COURT OF APPEAL FOR ONTARIO

CITATION: Westerhof v. Gee Estate, 2015 ONCA 206
DATE: 20150326
DOCKET: C56514 and C58021

Laskin, Sharpe and Simmons JJ.A.

BETWEEN

Jeremy Westerhof

Plaintiff (Appellant)

and

The Estate of William Gee and Kingsway General Insurance

Defendant (Respondent)

and

BETWEEN

Daniel McCallum

Plaintiff (Respondent)

and

James Baker

Defendant (Appellant)

Jane Poproski, Lou Ferro and Robert Zigler, for the appellant Jeremy Westerhof

Kieran C. Dickson and Kenneth J. Raddatz, for the respondent the Estate of William Gee

Donald Rollo and David Visschedyk, for the appellant James Baker

Paul J. Pape and Joanna Nairn, for the respondent Daniel McCallum

Richard Halpern and Brian Cameron, for the intervener the Ontario Trial Lawyers Association

William D. Black, Jerome R. Morse and John J. Morris, for the intervener The Holland Access to Justice in Medical Malpractice Group

John A. Olah and Stephen Libin, for the intervener the Canadian Defence Lawyers Association

Linda R. Rothstein and Jean-Claude Killey, for the intervener The Advocates' Society

Heard: September 22, 23, 24, 26, 2014

On appeal from the order of the Divisional Court (Justices P. Theodore Matlow, David Aston and Thomas R. Lederer) dated June 20, 2013 with reasons reported at 2013 ONSC 2093, 310 O.A.C. 335, affirming the judgment of Justice David S. Crane of the Superior Court of Justice dated October 26, 2011, following a decision by a jury; and on appeal from the judgment of Justice Gregory M. Mulligan of the Superior Court of Justice dated December 20, 2012, sitting with a jury.

Simmons J.A.:

A. INTRODUCTION

[1] Rule 53.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, sets out the requirements for introducing the evidence of expert witnesses at trial. These appeals, which were heard together, raise related issues about to whom 53.03 applies.

[2] Both cases were tried following the 2010 amendments to the *Rules*, which were aimed at ensuring the neutrality and expertise of expert witnesses, as well as adequate disclosure of the basis for an expert's opinion.

[3] Those amendments set out the overriding duty of an expert "engaged by or on behalf of a party" to provide opinion evidence "in relation to a proceeding" that is fair, neutral and non-partisan and within the expert's area of expertise: rule 4.1.01.

[4] The 2010 amendments also specified certain information relating to an expert's opinion and expertise that must be included in an expert's report and required that the expert sign an acknowledgement of his or her duty, which identifies the party by or on behalf of whom the expert was engaged: rule 53.03(2.1), Form 53.

[5] Both appeals arise from claims for damages for injuries suffered in car accidents. Both cases were tried before a judge and jury. In each case, the defendant admitted liability for causing the accident, and the issues at trial related to whether the accidents caused the plaintiffs' injuries and the quantum of damages.

[6] The *Westerhof* appeal raises the question of whether rule 53.03 applies only to experts described in rule 4.1.01 and Form 53 – experts "engaged by or on behalf of a party to provide [opinion] evidence in relation to a proceeding"

(referred to in these reasons as "litigation experts") – or whether it applies more broadly to all witnesses with special expertise who give opinion evidence. This broader group of witnesses would include, for example, treating physicians, who form opinions based on their participation in the underlying events (referred to in these reasons as "participant experts") rather than because they were engaged by a party to the litigation to form an opinion. It would also include experts retained by a non-party to the litigation (for example, statutory accident benefits ("SABS") insurers), who form opinions based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than the litigation (referred to in these reasons as "non-party experts").

[7] At the *Westerhof* trial, the trial judge ruled inadmissible opinion evidence concerning history, diagnosis and prognosis from various medical practitioners who were either participant experts or non-party experts. The trial judge found that these witnesses were required to comply with rule 53.03 and had not done so. In addition, he ruled that a neurologist, who had complied with rule 53.03, could not refer to the diagnoses made by the witnesses who had not complied with rule 53.03 and that Mr. Westerhof's family doctor's clinical notes and records could not be filed as an exhibit.

[8] The trial judge also ruled inadmissible the evidence of a road safety consultant/driving therapist intern who had assessed Mr. Westerhof at the

request of Mr. Westerhof's treating psychiatrist, holding that this witness was not qualified to give the opinion that would arise from his evidence.

[9] Although the jury awarded Mr. Westerhof $22,000 for general damages and for $13,000 past loss of income, the trial judge dismissed his action. The trial judge found that Mr. Westerhof's claim for non-pecuniary damages did not meet the threshold prescribed by s. 267.5(5) of the *Insurance Act*, R.S.O. 1990, c. I.8. In addition, he found the amount awarded for past loss of income was less than the collateral benefits Mr. Westerhof had already received.

[10] On appeal to the Divisional Court, Mr. Westerhof claimed that the trial judge erred in his evidentiary rulings by failing to distinguish between opinion evidence given by litigation experts and opinion evidence given by participant and non-party experts. Mr. Westerhof argued that the latter two classes of witnesses are not caught by rule 53.03.

[11] The Divisional Court disagreed. In dismissing Mr. Westerhof's appeal, the Divisional Court held that the "important distinction is not in the role or involvement of the witness, but in the type of evidence sought to be admitted": at para. 21. If the evidence at issue is opinion evidence, then compliance with rule 53.03 is required; if the evidence at issue is factual evidence, then compliance with rule 53.03 is not required.

[12] On appeal to this court with leave, Mr. Westerhof reiterates his argument in the Divisional Court: rule 53.03 applies solely to litigation experts – expert witnesses "engaged by or on behalf of a party to provide [opinion] evidence in relation to a proceeding".

[13] For reasons that I will explain, I do not agree with the Divisional Court's conclusion that the type of evidence – whether fact or opinion – is the key factor in determining to whom rule 53.03 applies.

[14] In my opinion, participant experts and non-party experts may give opinion evidence without complying with rule 53.03. Accordingly, I conclude that the trial judge in *Westerhof* erred in excluding the evidence of several witnesses. For that reason, I would order a new trial.

[15] At the *McCallum* trial, which took place prior to the Divisional Court's decision in *Westerhof*, the trial judge permitted several medical practitioners who had treated Mr. McCallum to give opinion evidence concerni ıg Mr. McCallum's future employment prospects and future treatment needs without complying with rule 53.03. The trial judge concluded that because these witnesses were treating medical practitioners, they could give opinion evidence without complying with rule 53.03.

[16] The jury awarded Mr. McCallum damages totalling $787,275.00. Mr. Baker appeals from that award. In oral argument before this court, he accepted that

treating physicians may give opinion evidence directly related to their treatment of a patient, such as a working diagnosis and prognosis.

[17] Nonetheless, he submits that the trial judge erred by allowing treating medical practitioners who had not complied with rule 53.03 to give "an avalanche" of opinion evidence going beyond the scope of their expertise and that did not arise directly from treatment of their patient. He also submits tha the trial judge's jury instructions were unbalanced and failed to properly set out the defence position.

[18] For reasons that I will explain, I would not accept these submissions, and I would dismiss the *McCallum* appeal.

[19] I will begin my reasons by addressing the *Westerhof* appeal and the question of to whom rule 53.03 applies. I will review the factual background of the case, the Divisional Court's decision and then turn to my analysis of the rule 53.03 issue. I will then address the more specific questions raised by each appeal.

B. *WESTERHOF V. GEE ESTATE*: TO WHOM DOES RULE 53.03 APPLY?

(1) Factual Background

(a) The accident

[20] Mr. Westerhof was injured in a car accident on the evening of April 22, 2004. A friend picked Mr. Westerhof up from his home in Hamilton, and the two

young men went out for a coffee. Mr. Westerhof rode in the front passenger seat of his friend's 1987 Pontiac Grand Am. On their way back to Mr. Westerhof's house, they drove along Stone Church Road at the speed limit, 50 km/hr. The accident happened just after Mr. Westerhof spotted a single headlight in the side mirror of his friend's car. Their car was hit hard from the rear suddenly and with such force that the trunk was pushed forward into the back of the Grand Am. Based on the distance their car travelled following the impact, Mr. Westerhof estimated that the car that hit them was travelling between 100 and 110 km/hr.

[21] Mr. Westerhof was wearing a seatbelt, but his friend's car did not have air bags. The force of the impact threw him back in his seat. He does not recall if his body struck the interior of the car. He got out of the car and leaned against a post. Eventually, his friend's mother drove him home.

(b) Mr. Westerhof's claim

[22] Mr. Westerhof claims that he suffered serious permanent impairments of important physical, mental and psychological functions as a result of the accident, including: post-traumatic headaches; post-traumatic mechanical low back pain; numbness and tingling in both hands (bilateral radiculopathy); post-traumatic sleep disturbances; a labral tear at the left hip joint; depression; anxiety when driving or riding in a car; and chronic pain. The labral tear was diagnosed in

2008 and surgically repaired in 2009. However, Mr. Westerhof claims that he still has restricted movement of his left hip and chronic pain as a result of his injuries.

[23] Mr. Westerhof described himself as shaky and in shock when he got home after the accident. He testified that he began to experience other symptoms the next day. His neck and shoulder were the prominent issues, but he also experienced pain in his lower back, left knee, groin and left leg.

[24] According to Mr. Westerhof's family doctor, Dr. Black, Mr. Westerhof attended his office the day after the accident and reported neck pain, left shoulder pain, left knee pain and numbness in the fingers of his left hand. Mr. Westerhof reported similar complaints to a chiropractor, Dr. Ramelli, whom he began seeing four days after the accident, on April 26, 2004.

[25] Eleven days after the accident, on May 3, 2004, Mr. Westerhof told Dr. Black he had low back pain, mainly on the left side with radiation down his left leg to his foot, and that this pain had developed within three or four days of the accident. Mr. Westerhof first reported low back pain to Dr. Ramelli fifteen days after the accident, on May 7, 2004. Dr. Ramelli concluded that Mr. Westerhof had tightness in the low back and pelvic area. In late May, Mr. Westerhof reported to Dr. Black difficulties with sleep, nightmares about the accident and anxiety, particularly about riding in a car. By early July, he was reporting headaches associated with nausea and vomiting.

[26] Mr. Westerhof was 25 years old at the time of the accident and otherwise in good health. He worked full-time as a thermoform machine operator at ITML Horticultural Products, a company that manufactured plastic flower pots. In 2003, the year before the accident, he earned $27,000.

[27] Following the accident, Mr. Westerhof remained off work because of his injuries for about five months, until September 13, 2004. His work required running and heavy lifting – roll bars weighing between 70 and 90 lbs and boxes weighing 50 lbs. Because of the pain he was experiencing, particularly in his left leg, Mr. Westerhof found it more and more difficult to cope. He found himself limping and eventually walked using a cane. He finally left his job at ITML on February 2, 2006. In 2005, he earned $33,000.

[28] After leaving his job, Mr. Westerhof felt depressed and started cutting himself.

[29] Mr. Westerhof remained off work until late 2008. He took some cooking courses at Mohawk College before returning to work. In late 2008, he got a part-time job as a short order cook at Montana's Cookhouse. He continued working at Montana's until his hip surgery in June 2009 but returned to Montana's about three to four months after the surgery. He was off work again because of pain for three to four months in 2010, but returned to Montana's in November. About three to four weeks before the trial began on October 11, 2011, he became a

kitchen supervisor, earning $12.50 per hour – an amount he claims is substantially less than what he could have earned had he been able to remain as a thermoform machine operator.

(c) The 2010 amendments to the *Rules* relating to expert witnesses

[30] Prior to the 2010 amendments to the *Rules* relating to expert witnesses, rule 53.03 consisted primarily of procedural requirements and provided limited direction concerning the substance of an expert's report.

[31] In essence, pre-2010, rule 53.03 required a party to provide a signed report from an expert witness setting out the expert's "name, address and qualifications and the substance of his or her proposed testimony" within specified time frames.

[32] As Sharpe J.A. noted in *Moore v. Getahun*, 2015 ONCA 55, [2015] O.J. No. 398, in 2010, significant changes were made to the *Rules* relating to expert witnesses following the recommendations of the Honourable Coulter Osborne in his review of the civil justice system, *Civil Justice Reform Project: Summary of Findings & Recommendations* (Toronto: Ontario Ministry of the Attorney General, 2007).

[33] Mr. Osborne's report highlighted, at page 71, the common complaint that "too many experts are no more than hired guns who tailor the reports and evidence to suit the client's needs." At pages 80-84 of his report, Mr. Osborne

also highlighted the need for adequate disclosure of the basis for an expert's opinion.

[34] Two significant recommendations of the Osborne Report were subsequently adopted through amendments to the *Rules*, which came into effect on January 1, 2010.

[35] First, rule 4.1.01 was added to the *Rules*. It sets out the overriding duty of every expert engaged by or on behalf of a party to provide opinion evidence that is fair, objective and non-partisan and within the expert's area of expertise. Significantly, the introductory paragraph to rule 4.1.01(1) refers specifically to the duty of experts "engaged by or on behalf of a party":

> 4.1.01(1) 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*.... [Emphasis added.]

[36] Second, rule 53.03(2.1) was added. It specifies the information to be included in an expert's report and requires that the expert sign an acknowledgment of the expert's duty. Some of the required information relates to the expert's retainer to give evidence in relation to the proceeding:

> 53.03(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 [Emphasis added.]

[37] The acknowledgment mandated by rule 53.03(2.1)7 is set out in Form 53 and reads, in part, as follows:

> ACKNOWLEDGMENT OF EXPERT'S DUTY
>
> 1. My name is ..... *(name)*. I live at ..... *(city)*, in the ..... *(province/state)* of ..... *(name of province/state)*.

2. *I have been engaged by or on behalf of ..... (name of party/parties) to provide evidence in relation to the above-noted court proceeding.* [Emphasis added.][1]

(d) The issues at trial

[38] The major issues at the Westerhof trial related to causation and damages. Mr. Westerhof claimed that all of his injuries, and his resulting loss of future economic opportunity, were related to the motor vehicle accident.

[39] The defence acknowledged that Mr. Westerhof suffered upper body soft tissue injuries in the accident. However, the defence maintained that those injuries resolved well before trial. Further, the defence claimed that Mr. Westerhof's remaining problems had other causes. According to the defence, Mr. Westerhof's hip and lower back problems were both caused by underlying conditions (hip: dysplasia (abnormality) of the femoral head and neck and femoral acetabular impingement; back: spondylosis and spondylolisthesis[2]). As his back and hip problems did not manifest themselves immediately after the accident, the defence claimed they were not related to it. Further, the defence claimed that Mr. Westerhof's psychological problems were caused largely by his

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[1] The full text of Form 53 is included in Appendix 'A'.

[2] Mr. Westerhof's expert, Dr. Rathbone, described spondylosis and spondylolisthesis without explicitly explaining the distinction between the two conditions. After describing vertebrae, the cushion between them and the nearby facet joints, he said a break can occur in the area going to the facet joint which leads to inflammation and pressure on the nerve root. He said in Mr. Westerhof's case, he also has slippage of one vertebrae over another, causing further pressure on nerve roots.

The respondent's expert, Dr. Cividino, explained that spondylosis is a condition where the area between a bone in the vertebra and another part of the spine becomes stretched out and weakened. Spondylolisthesis refers to the slippage of that vertebra on the vertebra below.

non-accident related physical symptoms and domestic difficulties he was having with his spouse.

(e) The impugned evidentiary rulings

[40] Mr. Westerhof proposed to call evidence from nine medical witnesses at trial. According to him, only two of these witnesses were allowed to give their evidence in its entirety. Those witnesses were Dr. McComas, a neurologist engaged by counsel to perform EMG testing on Mr. Westerhof in August 2004 (who complied with rule 53.03); and Dr. Adili, the orthopedic surgeon who performed hip surgery on Mr. Westerhof in June 2009 (who did not comply with rule 53.03).

[41] From the outset of the trial, the trial judge ruled that the medical witnesses who treated or assessed Mr. Westerhof but did not comply with rule 53.03 would not be entitled to give opinion evidence concerning their diagnosis or prognosis, even though they had not been retained for the purpose of the litigation. Those witnesses were also prevented from giving evidence of the history they had taken from Mr. Westerhof. These witnesses included: Dr. Ramelli, a treating chiropractor; Dr. Bartolucci, a treating psychiatrist; and Ms. Murray and Ms. Gross, a kinesiologist and a physiotherapist respectively, who conducted an

assessment for Mr. Westerhof's SABS insurer.[3] The trial judge also ordered redactions to two MRI reports of statements relating to the cause of Mr. Westerhof's labral tear. In addition, he ruled that Dr. Rathbone, a neurologist, who had complied with rule 53.03, could not refer in his evidence to the opinions of the witnesses who had not complied with rule 53.03.

[42] The trial judge also ruled that Mr. Westerhof's family doctor's clinical notes and records could not be marked as an exhibit. Finally, he ruled that Mr. Husler, a road safety consultant/driving therapist intern who had conducted an in-vehicle assessment of Mr. Westerhof, could not testify.

[43] Mr. Westerhof claims that the trial judge adopted an unduly narrow approach to rule 53.03, which led him to exclude relevant, material and probative evidence. I will return to these rulings when I address the specific issues raised on the Westerhof appeal.

(f) The jury's verdict

[44] The jury awarded Mr. Westerhof general damages of $22,000 and damages of $13,000 for past loss of income from April 22, 2004 until the date of the verdict on October 24, 2011. They did not award damages for future loss of economic opportunity or earning capacity.

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[3] In addition to the medical practitioners listed, Mr. Westerhof also called a treating physiotherapist, Dr. Bakri. Mr. Westerhof did not make any submissions concerning Dr. Bakri on the appeal.

(g) The trial judge's ruling dismissing the action

[45] As of the date of the accident, a claimant seeking to recover damages for non-pecuniary loss arising from a motor vehicle accident had to show either a permanent serious disfigurement or a permanent serious impairment of an important physical, mental or psychological function: *Insurance Act*, s. 267.5(5).

[46] The trial judge found that Mr. Westerhof's claim for non-pecuniary damages did not meet this threshold. He concluded that, to have a chance of meeting the threshold, Mr. Westerhof would have to show that his hip complaints related to the motor vehicle accident, and that Mr. Westerhof had not met this burden.

[47] Instead, the trial judge found that Mr. Westerhof's hip complaints and symptoms were not related to the motor vehicle accident, and that his upper body injuries had resolved long before trial. The trial judge also found that Mr. Westerhof's back complaints are congenital, although possibly aggravated by the motor vehicle accident. However, on balance, any back injuries arising from the motor vehicle accident were neither permanent nor serious. With respect to Mr. Westerhof's psychological symptoms, the trial judge concluded that they may have a pain component, but the pain related to the motor vehicle accident was not permanent.

[48] It was undisputed that collateral benefits paid to Mr. Westerhof exceeded the jury's award for past loss of income.

[49] In the circumstances, the trial judge dismissed Mr. Westerhof's action.

(2) The Divisional Court's decision

[50] The Divisional Court upheld the trial judge's evidentiary rulings and dismissed Mr. Westerhof's appeal.

[51] At the outset of its analysis, the Divisional Court reviewed various decisions, which had held that, at least in certain circumstances, medical practitioners retained by a non-party insurance company need not comply with the amended rule 53.03: *McNeil v. Filthaut*, 2011 ONSC 2165, [2011] O.J. No. 1863 (S.C.); *Slaight v. Phillips* (18 May 2010), Simcoe 109/07 (Ont. S.C.) and *Kusnierz v. The Economical Mutual Insurance Company*, 2010 ONSC 5749, 104 O.R. (3d) 113, rev'd on other grounds, 2011 ONCA 823, 108 O.R. (3d) 272.

[52] The Divisional Court rejected the conclusions in those cases, saying that they relied inappropriately on "who the witnesses were (who retained them and for what purpose) rather than the nature of the evidence to be provided": at para. 14.

[53] The Divisional Court then turned to *Beasley v. Barrand*, 2010 ONSC 2095, 101 O.R. (3d) 452, leave to appeal to Div. Ct. refused, [2010] O.J. No. 6319 (Sup. Ct.), in which Moore J. disallowed the evidence of three medical practitioners retained by a non-party insurer because the practitioners had not complied with rule 53.03.

[54] According to the Divisional Court, in *Beasley*, Moore J. focused on the nature and impact of the evidence, not the standing or involvement of the witnesses, and found there was no reason to distinguish between the three medical practitioners and other expert witnesses for the purposes of rule 53.03.

[55] The Divisional Court concluded, at para. 21, that "[t]he 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."

[56] In *Beasley*, Moore J. specifically noted that the three medical practitioners at issue were not treating physicians. Nonetheless, the Divisional Court stated at para. 23, "[t]his 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."

[57] Concerning treating professionals, the Divisional Court acknowledged that they are entitled to give factual evidence of their observations of a party and a description of the treatment provided without being qualified as experts and without complying with rule 53.03. However, when such "witnesses [seek] to offer opinions as to the cause of an injury, its pathology or prognosis [then] the evidence enters into the area of expert opinion requiring compliance with rule 53.03": at para. 23.

[58] The Divisional Court concluded that evidence of diagnosis and prognosis are opinions because they involve inferences from observed facts and may turn out to be either right or wrong. Thus, although a treating physician may give evidence of his or her diagnosis to explain the treatment provided, such evidence is not admissible for the truth of its contents. Rather, it is admissible only to understand the basis of the treatment provided.

(3) Analysis: To Whom Does Rule 53.03 Apply?

(a) General principles

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

[60] Instead, I conclude that a witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents without complying with rule 53.03 where:

- the opinion to be given is based on the witness's observation of or participation in the events at issue; and
- the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.

[61] Such witnesses have sometimes been referred to as "fact witnesses" because their evidence is derived from their observations of or involvement in the underlying facts. Yet, describing such witnesses as "fact witness" risks confusion because the term "fact witness" does not make clear whether the witness's evidence must relate solely to their o*bservations* of the underlying facts or whether they may give *opinion* evidence admissible for its truth. I have therefore referred to such witnesses as "participant experts".

[62] Similarly, I conclude that rule 53.03 does not apply to the opinion evidence of a non-party expert where the non-party expert has formed a relevant opinion based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than the litigation.

[63] If participant experts or non-party experts also proffer opinion evidence extending beyond the limits I have described, they must comply with rule 53.03 with respect to the portion of their opinions extending beyond those limits.

[64] As with all evidence, and especially all opinion evidence, the court retains its gatekeeper function in relation to opinion evidence from participant experts and non-party experts. In exercising that function, a court could, if the evidence did not meet the test for admissibility, exclude all or part of the opinion evidence of a participant expert or non-party expert or rule that all or part of such evidence is not admissible for the truth of its contents. The court could also requi e that the

participant expert or non-party expert comply with rule 53.03 if the participant or non-party expert's opinion went beyond the scope of an opinion formed in the course of treatment or observation for purposes other than the litigation.

(b) Errors in the Divisional Court's analysis

[65] In my view, the Divisional Court erred in concluding that rule 53.03 applies to participant experts and non-party experts who offer opinion evidence. I say this for several reasons.

[66] First, in its reasons, the Divisional Court made no reference to pre-2010 jurisprudence supporting the conclusion that, prior to the 2010 amendments to the *Rules*, participant experts were entitled to give opinion evidence arising from their observation of or participation in events for the truth of its contents without complying with the former rule 53.03.

[67] The leading pre-2010 case concerning the scope and application of rule 53.03 is this court's decision in *Marchand v. The Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97. In *Marchand*, this court confirmed that treating physicians could testify about treatment opinions without complying with the former rule 53.03.

[68] At para. 120 of *Marchand*, this court held that a treating physician is called as a "witness of fact, not as an expert witness", and therefore the former rule 53.03 was not engaged:

> Dr. Tithecott was not a "rule 53.03 witness". Dr. Tithecott was called as a witness of fact, not as an expert witness. Thus, insofar 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. [Emphasis added.]

[69] In describing Dr. Tithecott as "a witness of fact, not as an expert witness", this court was not making a simple distinction between factual evidence and opinion evidence. This court said specifically that, "insofar as Dr. Tithecott was testifying about the facts of his own involvement, *or the opinions that went to the exercise of his judgment*" (emphasis added), the former rule 53.03 "was not engaged."

[70] Put another way, Dr. Tithecott, a treating physician, was permitted to testify about opinions that arose directly from his treatment of his patient, the plaintiff in the case. He was not required to comply with rule 53.03, and his opinion evidence was admitted for the truth of its contents. This was because he formed his opinions relevant to the matters at issue while participating in the events and as part of the ordinary exercise of his expertise. Accordingly, rather than being a stranger to the underlying events who gave an opinion based on a review of documents or statements from others concerning what had taken place, Dr. Tithecott formed his opinion based on direct knowledge of the underlying facts. He was therefore a "fact witness", or, as I have referred to such witnesses in these reasons, a "participant expert".

[71] Other pre-2010 decisions also support the conclusion that rule 53.03 does not apply to opinion evidence given by participant experts.

[72] For example, in *Burgess (Litigation Guardian of) v. Wu* (2003), 68 O.R. (3d) 710 (S.C.), in *obiter* comments, the trial judge differentiated between physicians' opinions formed at the time of treatment – which involve making a diagnosis, formulating a treatment plan and making a prognosis ("treatment opinions") – and opinions formed for the purpose of assisting the court at trial and based on consideration of information from a variety of sources ("litigation opinions"). Although the question of to whom rule 53.03 applies was not before the court, the clear distinction made between treatment opinions and litigation opinions supports the view that not all opinion evidence falls within the ambit of rule 53.03.

[73] In my view, the Divisional Court's failure to refer to the pre-2010 jurisprudence was a significant oversight. In *Moore*, this court observed that "the 2010 amendments to rule 53.03 did not create new duties but rather codified and reinforced … basic common law principles": para. 52. I am not aware of any basis for concluding that the pre-2010 jurisprudence did not continue to apply following the 2010 amendments to the *Rules* relating to expert witnesses.

[74] Second, apart from *Westerhof*, no cases have been brought to our attention that support the view that participant experts are obliged to comply with rule 53.03 when giving evidence concerning treatment opinions. Following the

amendments to rule 53.03, but prior to the decisions at issue, several Superior Court judges grappled with the question of to whom rule 53.03 applies. Opinion was divided concerning whether rule 53.03 applies to non-party experts, but apart from *Westerhof*, no decision held that treating physicians must comply with rule 53.03.

[75] The cases brought to our attention include those brought to the attention of the Divisional Court: *Kusnierz; Slaight; McNeill*; as well as *Continental v. J.J.'s Hospitality*, 2012 ONSC 1751, 12 C.L.R. (4th) 90.

[76] Notably, in *McNeill*, MacLeod-Beliveau J. described rule 4.1.01, rule 53.03 and Form 53 as providing a "comprehensive framework" for the duty of an expert called as a witness at trial: at para. 18. She also described the "ultimate purpose of rule 53.03" as being "to limit and control the proliferation of experts retained by litigants": at para. 44. Further, she described the "introduction of the new rules about expert witnesses" as "an effort to eliminate the use of 'hired guns' or 'opinions for sale' in civil litigation, where the use of which has resulted in potentially biased expert evidence being given at trial": at para. 44. Thus, *McNeill* provides support for the position that rule 53.03 was not intended to apply to participant and non-party witnesses.

[77] Third, I see nothing in the Osborne Report that indicates an intention to address participant experts or non-party experts. Mr. Osborne began the section of his report on expert evidence with the following statement, at page 68:

> There is general agreement that the increased use of experts is a factor that increases the cost of litigation and causes delay through trial adjournments. There is very little agreement on what to do about it.

[78] Mr. Osborne identified several problems with expert evidence, including, for example: the proliferation of experts and expert reports, resulting in an "industry" of competing experts and associated increases in costs; expert bias; lengthy and uncontrolled expert testimony; the absence of a rule requiring experts to meet to seek to narrow disputed issues; problems with the timeliness of expert reports; and lack of regulation of the standard content of expert reports.

[79] By their nature, the problems Mr. Osborne identified relate to litigation experts – expert witnesses engaged by or on behalf of a party to provide opinion evidence in relation to a proceeding. I see nothing in his discussion or recommendations indicating an intention to address participant experts or non-party experts, whose evidence is relevant because of their observation of or participation in events underlying the litigation.

[80] Fourth, the text of the 2010 amendments supports the view that rule 53.03 does not apply to participant experts or non-party experts in several ways. For example, the use of the words "expert engaged by or on behalf of a party to

provide [opinion] evidence in relation to a proceeding" in rule 4.1.01 and Form 53 makes this clear. An expert must be "engaged by or on behalf of a party to provide [opinion] evidence in relation to the proceeding" before the rule applies.

[81] Like MacLeod-Beliveau J. in *McNeill*, I conclude that rule 4.1.01, rule 53.03 and Form 53 are a comprehensive framework addressing a specific class of expert witnesses and expert reports. Although the words "engaged by or on behalf of a party to provide [opinion] evidence in relation to a proceeding" do not appear in rule 53.03, they appear in both rule 4.1.01 and Form 53. Rule 4.1.01 defines the expert's duty referred to in rule 53.03(2.1)7, and rule 53.03(2.1)7 requires that Form 53 be signed. Taking account of these factors, I see no basis for concluding that rule 53.03 was intended to apply to persons other than expert witnesses "engaged by or on behalf of a party to provide [opinion] evidence in relation to a proceeding".

[82] Witnesses, albeit ones with expertise, testifying to opinions formed during their involvement in a matter, do not come within this description. They are not engaged by a party to form their opinions, and they do not form their opinions for the purpose of the litigation. As such, they are not "engaged by or on behalf of a party to provide [opinion] evidence in relation to a proceeding." A party does not "engage" an expert "to provide [opinion] evidence in relation to a proceeding" simply by calling the expert to testify about an opinion the expert has already formed.

[83] Similarly, the requirement in rule 53.03(2.1)3 that an expert's report set out "the instructions provided to the expert in relation to the proceeding" makes it abundantly clear that rule 53.03 only applies to litigation experts. A party does not provide instructions to a litigation expert or a non-party expert in relation to the proceeding – that it is because these experts have already formed their opinions.

[84] Moreover, the conclusion that rule 53.03 applies only to experts engaged by a party to form an opinion for the purpose of the litigation reflects the prior jurisprudence and practice. As I have said, in my view, *Marchand* makes it clear that prior to 2010, rule 53.03 did not apply to participant experts. I see nothing in rule 53.03 reflecting an intention on the part of the Civil Rules Committee to change the status quo. Had the Civil Rules Committee intended to make a change to the jurisprudential status quo, I am confident it would have made that intention clear.

[85] Fifth, I am not persuaded that disclosure problems exist in relation to the opinions of participant experts and non-party experts requiring that they comply with rule 53.03. In many instances, these experts will have prepared documents summarizing their opinions about the matter contemporaneously with their involvement. These summaries can be obtained as part of the discovery process. Further, even if these experts have not prepared such summaries, it is open to a party, as part of the discovery process, to seek disclosure of any opinions, notes

or records of participant experts and non-party experts the opposing party intends to rely on at trial. If the notes produced are illegible, the party producing them must provide a readable version.

[86] Sixth, I agree with the submissions of the parties and interveners who say that the Divisional Court's ruling will actually exacerbate the problems of expense and delay that it purports to alleviate. Unlike an expert witness engaged by or on behalf of a party to provide opinion evidence in relation to the proceeding, participant experts and non-party experts do not testify because they are being paid an expert's fee to write the report contemplated by rule 53.03. Rather, they testify because they were involved in underlying events and, generally, have already documented their opinions in notes or summaries that do not comply with rule 53.03. Rule 53.03(2.1) contains strict requirements. Requiring participant witnesses and non-party experts to comply with rule 53.03 can only add to the cost of the litigation, create the possibility of delay because of potential difficulties in obtaining rule 53.03 compliant reports, and add unnecessarily to the workload of persons not expecting to have to write rule 53.03-compliant reports (e.g. emergency room physicians, surgeons and family doctors).

C. WESTERHOF V. GEE ESTATE: SPECIFIC ISSUES

(1) Did the trial judge err in his evidentiary rulings?

[87] Based on my conclusions concerning to whom rule 53.03 applies, I agree that the trial judge erred in holding as a general matter that the various medical practitioners who had treated or assessed Mr. Westerhof could not give opinion evidence because they had not complied with rule 53.03. Nonetheless, I am not convinced that he erred in excluding all of the evidence that he excluded. I will address each of the impugned rulings in turn.

Dr. Ramelli

[88] Dr. Ramelli is a chiropractor who treated Mr. Westerhof from April 26, 2004 (four days after the accident) until April 2005. He was not permitted to give evidence of the history he took from Mr. Westerhof or of his diagnosis or prognosis. In addition, Dr. Ramelli could not give evidence that he submitted a treatment plan to the accident benefits insurer, nor that the insurer had accepted the treatment plan.

[89] Dr. Ramelli was permitted to give evidence of Mr. Westerhof's complaints and of the treatments he provided. He also gave evidence about the observations he made of Mr. Westerhof.

[90] Although I agree that the trial judge erred in making a blanket ruling that treating practitioners could not give evidence of the histories they took and of

their diagnosis and prognosis, based on the record before us, I am not persuaded that he erred in excluding the portions of Dr. Ramelli's evidence to which objection was taken. Defence counsel objected to Dr. Ramelli's giving opinion evidence in part because defence counsel did not receive Dr. Ramelli's clinical notes until the evening before Dr. Ramelli testified and had no indication of what Dr. Ramelli's opinion would be. There was no suggestion at trial that this was an invalid objection. In these circumstances, it was open to the trial judge to exclude the portions of Dr. Ramelli's evidence to which objection was taken.

Dr. Bartolucci

[91] Dr. Bartolucci is a psychiatrist and pain specialist. He treated Mr. Westerhof during about 30 sessions between May 2006 (about two years post-accident) and March 2009. He was not permitted to give evidence of the history he took, or of his diagnosis or prognosis. Like Dr. Ramelli, Dr. Bartolucci was permitted to testify about Mr. Westerhof's complaints, his observations of Mr. Westerhof, and the treatment he provided, including the medications he prescribed and why he prescribed them.

[92] Dr. Bartolucci's medical reports (which did not comply with rule 53.03) were not admitted into evidence at trial, but they were marked as lettered exhibits and included in the appeal record. The reports list a variety of diagnoses including: chronic pain; psychiatric post-traumatic symptoms (fear of the worst happening,

dizziness, heart pounding and racing, nervousness, and fear of losing control); and moderate to severe major depressive disorder.

[93] As Dr. Bartolucci was a treating psychiatrist and pain specialist, I agree that the trial judge erred in making a blanket ruling that he could not give evidence of the history he took and of his diagnosis and prognosis. This evidence should have been admitted.

Dr. Black's clinical notes and records

[94] Dr. Black, Mr. Westerhof's family doctor, was permitted to describe Mr. Westerhof's pre-motor vehicle accident medical history, as well as Mr. Westerhof's presenting symptoms and complaints the day after the accident and on subsequent visits. He also testified about the treatments he prescribed, the tests he ordered, and the referrals he made.

[95] Mr. Westerhof's counsel was not, however, permitted to file Dr. Black's clinical notes and records covering the period April 23, 2004 (the day after the accident) to June 30, 2009, as business records under s. 35 of the *Evidence Act*, R.S.O. 1990, c. E.23.

[96] At trial, defence counsel conceded that Dr. Black's clinical notes are the type of records that can be admitted as business records. However, he objected to the introduction of the clinical notes and records for two reasons. First, the notes and records contained reports and opinions from other practitioners (which

defence counsel acknowledged could be redacted). Second, the notes and records had little added probative value because Dr. Black had given evidence about his visits with Mr. Westerhof. Further, they had the potential to distract the jury because they were recorded in Dr. Black's own shorthand.

[97] The trial judge held that the clinical notes and records had limited probative value and declined to admit them.

[98] I see no basis on which to hold that the trial judge erred in his decision. If counsel for Mr. Westerhof wished to have the reports of other practitioners included in Dr. Black's notes and records admitted for the truth of their contents, he should have served notices under s. 52 of the *Evidence Act*.[4] There is no indication in the appeal record that this was done. Further, because Dr. Black had testified, the decision whether to also admit his clinical notes and records was an issue within the trial judge's discretion. I see no basis on which to interfere with that exercise of discretion.

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[4] Section 52(2) of the *Evidence Act* provides:

> (2) A report obtained by or prepared for a party to an action and signed by a practitioner and any other report of the practitioner that relates to the action are, with leave of the court and after at least ten days' notice has been given to all other parties, admissible in evidence in the action.

The MRI reports

[99] Counsel for Mr. Westerhof tendered two MRI reports, dated July 16, 2008 and September 21, 2008 (conducted with contrast), for admission as business records under s. 35 of the *Evidence Act*. The trial judge admitted them subject to redactions to exclude the radiologist's comments on causation related to the motor vehicle accident. The trial judge also ruled that, if called, the radiologist who authored the MRI reports would not be permitted to opine on causation because he had not filed a rule 53.03 report.

[100] Among other things, the MRI reports disclosed: dysplasia of the femoral head and neck; the potential for femoral acetabular impingement syndrome, which would be a chronic issue; mild bone marrow edema; a 5 mm loose body adjacent to the anterior acetabulum; and a degenerative complex labral injury with associated articular cartilage injury.

[101] The following redactions were made to the first report:

- "There is a history of a previous MVA."
- "Given the history of recent trauma the labral injury may in fact be due to an acute injury as well."
- "This [5 mm loose body] may represent an avulsed bony injury given the history of trauma and the presence of the bone marrow edema."

[102] The following statement was redacted from the second report:

- "The labral tear is probably secondary to trauma superimposed on a background of CAM femoroacetabular impingement."

[103] Because these reports were tendered under s. 35 of the *Evidence Act*, the opinions concerning causation were not admissible for the truth of their contents: *Robb Estate v. Canadian Red Cross Society* (2001), 152 O.A.C. 60 (C.A.), at para. 152; *MacGregor v. Crossland*, 1994 CanLII 388 (Ont. C.A.) at para. 3. Further, the appeal record contains no indication that notice was served for the admission of these reports under s. 52 of the *Evidence Act.*

[104] Nonetheless, I conclude that the trial judge erred in ruling that the author of the MRI reports could not be called because he had not complied with rule 53.03. The MRIs were conducted to diagnose and treat Mr. Westerhof. Thus, the author of the MRI reports was effectively a treating physician. There was no suggestion at trial that he was not qualified to give the opinions he offered.

Dr. Rathbone

[105] Dr. Rathbone testified as a rule 53.03 litigation expert. He was initially qualified as a neurologist and was later qualified as having expertise in the diagnosis (but not treatment or assessment) of "muscular skeletal injuries" and "in the field of physical and rehabilitative medicine".

[106] Dr. Rathbone examined Mr. Westerhof on June 10, 2011. He was permitted to give evidence about his own diagnosis and prognosis, and to provide an

opinion on causation, including his review of the MRI reports. He was not permitted to give evidence about diagnoses made by other professionals who had not complied with rule 53.03, namely, the causation opinion contained in the MRI reports and Dr. Bartolucci's psychiatric diagnoses, including any chronic pain diagnosis.

[107] As I understand it, Mr. Westerhof's complaints in relation to Dr. Rathbone are twofold. First, the trial judge erred in preventing Dr. Rathbone from giving evidence about the opinions of other rule-53.03-non-compliant experts for the truth of its contents. Second, Dr. Rathbone was precluded from referring to the evidence of the other rule-53.03-non-compliant experts to explain how he arrived at his own conclusions.

[108] I would not give effect to Mr. Westerhof's first complaint. As I have said, the author of the MRI reports and Dr. Bartolucci should have been permitted to testify about their opinions, and the trial judge erred in refusing to permit them to do so. However, whether the other rule-53.03-non-compliant experts testified, Dr. Rathbone could not give evidence about their opinions for the truth of its contents. The other experts had to give that evidence themselves; his recounting of their opinions would constitute hearsay.

[109] However, Mr. Westerhof's second complaint is valid. Dr. Rathbone was precluded from giving evidence at trial about his diagnosis that Mr. Westerhof

suffered accident-related post-traumatic psychological changes and his recommendations in that regard. The reason was that he had relied, at least in part, and perhaps largely, on Dr. Bartolucci's reports to reach that conclusion. An expert witness is entitled to refer to the reports of other experts to explain how he or she reached his or her conclusions. It is then up to the trier of fact to assess whether the basis for the expert's conclusions have been proven in evidence, and, if they have not, to determine how that should affect the weight to be given to the expert's opinion. Thus, the trial judge erred in precluding Dr. Rathbone from testifying about his opinions concerning the psychological effects of the accident on Mr. Westerhof and his recommended treatments.

[110] As for the MRI reports, I acknowledge that, although Dr. Rathbone was not permitted to read the redacted portions of the MRI reports into the record[5], he was permitted to testify about his diagnosis of Mr. Westerhof's hip problem based on his review of the MRI reports – and he was also able to state his opinion that Mr. Westerhof's labral tear "most probably happened traumatically".

[111] Dr. Rathbone testified that the MRI reports disclosed a labral tear; that such tears almost always occur in the presence of some abnormality in the bone; that the first MRI disclosed changes within the labrum that looked like a crack and

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[5] At one point in his examination-in-chief, Dr. Rathbone referred to the fact that the second MRI report disclosed "the appearance of degenerative changes ... with secondary trauma". Counsel for Mr. Westerhof immediately asked him to "please refrain from that" and to just state his opinion arising from his review of the MRI report.

that the second MRI was compatible with degenerative changes plus trauma. He also testified that a forceful movement is necessary to tear the labrum. And he explained that "the literature says that 2.5 years from trauma to diagnosis is characteristic". Nonetheless, the fact remains that Dr. Rathbone was not permitted to refer to the redacted portions of the MRI reports, which were consistent with his opinion that the labral tear happened traumatically – something he would have been entitled to do had the radiologist who authored the reports been permitted to testify.

Ms. Gross and Ms. Murray

[112] Ms. Gross is a physiotherapist, and Ms. Murray is a kinesiologist. They conducted a functional abilities assessment on Mr. Westerhof in August 2006 and prepared a report for Mr. Westerhof's SABS insurer.

[113] Ms. Gross and Ms. Murray each signed a Form 53 acknowledgement of expert's duty; however, the trial judge ruled that they could not provide rule 53.03 evidence because they were not retained for the purposes of the litigation. The trial judge held that they could give evidence of their observations of Mr. Westerhof, but that they could not testify about their conclusions and opinions, including opinions that Mr. Westerhof was experiencing pain. Due to these restrictions, Mr. Westerhof did not call them as witnesses.

[114] I agree that the trial judge erred in ruling that these witnesses could not testify about their opinions because they had not or could not comply with rule 53.0 ;. In my view, they were entitled to testify concerning the history they took, the tests they performed, and the results they observed, including their observations about whether Mr. Westerhof was experiencing pain, without complying with rule 53.03, because of their status as non-party experts.

[115] Their report is in the appeal record and includes the following notes and assessments:

i. Mr. Westerhof's present complaints include: constant pain in the left lumbar spine and left groin region; shooting intermittent pain in the left leg; intermittent aching in the left neck and shoulder blade region; driving anxiety; depression; irritability; mood swings; short concentration; and sleep disturbances;

ii. "Mr. Westerhof currently demonstrates the ability to work at a light physical demands level with a maximum of 20 lbs. being manipulated. He demonstrated the ability to walk on an occasional basis and stand on a frequent basis with the opportunity to alter his position approximately every 30 minutes. His demonstrated abilities are probably an over-estimation of his actual abilities to sustain activity on a day to day basis. Mr. Westerhof continues to be challenged by low back pain with static and repetitive

postures, left/leg hip weakness, with standing activities and low level postures";

iii. Mr. Westerhof cannot return to his previous job as a thermoform machine operator because "[h]is physical/functional abilities do not meet the requirements of his job for walking, standing, low level positioning, lifting, pushing, and reaching." Mr. Westerhof "could manage a job that allows for frequent altering of position between sitting and standing, light lifting requirements and no low level positioning";

iv. "There were some observed pain behaviours primarily with motion of the left hip"; "Squatting resulted in marked left hip pain which continued for approximately 1 to 2 minutes"; A "[h]ip evaluation shows the left hip to have decreased mobility.... The right hip mobility was pain free and full range of movement";

v. "Having reviewed Mr. Westerhof's file, derived a history, performed a physical examination, it is the opinion of this assessor that Mr. Westerhof's presentation today is consistent with the motor vehicle accident as described. There is a temporal relationship from the accident to the onset of symptoms. The mechanism of injury is consistent with whiplash and rear end collision. There was no pre-existing condition noted in his history";

vi. "Mr. Westerhof ... was involved in a motor vehicle accident which occurred on April 22, 2004. From this motor vehicle accident, he has sustained cervical, shoulder soft tissue injuries with EMG demonstrated radiculopathy and lumbar spine spondylolisthesis with EMG demonstrated L5 radiculopathy. There also appears to be left hip dysfunction."

[116] I am satisfied that Ms. Gross and Ms. Murray were entitled to testify concerning the contents of the first four paragraphs set out above. These paragraphs include statements about the history these witnesses took from Mr. Westerhof, their observations of Mr. Westerhof during their assessment, and their conclusions about his ability to return to his pre-accident employment in the light of his presenting condition. All of these matters related to their interactions with Mr. Westerhof and fell within the scope of the ordinary exercise of their expertise.

[117] Concerning the fifth and sixth paragraphs, which addressed causation, the trial judge could properly have excluded these opinions, or required the witnesses to comply with rule 53.03 in relation to them. This decision would depend on the trial judge's assessment of factors such as the witnesses' expertise and the extent to which their opinions were based on information gained from sources beyond their interactions with Mr. Westerhof. Rather than making a blanket ruling excluding the evidence of these witnesses, the trial judge

should have determined the admissibility of the contested portions of their opinions as part of the usual exercise of his gatekeeper function.

Mr. Husler

[118] Mr. Husler is a road safety consultant and driving therapist intern. At the request of Dr. Bartolucci, Mr. Husler did an in-vehicle assessment of Mr. Westerhof in February 2007 "for assessment with regard to diagnosed anxiety in-vehicle as well as pain factors in the ergonomics of safe driving." Mr. Husler also prepared a letter setting out his observations and conclusions and a treatment plan.

[119] At trial, Mr. Westerhof submitted that Mr. Husler was a "treater" not an "expert", and that compliance with rule 53.03 was not required. However, the trial judge concluded that Mr. Husler was being called to give evidence that Mr. Westerhof had a pathology of a psychiatric nature arising from the motor vehicle accident and that he was not qualified to give that opinion. In the result, the trial judge ruled that Mr. Husler could not testify.

[120] It is unclear from Mr. Husler's report exactly what qualifications he has, but there is no dispute that Dr. Bartolucci referred Mr. Westerhof to him and asked that he conduct an assessment and prepare a treatment plan. Based on this referral, it seems likely that Mr. Husler was sufficiently qualified to conduct the tasks he was asked to perform. His qualifications should have been explored

more fully before any ruling was made. In any event, he should have been allowed to testify concerning his observations of Mr. Westerhof during the in-car assessment.

(2) Do the trial judge's erroneous evidentiary rulings warrant a new trial?

[121] Section 134(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, authorizes an appeal court to order a new trial. However, s. 134(6) provides that this court "shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred."

[122] As this court stated in *Beldycki Estate v. Jaipargas*, 2012 ONCA 537, 295 O.A.C. 100, at para. 42, "in a civil trial, a new trial will only be ordered where the interests of justice plainly require it".

[123] Counsel for the respondent submits that, even if the trial judge erred in applying rule 53.03, an order for a new trial is not warranted because substantially all of Mr. Westerhof's tendered evidence was before the court in any event.

[124] For example, Drs. Ramelli, Black and Bartolucci were all entitled to describe their visits with Mr. Westerhof; the complaints he made; their observations of him; the treatments they prescribed or administered; and the referrals they made. Although precluded from testifying concerning his formal diagnosis, Dr. Bartolucci

was permitted to describe Mr. Westerhof as depressed and explain some of the complaints and symptoms that led him to this conclusion.

[125] Further, Dr. Rathbone was able to give his opinion on causation concerning Mr. Westerhof's hip and back problems. Although he was not entitled to read from the redacted portions of the two MRI reports, he was able to say he reviewed the MRIs and formed his conclusions, at least in part, on the basis of that review.

[126] Finally, although the trial judge ruled the driving counsellor could not testify, several lay witnesses testified as to their observations of Mr. Westerhof's state when riding in a car.

[127] I would not accept these submissions. In my view, the trial judge's erroneous evidentiary rulings prevented Mr. Westerhof from placing important evidence before the judge and jury that could reasonably have affected the outcome of the trial.

[128] As the trial judge observed in his threshold ruling, causation was a central issue at trial. Mr. Westerhof's claims that he is disabled, in chronic pain and suffering significant psychological post-traumatic symptoms are all inextricably linked to the question whether he suffered hip and back injuries as a result of the accident.

[129] At trial, each side called a rule-53.03-compliant witness to testify about causation. Mr. Westerhof called Dr. Rathbone, a neurologist, who examined Mr. Westerhof on June 10, 2011. I have described the essence of his testimony relating to Mr. Westerhof's hip problems above. Concerning Mr. Westerhof's low back pain, Dr. Rathbone testified that the x-rays of Mr. Westerhof's lower back revealed spondylosis and spondylolisthesis. He indicated that although spondylolisthesis can develop "in a relatively young man one has to suspect that it's most probably caused by trauma." In his view, Mr. Westerhof's low back pain was related to the accident. While there was likely some pre-existing degenerative change, it was asymptomatic. The additional stress of the motor vehicle accident likely caused Mr. Westerhof's lower back pain.

[130] The respondent called Dr. Cividino, a rheumatologist, as its rule-53.03-compliant expert.[6] He examined Mr. Westerhof on June 20, 2006. He opined that the motor vehicle accident did not cause Mr. Westerhof's low back and hip problems and that the soft tissue injuries Mr. Westerhof suffered in the accident had resolved prior to trial.

[131] According to Dr. Cividino, at the time of his examination, Mr. Westerhof reported left leg pain, groin pain and lower back pain on certain movements. Dr.

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[6] Dr. Cividino drafted his report in 2006, several years before the amendments to rule 53.03. As such, his report did not include a description of the instructions provided by defence counsel, as required by rule 53.03(2.1). A copy of defence counsel's instructions was provided to plaintiff's counsel before cross-examination.

Cividino opined that these were not valid complaints because the particular movements should not have produced pain in the areas identified by Mr. Westerhof. Despite this conclusion, Dr. Cividino accepted that Mr. Westerhof had mechanical low back pain (activity-related pain) as of June 2006. However, he opined that it was unrelated to the accident because Mr. Westerhof had not reported low back pain to either his family doctor or his chiropractor immediately following the accident.

[132] Dr. Cividino also reviewed additional medical records generated subsequent to his examination. He said they reflected worsening back pain and complaints of left hip pain. He noted that Mr. Westerhof had had an MRI done on his back, which showed some mild degenerative changes, and two MRIs of his hip, which showed dysplasia of the femoral neck and a labral tear.

[133] In Dr. Cividino's view, the labral tear at the left hip could not have resulted from the car accident. He said that in order to tear the labrum from trauma you have to sublux or dislocate the hip, meaning that the ball and socket come out partially or completely. These would be painful, memorable events, which would render a person unable to bear weight. Mr. Westerhof was able to get up and walk around after the accident, and his hip symptoms came years later. In Dr. Cividino's view, this was consistent with the natural history of femoral impingement that had been building up over time.

[134] Concerning the low back pain, Dr. Cividino indicated that Mr. Westerhof's spondylosis and spondylolisthesis "are things that develop in the late teen years in the lower spine ... so ... over the years [he's] been having changes to his low back. And so having them become symptomatic at some point it's not surprising." Further, it was his view that because Mr. Westerhof did not report back pain until two weeks after the accident, the source of the back pain was unrelated to the accident.

[135] Dr. Cividino also testified that Mr. Westerhof's hip problems could be affecting Mr. Westerhof's level of back pain. This was because Dr. Adili confirmed he saw and removed the synovium[7] during surgery, which indicated there was arthritis in the joint. People develop flexion contractures as a result of arthritis, meaning that they cannot move their leg back. That results in flexion of the hip, so that when a person stands up they arch their back and really load up their lower back joints.

[136] Based on the jury's verdict and the findings of the trial judge on the threshold motion, it is apparent that Dr. Cividino's evidence was accepted and that Dr. Rathbone's evidence was not accepted.

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[7] A fluid membrane lining the joint.

[137] In my view, had the improperly excluded evidence been admitted, at least three aspects of that evidence, in combination, could reasonably have affected the outcome of the trial.

[138] First, the evidence of Ms. Gross and Ms. Murray concerning Mr. Westerhof's condition in August 2006 could have undermined the evidence and credibility of the defence expert, Dr. Cividino.

[139] As I read his evidence, Dr. Cividino testified, in effect, that as of June 2006, Mr. Westerhof was malingering. Moreover, Dr. Cividino testified in-chief that Mr. Westerhof did not complain of hip pain at the time of his examination.[8]

[140] On the other hand, Ms. Gross and Ms. Murray observed pain behaviours and restricted hip movement. They described no observations suggesting malingering. In my view, their evidence had the potential to undermine Dr. Cividino's credibility and neutrality concerning whether Mr. Westerhof was malingering and concerning whether Mr. Westerhof was experiencing hip problems in the summer of 2006 – factors that may well have been important to the jury's (and the trial judge's) acceptance of Dr. Cividino's evidence.

[141] Second, had the radiologist been entitled to testify and express the opinion on causation that he expressed in the MRI reports, that evidence would have

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[8] Dr. Cividino did acknowledge in cross-examination that Mr. Westerhof complained of left groin pain at one point during his physical examination and that the pain could have been referred from the hip.

provided direct support for Dr. Rathbone's evidence concerning the cause of Mr. Westerhof's hip problems.

[142] Third, had Dr. Rathbone been entitled to refer to the radiologist's opinion expressed in the MRI reports, that could have been an important factor supporting his credibility. Dr. Rathbone testified about causation in relation to the hip injury based in part on his review of the MRI reports. Yet the references to the motor vehicle accident and the opinion that the labral tear was secondary to trauma were redacted from the MRI reports that were filed as exhibits. What remained in both exhibits was reference to a "degenerative complex labral injury", suggesting nothing more than wear and tear. Had Dr. Rathbone been permitted to refer to the redacted portions of the MRI reports, his evidence would have been supported rather than possibly undermined. This could have been important in determining which expert's evidence to accept.

[143] For the sake of completeness, I note that Dr. Adili's evidence could be interpreted as assisting the defence. Dr. Adili is the orthopedic surgeon who performed hip surgery on Mr. Westerhof in June 2009. He had not complied with rule 53.03 and therefore was not entitled, under the trial judge's rulings, to give opinion evidence.

[144] Dr. Adili described the surgery he performed as femoral reshaping, basically taking off the "offending parts" of the bone that were causing an

impingement. He explained that he found a lesion over the femoral neck that was banging into the cup part of the hip joint and some fraying of the labral material. He "trimmed [the labrum] back to stable margins", which he analogized to trimming frayed ends of a rug.

[145] During his examination-in-chief, he volunteered that "for the most part ... it looked like the labrum was stable, so [his] suspicion [was] that fraying was secondary to the bone banging up against the cartilage."

[146] Although this evidence may imply that it was Dr. Adili's opinion that Mr. Westerhof's hip problems are the result of wear and tear and not trauma, I do not think it appropriate that I draw that inference on appeal. Neither counsel referred to this evidence in their appeal submissions. Moreover, counsel's examination of Dr. Adili was circumscribed by the trial judge's ruling that witnesses who had not complied with rule 53.03 could not give opinion evidence.

[147] In my opinion, the trial judge's error in applying rule 53.03 resulted in the exclusion of important evidence tendered by Mr. Westerhof that could reasonably have affected the outcome of the trial. Based on my review of the record, I am not satisfied that, either the trial judge, in his threshold ruling, or the jury, in its verdict, "would necessarily have reached the same result" had such evidence not been excluded: *Moore*, at para. 117; *Khan v. College of Physicians and*

Surgeons (1992), 9 O.R. (3d) 641 (C.A.), at p. 676. Accordingly, in all the circumstances, I would order a new trial.

D. MCCALLUM V. BAKER

(1) Introduction

[148] Mr. McCallum suffered injuries in a motor vehicle accident on March 23, 2009. The accident happened at about 6:45 a.m. He was on his way to work in a full size GMC Sierra pickup truck, southbound on Highway 400. Traffic in the southbound lanes came to a stop just north of King Road. Mr. McCallum was in the far left lane. He looked in his rear view mirror and saw headlights coming and braced himself for a collision. The rear of his pickup truck was then struck by a car driven by Mr. Baker.

[149] Mr. McCallum was 41 years of age at the time of the accident and was working as an electrical sub-contractor. He claims that he was healthy prior to the accident, but that as a result of the accident he suffered serious injuries to his neck, back, shoulder and hands, as well as chronic pain, chronic headaches and severe depression. He claims that these injuries prevented him from returning to work and severely curtailed his activities of daily living. Mr. McCallum also claims that it is unlikely that he will ever be able to return to work.

[150] Mr. McCallum sued Mr. Baker for damages. In addition to general damages and damages for past loss of income, Mr. McCallum claimed significant amounts

for future loss of income and future costs of care, including $598,209 for medications.

[151] Mr. Baker admitted liability and agreed that Mr. McCallum was entitled to damages, including a significant amount for general damages and sums for future loss of wages and future care. However, Mr. Baker also claimed that Mr. McCallum had pre-existing conditions that were aggravated by the accident, and disputed Mr. McCallum's assertions that he will never be able to return to work. He claimed that some of Mr. McCallum's symptoms are side effects of medications Mr. McCallum has been prescribed, and that Mr. McCallum's award should be reduced for failure to mitigate by reducing his dependency on these medications.

[152] The trial was held before a judge and jury prior to the Divisional Court's decision in *Westerhof*.

[153] At trial, the trial judge permitted several medical practitioners who had treated Mr. McCallum to give opinion evidence concerning Mr. McCallum's future employment prospects and future treatment needs without complying with rule 53.03. The trial judge concluded that because these witnesses were treating

medical practitioners, they could give opinion evidence without complying with rule 53.03.[9]

[154] The jury awarded damages to Mr. McCallum totalling $785,275. That figure is broken down as follows:

- General damages: $175,000
- Past loss of income: $47,081
- Future loss of income: $272,285
- Future costs of care:
    - Multidisciplinary and other programs: $19,772
    - Medications: $222,016
    - Aids to daily living: $4,821
    - Physiotherapy: $25,000
    - Housekeeping and home maintenance: $19,300

[155] On appeal, Mr. Baker accepted that treating physicians may give opinion evidence directly related to their treatment of a patient, such as a working diagnosis and prognosis. Nonetheless, he submits that the trial judge retains a gatekeeper function in relation to opinion evidence of treating physicians who do

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[9] The trial judge's original ruling in this regard is not in the appeal record. However, Mr. Baker renewed his objection to this form of evidence when the witnesses were testifying.

not comply with rule 53.03 and that, in his case, the trial judge erred in failing to fulfill his gatekeeper function in three ways.

[156] First, the trial judge erred in permitting treating physicians to give opinion evidence concerning matters such as future employability and future medication requirements that were not directly related to the treating physician's treatment of Mr. McCallum and that had not been disclosed prior to trial.

[157] Second, the trial judge erred in permitting treating physicians to give opinions that went beyond their expertise.

[158] Third, by permitting treating physicians to opine on matters that properly fell within the boundaries of rule 53.03 expert evidence, the trial judge unfairly allowed an excessive amount of expert evidence and ran afoul of the provisions of s. 12 of the *Evidence Act*. Subject to leave, s. 12 limits to three the number of experts who may testify for a party.

[159] Mr. Baker also argues that the trial judge's jury instructions were unbalanced and failed to properly set out key portions of the evidence and his submissions and theory of the case.

(2) The opinion evidence issue

[160] Mr. Baker called seven rule 53.03-compliant medical expert witnesses at trial:

- a neurologist, qualified to speak about chronic pain and psychological issues as a sub-specialty;
- an anaesthetist qualified to give evidence about medical psychotherapy and pain medication;
- a physiatrist;
- an orthopedic surgeon with a sub-specialty in chronic pain and orthopedic disability;
- a psychiatrist;
- a family physician who works at a pain centre; and
- a psychologist qualified to give evidence about psychology and vocational rehabilitation and chronic pain.

[161] In addition to these experts, Mr. Baker called seven treating medical practitioners, the evidence of five of whom is controversial:

- Dr. Cutbush, his family doctor;
- Dr. McMaster, a treating psychologist;
- Dr. Kraus, a treating psychiatrist;
- Dr. May, a treating family doctor and pain specialist; and
- Mr. Ball, a treating physiotherapist.

[162] The controversial aspects of these witnesses' testimony all relate to opinions concerning Mr. McCallum's prognosis. Mr. Baker objects to the following general areas of testimony:

- Dr. Cutbush and Mr. Ball testified that with respect to the conditions for which they were treating Mr. McCallum he appeared to have plateaued and was unlikely to improve further;
- Drs. May and Kraus testified that Mr. McCallum would need to remain on medication indefinitely;
- Dr. Kraus testified that if Mr. McCallum stopped taking his anti-depressants, he would be at increased risk of suicide; and,
- Drs. McMaster, Kraus and Cutbush and Mr. Ball testified that Mr. McCallum was not able to return to work.

[163] Mr. Baker's first two complaints in relation to this evidence are inter-related. He says the opinions on matters such as future medication requirements and future employability were not directly related to these practitioners' treatment of Mr. McCallum, that such opinions had not been disclosed prior to trial, and that such opinions went beyond the treating practitioners' expertise.

[164] With respect to the opinions relating to potential for improvement and future medication requirements, I see no merit in Mr. Baker's complaints. On their face, these opinions relate to the practitioners' treatment of Mr. McCallum and fall

within their respective areas of expertise. Although some of the transcript excerpts to which we were referred may be somewhat ambiguous, it appears that the opinions at issue were formed at the time of treatment. I see no indication in the transcript that the opinions had not been disclosed.

[165] The opinions concerning ability to return to work are more difficult. Nonetheless, in the circumstances of this case, I am not persuaded that the trial judge erred in allowing Drs. McMaster, Kraus, Cutbush and Mr. Ball to give them. The opinions appear to have been formed at the time of, and arise directly from, the practitioners' treatment of Mr. McCallum, they are not complex vocational opinions requiring highly specialized expertise, and I see no indication that they had not been disclosed.

[166] Dr. McMaster gave her opinion in the context of describing her DSM IV diagnosis. To make this diagnosis, Dr. McMaster assessed Mr. McCallum on five axes. She described axis 5 as a Global Assessment of Functioning ("GAF"), and said that a score of 60 on the GAF scale is considered a minimum requirement for return to work (a score of 65 is ideal). She classified Mr. McCallum as a 50 on the GAF scale. She explained that although Mr. McCallum was making "a little bit of a turning point", he continued to have issues accepting his "new body" and "dealing with what it can't do anymore." Thus, in her view, Mr. McCallum was "definitely not ready to return to work." There is no suggestion that Dr. McMaster was not qualified to conduct this assessment.

[167] Concerning Dr. Kraus, when asked if Mr. McCallum could return to any form of gainful employment, he testified that if Mr. McCallum was going to go back to work as an electrician, he (Dr. Kraus) would not let Mr. McCallum into his house. He explained:

> [B]ut if you look at – with the way he is right now, his concentration isn't good enough, his motivation is not good enough, his energy level is not good enough. I don't think that he could do any kind of activity related to any sort of complex task that would require a significant period of sustained activity that aren't [*sic*] interruptible. I don't think he could do those things because he can't right now and I don't see anything on the horizon that is rapidly likely to change that.

[168] Considered in context, Dr. Kraus's opinion concerning Mr. McCallum's employability was no more than a conclusion that flowed naturally from his observations concerning Mr. McCallum's presenting condition. The observations and Dr. Kraus's conclusion arising from them fell within his expertise.

[169] Dr. Cutbush was asked if he formed an opinion with respect to Mr. McCallum's employability when he wrote a report dated January 8, 2012. In what appears to be a direct quotation from that report, Dr. Cutbush testified, "[i]n my opinion Mr. McCallum is permanently disabled from gainful employment for which he is qualified by training and/or experience, as a direct result of the motor vehicle accident of March 23, 2009."

[170] Dr. Cutbush also testified that in the same report he listed the following diagnoses in relation to Mr. McCallum: Whiplash Associated Disorder III, with left

arm neuropathy; cervical spine injury: discogenic, facet, or mechanical; lumbar spine injury: discogenic, facet, or mechanical; traumatic bilateral carpal tunnel syndrome; chronic post-traumatic headaches, posttraumatic depression and anxiety and chronic pain disorder.

[171] It appears that Dr. Cutbush's opinion concerning Mr. McCallum's ability to work flowed directly from the diagnoses he had made in his capacity as Mr. McCallum's family doctor. Again, this was not a complex vocational assessment, but simply a straightforward opinion formed as part of his ongoing treatment of Mr. McCallum.

[172] Finally, Mr. Ball's opinion was based on the simple fact that Mr. McCallum could not do overhead work because of the condition of the facet joints in his neck. This opinion was straightforward and fell within Mr. Ball's area of expertise.

[173] Mr. Baker's third complaint is that, in permitting treating physicians to give the opinions noted above (which he claims fall more properly within the boundaries of rule 53.03 litigation expert opinion) the trial judge unfairly permitted an "avalanche" of expert evidence.

[174] I agree that it may have been open to the trial judge, in the exercise of his gatekeeper function, to exclude at least some of the impugned evidence. Nonetheless, I am not persuaded that he erred in failing to do so. As I have said, the opinions concerning ability to return to work were not complex vocational

opinions of the kind one would expect from a rule 53.03 expert. Rather, they were opinions formed by treating practitioners in the course of their treatment, reflecting the treating practitioners' assessment of the impact of Mr. McCallum's presenting condition on his ability to return to work. There is no suggestion that any of these practitioners were litigation experts in disguise, *i.e.* practitioners to whom Mr. McCallum was referred to obtain additional evidence for the purposes of the litigation. In all the circumstances, I am not persuaded that permitting the evidence of these witnesses was unfair.

[175] In the result, I would not give effect to this ground of appeal.

(3) The jury instructions issue

[176] Mr. Baker submits that the trial judge's jury instructions were unbalanced and failed to adequately summarize for the jury his overriding theory – and the evidence that supported it – that many of Mr. McCallum's complaints were being caused by the medications he was taking and that Mr. McCallum had not taken adequate steps to improve his condition. We did not call on Mr. McCallum to respond to this argument.

[177] In the context of a civil jury trial, failure to object to the charge, particularly in a case involving non-direction, will often be fatal to any subsequent claim that the charge was flawed: *Marshall v. Watson Wyatt & Co.* (2002), 57 O.R. (3d) 813 (C.A.), at para.15.

[178] In this case, counsel for Mr. Baker had a copy of the trial judge's jury instructions by approximately 5 p.m. on the evening before the trial judge delivered his charge to the jury. Nonetheless, he did not raise the objection he now advances on appeal until after the trial judge had completed his instructions to the jury.

[179] The trial judge declined to recharge the jury. Among other things, he said it would be a virtually impossible and potentially confusing task:

> I also agree that it would be very confusing and difficult to go back to recharge the jury on issues that [defence counsel] suggest percolate through the whole evidence review, an issue which we could have tackled yesterday ... or at least been alerted to this morning. *But having given them that information to go back and try to readdress it I think is an impossible task and certainly might represent utter confusion to the jury*. [Emphasis added.]

[180] In recent years, it has become a common practice in Ontario for trial judges to distribute copies of their jury instructions to counsel in advance of delivering them to the jury. Counsel who receive a copy of such jury instructions have an obligation to the court to review them before the charge is delivered. Counsel who fail to review the instructions and make prompt objections in advance of their delivery to the jury do so at their peril.

[181] In the circumstances, we agree that the nature of Mr. Baker's objection would have made it difficult for the trial judge to promptly prepare a meaningful

recharge. We see no reason not to treat the absence of a *timely* objection in the same fashion as we would treat a failure to object at trial.

[182] In any event, Mr. Baker acknowledges that, prior to instructing the jury, the trial judge asked counsel to provide him with a statement of their positions for inclusion in his charge and that the trial judge read out Mr. Baker's position statement verbatim as part of his jury instructions. We note as well that, when reviewing each head of damages in his jury instructions, the trial judge reviewed the defence position and the reasons for it.

[183] In the circumstances, we declined to give effect to this ground of appeal.

E. DISPOSITION

[184] Based on the foregoing reasons, I would allow Mr. Westerhof's appeal, set aside the jury's verdict and the trial judge's judgment, and order a new trial. I would dismiss Mr. Baker's appeal. If the parties are unable to agree as to costs, we will receive brief written submissions.

Released: MAR 26 2015

JA.

I agree D.L. Neal JA

I agree Robert J. Bauman JA.

Appendix 'A'

ACKNOWLEDGMENT OF EXPERT'S DUTY

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

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

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

(a) to provide opinion evidence that is fair, objective and non-partisan

(b) to provide opinion evidence that is related only to matters that are within my area of expertise; and

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

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

Date .....

_____

Signature