparative weaknesses in the defence experts' qualifications, as well as their neutrality problems.

Caselaw on the Standard of Care

327 The plaintiff bears the onus of proving on a balance of probabilities that a defendant breached the standard of care of a reasonable and prudent medical practitioner with the same training and experience, having regard to all the circumstances of the case. *Crits v. Sylvester*, [1956] O.R. 132 (C.A.), at para. 13, aff'd [1956] S.C.R. 991 provides the following on the standard of care:

> Every medical practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. He is bound to exercise that degree of care and skill which could reasonably be expected of a normal, prudent practitioner of the same experience and standing, and if he holds himself out as a specialist, a higher degree of skill is required of him than of one who does not profess to be so qualified by special training and ability. Every medical practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. He is bound to

> exercise that degree of care and skill which could reasonably be expected of a normal, prudent practitioner of the same experience and standing, and if he holds himself out as a specialist, a higher degree of skill is required of him than of one who does not profess to be so qualified by special training and ability

328 In this case, the defendant in November 2005 was a qualified specialist as an orthopedic surgeon with emergency room privileges in Scarborough General Hospital in Toronto. Therefore, the plaintiff must prove on a balance of probabilities that the defendant breached the standard of care of a reasonable and prudent orthopedic surgeon in a community hospital practicing in Ontario in 2005.

329 In *Crawford (Litigation guardian of) v. Penney*, [2003] O.J. No. 89 (Ont. S.C.), Power J. states that the foreseeable risk of a certain treatment influences the standard of care. As the degree of risk involved for a specific treatment increases, "so rises the standard of care expected of the doctor. The principle was expressed succinctly in one case as follows: the 'degree of care required by the law is care commensurate with the potential danger'": *Crawford*, at para. 224.

330 At para. 230, Power J. confirms that the standard of care includes the duty to be competent and knowledgeable in the area of medicine practiced by the physician at the relevant time; the duty to make a diagnosis and advise the patient of that diagnosis; the duty to refer a patient to another physician in a timely fashion where the attending physician cannot make a diagnosis; and the duty to disclose to the patient the nature of the proposed treatment, all material risks, and alternatives.

331 In *Bafaro v. Dowd*, 2008 CanLII 45000 (Ont. S.C.), at paras. 24-43, aff'd 2010 ONCA 188, 260 O.A.C. 70 and *Morin v. Korkola*, 2011 ONSC 1393, [2011] O.J. No. 1091, at para. 20, aff'd 2012 ONCA 869, [2012] O.J. No. 5832, Carpenter-Gunn J. and Mulligan J. outline the legal principles to guide courts in considering the standard of care applicable to medical practitioners:

* An unfortunate outcome does not constitute negligence. Physicians are obliged to provide certain means, not a certain result. Courts must not judge a physician's treatment by its result.
* Physicians should not be held liable for mere errors in judgment, only professional faults. An error in judgment is distinct from acts of unskillfulness, carelessness, or lack of knowledge. An error in judgment is not negligence where the physician exercises clinical judgment. The law requires reasonable care, not perfection. Even reasonable doctors make mistakes.
* Courts must not judge a physician's conduct with hindsight. Physicians are not liable for mistakes that are apparent only after the fact. Courts must assess a physician based on the knowledge that a physician ought to reasonably possess at the time of the alleged act of negligence.
* Courts may give significant weight to a professional's invariable practice. If a person claims that he invariably performs a certain task in a certain way, this is

evidence that he performed that task in that way on the day in question.

* A physician should not be held liable for a treatment decision based on unreliable patient data when its unreliability was neither known to him nor discoverable by him upon reasonable inquiry at the critical time.
* The trier of fact may determine that the standard of care itself is inherently negligent. The standard practice must be "'fraught with obvious risks' such that anyone is capable of finding it negligent, without the necessity of judging matters requiring diagnostic or clinical expertise": *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, at para. 41.
* Courts often require expert evidence in medical malpractice cases due to the specialized knowledge of the medical profession. Courts should use expert evidence when the issues to be decided involve diagnostic or clinical skills that are not within the trier of fact's ordinary knowledge and experience.

332 In *Bafaro* at paras. 32-38, Carpenter-Gunn J. provides specific principles to guide courts in considering expert evidence in medical malpractice cases:

* Courts must be particular about accepting expert evidence in assessing the standard of care. Medical specialists should not opine on the standard of care of specialists in other areas: see e.g. *Alakoozi v. Hospital for Sick Children* (2002), 117 A.C.W.S. (3d) 828 (Ont. S.C.), aff'd (2002) 187 O.A.C. 187 (C.A.).
* Practice guidelines are not equivalent to the legal standard of care. Practice guidelines may be relevant to the court's assessment of the standard of care. However, they cannot determine the legal standard of care for a specific medical professional, especially when there is expert evidence on the standard of care with reference to the particular facts of the case.
* An expert's personal practice is not the standard of care.
* If there are different techniques available to treat the same medical condition, a physician may exercise his discretion to determine the best course of treatment for that particular patient. In *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351, at para. 31, L'Heureux-Dubé J. states that "a doctor will not be found liable if the diagnosis and treatment given to a patient correspond to those recognized by medical science at the time, even in the face of competing theories." In *Connell v. Tanner* (2002), 158 O.A.C. 268, at para. 1, Laskin J.A. writes, "a doctor who treats a patient in accordance with a respectable body of medical opinion - even if it is a minority opinion - will not normally be held liable in negligence."

333 Ultimately, the court determines the standard of care, not medical experts: *Tacknyk v. Lake of the Woods Clinic*, [1982] O.J. No. 170 (C.A.). Where there are conflicting expert opinions, the trier of fact must weigh the conflicting testimony: *Crawford*, at para. 248.

Review of Each Expert's Evidence on the Standard of Care

Dr. Richards' opinion on the standard of care

334 Dr. Richards gave the opinion in the facts of this case that the placement of a full circumferential cast on the plaintiff's fracture in this high impact injury was below the standard of care for an orthopedic surgeon in Ontario in November 2005. He testified that he prefers and has consistently taught students, residents, and fellows over the years since 1984 that, with a high impact injury of the distal radius, a splint with wrapping is the proper treatment to allow for anticipated swelling, and that a full circumferential cast on distal radius fractures is not appropriate.

335 Dr. Richards was unequivocal that, when teaching medical students, residents, and post-graduate fellows in the classroom or in the hospital, they must be very aware of the importance of compartment syndrome, including knowledge as to what it is, how to diagnose, treat, and prevent it, and the serious, disabling consequences.

336 Dr. Richards agreed that there may be a range of acceptable opinions about proper treatment that vary with teaching and clinical judgment. In his experience and opinion, he teaches that the splint is the proper treatment. He testified that a bivalved cast is also an acceptable treatment for a displaced acute distal radial fracture. Although Dr. Richards does not personally use or teach the use of a cast, "it's okay to use a cast if you bivalve the cast" in the plaintiff's circumstances. The cast must be bivalved. Dr. Richards stated, "It allows a limb to swell without causing a compartment syndrome." Dr. Richards was clear that the bivalved cast must be cut to the skin, through the soft web roll.

337 Dr. Richards testified that the ambit of this teaching overseen by the auspices of Sunnybrook Hospital include the community hospitals of Bayview Campus, the Wellesley Street Orthopedic Hospital, Women's College Hospital, and St. John's Rehabilitation Hospital.

338 As part of the prevention of compartment syndrome, Dr. Richards teaches all of his students in the classroom and at Sunnybrook Hospital, St. Michael's Hospital, and their associated hospitals that, after the reduction of a fracture in a high impact injury, a splint or a split circumferential cast should be applied, but never a full circumferential cast.

339 Dr. Richards testified that splinting, or bivalving or splitting the cast, meets the standard of care because it allows the anticipated swelling in a high impact injury to occur without increasing the pressure in the compartment. In contrast, a circular circumferential cast does not allow for swelling. Muscle swelling occurs within the constraints of the cast that can cause increased pressure in the forearm compartments, causing increased pressure within muscles and compromising nerves and blood vessels. Muscle necrosis can occur over time if the muscle is not receiving any oxygen, resulting in muscle death.

340 In his report dated April 16, 2012, Dr. Richards opined that the cast must be bivalved or very

well-padded:

> I have lectured to the University of Toronto medical school class annually since my appointment in 1984. The consistent teaching over these years is that any type of tight cast or constrictive dressing needs to be avoided in patients with acute injuries due to the risk of compartment syndrome developing. I have informed the students that in my practice I use splints with padding as opposed to circumferential casts initially (for the first one to three weeks) prior to applying the circumferential cast. If a circumferential cast is used initially it needs to be very well padded or bivalve to allow for swelling. [Emphasis added.]

341 I note that this is a description for treatment of any kind of acute injury. It does not refer to high impact injuries such as the plaintiff's injury. In any event, Dr. Richards during his testimony disassociated himself from this statement that a well-padded non-bivalved cast met the standard of care in this case. This single statement conflicts with all of Dr. Richards' evidence. Dr. Richards acknowledged the statement, but was obviously caught by surprise and initially denied making such a statement. Notwithstanding the one line in his report, he confirmed his view that the only acceptable treatment for the plaintiff was a splint or a bivalved cast cut to the skin.

342 I note Dr. Richards' report talks about "splints with padding," and then refers to a circumferential cast that must be "well padded or bivalved." Although Dr. Richards did not say so, it appears that the "or" should have been an "and." His evidence makes sense after making this adjustment for what appears to be a typo.

343 I note that no other expert suggested that padding in a full circumferential cast could accommodate swelling. Dr. Taylor specifically stated that the padding was to protect the skin from the effects of the plaster. He said that too much padding would prevent the cast from performing its function.

344 When commenting on the X-rays taken at North York General on November 13, 2005, Dr. Richards observed limited or non-existent padding next to the plaster cast. He observed that the arm had swollen so much within the strictures of the cast that any padding that may have been present was obliterated.

345 Dr. Richards clearly maintained his position that, if a circumferential cast is used to treat an acute wrist injury, the cast must be bivalved and the underlying padding must be cut. Dr. Richards gave the clear opinion that the care provided to Mr. Moore fell below the standard in the province.

346 I conclude that the degree of padding is not relevant to assessing the question of standard of care. The issue in this case is whether the application of a full circumferential cast was appropriate. It appears that there was an error in Dr. Richards' report; the "or" should have been an "and."

347 In his evidence, Dr. Richards commented on Exhibit 6b, which shows the X-rays taken at Scarborough General Hospital along with drawings. All of the experts and the defence accepted the drawings as accurate pictorial depictions of the injuries in the X-rays. Exhibits 6c and 6d show the acute initial injury before reduction and after reduction. Exhibit 6d confirms that, after reduction and casting, the distal radius was aligned but the lunate facet was still displaced. The lunate facet after the closed reduction was rotated 180 degrees.

348 The X-rays taken at North York General confirm essentially the same information with respect to the fracture. Dr. Richards confirmed that, due to the displaced lunate facet, it would be necessary to intervene to put the lunate bone back into place. In his view, surgery was clearly necessary. In these circumstances, Dr. Richards opined that the plaintiff should be treated with a splint or a bivalved cast.

349 The defendant's experts characterized compartment syndrome as rare. Dr. Richards disagreed and characterized compartment syndrome in acute distal radius fractures as uncommon.

350 Dr. Richards confirmed that the literature states that the incidence of compartment syndrome in tibial fractures of the leg in high impact injuries is 2.5%. He acknowledged that tibial fractures have a higher risk of compartment syndrome than distal radial fractures. Dr. Athwal's testimony confirmed that a review of one study suggests that compartment syndrome develops in 1.4% of cases of high impact distal radius fractures.

351 Dr. Richards testified that patients with a high impact injury should be educated and instructed on the signs of compartment syndrome.

352 Dr. Richards testified that the effects of compartment syndrome are known and can be devastating. Practitioners must be aware of the risks and take preventative measures to avoid compartment syndrome. Dr. Richards opined that it is unacceptable and below the standard of care to apply a circumferential cast that even marginally increases the risk of compartment syndrome.

353 In this case, Dr. Richards gave the opinion that the only treatment to meet the standard of care within the acceptable, established range of clinical judgment was a splint or a bivalved cast, split to the skin. It was his opinion that the application of the full circumferential cast fell below the standard of care.

Dr. Taylor's opinion on the standard of care

354 Dr. Taylor testified that in his opinion a well-applied full circumferential cast was appropriate after a closed reduction, to maintain the length and alignment of the successfully reduced fracture. If the fracture is well reduced, the cast best protects the bone fragments from shifting out of place. Dr. Taylor testified that the application of a full circumferential cast met the standard of care in 2005.

355 Dr. Taylor confirmed that the padding layer applied to the arm before the plaster "doesn't make all that much difference" to accommodate swelling. The purpose of the preliminary layer of soft padding is to protect the skin from the rigid plaster. Typically two to three rolls of soft material are applied prior to applying the plaster for a distal radial cast.

356 Dr. Taylor only recently received quality copies of the available X-rays. In Dr. Taylor's first report dated February 10, 2009, he confirmed that the plaintiff had a distal ulna fracture and a distal radius fracture. This was an error.

357 Dr. Taylor also confirmed in his first report that the plaintiff had a die punch fracture, for which a bone graft (as the defendant recommended) may be appropriate. After reading the better quality X-rays, he acknowledged that this was not a correct diagnosis. The plaintiff in fact had a rotated fracture of the lunate facet. Dr. Taylor testified that there was no need for a bone graft to treat the plaintiff's actual, correct diagnosis of a fractured, rotated lunate facet.

358 Dr. Taylor acknowledged that for the last ten years splints have been increasingly used with high impact injuries. However, he testified that casts are appropriate treatment if a person, who is proficient in putting on casts, properly applies and moulds the cast to the arm. He described the process of putting on a cast and gently working with the plaster to mould it to the shape of the arm.

359 Dr. Taylor confirmed that, after the successful reduction of a distal radial fracture, there was the need to immobilize the fracture. In his view, a cast was generally the most appropriate form of immobilization, unless "there was a good reason not to put a cast on."

360 In Dr. Taylor's evidence, he fairly confirmed circumstances in this case that may indicate that it is appropriate to use a splint, rather than a full circumferential cast and made other concessions that are helpful to the plaintiff. He testified:

* If he or another surgeon was going to do surgery in one or two days on the plaintiff, he would have applied a splint.
* Splints were commonly used for distal radial fractures, and a splint is a safer mode of treatment as it is easier to correctly apply than a cast.
* If there was "worrisome swelling at the time of the initial injury," then a splint or a half-cast may be appropriate rather than a full cast, as it is easier to remove. Dr. Taylor confirmed that no one can predict the amount and type of swelling at the time of the initial treatment. Swelling may increase from 24 to 48 hours after the initial injury. I note that the plaintiff in this case had swelling from the outset as observed by the paramedic, the defendant who noted "+ swollen," and the plaintiff.
* Where superficial swelling is anticipated, a splint, half cast, or a bivalved cast would accommodate swelling.
* The closed reduction performed by the defendant was difficult. Two attempts were necessary. Dr. Taylor opined that the degree of force for the closed

reduction was considerable, but was not as great as the force of the initial injury. Dr. Taylor testified that difficult reductions are not necessarily indicative of compartment syndrome developing. Not every difficult reduction results in compartment syndrome. The type of accident must also be taken into account.

* The plaintiff had a dinner fork deformity, which is a very common colles fracture. Dr. Taylor has seen hundreds of such fractures during his career. Dr. Taylor testified that the X-rays confirmed that, after the closed reduction and application of the cast, there was an excellent reduction of the radial styloid, but that the lunate facet was still significantly displaced. There was evidence that the scaphoid ligament ruptured, indicative of the degree of trauma and the degree of scaphoid lunate disassociation of some 180 degrees.
* Unless the closed reduction was perfect, the plaintiff would need surgery by way of open reduction. Dr. Taylor confirmed unequivocally that the plaintiff needed further surgery "with or without the closed reduction" due to the rotated lunate facet.
* Dr. Taylor understood that the plaintiff wanted Dr. Orsini to take over his case as the plaintiff and his family had great respect for him. He understood that the plaintiff was getting a second opinion to see the degree of displacement of the fracture fragment. Obtaining the second opinion would inevitably delay the surgery.

361 Dr. Taylor did not agree that it was below the standard of care not to split or bivalve the cast in this case where surgery was contemplated. He testified that a bivalved cast would compromise the cast's function to maintain the alignment of the styloid.

362 Dr. Taylor did not agree that anything that increases the risk of compartment syndrome was a breach of the standard of care. Dr. Taylor testified that the possibility of compartment syndrome would not influence his judgment on whether to use a cast or a splint in the plaintiff's circumstances, as the incidence of compartment syndrome is less than 1% of distal radial fractures. If compartment syndrome does develop, "you have to deal with that at the time."

Dr. Athwal's opinion on the standard of care

363 Dr. Athwal testified that the initial application of a closed circumferential cast after a closed reduction of a distal radius fracture was appropriate and reflected the practice taught at Queen's University and Western University. He testified that the defendant therefore met the standard of care in applying a full circumferential cast.

364 In his report he states that the application of the full circumferential cast after a closed reduction of a distal radius fracture is the standard at his place of employment. Dr. Athwal works at the Hand and Upper Limb Centre, which is the largest upper extremity center in Canada. He stated, "as this is the standard of care in my institution, which is in the province of Ontario, the treatment

that Mr. Moore received at the Scarborough Hospital cannot fall below the standard of care."

365 Dr. Athwal significantly fails to mention in his report that the maintaining of a full circumferential cast assumes that the reduction was successful, and that no surgery was required.

366 Dr. Athwal testified that he teaches and recommends applying a full circumferential cast to all distal fractures as the preliminary step after the closed reduction, until the X-rays are available to see if the reduction was successful.

367 The next step is to review the X-rays to see if the closed reduction was successful and review the appropriate steps, if any, to be taken. Dr. Athwal's report did not outline the two-step process.

368 Dr. Athwal confirmed that treatment decisions are made after reviewing the X-rays. After reviewing the X-rays, a physician must decide to either leave the closed circumferential cast intact or bivalve the cast. He testified that the reasonableness of leaving the closed circumferential cast on the patient is informed by the treatment options after reviewing the X-rays.

369 Dr. Athwal testified that if the X-rays revealed that the reduction was successful - i.e., the bones were put back into their pre-injury anatomical position - then surgery could be avoided. The goal of the reduction in Dr. Athwal's words is a "perfect reduction."

370 Dr. Athwal testified that in this case, had the reduction been successful - i.e., had both bone pieces been anatomically aligned within the acceptable guidelines for the reduction of a fracture - he would have retained the full circumferential cast in place. I note that Dr. Richards disagreed with this, and testified that the cast should be bivalved in a high impact injury, even if the reduction was successful. As the plaintiff's reduction was not successful, I do not have to deal with this difference of opinion.

371 Dr. Athwal testified that the post-reduction X-rays revealed that there were two or three large fragments at the fracture site: one or two were the radial styloid showing a fracture of the doral volar surface; the other was the lunate facet on the outside of the hand. The largest piece of the joint was the radial styloid, which had been successfully reduced to a proper anatomical position. However, the lunate facet on the outside part of the wrist was depressed. The joint was not in the same line. The piece of the lunate facet had dropped down into the joint and was rotated 180 degrees.

372 Dr. Athwal then testified that what he would do with the closed circumferential cast after reviewing the X-rays depends on the patient's decision. If the plaintiff chose to have surgery with him or another surgeon, Dr. Athwal confirmed that he would have bivalved the plaintiff's cast pending the surgery.

373 Dr. Athwal confirmed that the plaintiff's request for a second opinion about surgery was entirely reasonable. He interpreted this request for a second opinion as meaning that surgery may

not take place. He testified that some patients opt for a deformity rather than having recommended surgery, even in the case of a displaced fracture. Dr. Athwal opined that, as the plaintiff may not have had the recommended surgery, it was appropriate to maintain the closed circumferential cast.

374 I find that the evidence does not support Dr. Athwal's suggestion that a 21-year-old man working to become an electrician would choose to live with a deformity rather than have external fixation to align a bone fragment located in the wrist joint of his dominant right hand. Dr. Orsini's notes confirm that the median nerve was compromised prior to the surgery. The plaintiff wanted a second opinion about the bone graft, and was concerned about the defendant's inexperience as a qualified surgeon.

375 Further, the expert evidence does not support Dr. Athwal's suggestion that surgery was not necessary.

376 The defendant's notes and evidence confirmed that surgery was necessary, as did Dr. Richards and Dr. Taylor. Dr. Orsini observed potential nerve damage as a result of the injury requiring surgery. Clearly, external fixation was necessary to take the piece of rotated bone out of the wrist joint. Surgery was taking place, either with Dr. Orsini or someone else at North York General or with the defendant or Dr. Ali at Scarborough General.

377 Dr. Athwal's suggestion that surgery might not take place illustrates that he either seriously misunderstood the evidence, or that he distorted the evidence in favour of the defence.

378 Dr. Athwal testified that he would have bivalved the cast if the plaintiff was going to have surgery with him or another surgeon. As it became clear that, based on what Dr. Athwal would have done in the facts of this case, the defendant perhaps should have bivalved the cast, Dr. Athwal provided a new, alternative theory to support his conclusion that the full circumferential cast met the standard of care.

379 Dr. Athwal testified that other community orthopedic surgeons refer patients to him who require surgery. Those pre-surgery patients arrive at his clinic wearing full circumferential casts. Therefore, he reasoned that the practice of using full circumferential casts for patients requiring surgery exists in the orthopedic community. Based upon these observations of other cases referred to him, Dr. Athwal testified that the defendant met the standard of care in a community hospital in Ontario.

380 I note that this theory is not contained in Dr. Athwal's report before the court. I therefore I did not have the benefit of Dr. Richards' evidence commenting on Dr. Athwal's alternative theory. Plaintiff's counsel did not bring to my attention that this was a new theory not contained in Dr. Athwal's report, and the evidence was admitted without opposition.

381 I conclude that the standard of care of what a reasonably prudent orthopedic surgeon would do in 2005 in the circumstances of this case cannot be established by the fact that other orthopedic

surgeons refer pre-surgery cases to Dr. Athwal in full circumferential casts.

382 There is no evidence about the facts of those referred cases and whether they are analogous to the facts of this case. There is no evidence that the referred cases involve high impact injuries in young men with a higher risk of developing compartment syndrome, with a rotated lunate facet displaced in the joint. There is also no information about when the underlying injury occurred. The risk of compartment syndrome appears to be for the first 24 to 48 hours after an injury when swelling takes place. If these out of town referrals to the specialty center were outside this time frame - which may be quite likely - they would have little in common with the facts of this case. Without knowing whether the referrals made to Dr. Athwal are analogous to this case, it is not possible to use Dr. Athwal's alternative theory to support the defence position as to standard of care.

383 I note that Dr. Athwal initially used misleading statistics as to the chance of developing compartment syndrome. He repeated that the chances were 1 in 300 to 400 individuals (.25% of cases). However, the literature that he canvassed and brought to the court's attention provides a credible study that the chances of developing compartment syndrome in young men in a high impact acute injury of the distal radius are significantly higher: 1.4% rather than .25%.[4] Another article suggests a 30-fold increase in risk.[5]

384 Dr. Athwal acknowledged that applying a full circumferential cast is contraindicated when the swelling is abnormal and excessive, and the pain is disproportionate to the injury.

385 Dr. Athwal co-authored an article with Dr. Robert Turner and Dr. Kenneth Faber that discusses the complications of distal radius fractures.[6] The excerpts of the article were put to Dr. Richards in his evidence-in-chief about treatment of high energy distal radius fractures in young men. Dr. Richards agreed with the contents of the article. The article provides the following at page 85:

> Mild carpal tunnel symptoms are common and are usually related to swelling and contusion around the median nerve. In patients who have significant hand and wrist swelling, splints or bivalved casts should be used rather that circumferential casts. [Emphasis added.]

386 At page 86 the article continues:

> **Compartment Syndrome**
>
> Compartment syndrome is a rare complication but can have dramatic consequences. Your male patients are most at risk because they are more likely to have sustained a high-energy injury.

...

> Acute injuries should be supported with noncircumferential splint and bandages. Although a cast may provide better support to an unstable fracture, it may not accommodate swelling and should be used with caution. If concerns exist about the risk of developing compartment syndrome, the patient should be admitted for limb elevation and observation.
>
> **Cast Issues**
>
> Applying a full cast on an acute injury will not accommodate subsequent swelling. It may be used for unstable fractures, but patients should be warned of the potential complications of increased pain, nerve compression and ultimately compartment syndrome. A noncircumferential splint provides less support to the fracture, but will accommodate swelling.
>
> Posttrauma swelling reduces in the days and weeks after the injury. The cast may become loose and should be changed. If a noncircumferential splint was initially applied, then it may be replaced by a complete cast at 10 to 14 days. [Emphasis added.]

387 Dr. Athwal sought to distinguish the applicability of the principles outlined in the article that he co-authored based upon his understanding that there was no excessive swelling or pain and the plaintiff was "comfortable" after the cast had been put on.

388 As I have outlined, the evidence before me confirms that the plaintiff was not comfortable at any time before or after the cast was applied. The plaintiff testified that he experienced significant pain and swelling both before and after the cast was applied, which the defendant told him was normal. When asked if the cast was too tight, the plaintiff testified that he could not answer, as he could not feel the cast due to the pain. He had numbness, tingling, swelling, and pain after the cast was applied. The plaintiff - who is no stranger to sports injuries - testified that he was alarmed.

Conclusions on the Standard of Care

389 I accept Dr. Richards' evidence on the standard of care. There is more than one acceptable mode of treatment in high impact distal radius fractures. To meet the standard of care of a reasonably prudent orthopedic surgeon in a community hospital in Ontario in 2005, an orthopedic surgeon in this case should either have applied a splint or a bivalved cast that was split to the skin.

390 There are regional differences between the use of splints or bivalved casts in a case such as this. Physicians appropriately exercise clinical judgment and meet the standard of care in Ontario if they use one of these two treatment options.

391 It appears clear from Dr. Richards and Dr. Taylor's evidence that the trend is away from full casts. Dr. Richards explained that splints can accommodate swelling to avoid possible compartment syndrome. Dr. Taylor observed that splints are much easier to put on correctly, and are easy to remove in case of problems. Dr. Athwal testified that the only compartment where casts continue to be applied is to the wrist in some parts of the province. All other compartments are treated with splints capable of accommodating swelling.

392 In this case, the evidence confirms that significant swelling was to be anticipated due to the high impact injury. The plaintiff traveled at some 40 to 50 km per hour, hitting a hummer vehicle. Swelling was noted from the outset by the paramedic and by the defendant's "+ swollen." A closed circumferential cast could not accommodate the swelling that would inevitably occur.

393 I conclude that applying a full circumferential cast in this case was contraindicated and below the applicable standard of care, regardless of the amount of padding. For reasons previously outlined, I conclude that the padding issue in Dr. Richards' report is not relevant to assisting the standard of care. I note that no other expert suggested that the amount of padding in a full circumferential cast could accommodate the swelling in a high impact injury.

394 I do not accept Dr. Taylor's evidence that the standard of care was met in this case. I do not accept his evidence that it was of paramount importance to maintain the alignment of the styloid radius pending the anticipated surgery at all costs. I do not accept his approach of wait and see when it comes to compartment syndrome, and "deal with that at the time" as the risk is low. Dr. Taylor candidly confirmed that if he or another surgeon was going to do surgery in one or two days he would have applied a splint in this case.

395 I do not accept Dr. Athwal's evidence that the standard of care was met by the maintenance of the full circumferential cast in this case. The X-rays revealed that the reduction was only partially successful. It was clear that the lunate facet was located in the joint and required open reduction surgery.

396 In my view, a serious omission in Dr. Athwal's report and evidence was what he taught his medical students and residents was appropriate treatment when the closed reduction was only partially successful and surgery was contemplated in a high impact injury in a young man. In this case, the post-reduction X-rays demonstrated that the lunate facet was significantly displaced by 180 degrees, with a persistent intra-articular gap and step, and it was in the joint.

397 I conclude, to meet the standard of care in this case, after reviewing the X-rays it was necessary to remove the cast and splint the injury, or to bivalve the cast to the skin. Either of these two treatments would accommodate anticipated swelling from this high impact injury. Either

treatment is a necessary preventative measure to reduce the known risk of compartment syndrome in a patient such as the plaintiff.

398 The necessity of splinting or bivalving the cast to the skin was clear in this case. The plaintiff openly complained to the defendant of continued numbness and significant pain after the cast was applied.

399 I accept Dr. Richards' opinion as to the applicable standard of care. Further, I accept his evidence that all reasonable steps should be taken to avoid the known risk of developing compartment syndrome. Given the potentially devastating consequences of compartment syndrome, using a treatment that even marginally increases the risk of compartment syndrome is below the standard of care when other acceptable treatments are available. As Dr. Richards stated, a basic tenet in medicine is that the physician should "do no harm."

Failure to Adequately Educate and Warn the Plaintiff

400 Patient education is important. Compartment syndrome is a real risk that must be explained to patients who experience a high impact injury.

401 In *Tacknyk*, the Ontario Court of Appeal confirms that a physician's duty of care does not stop after completion of treatment. The physician has a continuing duty to provide "adequate advice and direction." The extent of a physician's duty to educate and warn a patient depends on many factors, including "the degree of risk to which the patient is susceptible" to complications: at para. 26.

402 Both Dr. Richards and Dr. Athwal talked of the importance of educating patients about the risks and the signs of compartment syndrome.

403 In the article co-authored by Dr. Athwal, he confirms the duty to inform and warn:

> [A]pplying a full cast on an acute injury will not accommodate subsequent swelling. It may be used for unstable fractures, but patients should be warned of the potential complications of increased pain, nerve compression and ultimately compartment syndrome. A non-circumferential splint provides less support to the fracture, but will accommodate swelling.[7] [Emphasis added.]

404 I refer to the above noted excerpt with reference to the duty to warn. This does not change my conclusions about the need to bivalve a cast if the reduction is only partially successful and surgery is contemplated.

405 Dr. Athwal explained the meaning of this reference in the article:

> Q. There is an issue with cast in your own article not accommodating swelling and we have already gone through that swelling can increase and perhaps,

dramatically over 24 hours. That's why you informed the patient clearly about compartment syndrome and that's why you want them to understand the consequences of it?

A. Correct. ... I just want them [the patient] to be sure of what to look out for to prevent the complication.

406 An article cited by Dr. Athwal with approval begins with the following statement:

> The most important determinant of a poor outcome from acute compartment syndrome after injury is delay in diagnosis. The complications are usually disabling and include infection, contracture and amputation. One of the main causes of delay may be insufficient awareness of the condition. ... Awareness of the risk of the syndrome may reduce delay in diagnosis.[8] [Emphasis added.]

407 In the evidence before me based upon the limited research available in this area, it appears that the risk of developing compartment syndrome in high impact injuries in young men according to one study is about 1.4%.[9] The second study confirms that there is a 30-fold increase in the usual risk of developing compartment syndrome.[10]

408 I agree with Dr. Richards' evidence that the incidence of compartment syndrome in cases such as the plaintiff is uncommon but not rare. Compartment syndrome can have disastrous consequences. Early diagnosis is important. Therefore, I find that physicians are required to educate and warn patients who have suffered a high impact injury, particularly young men who are at an enhanced risk, about the symptoms and potential consequences of compartment syndrome and what to do if these symptoms occur.

409 The defendant's steps in this case to educate the plaintiff about the possible development of compartment syndrome were inadequate.

410 It was clear that the defendant treated this injury as routine. His treatment and instructions reflect his relaxed view of the situation. His only specific instructions were to keep the cast dry and clean and to keep his arm elevated and bolstered while sleeping. The plaintiff was told to read the pamphlet, which he in fact did. This was not a fracture caused by skating on the Rideau Canal in Ottawa where the defendant had experience with routine distal radial fractures. Mr. Moore travelled at a high speed. He and his motorcycle impacted a hummer vehicle, causing it to displace two feet.

411 The defendant did not educate the plaintiff about the possible risk of developing compartment syndrome. The defendant knew that the plaintiff was a 21-year-old young man with a high impact injury; the fracture was not reduced; and a significant piece of bone was in the wrist joint and rotated 180 degrees after the closed reduction. The plaintiff complained of significant pain and numbness after the cast was put on. Clearly, he was one of the young men at elevated risk of developing compartment syndrome.

412 Perhaps the defendant does not need to use the words "compartment syndrome." However, in this case an orthopedic surgeon needs to inform patients that are susceptible to compartment syndrome about the symptoms, the urgency, and the very serious consequences if left untreated. The more specific the education the better if a patient has to go to a crowded city emergency department in case of complications. Appropriate patient education may well have helped the plaintiff express his concerns to the triage nurse.

413 Instead of warning the plaintiff, the defendant reassured him that pain and swelling in a high impact injury were normal for two to three days.

414 When the plaintiff awoke with increased pain and swelling, the father initially thought it was normal and to be expected, based upon the information given to them by the defendant.

415 Thankfully, despite the inadequate warning and explanation, the plaintiff followed his instincts that "something was not right" and asked to go to the emergency department.

416 Had the defendant properly educated the plaintiff in his father's presence about the risks associated with his injury, the plaintiff may well have gone immediately to the emergency department. He probably would have been less stoic and more insistent about his pain and tight cast at North York General Hospital the next day when he met the triage nurse had he known the potential consequences of compartment syndrome.

417 The literature confirms that early detection of the condition is crucial. However, there is no expert evidence before me on whether earlier detection and earlier cast removal could or would have had any effect on the outcome of this case. Therefore, the defendant's failure to adequately warn the plaintiff about compartment syndrome is relevant to the breach of the standard of care, but it is a neutral fact when it comes to the issue of causation.

Case Law on Causation

418 The plaintiff must show that the defendant's breach of the standard of care caused the plaintiff's injury. Case law provides two tests to establish causation: the "but for" test and the "material contribution to risk of injury" test: *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181.

419 The "but for" test is the primary test to determine causation: *Clements*, at para. 8. The plaintiff must show on a balance of probabilities that the injury would not have occurred but for the defendant's negligence: *Snell v. Farrell*, [1990] 2 S.C.R. 311. The "but for" test is a factual inquiry: *Clements*, at para. 8. The Supreme Court of Canada provides the following guidelines in *Clements* at paras. 9 and 10:

> The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the

> defendant's negligence made to the injury.
>
> A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss.

420 Inferences of causation must be based on reliable facts. The plaintiff must provide some evidence that the defendant's negligence caused the injury: *Clements*, at para. 56. In *Aristorenas v. Comcare Health Services* (2006), 83 O.R. (3d) 282, the Court of Appeal clarifies the following at para. 54:

> The "robust and pragmatic" approach is not a distinct test for causation but rather an approach to the analysis of the evidence said to demonstrate the necessary causal connection between the conduct and the injury. Importantly, a robust and pragmatic approach must be applied to evidence; it is not a substitute for evidence to show that the defendant's negligent conduct caused the injury.

421 It is a "misapplication of the 'robust and pragmatic' approach to make a finding or draw an inference of causation where" the plaintiff fails to provide any evidence that the defendant's negligence caused the injury: *Aristorenas*, at para. 64.

422 In order to recover, the plaintiff need not prove that the defendant's negligence was the sole cause or the predominant cause of the plaintiff's injury. The defendant's negligence must only be a cause, not the cause. There may be multiple "but for" tortious and non-tortious causes of the injury. For example, a fire ignited in a wastepaper basket is caused by the dropping of a lit match, combustible material, oxygen, a failure to empty the basket, and so forth. As long as the defendant is a necessary cause of the injury, the defendant is liable, even though his act alone was not sufficient to create the injury: *Clements*, at para. 8; *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3, at para. 78; and *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 17.

423 Both counsel submitted that the "but for" test applies in this case.

424 In exceptional circumstances, a plaintiff may "recover on the basis of 'material contribution to risk of injury,' without showing factual 'but for' causation": *Clements*, at para. 13. The plaintiff must only show that the defendant's negligence materially contributed to the risk of injury. This test is not applicable in this case.

425 The "but for" test and the material contribution to risk of injury test are "two different beasts": *Clements*, at para. 14. The former is a factual inquiry into what likely happened. The latter removes the requirement of "but for" causation. It is a policy-driven test designed to permit plaintiffs to recover in cases despite their failure to prove causation: *Clements*, at para. 14.

Overview of the Causation Issue

426 Compartment syndrome is a well-recognized emergency and is known to orthopedic surgeons from the beginning of their training in medical school. Surgeons are trained to take preventative measures to avoid the development of compartment syndrome, diagnose it, and treat it.

427 The literature confirms that trauma is the initial cause of compartment syndrome. Clearly in this case, without the trauma and the underlying injury, the plaintiff would not have developed compartment syndrome. This fact is a given, and is not disputed.

428 The evidence and literature are clear that compartment syndrome can develop in fractures with a full cast, a bivalved cast, a splint, or no dressing at all, as well as in other injuries such as burn or crush injuries.

429 In this case, when a full circumferential cast is applied, two factors affect the ability of the muscle to swell: the internal fascia and the external plaster cast.

430 In this case, for reasons that I have outlined, I have concluded as a fact based upon the evidence that when the cast was removed the compartment syndrome had developed and was irreversible, and a fasciotomy was necessary to relieve the pressure.

431 The issue to assess with respect to causation is the impact, if any, of the application of the closed circumferential cast to the plaintiff's underlying injury on the development of the compartment syndrome.

432 Dr. Richards opined that on a balance of probabilities the application of the full circumferential cast upon the plaintiff's underlying injury caused the plaintiff's compartment syndrome to develop.

433 Dr. Taylor and Dr. Athwal acknowledged that the presence of a full circumferential cast can aggravate, or exacerbate, the development of compartment syndrome. However, both testified that the cast did not cause compartment syndrome to develop. They testified that the underlying injury and trauma caused the development of the compartment syndrome. The trauma of the injury caused the swelling in the compartment that if limited externally will increase the pressure in the compartment causing the cycle of continuous and increased swelling.

Review of Each Expert's Evidence on Causation

Dr. Richards' opinion on causation

434 Dr. Richards testified, "I think the likelihood is that if he [the plaintiff] had the fracture and no treatment at all, he would probably not have got the compartment syndrome, but [would have] had a crooked arm." He also testified that, "if [the plaintiff] had had the fracture and the fracture reduced and put in a splint or a bivalved cast, he probably wouldn't have got the compartment

syndrome. That is my opinion."

435 Dr. Richards' opinion confirms that the "but for" test as defined in the caselaw has been met.

436 Dr. Richards was clear that the development of compartment syndrome involved the interaction of multiple causes. He testified that it was more probable than not that the plaintiff's compartment syndrome was caused by (i) the initial injury, (ii) the application of a full circumferential cast to that injury, and (iii) the soft tissue injury and hemorrhage that occurred with the initial fracture. There were multiple causes of the syndrome. The compartment syndrome would not have developed without the underlying injury and the swelling that resulted from that injury.

437 The plaintiff filed two diagrammatic depictions to explain the development of compartment syndrome when a full circumferential cast was applied to the plaintiff's injury. Dr. Richards commented on and adopted these depictions as correctly explaining how the circumferential cast caused the development of compartment syndrome in this case. He testified that the rigid plaster circumferential cast cannot accommodate anticipated swelling in the compartment and thereby causes pressure in the muscle compartment. Thus, the cycle of compartment syndrome begins and may continue to the point that the process becomes irreversible.

438 Dr. Richards agreed with the cautions and contraindications of applying a full circumferential cast in the article co-authored by Dr. Athwal in support of his conclusion that the full circumferential cast played a role in the development of the compartment syndrome in the plaintiff, including the following excerpt from the article:

> Acute injuries should be supported with a non-circumferential splint and bandages. Although a full cast may provide better support for an unstable fracture, it may not accommodate swelling and should be used with caution. If concerns exist about the risk of developing compartment syndrome, the patient should be admitted for limb elevation and observation.[11] [Emphasis added.]

439 Dr. Richards referred to a recognized text used by orthopedic surgeons, *Rockwood and Green's Fractures in Adults*, filed as Exhibit 8 in support of this proposition.[12] At 331 and 332, the textbook provides that tight casts are known to be associated with the development of compartment syndrome.

440 Defence counsel objected to Dr. Richards referring to this textbook as it was not specifically mentioned in his report. I did not agree with the defence submission that Dr. Richards could refer only to textbooks referred to in his report. This is a standard, recognized textbook used by orthopedic surgeons.

441 Dr. Richards testified that it is common medical knowledge that a tight cast can cause compartment syndrome. As an illustration, not of learned literature available only to orthopedic surgeons, Dr. Richards attached to his letter dated April 16, 2012 a Google Search on compartment

syndrome that is available to the public. The evidence from this search includes the following excerpts:

> Pg. 1. Acute compartment syndrome is a medical emergency. It is usually caused by a severe injury. Without treatment, it can lead to permanent muscle damage.
>
> Pg. 3.
>
> Conditions that may bring on acute compartment syndrome include:
>
> ...
>
> Constricting Bandages
>
> Casts and tight bandages may lead to compartment syndrome. If symptoms of compartment syndrome develop, remove or loosen any constricting bandages. If you have a cast, contact your doctor immediately. [Emphasis added.]

442 Dr. Richards relied on certain facts to support his conclusion that the tight cast in this case caused the compartment syndrome. Dr. Richards relied on Dr. Orsini's inpatient operative report, dictated three days after the surgery:

> The following day he had increasing pain and came to North York General Hospital and his cast was split by Dr. Russel Tanzer in the Emergency Department. He had really no significant relief of his pain. At this point he had significant pain, numbness and weakness of his entire right hand. He did have hand weakness and numbness following his injury but it had worsened with the tight cast. [Emphasis added.]

443 Dr. Richards also relied on Dr. Tanzer's observations on November 13, 2005 that the cast was tight, as reflected in Dr. Orsini's notes.

444 Dr. Richards relied on his meeting and assessment of the plaintiff. The plaintiff told him that "the cast was tight and painful. He had to go back to the hospital." During the assessment, the plaintiff described his pain symptoms, and Dr. Richards noted that the plaintiff had symptoms of throbbing pain.

445 Dr. Richards opined that applying a tight cast, without any underlying injury, could cause compartment syndrome on its own. Defence counsel challenged Dr. Richards' opinion as no

scientific studies show that tight casts alone can cause compartment syndrome. Dr. Richards responded that his opinion was common sense. The tighter the cast or the external bandages, the higher the risk of compartment syndrome. Any external pressure necessarily reduces the compartment size. Obviously there have been no studies to support Dr. Richards' opinion that a tight cast alone can cause the development of compartment syndrome, as such a study would be unethical.

446 Dr. Richards acknowledged that an injury alone, without any cast, could cause compartment syndrome; an injury deep in the muscle can cause pressure on the muscles and nerves.

447 Dr. Richards confirmed, "I have said what I think caused the compartment syndrome." He was firm in his view that, on a balance of probabilities, the tight circumferential cast combined with the underlying injury and the swelling resulting from the injury caused pressure to develop in the compartment and the development of compartment syndrome.

448 Dr. Richards acknowledged that the plaintiff would not have developed compartment syndrome if he did not have the underlying injury. This fact is obvious and does not help in the analysis of causation. Of course, if the plaintiff did not have the underlying injury, to which a circumferential cast was applied, there would be no compartment syndrome.

449 Dr. Richards confirmed that there was abundant evidence that the plaintiff had compartment syndrome before the surgery, but that until the surgery takes place the diagnosis cannot be made 100%.

450 Dr. Richards confirmed that the observations in Dr. Orsini's operative notes dated November 16, 2005 that the muscles were viable, red, bleeding, and contractile do not mean that muscle damage had not occurred. Dr. Richards stated that the muscle "certainly wasn't normal, but it was alive."

451 In his opinion, given the plaintiff's permanent disabilities, muscle damage had occurred by the time surgery took place, but complete muscle death and necrosis had not. Dr. Richards confirmed that, if the compartment syndrome had not been caught in time, the plaintiff could have lost his arm.

Dr. Taylor's opinion on causation

452 In Dr. Taylor's view, the underlying injury caused the compartment syndrome. His logic was that, had there not been an underlying injury, compartment syndrome would not have developed.

453 Dr. Taylor testified that "you have to have an injury to have a compartment syndrome and any occlusive dressing can aggravate the problem, but it doesn't cause it. You have to have an injury within the compartment to start the process of the compartment syndrome."

454 Dr. Taylor confirmed that in this case the full circumferential cast was an aggravating factor with respect to the compartment syndrome.

455 Dr. Taylor agreed that the cast could act like an external compartment on the skin and push back against the compartments, so "that's why it can be an aggravating factor."

456 He also testified that it is reasonable to anticipate increased swelling during the first 24 to 48 hours after the injury. The constrictive dressing limits the skin's ability to swell within the compartment.

457 He explained the role of the cast as an aggravating factor. Swelling takes place. The cast pushes back against the swollen tissue, aggravating but not causing the situation to develop. A tight cast can aggravate the underlying injury as it is located close to the compartment and cannot accommodate swelling within the compartment.

458 Dr. Taylor testified about the effect of the cast on the development of the compartment syndrome when the cast was removed at 2:00 p.m. He confirmed that the cast "certainly was an aggravating factor and had to be removed."

459 After the cast was removed at 2:00 p.m., it was no longer an aggravating factor as the compartment syndrome was already established and irreversible at that point.

460 Of note is that at no time in his evidence did Dr. Taylor express the opinion that had the cast not been present, the compartment syndrome would have developed.

461 Dr. Taylor had one case of upper extremity compartment syndrome in his career and 12 cases of lower extremity compartment syndrome where no cast had been applied. Dr. Taylor testified that, with a high impact injury of the volar forearm, compartment syndrome can develop in the absence of a cast or splint. However, in Dr. Taylor's one personal experience, once the cast was removed, the problem rectified. The pressure in the compartment did not warrant surgery. Therefore, it appears that in Dr. Taylor's one case of upper extremity compartment syndrome, the cast caused the symptoms of compartment syndrome to begin. Once the cast was removed, the process of development stopped and surgery was not necessary. In Dr. Taylor's case, the developing compartment syndrome was caught and the cast was removed before the process had become irreversible.

462 The facts of this case were put to Dr. Taylor. In examination-in-chief, defence counsel asked him when the compartment syndrome started. He answered that there are two extremes: it could have started at 7:30 a.m. or after the cast was removed. In cross-examination, Dr. Taylor testified that the compartment syndrome could have started at night when the plaintiff was sleeping after taking Tylenol 3 for his pain. Dr. Taylor's evidence did not assist in determining when the compartment syndrome began, nor how that may relate to the presence of the cast.

463 I have outlined my findings of fact that the compartment syndrome was established before Dr. Tanzer's diagnosis and before the cast was split based upon the plaintiff's evidence of his symptoms and Dr. Tanzer's evidence of his observations and diagnosis.

Dr. Athwal's opinion on causation

464 Dr. Athwal testified that in his opinion the full circumferential cast was not the cause of the compartment syndrome. Based upon the scientific literature, the trauma is the etiology of the compartment syndrome. In this case, the fracture in the high energy motorcycle accident was the precipitating causal event for the development of the plaintiff's compartment syndrome. Dr. Athwal testified, "you need to have the injury, and if your injury is high energy, you are at risk for compartment syndrome." The "etiology is actually the trauma, the first eliciting event" (emphasis added).

465 In support of his opinion on causation, Dr. Athwal testified that compartment syndrome develops in other injuries where casts are never used; therefore, if compartment syndrome develops, it has to be a result of the underlying injury. He stated as follows:

> In other injuries when compartment syndrome can occur we always put splints on and compartment syndrome can still occur. So using examples of other compartment syndromes that occur, casting is not done. So with tibia, femur, elbow, we always put splints on and patients can still get compartment syndrome. So the precipitating factor was the injury.

466 His reasoning is not helpful in this case. It is not disputed that compartment syndrome can develop without any sort of restrictive dressing, and the underlying trauma is "the first eliciting event." Clearly Dr. Athwal is correct that, in cases where a cast is not applied, a cast played no role in the development of the compartment syndrome. However, the fact that compartment syndrome can develop when no cast is applied does not assist in this case to determine the impact, if any, in this case of the application of a full circumferential cast on the plaintiff's injury to the development of compartment syndrome.

467 Dr. Athwal acknowledged that the precipitating injury causes the muscles in the compartment to begin to swell. The fascia is the first restrictive limit for swelling. He confirmed that the next restrictive limit to swelling is the full circumferential cast.

468 Dr. Athwal acknowledged, based on a hand written note found in his file in his handwriting, that the presence of a cast could increase the risk of compartment syndrome. However, he testified that it has not been scientifically proved that applying a full circumferential cast could cause compartment syndrome. He stated, "I agree cast was an acceerbating [exacerbating] factor in the development of the compartment syndrome." I note that Dr. Athwal did not include this important acknowledgment in his report.

469 Counsel asked Dr. Athwal whether the compartment syndrome would have occurred if a different form of dressing had been applied, a splint or a bivalved cast. Dr. Athwal replied that, to his knowledge, there is no literature, personal experience, or clinical study that says a bivalved cast or non-circumferential dressing makes any difference. It was his opinion that the high energy trauma is the eliciting factor.

470 However, Dr. Athwal also testified that, because a full circumferential cast is an exacerbating factor, he would bivalve the cast to accommodate swelling. He acknowledged that, if compartment syndrome is going to happen, a full cast could bring it on "faster" and make it "worse."

471 Dr. Athwal testified that no scientific literature confirms that the use of a circumferential cast affects the development of compartment syndrome. I do not accept this evidence.

472 The plaintiff's counsel cross-examined Dr. Athwal on recognized professional literature that confirms that tight casts are associated with or cause compartment syndrome, including the article that Dr. Athwal co-authored. He did not accept these references as being scientifically proved or applicable in this case.

473 Dr. Athwal did not accept the following principles outlined in *Rockwood and Green's Fractures in Adults* at 331-332:

> **Pathophysiology**
>
> A simple working definition of a compartment syndrome is an increased pressure within an enclosed osteofascial space that reduces the capillary blood perfusion below a level necessary for tissue viability. This situation may be produced by two mechanisms: an increase in volume within an enclosed space, and a decrease in size of the space.
>
> An increase in volume occurs in the clinical settling of hemorrhage, postischemic swelling, reperfusion, and arterial venous fistula. A decrease in size is the result of too tight a cast, constrictive dressings, pneumatic antishock garments, and closure of fascial defects. As the pressure increases in the tissue, it exceeds the low intramuscular arteriolar pressure, causing decreased blood flow in the capillary anastomosis and shunting within the compartment. Elevation of the tissue fluid pressure results in a lowering of capillary blood flow. If a significant period of decreased flow results, microcirculatory ischemia produces necrosis of the tissues within the compartment.
>
> ...

> The clinical conditions that may be associated with a compartment syndrome include fractures, soft tissue injuries, arterial injuries, drug overdose, limb compressions, burns, postischemic swelling, constrictive dressings, and tight casts. The one constant factor in these conditions is that intercompartmental fluid accumulates inside a very tight, impermeable fascial enclose, causing the initial event. As increased intracellular calcium concentrations occur following ischemia, there is a shift of water into the muscle fibers, further compounding the problem. [Emphasis added.]

474 Dr. Athwal was also cross-examined on chapter 12 from Browner et al., eds., *Skeletal Trauma: Basic Science, Management, and Reconstruction*, 3d ed. (Philadelphia: Saunders, 2003), written by A. Amendola and B. Twaddle on compartment syndrome. The beginning of the chapter explores compartment syndrome of all types. The authors note at 269 that "any condition that increases the content or reduces the volume of a compartment would be related to the development of an acute compartment syndrome."

475 Amendola and Twaddle specifically consider the issue of casts at 270:

> Considering the underlying pathophysiology, the cause of a compartment syndrome may be related more specifically to conditions that decrease the size or increase the contents of a compartment. ... The most common cause of compartment syndrome associated with the decrease in the size of the compartment is the application of a tight cast, constrictive dressings or pneumatic anti-shock garments. [Emphasis added]

476 Dr. Athwal pointed out that one of the authors of this chapter is a foot surgeon, not a wrist surgeon. He used this as a reason for not accepting this as authoritative and applicable in this case. However, I note that this chapter, which he acknowledged to be a reputable reference source for all orthopedic surgeons, addresses all types of compartment syndrome. It describes in detail surgical procedures used for compartment syndrome of the forearm.

477 Dr. Athwal was also cross-examined on "Delayed Onset of Forearm Compartment Syndrome: A Complication of Distal Radius Fracture in Young Adults:"

> Compartment syndrome may be defined as a condition is which capillary perfusion is inadequate to sustain tissue viability, consequent upon high pressure within a closed fascial space...
>
> Since the original clinical definition, the condition has been described in association with acute fracture of the forearm bones, the use of constricting

> dressings or plaster casts...
>
> and various miscellaneous conditions that reduce volume or increase pressure within the compartment.[13] [Emphasis added.]

478 Dr. Athwal testified that being "associated with compartment syndrome" is different from causing compartment syndrome. He also challenged the authors' proposition that tight casts are associated with compartment syndrome, however, in cross-examination, he made this concession.

479 Dr. Athwal rejected the literature presented to him, and confirmed that "scientific proof that is what you are looking for as an academic." Cause in the medical sense means "statistically speaking" with tests we can run and reproduce something to prove something statistically. He steadfastly refused to accept the literature that confirmed that a tight cast can cause compartment syndrome. He claimed that this proposition has not been scientifically proved and has not been properly footnoted. He claimed that, when you make a statement, it must be based "on scientific fact." He stated, "This quote in the textbook is not referenced, so in the medical literature, if we say this thing causes something else it has to be referenced -- I would probably email him and ask him so where did you get it from?"

480 The absence of scientific proof that a tight cast can cause compartment syndrome is an important factor that underpins Dr. Athwal's opinion that the cast in this case did not cause the development of the compartment syndrome.

Conclusions on Causation

481 In this case, a full circumferential cast was applied and was not bivalved. I have concluded that this treatment was below the applicable standard of care. Two modes of treatment meet the standard of care of a reasonably competent orthopedic surgeon in a community hospital in Ontario in 2005, where there is a high impact injury, the closed reduction is partially successful, and surgery is contemplated: (i) application of a splint or (ii) a bivalved cast cut to the skin.

482 Further, it is clear that compartment syndrome can develop in the upper extremity without a cast being applied. Dr. Athwal's evidence confirmed that a dorsal radial or ulnar fracture is the only compartment of the body where compartment syndrome can develop that is still treated with casts in some centers in Ontario. All other compartments in the body are treated now with splints or other non-constrictive supportive dressings.

483 The issue to assess with respect to causation is the impact, if any, of the application of the closed circumferential cast to the plaintiff's underlying injury on the development of the compartment syndrome.

The defence evidence establishes causation

484 The defendant's experts testified that the underlying injury was the cause of the compartment syndrome. Both defence experts agreed that the rigid plaster cast is the second barrier to the swelling. The first barrier is the fascia, which contains the muscle, nerves, and blood vessels in the compartment. Both defence experts agreed that a full circumferential cast may aggravate (Dr. Taylor) or exacerbate (Dr. Athwal) the compartment syndrome by making it worse and by speeding up the development process.

485 Dr. Taylor did not testify that, had the circumferential cast not been applied, the plaintiff's compartment syndrome would have developed anyway. This case may be distinguished from Dr. Taylor's one experience with upper limb compartment syndrome. In Dr. Taylor's case, the symptoms fortunately abated after he removed the cast. A fasciotomy was not necessary.

486 Dr. Athwal testified that, once the underlying injury causes compartment syndrome to develop, the "dye is cast." The condition would continue to progress and the only treatment is a fasciotomy. I do not accept his conclusion. I accept as a fact that, regardless of the cause of the compartment syndrome, with or without a cast, at some point the condition becomes irreversible. In that sense, the "dye is cast." Dr. Athwal's statement does not assist in determining what role, if any, the application of a full circumferential cast played in causing the development of compartment syndrome.

487 I find that neither Dr. Taylor nor Dr. Athwal understood the legal test for causation. Neither appeared to understand that there could be more than one "but for" cause. Both Dr. Taylor and Dr. Athwal appeared to think causation involved one cause, and one cause only, that is the underlying injury. Dr. Athwal used the words "etiology is actually the trauma, the first eliciting event" (emphasis added).

488 Applying the "but for" test, the plaintiff need not prove that the defendant's negligence was the sole cause or the predominant cause of the plaintiff's injury. The defendant's negligence must only be a cause, not the cause. Causation may be multi-faceted. There may be multiple "but for" tortious and non-tortious causes of the injury. As long as the defendant is a necessary cause of the injury, the defendant is liable, even though his act alone was not sufficient to create the injury: *Clements*, at para. 8; *Blackwater*, at para. 78; and *Athey*, at para. 17.

489 In this case, there is no dispute that the underlying injury is one of the "but for" causes of the plaintiff's compartment syndrome. If the underlying injury had not occurred, there would be no fracture, no swelling, no need to apply a cast, and no compartment syndrome. This does not assist in determining the role, if any, of the application of a rigid, plaster cast in the development of the plaintiff's condition.

490 I note that Dr. Athwal's opinions on causation are problematic quite apart from his view that causation is limited to one cause. Dr. Athwal understands causation in this lawsuit to mean scientific causation - i.e., "causation statistically speaking" with proven correlations. Dr. Athwal stated, "I don't know what causation is in a legal sense. I know what it is in a medical sense. So,

when I refer to a medical sense -- when I refer to causation, I am referring to it as a medical sense." Dr. Athwal's insistence on scientific proof, and his refusal to accept propositions in standard textbooks that tight casts can cause compartment syndrome, undermine the reliability of his evidence.

491 Plaintiffs are not required to meet a standard of scientific proof to be able to prove causation: *Clements*, at para. 9. A gold standard of scientific proof of a single cause would be impossibly high.

492 I conclude, contrary to Dr. Athwal's views, that reputable medical literature confirms that a tight cast applied to an underlying high impact injury may cause the development of compartment syndrome.

493 The defence experts acknowledged that the cast aggravated or exacerbated the compartment syndrome. It was not clearly argued by plaintiff's counsel that the evidence of the defence experts alone is sufficient to prove causation. It appears that these admissions, without considering Dr. Richards' evidence, support a finding of causation in this case.

494 The caselaw confirms that a plaintiff can prove causation by showing that a defendant's negligence aggravated or exacerbated an existing injury or condition: see e.g. *Price v. Milawski*, [1976] O.J. No. 228 (H. Ct. J.), aff'd (1977) 18 O.R. (2d) 113 (Sup. Ct. App.); *Wood v. Cobourg District General Hospital* (1999), 125 O.A.C. 370 (C.A.); *Johal v. Conron*, 2013 BCSC 1924, [2013] B.C.J. No. 2318; see also *Snell*, at p. 331; *Athey*; and Erik S. Knutsen, "Clarifying Causation in Tort" (2010) 33 Dal. L.J. 153.

495 The textbook, Lewis N. Klar, *Tort Law*, 5th ed. (Toronto: Thomson Reuters, 2012), was published after the Supreme Court's decision in *Clements* and cites *Clements* in its discussion of causation. At 485, the author confirms that a defendant is liable for the "exacerbation of a manifest, on-going pre-existing injury, or the acceleration of an existing degenerative process."

496 Cases where a defendant's negligence aggravates a plaintiff's pre-existing injury or condition are sometimes referred to as "crumbling skull" cases. The crumbling skull doctrine is relevant to assessing damages. In *McCulloch v. Isaac*, 2013 BCSC 1319, [2013] B.C.J. No. 1626, at para. 94, the court cites a past case, *Pavlovic v. Shields*, 2009 BCSC 345, [2009] B.C.J. No. 502, at para. 56, with approval: "A 'crumbling skull' injury is ... one where there is a pre-existing condition, but [the condition] is active or likely to become active regardless of the accident. If the injury is proven to be of a crumbling skull nature, then the plaintiff is liable only to the extent that the accident caused an aggravation to the pre-existing condition."

497 The crumbling skull doctrine does not apply in this case. Prior to the defendant's negligence, there was no pre-existing compartment syndrome in the plaintiff's right arm that was active, or likely to become active, to cause damage to the plaintiff's right arm. The compartment syndrome started to develop after the defendant applied a full circumferential cast to the plaintiff's high impact injury.

498 Dr. Taylor recognized that by 2:00 p.m. the process of the developing compartment syndrome had become irreversible. He testified that, at 2:00 p.m. on November 13, 2005, when the cast was removed "what you're left with is that the compartment syndrome has progressed to the point where it requires surgical treatment. It's ... a true compartment syndrome, you have the self-perpetuating escalating process that goes on and it can only be stopped by surgical treatment and incising the fascia and reducing the pressure by increasing the volume of the muscles."

499 When the cast was removed it was no longer of any relevance as an aggravating factor as the evidence establishes that by that time, the damage by the cast had already been done. By then, the compartment syndrome was significant, established, and was irreversible.

500 It appears that the defence admissions confirm that the plaintiff has met the onus of proof for causation.

Dr. Richards' evidence

501 I accept Dr. Richards' evidence on causation. Adding Dr. Richards' evidence to the defence concessions makes proof of causation very clear.

502 Dr. Richards' opinion makes sense and is based upon the evidence. He relied upon the facts of the case as provided by the plaintiff, Dr. Tanzer's observations, and Dr. Orsini's surgical notes and records.

503 Dr. Richards testified that a full circumferential cast applied to the plaintiff's injury on a balance of probabilities caused the development of compartment syndrome. The underlying injury results in swelling within the muscle compartment that cannot be accommodated by the rigid plaster cast. The cast applies pressure to the muscles of the compartment, which in turn causes increased swelling.

504 The plaintiff in this case had swelling at the time of the injury, as documented by the paramedic and the defendant's "+ swollen." After the partially successful closed reduction, the lunate facet was located in the joint and further swelling was to be anticipated.

505 The plaintiff experienced pain and significant swelling after the cast was applied. He was unable to feel the cast when he left the hospital, as there was too much pain. The plaintiff complained of numbness, tingling, and significant pain; these symptoms did not subside after the reduction and cast application. The plaintiff was "alarmed" about his symptoms. The defendant told him that pain and swelling were normal for two to three days.

506 Before discharge from Scarborough General the plaintiff was exhibiting significant symptoms of pain, swelling, and loss of sensation consistent with the risk of developing compartment syndrome.

507 Dr. Tanzer recognized and made the working diagnosis immediately that the plaintiff had compartment syndrome when he saw him. His eyes lit up when he saw the full cast. For reasons I have outlined, I accept this evidence. He hoped that by splitting what he observed to be a tight cast, the muscles in the compartment could recover their blood supply and the process of the developing compartment syndrome would stop.

508 Unfortunately, in the plaintiff's case by the time the cast was removed shortly after 1:44 p.m. on November 13, 2005, the compartment syndrome had become irreversible. The pain and swelling did not abate. The cast had to be split, but splitting the cast could not retard the process. The only remedy was a fasciotomy. Dr. Tanzer called Dr. Orsini to report the plaintiff's compartment syndrome requiring urgent care.

509 I accept Dr. Richards' evidence that a full circumferential cast can cause the development of compartment syndrome when applied to a high impact injury, as the anticipated swelling cannot be accommodated.

510 I accept Dr. Richards' evidence that "I think the likelihood is that if he [the plaintiff] had the fracture and no treatment at all, he would probably not have got the compartment syndrome, but [would have] had a crooked arm." I also accept his evidence that, "if [the plaintiff] had had the fracture and the fracture reduced and put in a splint or a bivalved cast, he probably wouldn't have got the compartment syndrome."

511 I accept Dr. Richards' evidence expressed in simple words that, on a balance of probabilities based on the facts of this case, but for the application of a full circumferential cast to the plaintiff's high impact injury, the compartment syndrome would not have developed.

512 For these reasons, I find that the plaintiff has met the onus of proof of causation applying the "but for" test to the facts of this case.

Summary of Conclusions

Admissibility of Dr. Orsini's medical report

513 I ruled at the commencement of the trial that the content of Dr. Orsini's reports outlining the facts and his observations were admissible for their truth. Both parties relied on this factual content throughout the trial. This factual content supplements the hospital records admitted into evidence, and they appear to be admissible under s. 52 of the *Evidence Act*. The defence did not object to this ruling, and reflects their alternative argument on the preliminary motion.

514 I ruled that Dr. Orsini's opinions on negligence and causation expressed in his reports were not admissible for their truth as necessity had not been met. Dr. Orsini was not available for cross-examination. The plaintiff had another qualified expert, Dr. Richards, available to testify on negligence and causation.

515 The various expert reports comment on Dr. Orsini's opinion, as well as his surgical notes and observations. I concluded that Dr. Orsini's opinions on negligence and causation expressed in his reports are admissible as part of the *res gestae* and background, but not for their truth.

Scope of admissible evidence of treating emergency room physicians

516 I concluded that Dr. Tanzer as the treating emergency room physician must be able to give evidence about the steps he took, his observations, and his diagnosis at the time. His observations that the cast was tight and therefore he split the cast are admissible facts for their truth. His working diagnosis of compartment syndrome is an admissible fact.

517 Dr. Richards relies on Dr. Tanzer's observations and actions as reflected in Dr. Orsini's notes as some of the facts underpinning his opinion on causation.

518 Dr. Tanzer did not serve a report pursuant to Rule 53.03 of the *Rules of Civil Procedure*. Therefore, he cannot testify directly on issues of standard of care or causation: *Westerhof*.

Whether it is appropriate for counsel to review experts' draft reports

519 Defence counsel reviewed Dr. Taylor's draft report during a one-and-a-half-hour telephone conference call.

520 The purpose of Rule 53.03 of the *Rules of Civil Procedure* is to ensure the independence and integrity of the expert witness. The expert's primary duty is to the court. In light of this change in the role of the expert witness under the new rule, I conclude that counsel's practice of reviewing draft reports should stop. There should be full disclosure in writing of any changes to an expert's final report as a result of counsel's corrections, suggestions, or clarifications, to ensure transparency in the process and to ensure that the expert witness is neutral.

Defence objections limiting the scope of the plaintiff's expert evidence

521 Defence counsel took a restrictive view of Rule 53.03 of the *Rules of Civil Procedure* objecting to all evidence not specifically covered in Dr. Richards' report. I do not accept defence counsel's approach as the proper or intended interpretation of Rule 53.03. Defence counsel limited the expert's testimony to what is directly contained in his report, even if the substance of the testimony was latent in the report. However, in light of plaintiff counsel's concession, Dr. Richards' answers in chief were limited to the content of his reports. He was not permitted to comment on trial evidence, or any issues arising from the evidence, unless they were referred to in his reports.

522 I note that defence counsel did not follow the same set of strict rules when questioning her experts. I allowed the expanded questioning of the defence experts with respect to the evidence in this case, notwithstanding the defence counsel's rigid approach limiting Dr. Richards' evidence.

523 It would have been helpful to me as the trier of fact to have counsel present to each of the

expert witnesses the agreed upon and the disputed facts, to fairly test whether the facts of the case impact upon their opinions contained in their expert reports. In light of the defence objections, this approach was not taken.

524 As well, defence counsel objected to the written reports being admitted for their truth into evidence. Copies of the reports were available to me as an aide to assist in following the evidence, but not admitted into evidence. The oral evidence was not necessarily as clear as the experts' written reports. This made my task of fairly summarizing each expert's evidence more challenging.

525 In light of the defence submissions, I have not considered the experts' reports for their truth. However, I conclude that the common law rule, that an expert has the option of filing his report or testifying at the trial, does not make practical sense after the amendments to Rule 53.03 of the *Rules of Civil Procedure*. I suggest that experts should be entitled to rely upon their written reports as part of their evidence-in-chief. This approach would both streamline the trial process and assist the trier of fact in understanding and assessing expert evidence. This is a matter for a higher court, or the Civil Rules Committee.

Standard of Care

526 I have concluded that the defendant did not meet the standard of care of a reasonably prudent general orthopedic surgeon in 2005 in a community hospital in Ontario in applying a full circumferential cast in the facts of this case. I accept Dr. Richards' evidence on this issue, and do not accept the evidence of the defence experts.

527 To meet the standard of care, the defendant should have applied either a splint or a bivalved cast cut to the skin.

528 Before discharging the plaintiff, the defendant failed to adequately educate or warn the plaintiff of the risk of developing compartment syndrome, and he treated this injury as routine. He did not meet the standard of care of an orthopedic surgeon in a community hospital in 2005 by failing to adequately educate the plaintiff about the risks and symptoms of compartment syndrome. In spite of this omission, the plaintiff attended at the hospital the next day. Therefore, this omission did not impact the issue of causation.

Causation

529 The plaintiff bears the onus of proof on a balance of probabilities to show that the closed circumferential cast in this case caused the compartment syndrome to develop, applying the legal test for causation.

530 The defence experts' admissions that the cast aggravated, or exacerbated, the underlying injury and the development of compartment syndrome appear to support the conclusion that causation has been proved.

531 I accept Dr. Richards' evidence that a full circumferential cast can cause the development of compartment syndrome when applied to a high impact injury, as the anticipated swelling cannot be accommodated.

532 Further, I accept Dr. Richards' evidence expressed in simple words that, on a balance of probabilities based on the facts of this case, but for the application of a full circumferential cast to the plaintiff's high impact injury the compartment syndrome would not have developed.

533 I find that the plaintiff has met the onus of proof of causation in the facts of this case.

Costs

534 If the parties are unable to agree on appropriate costs, the parties may file written submissions within 30 days of the release of these reasons. The plaintiff shall file a consolidated brief containing the submissions of both parties.

J.M. WILSON J.

cp/e/qlcgh/qlpmg/qlced

1 (Paper presented at the Superior Court of Justice (Ontario) Fall Education Seminar, 31 October 2013) [unpublished].

2 "In the Opinion of the Treating Doctor: Adducing Opinion Evidence from Fact Witness Physicians" (2013) 32 Advocates' Soc. J. 14.

3 In developing this list of criteria, I was guided by the comments made by Justice George Strathy in his presentation delivered at the Superior Court of Justice (Ontario) Fall Education Seminar, 31 October 2013, "Dealing with Expert Qualifications, the Scope of the Expert's Testimony and the Bias of the Expert".

4 M.M. McQueen, P. Gaston, & C.M. Court-Brown, "Acute Compartment Syndrome. Who is at Risk?" (1999) 82 The Journal of Bone & Joint Surgery 200 at 202.

5 N.S. Simpson & J.B. Jupiter, "Delayed onset of forearm compartment syndrome: a complication of distal radius fracture in young adults" (1995) 9 Journal of Orthopedic Trauma 411.

6 "Complications of Distal Radius Fractures" (2007) 38 Orthopedic Clinics of North America

217.

7 *Ibid*, at 87.

8 McQueen, Gaston, & Court-Brown, *supra* note 4, at 200.

9 *Ibid*, at 202.

10 Simpson & Jupiter, *supra* note 5.

11 Athwal, Turner, & Faber, *supra* note 6.

12 Bucholz & Heckman, eds., 5th ed. (Philadelphia: Lippincott Williams & Wilkins, 2001).

13 Simpson & Jupiter, *supra* note 5, at 417.

Case Name:

Westerhof v. Gee Estate

Between
Jeremy Westerhof, Plaintiff/Appellant, and
The Estate of William Gee and Kingsway General Insurance,
Defendant/Respondent

[2013] O.J. No. 3134

2013 ONSC 2093

310 O.A.C. 335

Divisional Court File No. DC-11-330

Ontario Superior Court of Justice
Divisional Court - Hamilton, Ontario

P.T. Matlow, D.R. Aston and T.R. Lederer JJ.

Heard: February 12, 2013.
Judgment: June 20, 2013.

(41 paras.)

Civil litigation -- Civil evidence -- Opinion evidence -- Expert evidence -- Admission of reports -- Criteria for admissibility -- Qualification as an expert -- Appeal by plaintiff from dismissal of claim for damages for physical injuries dismissed -- Appeal related to trial judge disallowing expert evidence under Rule 53.03 -- Important distinction was in type of evidence sought to be admitted, not role or involvement of witness -- Opinion evidence required compliance with Rule 53.03; factual evidence did not -- There was no basis for distinguishing witnesses that treated appellant and those called as experts -- Trial judge was correct to require compliance with Rule 53.03 -- Judge had also not made factual findings in jury charge -- Rules of Civil Procedure, Rule 53.03.

Damages -- Physical and psychological injuries -- Physical injuries -- Considerations impacting on award -- Appeal by plaintiff from dismissal of claim for damages for physical injuries dismissed -- Appeal related to trial judge disallowing expert evidence under Rule 53.03 -- Important distinction was in type of evidence sought to be admitted, not role or involvement of witness -- Opinion

evidence required compliance with Rule 53.03; factual evidence did not -- There was no basis for distinguishing witnesses that treated appellant and those called as experts -- Trial judge was correct to require compliance with Rule 53.03 -- Judge had also not made factual findings in jury charge -- Rules of Civil Procedure, Rule 53.03.

Damages -- Proceedings -- Appeals and judicial review -- Natural justice -- Evidence -- Appeal by plaintiff from dismissal of claim for damages for physical injuries dismissed -- Appeal related to trial judge disallowing expert evidence under Rule 53.03 -- Important distinction was in type of evidence sought to be admitted, not role or involvement of witness -- Opinion evidence required compliance with Rule 53.03; factual evidence did not -- There was no basis for distinguishing witnesses that treated appellant and those called as experts -- Trial judge was correct to require compliance with Rule 53.03 -- Judge had also not made factual findings in jury charge -- Rules of Civil Procedure, Rule 53.03.

Appeal by the plaintiff from the dismissal of his claim for damages for physical injuries as a result of a car accident. The trial jury had awarded the appellant general damages and loss of income. The judge dismissed the claim on the basis the claim for non-pecuniary damages did not meet the Insurance Act threshold. The grounds for appeal related to rulings made by the trial judge disallowing expert evidence. The judge disallowed a substantial amount of the appellant's medical evidence because the witness was not qualified, or because it did not comply with Rule 53.03, particularly in the absence of a required report. The appellant submitted the judge failed to recognize the distinction between witnesses called because they had treated the appellant and those called as experts. The appellant asserted that Rule 53.03 did not apply to witnesses that had provided treatment or were retained by a non-party. The appellant also asserted treatment providers could not fully comply with Rule 53.03, which required them to acknowledge a duty owed to the court, beyond a duty to their patient. Further, the appellant submitted the judge's charge to the jury was inappropriate as it urged the jury to accept certain findings of fact.

HELD: Appeal dismissed. The important distinction was in the type of evidence sought to be admitted. Opinion evidence required compliance with Rule 53.03; factual evidence did not. If the expert had not been qualified to give the opinions to be tendered or where the report relied on to advance the opinion was not in compliance with Rule 53.03, it was correct to refuse to admit the evidence. Professionals who provided treatment were able to give evidence as to their observations and a description of the treatment provided; this was factual and not opinion evidence. A treating physician or professional whose evidence was thus limited did not need to be qualified and was not treated as an expert. However, when such a witnesses offered opinions as to the cause of the injury, its pathology or prognosis, the evidence entered into expert opinion that required compliance with Rule 53.03. A diagnosis was not always a fact; it began as an inference, which could prove to be correct or incorrect, and also depended on the use to which it was applied. The trial judge had been correct to require the appellant's treating professionals' opinions be supported by Rule 53.03 reports. In the application of Rule 53.03, there was no basis for distinguishing between witnesses who

treated the appellant and those who were retained solely to provide an opinion at trial. There was also no basis to distinguish opinion evidence given by witnesses engaged by a non-party as opposed to a party to the claim. Treatment providers that executed Rule 53.03 did not necessarily run a risk of being unable to act in the best interests of their patients. The trial judge's charge to the jury had not made findings of fact or usurped their role; the trial judge had repeatedly advised the jury that they had exclusive authority to find facts.

Statutes, Regulations and Rules Cited:

Insurance Act, R.S.O. 1990, c. 1.8, s. 267.5

Rules of Civil Procedure, Rule 4.1.01, Rule 53, Rule 53.03, Rule 53.03(2.1)

Statutory Accident Benefits Schedule,

Counsel:

Jane Poproski, for the Plaintiff/Appellant.

Kieran Dickson, for the Defendant/Respondent.

The judgment of the Court was delivered by

T.R. LEDERER J.:--

Background

1 The plaintiff appeals the October 24, 2011 dismissal of his claim for damages.

2 The appellant was in a car accident on April 22, 2004. He sued. Liability was admitted. There was a trial before a jury to assess what, if any, compensation should be awarded. It lasted ten days. The jury awarded $22,000 in general damages and $13,000 for loss of income to the date of the trial. It made no award for future loss of economic opportunity or earning capacity. The claim was dismissed based on the subsequent determination, by the trial judge, that the claim of the plaintiff for non-pecuniary damages did not meet the threshold prescribed by s. 267.5 of the *Insurance Act*, R.S.O. 1990, c. 1.8.

3 The appellant appeals both the verdict of the jury and the finding of the trial judge that the statutory threshold had not been met.

4 The appeal relates to restrictive evidentiary rulings made by the trial judge which, for the most

part, concern the application of rule 53.03 (expert evidence). The appellant asserts that these rulings denied the jury access to probative, relevant and material evidence. It was submitted that these rulings were wrong in law and, when taken as a whole and in combination with what was said to be findings of fact, made by the trial judge in his charge to the jury, resulted in a miscarriage of justice. Nothing was said by either party with respect to the standard of review. Evidentiary rulings are questions of law. The standard of review is correctness.

5 Our courts have long afforded witnesses, recognized as experts, the privilege of giving evidence of their opinions in areas where their expertise has been demonstrated. This has not always worked in a way that assists the administration of justice. There are some who do not understand or accept that, with the privilege, comes responsibility to the court and its process. They offer opinions outside their expertise and testify with a predisposition in favour of the party on whose behalf they have been called. The *Rules of Civil Procedure* have been amended, in part to respond to these issues. This appeal is founded on the proposition that the trial judge has interpreted the applicable rule such that the solution will cause a fresh set of problems. We do not agree.

Rule 53.03

6 Any witness to be called as an expert is required to be qualified as to his or her expertise and to produce a report that provides and demonstrates the basis for any opinion to be included in the evidence to be given at trial. The applicable rule states:

> ***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 required under Rule 50, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48.
>
> (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). O. Reg. 438/08, s. 48.
>
> (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

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
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. O. Reg. 438/08, s. 48.

[Emphasis added]

It is through reliance on this rule that the court can be assured that expert witnesses are aware of their responsibilities to the court. The preparation of the report according to the directive found in the rule confirms that the witness is prepared to provide the opinion and the other parties will not be taken by surprise by what is said.

The Witnesses

7 During the trial, the judge was required to make rulings as to the admissibility of evidence of a series of witnesses called on behalf of the appellant (the plaintiff at the trial). These rulings concerned the evidence of:

* A driving counselor (Brian Hustler)

This witness was not called "as an opinion witness but strictly as a lay witness". He was identified as someone who assists people "... who have anxieties or phobias with respect to motor vehicles" (*Trial Transript*, at p. 444). The judge expressed a concern that this witness would offer an opinion that the appellant had pathology of a psychiatric nature resulting from the motor vehicle accident. This was an opinion the witness was not qualified to give. It would have been given in circumstances where no report, as required by rule 53.03, had been prepared or served.

* A treating chiropractor (Frank Ramelli)

This witness was not presented as an expert. Nonetheless, after he gave a history as to his diagnosis, counsel sought to have the witness provide an opinion as to prognosis. There had been no report delivered pursuant to rule 53.03. The judge limited the evidence of this witness to explaining his examinations of the appellant and the particulars of his treatment.

* An occupational therapist (Anita Gross) and a kinesiologist (Margaret Murray)

These two witnesses were retained by an insurer "to assess the Appellant's Functional Abilities" (see *Factum of the Appellant*, at para. 36). A report was prepared some years in advance of the trial. It did not comply with the requirements of rule 53.03. These witnesses would have been permitted to testify as to their examinations and clinical observations, but not to provide expert (opinion) evidence. Counsel determined not to call them to give evidence before the jury.

* A psychiatrist (Dr. Bartolucci)

This witness was described as a treating psychiatrist. He had "... not provided a medical-legal report that complied with rule 53.03" (*Trial Transcript*, at p. 624). The trial judge ruled that the witness could not provide evidence as to diagnosis or prognosis. He was allowed to give evidence as a treatment provider, regarding his clinical observations, his treatment and its progress.

* The appellant's family doctor (Dr. Black)

This witness did provide evidence to the jury as to the treatment he provided to the appellant. He was taken to his clinical notes and given the opportunity to go "... through the shorthand form and put it into full sentences". The trial judge did not allow the clinical notes to be filed. He expressed the view that "... there is limited probative value to put in the notes ... when the jury has heard from Dr. Black" (*Trial Transcript*, at p.

758).

* A neurologist (Dr. Rathbone)

This witness prepared the acknowledgement required by rule 53.03(2.1) clause 7. He undertook "... to provide an opinion [in] a fair, objective and non partisan manner [*sic*]". He prepared a report that was consistent with the instruction found in the rule. At trial, he was qualified and accepted as an expert in "... neurology, and the impact of trauma on the musculoskeletal system (*Trial Transcript*, at p. 770). He was not proffered as an expert in the fields of psychiatry and psychology. Accordingly, the trial judge did not allow the witness to give evidence with respect to psychiatric or psychological issues. Specifically, the trial judge did not allow him to give evidence regarding an opinion from Dr. Bartolucci, the appellant's treating psychiatrist.

* Two MRI ("Magnetic Resonance Imaging") Reports

These reports were made exhibits at the trial. The authors of the report were not called. Portions of the reports were redacted to remove an opinion given "at least implicitly" that the difficulties suffered by the appellant were from a car accident. The trial judge indicated that if the authors were called it was possible that they would not have been permitted to provide these opinions because they had not complied with the requirements of rule 53.03. The content of the reports was described by Dr. Rathbone and the findings were read in by Dr. Black.

8 What is evident from this is that a substantial amount of the medical evidence the plaintiff intended to call was not admitted by the trial judge either because the witness was not qualified to provide it or because the requirements of rule 53.03 had not been complied with. The appellant says that the rulings, made by the trial judge, were flawed. They failed to recognize the distinction between witnesses called because they had treated the appellant and those called as experts who were retained for the purposes of the litigation.

Analysis

(i) *The Application of Rule 53*

9 This case engages the question of how and in what circumstances rule 53.03 is to be applied. It

appears that, in the aftermath of its promulgation, there have been several attempts to come to grips with this problem.

10 In *McNeil v. Filthaut,* 2011 ONSC 2165 (CanLII), the trial judge concluded that rule 53.03 cannot be read on its own. It must be considered together with rule 4.1.01. This rule states:

> It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,
>
> (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 the expert's area of expertise; and
> (c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.
>
> [Emphasis added]

11 By its introductory words, rule 4.1.01 only applies to experts who have been retained by a party to the proceeding. In *McNeil v. Filthaut, supra,* it was determined that this rule and rule 53.03 are part of a comprehensive "... framework for the duty of an expert called as witness at a trial". The judge held that the pre-condition that rule 4.1.01 applies only to experts engaged by or on behalf of a party extends to rule 53.03. It is only those experts who must comply with the latter rule. She held that assessors retained by an insurance company (as in this case, Anita Gross and Margaret Murray) are not bound by these rules (at paras. 39 and 44).

12 In *Slaght v. Phillips* (18 May 2010, unreported, Court File No. 109/07), the trial judge conducted a *voir dire* to consider whether a vocational consultant, who had provided care to the plaintiff at the instance of the accident benefit insurer, could give evidence at the trial. He distinguished between experts engaged in treatment ("treating physicians, counsellors, psychologists, physiotherapists and other treating specialists") where the opinions expressed are with respect to "... the need for treatment, the recommended course of treatment and the next step to be taken" in that treatment (see pp. 9 and 10) and experts retained for the purpose of providing opinions at trial. The trial judge concluded that, while rule 53.03 should be strictly applied to the latter experts, it could be relaxed for the former (see: pp. 11 and 12). He allowed the vocational consultant to testify despite the fact that she had not complied with rule 53.03. (For a further discussion of *Slaght v. Phillips, supra*, see: *McNeil v. Filthaut, supra,* at para. 48).

13 *Kusnierz v. Economical Mutual Insurance Company* 2010 ONSC 5749 also distinguishes witnesses who are treating physicians. The plaintiff sued his own insurer. He sought a declaration recognizing that he had sustained a "catastrophic impairment" and was, accordingly, entitled to enhanced benefits under the *Statutory Accident Benefits Schedule.* The witness was retained by counsel for the plaintiff to assist in preparing the claim. The trial judge observed that the doctor "...

almost immediately moved from the status of an independent expert to something close to a treating physician". The trial judge held that it was reasonable to accept the doctor as such and went on to note that "... [s]uch 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" (see: paras. 114 and 118).

14 The appellant, in this case, seeks to rely on these cases. It was submitted by counsel on his behalf that they demonstrate distinctions that the trial judge failed to take into account; distinctions that confirm that the requirements of rule 53.03 did not apply to the evidence he refused to admit. What is striking about these distinctions is that they arise from who the witnesses were (who retained them and for what purpose) rather than the nature of the evidence to be provided. (Is it fact-based evidence for which no special expertise is required or opinion evidence for which it is?) The proposition relied on by the appellant is that the rule does not apply to certain witnesses who are, thus, able to offer their opinions without the constraint provided by the rule. An indication of the risk in this approach was provided by the judge in *Kusnierz v. Economical Mutual Insurance Company, supra.* Having noted that a treating physician should be able to provide "relevant evidence" about a patient, the judge went on to observe:

> I will take into account that [the doctor] has been a passionate advocate for Mr. Kusnierz and has formed a therapeutic alliance with him. I must, therefore, take his evidence with the proverbial grain of salt that goes to its weight.
>
> (*Kusnierz v. Economical Mutual Insurance Company, supra*, at para. 118)

15 In other words, having allowed the evidence to be admitted, the judge recognized that it might reflect a bias in favour of the plaintiff. Precisely a concern rule 53.03 was intended to guard against.

16 I have not yet referred to *Beasley v. Barrand,* [2010] O.J. No. 1466, 2010 CarswellOnt 2172 (S.C.J.). At least one judge has referred to it as the seminal case directed to unravelling the proper application of rule 53.03 (see: *McNeil v. Filthaut, supra,* at para. 40). The plaintiff was the operator of a motorcycle. It collided with a car. The plaintiff claimed damages for injuries suffered in the accident. Before the jury was selected, counsel for the defendants applied for a ruling as to whether certain expert witnesses could provide opinion evidence at the trial. Following the accident, the plaintiff had been examined by three medical doctors. They were each retained "... in connection with the claim that the plaintiff had made to his own insurer, a claim for accident benefits ... [t]he doctors were not retained by a party to [the] proceeding". The reports authored by these three medical specialists did not comply with the provisions of rule 53.03. The experts had not seen the plaintiff since their reports had been prepared, over seven years before the trial was to begin (see: paras. 9, 13 and 10).

17 The judge refused to allow the evidence to be presented to the jury. In his decision, he relied on the nature and impact of the evidence, not the standing or involvement of the witnesses:

> Surely, one of the important reasons for the rule change was to eliminate the practice of tendering opinion evidence of questionable value in a trial, particularly where, as is the case here, the evidence was created in another proceeding, at the instance of a party who is not before this court and to address matters that are beyond the scope of this trial.
>
> (*Beasley v. Barrand, supra,* at para. 62)

18 The judge determined that, in the circumstances, compliance with rule 53.03 was required:

> In my view, having considered all of the circumstances of this case, I think that the application of Rule 53.03 to the proposed evidence of the three experts is necessary ...
>
> [Emphasis added]
>
> (*Beasley v. Barrand, supra,* at para. 62)

19 If the rule had been complied with, the evidence could have been helpful and admissible:

> I suggested that the defendants could invite the doctors, at the defendants' expense, to write meaningful, Rule 53.03 compliant, reports to plaintiff's counsel which, if relevant and producible, could help me to understand any opinions they might be able to express on issues between the parties before this court. That was not attempted. No request has been made for more time to redress the current situation.
>
> (*Beasley v. Barrand, supra,* at para. 68)

20 There was no reason to distinguish between the three doctors and other expert witnesses:

> I see no reason to require a high standard be met by consulting medical experts retained by the parties and a different, lower standard from consulting medical experts who just happened to have been retained by a non-party but whose opinions might be read to assist one of the parties at this trial.
>
> I am not to be heard to state that experts retained by accident benefits insurers cannot give opinion evidence in a tort action; rather, I say that such experts should first comply with Rule 53.03 ...

(*Beasley v. Barrand, supra*, at paras. 69 and 70)

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.

23 There is more in *Beasley v. Barrand, supra*, that should be reviewed. It appears to distinguish witnesses who were engaged in treatment by noting that the three doctors whose reports were being considered were not involved in this way (see: paras. 64 and 65). This does not suggest that, if they had been treating physicians, the three doctors would have been free to offer opinions without concern for rule 53.03. Treating professionals do stand apart. They are present during the progress of any injury suffered by a plaintiff. They may give evidence as to their observations of the plaintiff and their description of the treatment provided. This is factual and not opinion evidence. Simply put, a treating physician or other treating professional who limits his or her evidence in this way does not need to be qualified and is not treated as an expert. It is when the witnesses seeks to offer opinions as to the cause of the injury, it's pathology or prognosis that the evidence enters into the area of expert opinion requiring compliance with rule 53.03.

24 In her submissions, counsel for the plaintiff said that a diagnosis is a fact not an opinion. On this basis, treating physicians would be permitted to give evidence as to their diagnosis without the need to comply with rule 53.03. A diagnosis is not always a fact. In the law of evidence, an opinion is an "inference from observed facts" (see: *R. v. Abbey, [1982] 2 S.C.R. 24, supra*, at 409, as quoted in *R. v. Collins, [2001] O.J. No. 3894, supra,* at para. 17). A diagnosis begins as an inference a doctor, relying on his or her expertise and experience, makes from observations and other information to identify an injury or disease. It may, as a result of further observation or the response to treatment, prove to be correct. It may also turn out to be wrong. Having said this, there are situations where evidence of a diagnosis may be treated as a fact. It depends on the purpose to which the evidence is put. If a physician gives evidence of his or her diagnosis to explain the treatment provided, it is a fact that the diagnosis was the catalyst for the treatment. The diagnosis may still have been wrong. The statement of the witness does not establish as a fact that it correctly diagnoses the injury or illness. It is only relevant and admissible to understand the basis of the treatment chosen. It may be that the inference to be drawn seems irrefutable as a result of observations that can be made, for example, by use of an x-ray. Even so, for the purposes of evidence, it remains an opinion. X-rays can be misread. In this case, it is opinions of the treating professionals that the judge required be supported by reports that complied with rule 53.03. He was correct in doing so.

25 In *Beasley v. Barrand, supra*, the judge also suggested that there can be circumstances where it may be difficult to comply with rule 53.03:

> I can conceive of circumstances where an expert who is retained by a person outside of the litigation may be uncooperative or be professionally unable to communicate with one or more of the parties at trial but, in this case, the defendants have simply not made reasonable efforts to assist the three doctors to an understanding of the requirements of Rule 53.03 and to enlist their help to assist the court by properly reporting on their opinion evidence in advance of the trial.
>
> (*Beasley v. Barrand, supra*, at para. 66)

26 There is nothing to suggest that these sorts of concerns arise here.

27 When the requirements of the law are understood, as described above, it is evident that the decisions of the trial judge were correct. This is so with respect to each of the concerns raised by the appellant. In determining whether and how rule 53.03 is to be applied, there is no basis for distinguishing between witnesses who treated the plaintiff and those who were retained solely to provide an opinion at trial. Rule 53.03 has to be applied taking into account the nature of the evidence to be called. Is it factual or opinion evidence?

28 The driving counsellor (Brian Hustler), and the chiropractor (Frank Ramelli) were not presented as experts or qualified as such. On that basis alone, there was no basis to allow them to provide opinion evidence as to the injuries suffered by the plaintiff. Neither of them produced a report that complied with rule 53.03. Had they been qualified, this would have been required before they would have been able to provide evidence of their professional opinions. There is no basis on which the ruling made by the trial judge could be set aside. As it is, the chiropractor was permitted to give factual evidence as to his examinations of the plaintiff and his treatment.

29 The occupational therapist (Anita Gross) and the kinesiologist (Margaret Murray) were assessors retained by an insurance company with respect to the claim of the plaintiff, pursuant to the *Statutory Accident Benefits Schedule.* Their reports did not comply with rule 53.03. The judge would not permit them to give opinion evidence. They are in the same position as the three doctors in *Beasley v. Barrand, supra.* I do not accept the finding of the judge in *McNeil v. Filthaut, supra,* that rule 4.1.01 and rule 53.03 are part of a comprehensive scheme and that, as a result, the fact that these two witnesses were not "engaged by or on behalf of a party to provide evidence" (see: rule 4.1.01) excludes them from the requirements of the latter rule. In making this finding, the judge acknowledged that her decision conflicts with the reasons in *Beasley v. Barrand, supra,* and that she was unable to find that rule 53.03 can be extended to apply to experts engaged by non-parties to the litigation (see: *McNeil v. Filthaut, supra,* at para. 44). This is not a difficulty I share. I agree with the judge in *Beasley v. Barrand, supra.* On this basis, the decision of the trial judge should be left to

stand.

30 The psychiatrist (Dr. Batolucci) and the family doctor of the appellant (Dr. Black) were permitted to and gave evidence as treatment providers. This was not expert opinion evidence. It was a factual recounting of what they did and what they observed. The psychiatrist had not provided a report that complied with rule 53.03 and, accordingly, could not provide his diagnosis or prognosis. This would have been evidence of his opinions. Again, there is no basis to set aside the ruling of the trial judge.

31 The neurologist (Dr. Rathbone) signed a report that complied with the requirements of rule 53.03. However, it was in areas in which he was not qualified as an expert (psychiatry and psychology). Accordingly, the trial judge properly did not admit his evidence in those spheres nor was he allowed to tell the jury about some other doctor's opinion that dealt with those areas of expertise.

32 The trial judge's treatment of two MRI reports reflects similar problems. They contained opinions as to the cause of the difficulties suffered by the plaintiff. If the authors had been called to give evidence, the judge noted the possibility that they would have been required to comply with rule 53.03. It stands to reason that this requirement cannot be avoided by failing to call the author and putting the opinions into evidence through another witness. Hence, the opinions were redacted. It was appropriate for the trial judge to order that this be done.

(ii) *Form 53*

33 Counsel for the plaintiff also submitted that treatment providers cannot comply with rule 53.03(2.1) clause 7. This is the clause that requires an expert witness to acknowledge that, in providing evidence, he or she owes a duty to the court. This is put in effect by requiring a witness to sign Form 53 which is incorporated into the rule (see: para. [6], above). The form is as follows:

FORM 53

COURTS OF JUSTICE ACT ACKNOWLEDGEMENT OF EXPERT'S DUTY

(General Heading)

ACKNOWLEDGEMENT 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.*

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[Emphasis added]

34 Counsel for the plaintiff submitted that, unless a medical professional was specifically engaged to provide evidence in relation to the court proceeding, they cannot sign Form 53. However, there is nothing to suggest that, having been engaged to work on behalf of an insurer, an expert witness cannot subsequently be engaged to appear in court on behalf of a party to the proceeding and sign a form that confirms that fact. Counsel for the plaintiff submitted that, in such a situation, the prospective medical witness still cannot execute Form 53 if there was any doctor/patient relationship because he or she cannot attest to paragraph 4, which requires an acknowledgment that the duties referred to in paragraph 3 of Form 53 prevail over any obligation owed to the party that engaged him of her. In making this submission, counsel relied on the implication that, to adhere to the duty identified in Form 53, may require a doctor to breach the Hippocratic oath. The oath requires a doctor to swear, among other things:

> That whatsoever I shall see or hear of the lives of my patients that is not fitting to be spoken, I will keep in confidence;

> ....
>
> That I will maintain this sacred trust; holding myself far aloof from wrong ...
>
> That above all else I will serve the highest interests of my patients through the practice of my science and my art;
>
> That I will be an advocate for patients in need and strive for justice in the care of the sick
>
> (*Hippocratic Oath,* Copyright 2005, Weill Cornell Medical College, New York, NY

35 It is difficult to understand how these responsibilities can run contrary to, or compete with, the duties expressed in paragraph 3 of Form 53 (see: para. [34], above). There is no reason to assume any inherent conflict. I do not agree that, in executing Form 53, a doctor qualified as an expert to give opinion evidence necessarily runs a risk of being unable to act in the best interests of his patient. To the contrary, the submission, made by counsel for the plaintiff, leads to the understanding that such witnesses, not being bound by rule 53.03 and the concomitant responsibility to execute Form 53, should be left free to advocate for their patients without the constraint of being required to maintain their objectivity or to offer opinions restricted to their area of expertise - the very problems the amendment to the *Rules of Civil Procedure* were designed to cure. I do not accept these submissions. Counsel offered no valid reason why in this case Form 53 could not be signed by an expert witness who was to provide his or her opinions to the jury.

The Judge's Charge

36 Counsel for the plaintiff also objected to portions of the judge's charge to the jury. It was the view of counsel that the trial judge urged the jury to accept certain findings of fact. In making this submission, counsel referred to two statements made by the judge in his charge:

> My comment on the evidence is that, even if one takes the labrum to have been torn in the motor vehicle accident, it was repaired and intact on Dr. Adili's surgery. So, following the surgery in June 2009, if not before, the labrum would not be a source of pain in the hip.

> (*Trial Transcript*, at pp. 1106-7)

and

> I think we have the evidence, I suggest to you that the hip and the spondylosis of the back are congenital and predate the accident.
>
> (*Trial Transcript*, at p. 1123

37 It was the view of counsel for the plaintiff that the trial judge, in making these statements, effectively directed the jury to their conclusion, leaving them no option but to make the findings they did with respect to damages. These submissions ignore cautions given by the trial judge, both in his opening at the outset of the trial and as part of his charge at the end. In his opening, the trial judge stated:

> I am the sole judge of the law and you are obliged to take the law as I give it to you. You are the sole judges of the facts. So that, although I may comment on the evidence, you decide and you, and you alone decide what the facts of this case are. So you are the judge of the, of the facts.
>
> (*Trial Transcript*, at p. 37)

38 As part of his charge, the trial judge said:

> While I am the judge so far as the law, you have the sole and exclusive authority to determine the facts. As jurors it is your exclusive duty to decide all questions of fact submitted to you, and for that purpose to determine the effect and value of the evidence.
>
> (*Trial Transcript*, at p. 1080)
>
> (see also: *Transcript*, at pp. 1086 and 1108)

39 In light of these instructions, advising the jury of its exclusive fact-finding role and the qualifying of any comments made with respect to the evidence, I am unprepared to accept the submission of counsel for the plaintiff that there were findings of fact "made by" the trial judge or that he usurped the jury's role.

Conclusion

40 The appeal is dismissed.

Costs

41 Pursuant to the agreement of counsel, costs are payable by the appellant to the respondent in the amount of $7,500.

T.R. LEDERER J.
P.T. MATLOW J.
D.R. ASTON J.