COURT OF APPEAL FOR ONTARIO

CITATION: Moore v. Getahun, 2015 ONCA 55
DATE: 20150129
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Laskin, Sharpe and Simmons JJ.A.

BETWEEN

Blake Moore

Respondent

and

Dr. Tajedin Getahun, The Scarborough Hospital – General Division, Dr. John Doe and Jack Doe

Appellant

J. Thomas Curry and Jaan E. Lilles, for the appellant

Paul J. Pape and Joanna Nairn, for the respondent

Matthew Gourlay and Samuel Walker, for the intervener Criminal Lawyers' Association

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

William D. Black, Jerome R. Morse and John J. Morris, for the intervener The Holland Group

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

Courtney Raphael, for the intervener Canadian Institute of Chartered Business Valuators

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

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

On appeal from the judgment of Justice Janet M. Wilson of the Superior Court of Justice, dated January 14, 2014, with reasons reported at 2014 ONSC 237.

Sharpe J.A.:

[1] This appeal raises significant issues in relation to the preparation and use of expert reports in the context of a medical malpractice action.

[2] Following a motorcycle accident, the respondent (plaintiff) was treated by the appellant (defendant), a recently qualified orthopedic surgeon, for a fracture to his right wrist. The appellant applied a full circumferential cast to the respondent's wrist and forearm. The respondent suffered permanent damage to the muscles in his arm due to compartment syndrome that he alleged was caused by the appellant's negligence in the application of a full cast.

[3] The trial judge preferred the evidence of the respondent's expert witness over that of the appellant's expert witnesses and found that the application of the full circumferential cast was a breach of the standard of care and had caused the compartment syndrome to develop.

[4] The first and most significant legal issue raised on appeal involves the preparation of the written report of one of the appellant's expert witnesses. The trial judge held that it was improper for counsel to assist an expert witness in the preparation of the expert's report. That proposition is strongly challenged by the appellant and by all of the interveners. The respondent concedes that the view

expressed by the trial judge is erroneous, but argues that her error had no impact on the outcome of the trial.

[5] The second significant legal issue involves the use of the appellant's expert witness reports. The reports were not entered into evidence and the parties proceeded to call *viva voce* evidence from all expert witnesses. The expert reports were, however, made available to the judge as an *aide memoire*. In assessing the credibility of the expert witnesses called by the appellant, the trial judge took into account what she perceived to be contradictions between the experts' *viva voce* evidence and the written reports. The appellant submits that she erred in doing so. The respondent concedes that the trial judge erred, but once again argues that the error was harmless.

[6] The appellant takes issue with several other aspects of the trial judge's conduct of the trial and with her reasons for judgment.

[7] For the following reasons, I conclude that the trial judge erred in holding that it was unacceptable for counsel to review and discuss the draft expert reports. She further erred in using the written expert reports that were neither entered into evidence, nor the subject of cross-examination, to contradict and discredit aspects of the *viva voce* evidence of the appellant's expert witnesses. I conclude, however, that these errors did not affect the outcome. As no

substantial wrong or miscarriage of justice flowed from the errors, this court would not be justified in ordering a new trial.

FACTS

[8] On November 12, 2005, the respondent seriously injured his right wrist in a motorcycle accident. He was 21 years old at the time. Paramedics took him to the emergency department at Scarborough General Hospital. He was seen by an emergency room physician and then by the appellant, who had qualified as an orthopedic surgeon a few months earlier. The appellant obtained an X-ray, which confirmed that the respondent's wrist was fractured. The X-ray revealed two large bone fragments, the styloid of the distal radius and the lunate facet, as well as many small fragments. The appellant performed a closed reduction, attempting to manually realign the bones by manipulating the respondent's arm. He had to attempt this procedure twice. He then applied a full circumferential plaster cast to the respondent's wrist and forearm.

[9] The appellant subsequently ordered a second X-ray, which revealed that the closed reduction had only been successful in realigning the radial styloid. The other bone fragment, the lunate facet, was displaced and rotated 180 degrees. The appellant recommended a surgical reduction together with a possible bone graft to repair the injury. In consultation with his father, the respondent declined the appellant's offer to perform the surgery that evening. He was concerned

about undergoing a bone graft due to the appellant's relative lack of experience and the seemingly drastic nature of the procedure. The respondent and his father decided to seek a second opinion from another orthopedic surgeon they knew, Dr. Orsini, who practiced at a different hospital. The respondent understood that the surgery must take place within the week, but was not aware of any urgency beyond that.

[10] The respondent was discharged with oral instructions that he would suffer some pain and swelling for up to two or three days after the cast was put on, and was directed to return to the hospital if the pain and swelling increased beyond that point. He was also provided oral and written instructions on cast care, including a pamphlet advising patients to seek medical attention in the event of severe swelling and pain, numbness, loss of motion control, drainage and odour, sensations of burning, tightness, or blue discolouration of the fingers. There was no discussion about possible compartment syndrome or the fact that the respondent was at increased risk of complications due to the high impact injury. The respondent knew that he should return to the emergency room if the cast was too tight.

[11] The next morning, the respondent awoke with increased pain and swelling. The respondent's father initially recalled the appellant's advice that pain and swelling were normal for up to two to three days. However, due to the excruciating nature of the pain, the respondent and his father ultimately attended

the hospital where Dr. Orsini practiced, arriving sometime before 11:26 a.m. The triage nurse erroneously gave the respondent low priority, reflecting her assessment of his level of pain and discomfort. While waiting, the respondent became concerned that something was wrong. He managed to attract the attention of a cast technician who immediately contacted the emergency room physician. The respondent was examined shortly thereafter, at approximately 1:15 p.m. The emergency room physician, Dr. Tanzer, observed that the respondent's hand was bluish in colour, that he was in significant pain and that he had very little hand movement. He suspected compartment syndrome and ordered an X-ray.

[12] The trial judge adopted, at para. 9 of her reasons, the following definition of compartment syndrome from a glossary of medical terms filed by the appellant: "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."

[13] The emergency room physician split the cast open. By coincidence, Dr. Orsini was the orthopedic surgeon on call. Later that evening, Dr. Orsini performed a fasciotomy, a surgical procedure to open the respondent's forearm and cut into the arm's compartments to relieve the pressure built up by the compartment syndrome. The procedure confirmed a diagnosis of compartment syndrome. Dr. Orsini reported in his notes that the muscles in the respondent's

arm were viable, red, bleeding and contractile, indicating that muscle necrosis had not yet set in.

[14] Despite the absence of necrosis, the respondent suffered permanent muscle damage as a result of the compartment syndrome. Before trial, the parties had agreed that, should there be a finding of liability, the appropriate award of damages would be $350,000, inclusive of pre-judgment interest.

THE TRIAL

[15] The central issues at trial were whether the appellant had fallen below the standard of care by applying a full circumferential cast on the respondent's wrist and whether the full cast caused the compartment syndrome.

[16] The respondent's theory was that the nature of his injury could be expected to cause significant swelling and that the full circumferential cast – rather than a splint or bivalved (half) cast – acted as a barrier that became too tight and caused the compartment syndrome to develop. The appellant's theory was that a full cast was appropriate in the circumstances, as the respondent had not decided whether to undergo surgery. The appellant further submitted that the compartment syndrome was not caused by the cast but rather by the original injury, and had developed after the cast was removed.

[17] As might be expected, much of the eight-day trial concerned expert evidence. The trial judge made several attempts to manage the way in which the expert evidence was received.

[18] Despite repeated suggestions by the trial judge that the parties make the expert reports exhibits, counsel for both parties (particularly the appellant's counsel) objected. However, they agreed to provide her with copies of the reports to aid her in following the evidence. I note here that both the appellant and the respondent were represented at trial by different counsel than on this appeal.

[19] The trial judge also suggested on more than one occasion that the expert witnesses should meet and confer in an attempt to narrow the issues or conduct a "hot tubbing" session. Counsel, particularly the appellant's counsel, resisted these suggestions.

[20] Several issues arose as to the admissibility of various aspects of the expert evidence. The trial judge indicated that she would not accept the evidence of one proposed expert, Dr. Regan, on the standard of care or causation, as he was the brother of the respondent's counsel and therefore had a potential conflict of interest. Dr. Regan was not called.

[21] The respondent obtained an expert report from Dr. Orsini, the orthopedic surgeon who performed the surgery to relieve the compartment syndrome. Dr. Orsini died before the trial. The trial judge ruled that his first report outlining his

observations and the facts as to the treatment he provided were admissible pursuant to s. 52 of the *Evidence Act*, R.S.O. 1990, c. E.23, which permits the admission of a medical practitioner's report with leave of the court. This ruling was not contested at trial or on appeal. The trial judge refused to admit Dr. Orsini's opinions on standard of care and causation, contained in his second report, for the truth of their contents. She did so on the grounds that Dr. Orsini was not available for cross-examination, and the requirement of necessity had not been met since the respondent had another expert who could testify to these issues. However, as other expert witnesses had commented on Dr. Orsini's opinion, the trial judge concluded, at para. 21, "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] The trial judge also ruled that certain statements made by Dr. Orsini to the respondent's father expressing strong criticism of the appellant's treatment of the respondent were admissible as part of the *res gestae*, but not for their truth. The father testified that Dr. Orsini told him:

- "The cast never should have been put on, as it was far too tight… it killed the flesh in your son's arm."
- "[The appellant] didn't set the wrist. He made it worse" and "managed to catch the nerve between the bones and damaged the nerve as well."

- “Whoever did this butchered your son.”

[23] The trial judge explained her treatment of this evidence at para. 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.

[24] The respondent also sought to adduce opinion evidence from Dr. Tanzer, the emergency room physician who first saw the respondent and detected the compartment syndrome. Following the Divisional Court’s judgment in *Westerhof v. Gee Estate*, 2013 ONSC 2093, 310 O.A.C. 335, the appeal from which was heard at the same time as this appeal, the trial judge refused to admit Dr. Tanzer’s opinion evidence as to the standard of care and causation because he had not prepared a report in compliance with rule 53.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[25] The respondent’s expert witness was Dr. Robin Richards, a senior orthopedic surgeon and professor at the University of Toronto. Dr. Richards had lectured and published extensively on upper extremity orthopedic surgery and had been qualified as an expert witness on many occasions. His other experience included conducting external reviews of orthopedic standards at various hospital settings in London and Hamilton. Dr. Richards testified that the

appellant had fallen below the expected standard of care by using a full circumferential cast, and that splints or a bivalved cast would have been the appropriate course of action. He concluded from certain symptoms and signs observed by the respondent and from the state of the forearm at the time the surgery was performed that the application of the full circumferential cast was the cause of the compartment syndrome.

[26] The appellant called two expert witnesses. Dr. Ronald Taylor was a retired orthopedic surgeon who had practiced in a community hospital setting for his entire career. He supported the appellant's use of the full circumferential cast as complying with the standard of care, although he agreed that he would have applied a bivalved cast had he known that surgery would take place within a few days. He testified that in his opinion, the fracture itself, not the cast, was the cause of the compartment syndrome.

[27] During cross-examination, Dr. Taylor indicated that he had sent a draft of one of his reports to the appellant's counsel for review. Dr. Taylor testified that he had produced his final report following an hour and a half conference call with counsel. Although the respondent's counsel did not pursue this issue, the trial judge expressed her concern over what had occurred. She asked Dr. Taylor to organize his file in chronological order and to provide the court with his draft reports. After counsel had completed their examinations of Dr. Taylor, she proceeded to question Dr. Taylor about his draft reports, the meetings he had

with the appellant's counsel and any changes that he had made to his reports as a result. When Dr. Taylor indicated that there was another file that he did not have with him, she directed the appellant's counsel to provide the court with all instructing letters and records of any conference calls, and asked Dr. Taylor to return the next day. That led to a detailed review of Dr. Taylor's draft reports as well as scrutiny of the notations and changes he made as a result of discussing his draft reports with the appellant's counsel.

[28] In her reasons for judgment, the trial judge commented adversely on the consultation between Dr. Taylor and the appellant's counsel, and on Dr. Taylor's reaction in the witness stand when confronted with the fact that he had discussed his draft with counsel.

[29] The appellant also called Dr. George Athwal, another orthopedic surgeon, who supported the use of a full circumferential cast. Dr. Athwal was primarily engaged in teaching and research and had limited clinical experience.

[30] Following the completion of the evidence and oral argument, the trial judge convened a meeting with counsel at which time she again requested that the expert reports be made exhibits. Again, counsel refused to have the reports dealt with in that manner.

[31] The trial judge subsequently delivered lengthy and detailed written reasons accepting the evidence of Dr. Richards and rejecting that of Drs. Taylor

and Athwal. She found that the appellant was negligent in using a full circumferential cast and that his negligence caused the respondent to develop compartment syndrome. I will review the impugned portions of her reasons in the course of my analysis of the issues.

ISSUES

[32] The appellant raises the following issues on appeal:

1. Did the trial judge err in her treatment of the appellant's expert opinion evidence by:

    a. Criticizing the appellant's counsel for discussing with an expert witness the content of his draft report?

    b. Rejecting aspects of the appellant's expert opinion evidence on account of alleged contradictions between the experts' testimony and the experts' written reports?

2. Did the trial judge err in her application of the doctrine of *res gestae*?

3. Did the trial judge err in her analysis of causation?

4. Did the trial judge's errors render the trial unfair and cause a substantial wrong or miscarriage of justice?

ANALYSIS

1. (a) Did the trial judge err by criticizing the appellant's counsel for discussing with their expert witness the content of his draft report?

(i) Expert evidence

[33] Expert evidence is a significant and controversial feature of modern civil litigation. It constitutes an exception to the rule that witnesses may only testify as to facts, not opinions, and that it is the exclusive prerogative of the trier of fact to draw inferences from proven facts. The expert evidence exception operates where specialized knowledge is required to determine the implications of the bare facts and where the trier of fact is not competent to draw the necessary inferences unaided: *R. v. Mohan*, [1994] 2 S.C.R. 9, at p. 23; *R. v. Abbey*, 2009 ONCA 624, 246 C.C.C. (3d) 301, at para. 94.

[34] Expert evidence has become more significant with the explosion of scientific knowledge and technical innovation. Many cases have been described as a “battle of experts”. Medical negligence cases are a prime example. The trier of fact requires the assistance of expert witnesses to decide issues pertaining to the standard of care, causation and prognosis.

[35] The use of expert evidence poses difficult issues that have been the focus of consideration in civil justice reform. How do we control the added costs associated with the explosion of expert witnesses? How do we ensure that a party has a fair opportunity to challenge an adverse expert witness? How do we ensure that expert witnesses offer an unbiased scientific or technical opinion based upon their training and expertise, rather than act as “hired guns” who present unbalanced opinions unduly favouring the party that retains them?

(ii) 2010 amendments to rule 53.03

[36] Rule 53.03 establishes the framework that parties must follow when they intend to call an expert witness at trial. The rule requires a party to provide a signed report from the expert witness not less than 90 days before the pre-trial conference or, in the case of a responding report, not less than 60 days before the pre-trial conference (rules 53.03(1), (2)). Rule 53.03(3) 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 is set out in writing in compliance with the other provisions of the rule.

[37] In 2010, significant changes were made to the *Rules of Civil Procedure* relating to expert witnesses, following the recommendations of the Honourable Coulter Osborne contained in his review of the civil justice system, *Civil Justice Reform Project: Summary of Findings & Recommendations* (Toronto: Ontario Ministry of the Attorney General, 2007). His report highlighted, at p. 71, the common complaint that “too many experts are no more than hired guns who tailor their reports and evidence to suit the client’s needs.” Two significant recommendations of the Osborne Report, designed to foster unbiased expert evidence, were subsequently adopted.

[38] First, rule 4.1.01(1) specifically addresses the duty of an expert witness:

> 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.

[39] Second, rule 53.03(2.1) provides that an expert report must 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.

[40] The certificate mandated by rule 53.03(2.1) reads 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.

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

(iii) The trial judge's ruling

[41] The trial judge was plainly troubled by the suggestion that Dr. Taylor had reviewed his draft report with the appellant's counsel. The issue first emerged in answer to a question during Dr. Taylor's cross-examination, but the respondent's counsel did not pursue it at any length. The trial judge took up the issue and, as I have indicated, directed Dr. Taylor to produce his draft reports and the notes he made while discussing them with the appellant's counsel. The trial judge questioned Dr. Taylor at length about the precise changes he had made as a result of those discussions.

[42] The trial judge was critical of the appellant's counsel for having discussed Dr. Taylor's draft report with him during an hour and a half telephone conference call. She concluded that there had been significant changes. The trial judge stated, at paras. 287-288, that this put Dr. Taylor in a "very awkward situation" as he was "obviously totally unaware that it may be improper to discuss and change a draft report, as a breach of his duty of impartiality." She commented adversely on Dr. Taylor's credibility, at para. 291, on account of "a dramatic difference in the tone and demeanor of Dr. Taylor's evidence" after he was confronted with the fact that he had made changes to his report as a result of discussions with counsel. She rejected his explanation that the changes were minor, found that he minimized the changes and concluded, at para. 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.

[43] The trial judge strongly disapproved of the practice of counsel reviewing draft expert reports. She stated, at para. 52:

> 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.

[44] The trial judge expanded upon this proposition, at para. 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.

[45] The trial judge was obviously of the view that the then current practice and the ethical rules and standards of the legal profession were inadequate to deal with the "hired gun" problem. Her solution was to strictly control discussions between expert witnesses and counsel and to require that all discussions be documented and subject to disclosure and production.

(iv) Reaction to the trial judge's ruling

[46] The trial judge's statements as to the propriety of counsel reviewing draft expert reports have caused considerable concern in the legal profession and in the community of expert witnesses. Both The Advocates' Society and the Canadian Institute of Chartered Business Valuators struck task forces to develop a response. Both of these organizations have intervened in this appeal to provide their perspectives. The Advocates' Society presented the court with its *Principles Governing Communications with Testifying Experts* (Toronto: The Advocates' Society, June 2014) as well as its *Position Paper on Communication with Testifying Experts* (Toronto: The Advocates' Society, June 2014).

[47] There are several other interveners, all of whom oppose the trial judge's ruling. The Holland Access to Justice in Medical Malpractice Group ("The Holland Group") is composed of leading members of the plaintiff and defence bar engaged in medical malpractice litigation. Its objective is to promote reform of the justice system to achieve the equitable, affordable and just resolution of medical malpractice claims. In response to the trial judge's decision, The Holland Group prepared a position paper, which posits, at p. 2, that if accepted, the trial judge's ruling:

> [W]ould have the effect of impairing normal, reasonable and prudent litigation practices, would substantially increase the cost of litigation, would do a disservice to the Court in terms of hearing fulsome, well-organized and appropriate evidence, and ultimately would result in a chilling and significantly restrictive effect on access to justice.

[48] The Canadian Defence Lawyers Association submitted that the trial judge's ruling was "unprecedented, unsupported in law and seriously flawed". The Criminal Lawyers' Association intervened to point out the problems that would be encountered in criminal cases if the trial judge's prohibition on consultation with experts were adopted. The Ontario Trial Lawyers Association agrees that the trial judge's imposed restriction on communication with expert witnesses is contrary to the interests of justice, and argued that any communication between counsel and expert witnesses that does not undermine their helpfulness or foster bias should be permitted.

[49] It is apparent from the submissions of the parties and the interveners representing both sides of the bar that, if accepted, the trial judge's ruling would represent a major change in practice. It is widely accepted that consultation between counsel and expert witnesses in the preparation of Rule 53.03 reports, within certain limits, is necessary to ensure the efficient and orderly presentation of expert evidence and the timely, affordable and just resolution of claims.

(v) Is it appropriate for counsel to review draft expert reports?

[50] I begin by considering the changes made to Dr. Taylor's report following discussion with counsel. Nowhere in her reasons does the trial judge explain which changes were significant. My review of the draft reports, the notes, the changes and Dr. Taylor's explanation indicates that the changes could be

described as relatively minor editorial and stylistic modifications intended to improve the clarity of the reports. I can see no evidence of any significant change in substance, nor did counsel for the respondent on this appeal point to any such change. In my view, there is nothing in the record to indicate that either counsel or Dr. Taylor did anything improper or that Dr. Taylor's report reflected anything other than his own genuine and unbiased opinion.

[51] I now turn to the law. I disagree with the trial judge's statement that the 2010 amendments to rule 53.03 introduced a "change in the role of expert witnesses".

[52] As I read the amendments and the Osborne Report recommendations, the changes were intended to clarify and emphasize the existing duties of expert witnesses. I agree with Lederman J.'s statement in *Henderson v. Risi*, 2012 ONSC 3459, 111 O.R. (3d) 554 (S.C.), at para. 19, that these changes represent a restatement of the basic common law principle that it is the duty of an expert witness "to provide opinion evidence that is fair, objective and non-partisan." Those common law duties were summarized in an often cited passage from *National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd*. ("*The Ikarian Reefer*"), [1993] 2 Lloyd's Rep. 68, at p. 81 (Eng. Q.B. Comm.), rev'd on other grounds but endorsed on this point, [1995] 1 Lloyd's Rep 455 (Eng. C.A. Civ.), at p. 496:

> 1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation [citation omitted].
>
> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise [citation omitted]. An expert witness… should never assume the role of an advocate.

The 2010 amendments to rule 53.03 did not create new duties but rather codified and reinforced these basic common law principles.

[53] The changes suggested by the trial judge find no support in the various reviews and studies on civil justice reform to which we have been referred. The Honourable Coulter Osborne certainly shared the trial judge's aspiration for a regime that fosters unbiased expert evidence, yet there is no suggestion in his report that the solution could be found by altering the long-standing practice of counsel reviewing draft reports.

[54] The *Inquiry into Pediatric Forensic Pathology in Ontario* (Toronto: Ontario Ministry of the Attorney General, 2008), conducted by Justice Stephen Goudge, looked into the shocking miscarriages of justice brought about by biased expert evidence. At p. 48 of his report, Justice Goudge stressed the importance of "[p]roperly prepared expert reports, along with a certification that the expert understands the duty to provide impartial advice to the court" in order to help ensure the reliability of expert evidence. Justice Goudge concluded, at p. 47, that

proper communication with and preparation of expert witnesses was vital to enable them to communicate their opinions effectively to the court: “[C]ounsel, whether Crown or defence, should properly prepare forensic pathologists they intend to call to give evidence.”

[55] While some judges have expressed concern that the impartiality of expert evidence may be tainted by discussions with counsel (see the cases cited below, at para. 72), banning undocumented discussions between counsel and expert witnesses or mandating disclosure of all written communications is unsupported by and contrary to existing authority: see *Maras v. Seemore Entertainment Ltd.,* 2014 BCSC 1109, [2014] B.C.W.L.D. 4470, at para. 90 (“[c]ounsel have a role in assisting experts to provide a report that satisfies the criteria of admissibility”); *Surrey Credit Union v. Willson* (1990), 45 B.C.L.R. (2d) 310 (S.C.), at para. 25 (“[t]here can be no criticism of counsel assisting an expert witness in the preparation of giving evidence”). In *Medimmune Ltd. v. Novartis Pharmaceuticals UK Ltd. & Anor*, [2011] EWHC 1669 (Pat.), the court pointed out, at para. 110, that in some highly technical areas such as patent law, expert witnesses “require a high level of instruction by the lawyers” which may necessitate “a high degree of consultation” involving “an iterative process through a number of drafts.”

[56] As the court in *Medimmune* noted, at para. 111, “this process entails a risk of loss of objectivity on the part of the expert”. However, the independence

and objectivity of expert witnesses is fostered under existing law and practice in a number of ways.

[57] First, the ethical and professional standards of the legal profession forbid counsel from engaging in practices likely to interfere with the independence and objectivity of expert witnesses. I attach as an Appendix to these reasons The Advocates' Society's *Principles Governing Communications with Testifying Experts*, which provides a thorough and thoughtful statement of the professional standards pertaining to the preparation of expert witnesses. Principle 3 states:

> In fulfilling the advocate's duty to present clear, comprehensible and relevant expert evidence, the advocate should not communicate with an expert witness in any manner likely to interfere with the expert's duties of independence and objectivity.

[58] To the same effect, The Holland Group's position paper includes, at p. 4, its opinion "that it is inappropriate for counsel to persuade or attempt to persuade experts to articulate opinions that they do not genuinely hold, and that it is of paramount importance that the expert genuinely believes the opinion that he or she articulates both in the expert report and in the witness box."

[59] In *Medimmune*, at para. 111, the court emphasized that it is "crucial that the lawyers involved should keep the expert's need to remain objective at the forefront of their minds at all times."

[60] Second, the ethical standards of other professional bodies place an obligation upon their members to be independent and impartial when giving expert evidence: see *Guideline: The Professional Engineer as an Expert Witness* (Toronto: Association of Professional Engineers of Ontario, September 2011); the Actuarial Standards Board's *Standards of Practice* (Ottawa: Canadian Institute of Actuaries, October 2014); the Canadian Institute of Chartered Business Valuators' *Code of Ethics* (Toronto: Canadian Institute of Chartered Business Valuators, 2012), *Standard No. 110: Valuation Reports* (Toronto: Canadian Institute of Chartered Business Valuators, 2009) and *Standard No. 310: Expert Reports* (Toronto: Canadian Institute of Chartered Business Valuators, 2010). Further, pursuant to the *Rules of Civil Procedure*, every expert witness is reminded of the duty imposed by rule 4.1.01 to be objective and impartial when signing the acknowledgment of expert's duty mandated by rule 53.03(2.1).

[61] Third, the adversarial process, particularly through cross-examination, provides an effective tool to deal with cases where there is an air of reality to the suggestion that counsel improperly influenced an expert witness. Judges have not shied away from rejecting or limiting the weight to be given to the evidence of an expert witness where there is evidence of a lack of independence or impartiality. In *Medimmune*, at para. 111, the court noted that "partisan expert evidence is almost always exposed as such in cross-examination, which is likely

to reduce, if not eliminate, the value of the evidence to the client's case"; see also *Alfano v. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62, at paras. 106-120.

[62] I agree with the submissions of the appellant and the interveners that it would be bad policy to disturb the well-established practice of counsel meeting with expert witnesses to review draft reports. Just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case.

[63] Consultation and collaboration between counsel and expert witnesses is essential to ensure that the expert witness understands the duties reflected by rule 4.1.01 and contained in the Form 53 acknowledgment of expert's duty. Reviewing a draft report enables counsel to ensure that the report (i) complies with the *Rules of Civil Procedure* and the rules of evidence, (ii) addresses and is restricted to the relevant issues and (iii) is written in a manner and style that is accessible and comprehensible. Counsel need to ensure that the expert witness understands matters such as the difference between the legal burden of proof and scientific certainty, the need to clarify the facts and assumptions underlying the expert's opinion, the need to confine the report to matters within the expert witness's area of expertise and the need to avoid usurping the court's function as the ultimate arbiter of the issues.

[64] Counsel play a crucial mediating role by explaining the legal issues to the expert witness and then by presenting complex expert evidence to the court. It is difficult to see how counsel could perform this role without engaging in communication with the expert as the report is being prepared.

[65] Leaving the expert witness entirely to his or her own devices, or requiring all changes to be documented in a formalized written exchange, would result in increased delay and cost in a regime already struggling to deliver justice in a timely and efficient manner. Such a rule would encourage the hiring of “shadow experts” to advise counsel. There would be an incentive to jettison rather than edit and improve badly drafted reports, causing added cost and delay. Precluding consultation would also encourage the use of those expert witnesses who make a career of testifying in court and who are often perceived to be hired guns likely to offer partisan opinions, as these expert witnesses may require less guidance and preparation. In my respectful view, the changes suggested by the trial judge would not be in the interests of justice and would frustrate the timely and cost-effective adjudication of civil disputes.

[66] For these reasons, I reject the trial judge’s proclamation that the practice of consultation between counsel and expert witnesses to review draft reports must end. However, as I will discuss below, the trial judge’s unwarranted criticism of the appellant’s counsel on this basis did not, in my view, affect the outcome of the trial.

(vi) Documentation and disclosure of consultations regarding draft reports

[67] I now turn to the issue of the extent to which consultations between counsel and expert witnesses need to be documented and disclosed to an opposing party.

[68] The starting point for analysis is that such consultations attract the protection of litigation privilege. Litigation privilege protects communications with a third party where the dominant purpose of the communication is to prepare for litigation. As explained by the Supreme Court of Canada in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319, at para. 27, the object of litigation privilege "is to ensure the efficacy of the adversarial process", and "to achieve this purpose, parties to litigation… must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure." These concerns are important in the context of the preparation of expert witnesses and their reports.

[69] In *Blank*, the court noted, at para. 34, that litigation privilege creates "a 'zone of privacy' in relation to pending or apprehended litigation." The careful and thorough preparation of a case for trial requires an umbrella of protection that allows counsel to work with third parties such as experts while they make notes, test hypotheses and write and edit draft reports.

[70] Pursuant to rule 31.06(3), the draft reports of experts the party does not intend to call are privileged and need not be disclosed. Under the protection of litigation privilege, the same holds for the draft reports, notes and records of any consultations between experts and counsel, even where the party intends to call the expert as a witness.

[71] Making preparatory discussions and drafts subject to automatic disclosure would, in my view, be contrary to existing doctrine and would inhibit careful preparation. Such a rule would discourage the participants from reducing preliminary or tentative views to writing, a necessary step in the development of a sound and thorough opinion. Compelling production of all drafts, good and bad, would discourage parties from engaging experts to provide careful and dispassionate opinions and would instead encourage partisan and unbalanced reports. Allowing an open-ended inquiry into the differences between a final report and an earlier draft would unduly interfere with the orderly preparation of a party's case and would run the risk of needlessly prolonging proceedings.

[72] I recognize that the wisdom of extending litigation privilege to the preparation of expert reports has been questioned by some judges: see *Browne (Litigation Guardian of) v. Lavery*, (2002) 58 O.R. (3d) 49 (S.C.), at paras. 65-71; *Aviaco International Leasing Inc. v. Boeing Canada Inc.*, 2002 CanLII 21293, [2002] O.J. No. 3799 (S.C.), at para. 16. However, the law currently imposes no routine obligation to produce draft expert reports: *Conceicao Farms Inc. v.*

Zeneca Corp. (2006), 83 O.R. (3d) 792 (C.A.), at para. 14; *Mendlowitz v. Chaing*, 2011 ONSC 2341 (S.C.), at paras. 20-24.

[73] It is important to note that the litigation privilege attaching to expert reports is qualified, and disclosure may be required in certain situations.

[74] The most obvious qualification is that the *Rules of Civil Procedure* require disclosure of the opinion of an expert witness before trial. If a party intends to call the expert as a witness at trial, rule 31.06(3) entitles the opposite party on oral discovery to "obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined".

[75] As well, the party who intends to call the expert witness is required to disclose the expert's report and the other information mandated by rule 53.03(2.1). The result is that what has been called "the foundational information" for the opinion must be disclosed: *Conceicao Farms*, at para. 14. Bryant, Lederman and Fuerst refer to this as an "implied waiver" of privilege over the facts underlying an expert's opinion that results from calling the expert as a witness: Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada,* 4th ed. (Markham: LexisNexis Canada, 2014), at para. 14.220. These authors favour restricting the implied waiver "to material relating to formulation of the expressed opinion" (at para. 14.224). They state that caution should be exercised before requiring

"wide-ranging disclosure of all solicitor-expert communications and drafts of reports", as such a practice could encourage "a general practice among solicitors of destroying drafts after they are no longer needed just to avoid the problem" (at para. 14.226).

[76] The second qualification is that, as stated in *Blank*, at para. 37, "litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration." Litigation privilege yields where required to meet the ends of justice, and "[i]t is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day": *Blank*, at para. 44.

[77] In my view, the ends of justice do not permit litigation privilege to be used to shield improper conduct. As I have already mentioned, it is common ground on this appeal that it is wrong for counsel to interfere with an expert's duties of independence and objectivity. Where the party seeking production of draft reports or notes of discussions between counsel and an expert can show reasonable grounds to suspect that counsel communicated with an expert witness in a manner likely to interfere with the expert witness's duties of independence and objectivity, the court can order disclosure of such discussions. See, for example, *Ebrahim v. Continental Precious Minerals Inc.*, 2012 ONSC 1123 (S.C.), at paras. 63-75, where the court ordered disclosure of draft reports and affidavits after an expert witness testified that he did not draft the report or

affidavit containing his expert opinion and admitted that his firm had an ongoing commercial relationship with the party calling him.

[78] Absent a factual foundation to support a reasonable suspicion that counsel improperly influenced the expert, a party should not be allowed to demand production of draft reports or notes of interactions between counsel and an expert witness. Evidence of an hour and a half conference call plainly does not meet the threshold of constituting a factual foundation for an allegation of improper influence. In my view, the trial judge erred in law by stating that all changes in the reports of expert witnesses should be routinely documented and disclosed. She should not have ordered the production of Dr. Taylor's drafts and notes.

1. (b) Did the trial judge err by rejecting aspects of the appellant's expert opinion evidence on account of alleged contradictions between the experts' testimony and the experts' written reports?

[79] In her reasons for judgment, the trial judge explained, at para. 73, how she dealt with the written reports when assessing the expert evidence:

> [I]n light of defence counsel's insistence, I considered only the *viva voce* [evidence] 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.

[80] The appellant points to one instance where the trial judge used Dr. Taylor's report in this way. The trial judge noted, at para. 224, that Dr. Taylor testified that the compartment syndrome could have been developing early in the morning when the respondent awoke, "or it could have developed after the cast was removed." She rejected his evidence as to the latter possibility based on what she perceived to be a contradiction between his trial evidence and the contents of his written report, where he had stated that the compartment syndrome developed early in the morning. The trial judge explained her rejection of his *viva voce* evidence, at para. 227, as follows:

> Dr. Taylor's report is available to me as an aide only. I do not accept Dr. Taylor's 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.

[81] The appellant points to several instances where the trial judge made the same alleged error in relation to the evidence of Dr. Athwal.

[82] At para. 315, she observed that Dr. Athwal's report confirmed the view he expressed in his evidence that a full circumferential cast was appropriate, but the 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." This led her to find that "[h]is written report was incomplete and hence in my view misleading."

[83] The trial judge noted, at para. 322, Dr. Athwal's acknowledgment that a full cast could exacerbate the development of compartment syndrome, but commented that "[t]his important acknowledgement was not contained in his report." She criticized his report, at para. 396, for failing to disclose what he taught his students and, at para. 365, for failing to mention that "the maintaining of a full circumferential cast assumes that the reduction was successful, and that no surgery was required." Likewise, she observed, at para. 367, that his report failed to state that after a closed reduction, the next step is to review the X-rays to assess the success of the reduction and determine what further steps should be taken.

[84] The appellant contrasts the trial judge's treatment of alleged discrepancies between the *viva voce* evidence and the reports of his experts with her treatment of a similar issue in relation to Dr. Richards' report. On cross-examination, Dr. Richards was confronted with the statement in his report that the cast should have been "well-padded *or* bivalved" (emphasis added). He maintained in his testimony that a bivalved cast was required. In her reasons, the trial judge accepted his *viva voce* evidence and suggested that the word "or" was a typo and should have read "and", an explanation not offered by Dr. Richards. However, she also noted that this statement in Dr. Richards' report described treatment for any kind of acute injury and did not specifically refer to high impact injuries, such as the respondent's injury.

[85] In my view, the trial judge's use of the expert reports of Drs. Taylor and Athwal to contradict their *viva voce* evidence reveals an error of law.

[86] If an expert's report has not been entered into evidence as an exhibit, it has no evidentiary value, even if provided to the trial judge as an *aide memoire*. Inconsistencies between the *viva voce* evidence of an expert witness and his or her written report are the proper subject of cross-examination. However, if the expert witness was not cross-examined as to an inconsistency between his or her *viva voce* evidence and the contents of their report, it is not open to a trial judge to place any weight in assessing the expert's credibility on this perceived inconsistency. This is not a mere technicality but rather a matter of trial fairness. The expert witness is entitled to be openly confronted with what may appear to be contradictions so that he or she has the opportunity to explain or clarify the apparent inconsistencies.

[87] It follows that the trial judge erred to the extent that she relied on perceived contradictions between the experts' oral evidence and their reports, as the alleged contradictions were not put to the experts in cross-examination and the reports were not exhibits.

2. Did the trial judge err in her application of the doctrine of *res gestae*?

[88] The appellant submits that the trial judge erred in her application of the *res gestae* exception to the hearsay evidence rule. The *res gestae* exception

allows a court to admit, for the truth of their contents, certain utterances which would otherwise be classified as hearsay on the grounds that the contemporaneous circumstances make the utterances reliable and less prone to misinterpretation. The three categories of utterances that may be properly characterized as part of the *res gestae* are (i) “declarations of bodily and mental findings and conditions”, (ii) “declarations accompanying and explaining relevant acts” and (iii) “spontaneous exclamations”: Bryant, Lederman and Fuerst, at para. 6.299.

[89] While I agree that the trial judge misused the label “*res gestae*”, I am not persuaded that she made inappropriate use of hearsay evidence or that any error she made had an impact on the outcome of this trial.

[90] As I have noted, the trial judge referred to *res gestae* in relation to two pieces of evidence – first, in relation to the report written by Dr. Orsini giving his opinion on the issues of standard of care and causation, and second, in relation to the statements made by Dr. Orsini to the respondent’s father commenting adversely on the appellant’s treatment of the respondent. In both instances, she clearly stated that she was not admitting the hearsay evidence for its truth, but only as part of the narrative.

[91] The *res gestae* doctrine operates as an exception to the hearsay rule and allows a court to admit certain utterances for their truth. The *res gestae* doctrine

has no application to the admission of evidence as part of the narrative. I note, however, that the trial judge's error is relatively common: see Bryant, Lederman and Fuerst, at paras. 6.300-6.301. In my view, in this case, it was a harmless error of nomenclature rather than substance.

[92] The trial judge explained that she was admitting Dr. Orsini's report simply because other experts had referred to it in their reports and it would assist her in understanding the evidence. Although it was wrong to describe this as *res gestae*, it was appropriate for her to use Dr. Orsini's report in this manner and there is nothing in her reasons or in the record to indicate that she made any improper use of this evidence.

[93] I find it more difficult to understand any reason for admitting the statements Dr. Orsini made to the respondent's father. However, the trial judge explicitly held that Dr. Orsini's statements were not being admitted for their truth and I can find nothing in her reasons or in the record to suggest that she relied on those statements.

[94] Accordingly, I would not give effect to this ground of appeal.

3. Did the trial judge err in her analysis of causation?

[95] I am unable to accept the appellant's submission that it was unreasonable for the trial judge to find that the cast caused the respondent to suffer

compartment syndrome, or that the trial judge erred by failing to consider whether the cast had only aggravated a pre-existing condition.

[96] The defence theory was that compartment syndrome developed after the cast was removed, not before. This theory was supported by the triage nurse's assessment of the respondent when he appeared at the emergency department the day after the cast had been applied, complaining of pain. She observed "no acute distress and no obvious discomfort."

[97] However, the trial judge rejected the nurse's evidence and accepted that of the respondent as to his level of discomfort. She accepted the medical evidence of the respondent's witnesses as to the state of his arm at the time the fasciotomy was performed.

[98] The appellant also relies on Dr. Richards' evidence that muscle necrosis sets in within a few hours of the development of compartment syndrome, and that as there was no necrosis when the fasciotomy was performed in the evening, compartment syndrome could not have developed in the morning before the cast was removed.

[99] The trial judge reviewed the evidence on this issue at considerable length and her reasons demonstrate that she was alive to the issues raised at trial and on appeal. She accepted the respondent's evidence as to the pain and discomfort he felt and, as submitted by the respondent, there was no clear

evidence of precisely how long it takes for necrosis to develop. Dr. Richards was not asked to explain what he meant by “a few hours”. Dr. Taylor testified that in the worst case, compartment syndrome develops in four hours, but the speed depends upon the microcirculation of the compartment. It was not unreasonable for the trial judge to find that the compartment syndrome developed before the cast was removed.

[100] The appellant invoked the “crumbling skull” doctrine, both at trial and on appeal, and argued that the appellant should only be liable for new injuries caused by his negligence, not for a pre-existing injury that may have been exacerbated or aggravated by the negligent act. The trial judge rejected this argument, at para. 497: “The crumbling skull doctrine does not apply in this case. Prior to the defendant’s negligence, there was no pre-existing compartment syndrome”. I see no error in the trial judge’s conclusion that the “crumbling skull” doctrine had no application to the facts of this case.

[101] In my view, the appellant has failed to demonstrate any error of fact or law that warrants appellate review on the issue of causation.

4. Did the trial judge’s errors render the trial unfair and cause a substantial wrong or miscarriage of justice?

[102] I now turn to the question of whether the errors I have identified justify setting aside the decision and ordering a new trial.

[103] The appellant submits that the trial judge's errors and interventions undermined the fairness of the trial, and that justice requires that a new trial be ordered. Section 134(6) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, provides that this court "shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred."

[104] It is clear from reading the trial judge's reasons for judgment that she has strong views about the current state of the law relating to expert evidence. The legal errors I have identified and the trial judge's interventions were a product of those views. She took the initiative of conducting a lengthy inquiry into the discussions that occurred between counsel and Dr. Taylor in the preparation of his draft report. She purported to change the law on such discussions and she made no secret of her desire to see the law on other aspects of expert evidence revised. She did her best to urge counsel to agree to proceed in various ways that she could not force upon them.

[105] While neither counsel was prepared to agree with the trial judge's suggestions, the appellant's counsel appears to have been most vocal in her opposition to these suggestions and she bore the brunt of the trial judge's dissatisfaction with the way the expert evidence was being presented. The trial judge also criticized the appellant's counsel for taking inconsistent positions on the extent to which the experts should be restricted to the scope of their reports. Of particular concern is the trial judge's unwarranted and unjustified suggestion

that the appellant's counsel acted improperly by discussing with Dr. Taylor his draft report.

[106] However, the question that must be asked is whether, at the end of the day, either the fairness or result of this trial was actually affected by the trial judge's errors and interventions.

[107] While the trial judge made erroneous findings about the allegedly improper preparation of Dr. Taylor's report, and incorrectly used the reports of Drs. Taylor and Athwal to undermine aspects of their testimony, these errors do not appear to me to have been a significant factor that led her to prefer the evidence of Dr. Richards.

[108] The trial judge placed the blame for the allegedly improper preparation on the appellant's counsel. The only adverse credibility finding she made against Dr. Taylor in this regard was a result of his change in tone and demeanour after he was subjected to her questioning. This led the trial judge to conclude that he viewed his obligations as being to the defence, which detracted from his credibility. However, this case turned on the reliability of the expert witnesses, not their credibility.

[109] The trial judge gave extensive reasons for accepting Dr. Richards' evidence and rejecting that of the appellant's experts, which were in no way linked to the errors she made. The main issue was not whose expert witnesses

were most credible, but rather whether the opinions of Drs. Taylor and Athwal were to be preferred to that of Dr. Richards as offering a coherent, logical and convincing explanation of the applicable standard of care and the cause of the compartment syndrome.

[110] The trial judge explained the basis for her conclusion that Dr. Richards' evidence was to be preferred over that of Drs. Taylor and Athwal, at para. 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.

[111] By contrast, she described Dr. Taylor, at para. 285, to be "of the old school… [though] obviously a very competent general orthopedic surgeon." He had "vast experience" in the limited setting of his own community hospital but "his knowledge of procedures across Ontario is limited to his practical experience in one setting… as well as what he has learned in annual meetings and journals." He did not teach or research and had only treated a few cases of compartment

syndrome, none requiring surgery. He agreed that a bivalved cast would have been appropriate if it was clear that surgery would follow within a few days. He also acknowledged that he was infrequently involved in emergency treatment of distal radial fractures after 2001.

[112] Dr. Athwal had worked primarily as an academic and had very limited clinical experience. He had never before been qualified as an expert witness. The trial judge found that he had based his opinion on the mistaken facts that (i) the plaintiff was comfortable after the cast was applied and (ii) surgery might not take place. The first error was particularly significant because, as the trial judge noted, Dr. Athwal had acknowledged that applying a full circumferential cast is contraindicated when swelling is abnormal and excessive and pain is disproportionate to the injury. Further, the trial judge noted that he did not appear to understand the difference between scientific and legal causation.

[113] Dr. Richards quite clearly out-matched the appellant's experts in terms of his credentials, expertise and experience. He had worked in several Toronto hospitals, he had extensive experience treating compartment syndrome and he had taught, lectured and published on the subject. His opinion had weight and cogency that the opinions of the appellant's experts lacked. He presented a clear and compelling account of the applicable standard of care and it was almost inevitable that his evidence on this crucial issue would be preferred over that of Drs. Taylor and Athwal.

[114] Moreover, both of the appellant's experts conceded that if surgery was to be performed in a matter of days, a splint or bivalved cast would have been the appropriate course of action. The trial judge found, at para. 218, that "the evidence clearly establishes that the plaintiff needed external fixation surgery". At para. 215, she found that "the evidence did not support Dr. Athwal's understanding that surgery was not required." Given those findings, it is difficult to see how the appellant could have escaped liability even on the basis of the evidence of his own experts.

[115] In addition to the errors I have mentioned, there is one other significant alleged error that falls into the category of improper intervention. The trial judge found that the appellant had breached the standard of care by failing to provide the respondent with adequate instructions as to the risk of compartment syndrome developing. That issue was not pleaded by the respondent and it was only at the insistence of the trial judge that the expert witnesses addressed it in their evidence. I agree with the appellant that the trial judge erred by entering into an area that had not been raised by the parties and was not addressed by the experts in their reports.

[116] However, it is difficult to see how the error as to the adequacy of the instructions given to the respondent had any material impact on the outcome given the trial judge's finding that the appellant breached the standard of care by applying a full circumferential cast.

[117] After giving the matter careful consideration, I have come to the conclusion that the errors made by the trial judge did not give rise to a substantial wrong or miscarriage of justice. I do not think that her interventions rendered the trial unfair. Even without her errors, she "would necessarily have reached the same result" and therefore, pursuant to s. 134(6) of the *Courts of Justice Act*, a new trial is not warranted: *Khan v. College of Physicians and Surgeons* (1992), 9 O.R. (3d) 641 (C.A.), at p. 676.

[118] The trial judge gave comprehensive reasons that carefully considered the evidence and the arguments advanced by the appellant. She gave convincing reasons, well supported by the record, explaining why the opinion of Dr. Richards was to be preferred to that of Drs. Taylor and Athwal. In my view, there has been no substantial wrong or miscarriage of justice.

CONCLUSION

[119] For these reasons, I would dismiss the appeal. If the parties are unable to agree as to costs, we will receive brief written submissions.

Released: "R.J.S." January 29, 2015

"Robert Sharpe J.A."
"I agree John Laskin J.A."
"I agree Janet Simmons J.A."

APPENDIX:
The Advocates' Society, *Principles Governing Communications with Testifying Experts* (Toronto: The Advocates' Society, 2014)

Principles Governing Communications with Testifying Experts

The Advocates' Society

June 2014

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THE ADVOCATES' SOCIETY

PRINCIPLES GOVERNING COMMUNICATIONS WITH TESTIFYING EXPERTS

OVERVIEW

For more than five hundred years, expert witnesses have played an important role in the litigation process. By at least as early as the 19th century, members of the judiciary had begun to express concerns about the objectivity and independence of experts, and about the quality and reliability of their evidence. Later, judicial concerns were expressed about the disproportionate weight likely to be given to expert evidence, particularly in jury trials.

Such concerns inevitably led to efforts to enhance the reliability of expert evidence. Thus, for more than 20 years, common law courts have insisted that experts: (i) be independent from the parties who retain them; (ii) provide objective, unbiased opinion evidence in relation only to matters within their expertise; and (iii) avoid assuming the role of advocates for the parties that retain them.[1]

On January 1, 2010, Ontario's *Rules of Civil Procedure* were amended to recognize explicitly and reinforce well-established common law principles concerning expert evidence, including the common law requirements of independence and objectivity. Pursuant to Rule 53.03, experts testifying in civil proceedings in Ontario that are governed by the *Rules* must now sign a prescribed form in which they acknowledge and undertake to abide by their important duties.[2] Similar rules have been adopted in the Federal Court, and in a number of other provinces.[3]

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1 These duties were identified by Justice Creswell in, *National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd.*, [1993] 2 Lloyd's Rep. 68 (Q.B.D.) ["*Ikarian Reefer*"], rev'g on other grounds [1995] 1 Lloyd's Rep 455 (C.A. Civ.). The Court of Appeal affirmed Justice Creswell's statements regarding the duties of testifying experts. A number of Canadian courts have cited the *Ikarian Reefer* with approval and adopted its formulation of the duties of expert witnesses. See, for example, *Fellowes, McNeil v. Kansa General International Insurance Company Ltd. et al*, (1998) 40 O.R. (3d) 456 at 3 (Gen. Div.) (QL); *Jacobson v. Sveen*, 2000 ABQB 215 at paras. 32-36 ["*Jacobson*"]; *Baynton v. Rayner*, [1995] O.J. No. 1617 at para. 124 (Gen. Div.) (QL); *Kozak v. Funk*, [1995] S.J. No. 569 at para. 16 (Q.B.) (QL); *Lundbeck Canada Inc. v. Canada* (Minister of Health), 2009 FC 164 at para. 75; *Widelitz v. Robertson*, 2009 PESC 21 at para. 35; *Posthumous v. Foubert*, 2009 MBQB 206 at para. 41.

2 R.R.O. 1990, Reg 194, rr. 4.1, 53.03 and Form 53 ["*Ontario Rules*"].

3 See Federal Court, *Federal Courts Rules*, r. 52.1, Form 52.2 and Schedule to Rule 52.2 , "Code of Conduct for Expert Witnesses" ["*Federal Rules*"]; Nova Scotia, *Civil Procedure Rules Nova Scotia*, r. 55 ["*N.S. Rules*"]; Prince Edward Island, *Supreme Court Rules of Prince Edward Island*, r. 53 ["*P.E.I. Rules*"]; Yukon Territories, *Rules of Court*, r. 34(23) ["*Yukon Rules*"]; Saskatchewan, *Queen's Bench Rules*, r. 5-37 ["*Saskatchewan Rules*"]; and British Columbia, *Supreme Court Civil Rules*, r. 11-2 ["*B.C. Rules*"].

From time to time, decisions have been rendered that call into question the acceptable bounds of conduct that counsel must observe in interacting with experts, including in the preparation of experts' reports and affidavits and in preparing experts to testify at hearings or trials. Moreover, the law in this area is somewhat unsettled, and varies from jurisdiction to jurisdiction. Confusion and concerns have arisen among members of the legal profession and among expert witnesses. Requests have been made for clarity and guidance.

The following *Principles Governing Communications With Testifying Experts* (the "*Principles*") have been developed by The Advocates' Society to provide guidance to members of the profession. Drafts of these *Principles* were developed by a Task Force of the Advocates' Society that was comprised of more than twenty senior advocates who practice in a wide variety of areas, including family, personal injury, intellectual property, corporate commercial, administrative and criminal law. The drafts were then reviewed and commented on by members of the Board of Directors of the Advocates' Society who serve on the Society's Standing Committee on Advocacy and Practice, as well as by senior advocates in a number of law firms and by members of the Executive of the Ontario Trial Lawyers Association and Intellectual Property Section of the Canadian Bar Association. Modifications were made to reflect comments provided during this consultation process. The *Principles* were then reviewed and approved by the Board of Directors of the Advocates' Society in May, 2014.

The *Principles* are not intended to address all aspects of the retention and preparation of expert witnesses. Numerous other works have addressed those issues. Rather, the *Principles* are intended to address the conduct of advocates in their dealings with experts with a view to ensuring that advocates can fulfill their important duties to their clients and to courts and tribunals without compromising the independence or objectivity of testifying experts or impairing the quality of their evidence. The *Principles* are offered with the expectation that adherence to the *Principles* will serve to safeguard appropriately the independence and objectivity of expert witnesses while supporting the proper and efficient administration of justice.

PRINCIPLES

PRINCIPLE 1

An advocate has a duty to present expert evidence that is: (i) relevant to the matters at issue in the proceeding in question; (ii) reliable; and (iii) clear and comprehensible. An appropriate degree of consultation with testifying experts is essential to fulfilling this duty in many cases. An advocate may therefore consult with experts, including at the stage of preparing expert reports or affidavits, and in preparing experts to testify during trials or hearings.[4] An advocate is not required to abandon the preparation of an expert report or affidavit entirely to an expert witness, and instead can have appropriate input into the format and content of an expert's report or affidavit before it is finalized and delivered.

Commentary

Lawyers acting as advocates have a duty to represent their clients resolutely and honourably within the limits of the law, while treating courts and tribunals with candour, fairness, courtesy and respect.[5] It is axiomatic that to meet this duty the advocate must strive to present relevant evidence to courts and tribunals in a manner that is fair, clear and persuasive. Moreover, counsel have an important duty to ensure that expert reports comply with the formal and substantive requirements imposed by the procedural rules of the jurisdictions in which they practice.[6] The effective and efficient presentation of evidence is essential to the proper administration of justice in an adversarial system and is of paramount importance both to parties and to the court or tribunal. The advocate's role in presenting complex evidence is particularly important with respect to expert evidence, the purpose of which is to assist the court or tribunal by providing it with specialized knowledge on an objective and impartial basis. In this context, advocates play an important role in presenting complicated evidence of a technical nature in a manner that ensures it is properly understood by the court or tribunal.

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4 See *MedImmune Limited v. Novartis Pharmaceuticals UK Limited, Medical Research Council*, [2011] EWHC 1669 at paras. 99-114 (Pat.) ["*MedImmune*"]. Among other things, *MedImmune* holds that consultation is entirely proper between an advocate and an expert witness. This is a patent case, but the principles stated there are of more general application, particularly in cases involving complex expert evidence.

5 See Law Society of Upper Canada, *Rules of Professional Conduct*, r. 4.01(1).

6 See the recent decision of Justice Brown in *(Re) Champion Iron Mines Limited*, 2014 ONSC 1988 at paras. 16-19. This proceeding concerned the approval of a plan of arrangement. Justice Brown found that a fairness opinion provided by a financial advisor in the form usually followed when providing advice to Boards of Directors in corporate transactions did not meet the requirements for expert evidence under Rules 53.03(2.1) and Rule 4.1 of the *Ontario Rules* and placed no weight on the opinion. See also *Dr. Andrew Hokhold Inc. v. Wells*, [2005] B.C.J. No. 2147 at para. 11 (S.C.) (QL).

Courts and tribunals depend on advocates to perform this important duty. This can, and indeed must, be achieved without changing the substance of the evidence of testifying experts in an impermissible fashion.[7]

The delivery of an expert's report or affidavit is an important part of the presentation of the client's case. In many cases, reports or affidavits of experts are introduced into evidence, marked as exhibits and play significant roles in the decision making process. Even in circumstances where an expert's report or affidavit serves the limited purpose of disclosing the expert's opinion, and is not entered as the evidence of the expert, the report or affidavit may be used for impeachment purposes and may be relied upon by the court in assessing the admissibility or weight of the expert's evidence. Unbiased reports of independent experts may also be of assistance to clients in considering settlement options, and to advocates in recommending proposed settlements to their clients. An expert's report or affidavit that is poorly organized or written, mistakenly omits important facts or assumptions, misstates the relevant issues or fails to address a relevant matter that the expert has been asked to opine on may unintentionally restrict the expert's testimony, may expose the expert to unnecessary criticism, and may be unfairly prejudicial to the proper presentation of the client's case. Moreover, reports of that nature will be of limited assistance to the court or tribunal, and may give rise to frustration, inefficiency and delay. An advocate must therefore ensure that the expert's report or affidavit is focused, intelligible and properly responsive to the questions posed to the expert, and that any stated factual premises or assumptions are accurate. In many cases, this cannot be achieved without a reasonable degree of consultation between the advocate and the expert in the period before the expert's report or affidavit is finalized and delivered.

PRINCIPLE 2

At the outset of any expert engagement, an advocate should ensure that the expert witness is fully informed of the expert's role and of the nature and content of the expert's duties, including the requirements of independence and objectivity.

Commentary

An advocate should ensure that from the outset of an engagement the expert witness is aware that the role of the expert is to assist the court fairly and objectively.[8] Many

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[7] *Stephen v. Stephen*, [1999] S.J. No. 479 at para. 26 (Q.B.) (QL) and *Fournier Pharma Inc. v. Canada (Minister of Health)*, 2012 FC 740. See also *Surrey Credit Union v. Wilson* 1990 CarswellBC 94 at para. 25 (S.C.) (WLeC) ["*Surrey*"] and *Vancouver Community College v. Phillips, Barratt*, 1988 CarswellBC 189 at para. 41 (S.C.) (WLeC) ["*Vancouver*"].

experienced expert witnesses will be well aware of their duties of independence and objectivity. These duties may be unfamiliar to experts who have not previously been involved in litigation, however, and even experts who are familiar with these duties may not fully understand the content of the duties or the consequences associated with their breach. Accordingly, an advocate should ensure that testifying experts have a proper and early appreciation of their duties, and should thereafter remain vigilant to ensure that those duties are complied with. At or near the outset of an expert's engagement, the advocate should provide the expert with a copy of any procedural rule, code of conduct or form of "expert's certificate" related to the expert's duties that may apply in the particular proceeding.[9] The advocate should explain to the expert the nature and content of the expert's duties,[10] have the expert acknowledge that she understands those duties and ask the expert to undertake to abide by them. In this regard, the advocate should consider having the expert execute the certificate of independence and objectivity now provided for in applicable procedural rules or Practice Directions at or near the outset of an engagement, rather than at the time the expert's report is finalized and delivered.[11]

The advocate should explain to the expert that her evidence may be ruled inadmissible or may be given little or no weight if the expert is shown to lack independence or objectivity. The advocate should also discuss with the expert those matters that are generally considered to be indicia of a lack of independence or objectivity, including the selective use of information to support tenuous opinions, the expression of opinions that lie beyond the scope of the expert's expertise, the use by the expert of language that is inflammatory, argumentative or otherwise inappropriate, or other conduct that casts the expert into the role of being an advocate for the party that retained them.[12]

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8 *Carmen Alfano Family Trust (Trustee of) v. Piersanti*, 2012 ONCA 297 at para. 108; *Alfano (Trustee of) v. Piersanti*, [2009] O.J. No. 1224 at para. 6 (S.C.J.) (QL); and *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 at para. 5 (S.C.J.) (QL).

9 See, for example, *Federal Rules*, *supra* note 3 r. 52.2; *Ontario Rules*, *supra* note 2 r. 53; *B.C. Rules*, *supra* note 3 r. 11-2; *N.S. Rules*, *supra* note 3 r. 55; *P.E.I. Rules*, *supra* note 3 r. 53; *Yukon Rules*, *supra* note 3 r. 34(23); and *Saskatchewan Rules*, *supra* note 3 r. 5-37.

10 As noted above, a summary of the duties adopted by Canadian courts can be found in the *Ikarian Reefer*, *supra* note 1.

11 See, for example, the Expert's Certificate now required by Rule 53.03, *Ontario Rules*, *supra* note 2. Advocates might also consider providing testifying experts with copies of these *Principles* at the outset of engagements. See also *Saint Honore Cake Shop Limited v. Cheung's Bakery Products Ltd.*, 2013 FC 935 at paras. 17-19, where the court found the affidavit of an expert witness inadmissible after the expert admitted that she had never seen the Code of Conduct outlined in the Rules.

12 See for example, *Gould v. Western Coal Corporation*, 2012 ONSC 5184 at paras. 81-95.

PRINCIPLE 3

In fulfilling the advocate's duty to present clear, comprehensible and relevant expert evidence, the advocate should not communicate with an expert witness in any manner likely to interfere with the expert's duties of independence and objectivity.

Commentary

Advocates must guard at all times against the risk of impairing or undermining the expert's independence or objectivity. An expert's opinion must be the result of the expert's independent analysis, observations and conclusions. The opinion of a testifying expert should not be influenced by the exigencies of litigation, or by pressure from the advocate or the advocate's client. Allowing or causing the expert to lose her independence or objectivity does a disservice to the expert, the client and the court. It does the expert a disservice because the expert may be subject to criticism during cross-examination and in the court's judgment as a result. It does the client a disservice because partisan expert evidence may well be ruled inadmissible, or given little or no weight in the court's determination of the client's case.[13] It does the court a disservice by wasting the court's time and resources, by making the decision making process more difficult than it should be, and by depriving the court of potentially useful and important evidence that could otherwise assist the court in rendering a fair and informed decision.

An advocate must be particularly careful not to persuade, or be seen to have persuaded, an expert to express opinions that the expert does not genuinely share or believe. Advocates should be particularly careful, in this regard, when engaged in an iterative process with testifying experts at the stage of preparing reports or affidavits.[14]

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13 *MedImmune*, *supra* note 4.

14 *Eli Lilly v. Apotex*, [2009] F.C.J. No. 1229 at para. 62 (QL); *Vancouver, supra* note 7 at para. 41; and *Squamish Indian Band v. Canada*, [2000] F.C.J. No. 1568 at para. 49 (QL).

PRINCIPLE 4

The appropriate degree of consultation between an advocate and a testifying expert, and the appropriate degree of an advocate's involvement in the preparation of an expert's report or affidavit, will depend on the nature and complexity of the case in question, the level of experience of the expert, the nature of the witness's expertise and other relevant circumstances of the case.[15]

Commentary

In many cases advocates can, and indeed must, play an important role in the presentation of complex expert evidence to ensure that it will be readily understood, and therefore of assistance to the court or tribunal. Any rule that has the purpose or effect of precluding advocates from reviewing or commenting on draft reports or affidavits of experts in all cases, regardless of the subject matter, complexity or intended use of the expert evidence at issue, would constitute a marked departure from the practice currently followed by advocates in a wide range of different practice areas, and would have a series of unfortunate consequences.[16] Among other things, such a rule would place a premium on "professional experts" who have testified on numerous occasions, are intimately familiar with the litigation process and are therefore experienced in drafting reports for litigation. It would deter parties from retaining experts who have little or no experience in testifying, and would deter such experts from testifying, if asked. Moreover, such a rule could have the effect of causing the withdrawal or abandonment of experts after poorly written, disorganized or incomplete reports are finalized without input from counsel. This would inevitably add to the cost and expense of litigation and would favour affluent litigants over those who are less affluent. Access to justice would be impaired. The courts could be deprived of helpful and informative expert evidence that would assist in the decision making process. The hearing process would be rendered less efficient and effective.

An appropriate educational dialogue between the expert and the advocate may be essential to ensure that an expert's evidence will be of assistance to the court or tribunal, and can be adduced effectively and efficiently. In many cases, counsel must learn about the scientific, economic or other subject to which the evidence of the expert relates in order to identify what is relevant, and the expert must learn enough about the case or dispute in question, and the legal process, to understand what issues should be addressed.[17] Some expert witnesses have more experience in preparing reports or

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15 *MedImmune*, *supra* note 4.

16 *Surrey*, *supra* note 7 at para. 25; *Vancouver*, *supra* note 7 at para. 40 and *Mendlowitz v. Chiang (Berenblut)*, 2011 ONSC 2341.

17 *MedImmune*, *supra* note 4. See also *Dimplex North America Ltd., v. CFM Corp*., [2006] F.C.J. No. 776 at paras. 43-44 (QL). In this case, the court recognized that appropriate collaboration

affidavits and in testifying than others, and some experts are more capable than others of preparing properly organized, succinct and cogent reports or affidavits. Moreover, there is a wide variation in the complexity of expert evidence in particular cases. Expert witnesses in complex litigation are frequently leading economists, accountants, engineers or scientists. In many cases they will not have previously given expert evidence in litigation, or may have done so in only a small number of cases. Many experts have little or no knowledge of the relevant legal process. Some foreign experts, regardless of the expert qualifications, may lack a command of English or French. For all of these reasons, expert witnesses will frequently require consultation with, and instruction by, the advocate before finalizing their reports or affidavits, rather than after.[18]

In some complex cases, particularly where the expert's evidence is to be entered in by way of affidavit (or other written form), the above considerations may make it appropriate for an advocate to play a greater role in the preparation of an expert's affidavit (or report).[19] The advocate must always ensure that the resulting affidavit or report represents fairly and accurately the independent analysis, observations and conclusions of the expert. [20]

In some cases the parties will be sufficiently well-funded, and the issues will be sufficiently complex, that an advocate's client will elect to retain separate testifying and consulting experts. Consulting experts do not testify. Instead, they assist in tactical or strategic deliberations and other matters. This can serve to reduce the degree of

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between counsel and expert witnesses occurs to "conform [reports] to varying legal requirements in different jurisdictions or to focus the report on the issues".

18 *MedImmune*, *supra* note 4.

19 This occurs, for instance, in intellectual property cases in the Federal Court of Canada. See also *Ebrahim v. Continental Precious Metals Inc*., 2012 ONSC 1123, at paras. 59-75. In the context of a refusals motion in a commercial case in the Ontario Superior Court, Justice Brown stated that it was "unusual, to say the least, to come across an expert who has not drafted his own report, in this case in affidavit form". Justice Brown therefore required the production of communications between the testifying expert and counsel.

20 *MedImmune*, *supra* note 4 at para. 110; *Tsilhqot'in First Nation v. Canada (Attorney General)*, [2005] B.C.J. No. 196 at paras. 30-34 (Sup. Ct.) (QL). An advocate is expected to take professional care in the preparation of affidavit evidence. See *Inspiration Management v. McDermott*, [1989] B.C.J. No. 1003 at para. 59 (C.A.) (QL). Referring to the summary trial procedure, the British Columbia Court of Appeal stated, "it should not be good enough for counsel to throw up volumes of ill-considered affidavits and exhibits which do not squarely raise or answer the real issues in the case. The preparation of affidavits for an application or defence under R.18A is a serious matter which requires the careful professional attention of counsel". The fact that counsel has been directly involved in the preparation of an expert's report does not render the report inadmissible, but where an expert testified that his report was only "reasonably accurate", this was found to detract from the reliability of the report*: Brock Estate v. Crowell*, [2013] N.S.J. No. 505 at para. 88 (S.C.) (QL).

consultation required as between the advocate and testifying experts. Many litigants will not have the luxury of retaining dual experts, however, and the retainer of dual experts should not be essential to the proper conduct of any proceeding. Accordingly, where a client has elected not to retain dual experts, a greater degree of consultation with a testifying expert may be necessary and appropriate.

In some cases, the expert will be experienced in giving opinion evidence, or the factual premises and issues upon which their opinion will be given will be relatively straightforward. In such cases, consultation between the advocate and the expert may not be necessary and might be seen as impairing the expert's objectivity and independence.

PRINCIPLE 5

An advocate should ensure that an expert has a clear understanding of the issue on which the expert has been asked to opine. An advocate should also ensure that the expert is provided with all documentation and information relevant to the issue they have been asked to opine on, regardless of whether that documentation or information is helpful or harmful to their client's case.

Commentary

Advocates must treat expert witnesses fairly and with appropriate candour. Among other things, advocates must ensure that an expert witness receives all relevant documentation and information in order to ensure that the expert is in a position to formulate an independent and objective opinion on a properly informed basis. Depriving testifying experts of documentation or information that is relevant to the issue they have been asked to opine on is wrong for many reasons, and may well expose the expert and the advocate to serious criticism. Conduct of this nature breaches the advocate's duties to the court, as well as to the advocate's client.[21]

Moreover, advocates should ensure that expert witnesses understand that they are able to probe and question information and assumptions provided to them before they complete their analysis and express their opinions. Questions posed to advocates or their clients by testifying experts should be responded to properly and on a timely basis.

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[21] *Livent v. Deloitte*, [2014] O.J. No. 1635 at paras. 70 and 72 (S.C.J.) (QL).

PRINCIPLE 6

An advocate should take reasonable steps to protect a testifying expert witness from unnecessary criticism.

Commentary

Different courts and tribunals have different practices and requirements with respect to the disclosure by testifying experts of draft reports, working papers and correspondence. Advocates should generally err on the side of caution and proceed on the basis that disclosure of this nature will be required. The advocate should take reasonable steps to reduce the risk that extensive changes will have to be made to draft reports or affidavits. In complex cases, the advocate should generally discourage an expert from preparing any draft report until the advocate is satisfied that the expert: (a) has a proper understanding of the issue upon which the expert will offer her opinion; (b) understands the facts and assumptions upon which the opinion will be based; (c) has been provided with all documentation and information relevant to the opinion sought; and (d) will confine her analysis, observations and opinions to matters that lie within the expert's area of expertise. The advocate should also discuss with the expert in advance the expected structure and organization of the report. The expert should be reminded that they are obligated to assist the court fairly and objectively.

An advocate should be prepared to disclose any communication with a testifying expert that: (i) relates to compensation for the expert's analysis or testimony; (ii) identifies facts or data that the expert considered in forming the opinions to be expressed; (iii) identifies assumptions that the advocate provided or the expert relied on in forming the opinions to be expressed; [22] or (iv) pertains to the contents to the expert's report or affidavit or to the substance of the expert's evidence. Advocates must be careful not to compromise the independence or objectivity of testifying experts, or to expose them to unnecessary criticism, by communicating with them in a careless, imprudent or improper manner.

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[22] Consider Rule 26(b)(4)(c), *United States Federal Rules of Civil Procedure* ("F.R.C.P").

PRINCIPLE 7

An advocate should inform the expert of the possibility that the expert's file will be disclosed, and should advise the expert witness not to destroy relevant records.

Commentary

An advocate should inform an expert witness at the outset of the engagement that the contents of the expert's file may ultimately be disclosed to opposing parties, as well as to the court or tribunal in question.

The expert should be advised not to destroy relevant records, and should also be told that the destruction of records concerning the expert's retainer, the expert's analysis or findings, the expert's communications with the advocate or the advocate's client or the substance of the expert's evidence may be treated with disfavour by the court or tribunal. This could result in, among other things, adverse findings of credibility, the drawing of adverse inferences and the exclusion of otherwise admissible evidence.

PRINCIPLE 8

At the outset of the expert's engagement, an advocate should inform the expert of the applicable rules governing the confidentiality of documentation and information provided to the expert.

Commentary

While many experienced experts will assume that documentation or information provided to them by an advocate should be treated in a confidential manner, less experienced experts may not be aware of special rules that govern the confidentiality and use of documentation or information disclosed during the litigation process, including at discoveries. A breach of these rules may result in prejudice to other parties to the proceeding in question and to the client, and may also expose the expert to criticism. For these reasons, an advocate should make the expert aware of the applicable rules at the outset of the engagement. Examples of such rules include the common law implied undertaking rule, the deemed undertaking rule contained in the procedural rules of a number of provinces (including Rule 30.1 in Ontario) and the secrecy provisions contained in most provincial securities legislation (including section 16 of the *Securities Act* of Ontario).[23]

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[23] See e.g. the secrecy provisions in the following: R.S.O. 1990, c. S.5, s. 16; British Columbia *Securities Act*, R.S.B.C. c. 418, s. 148; Manitoba *The Securities Act*, C.C.S.M. c S50, s. 24(1); Saskatchewan *Securities Act*, *1988*, S.S. 1988-89, c-S 42.2, s. 15; Nova Scotia *Securities Act*, R.S.N.S. c. 418, s. 29A; Quebec *Securities Act,* R.S.Q. c. V-1.1, s. 245; New Brunswick

PRINCIPLE 9

In appropriate cases, an advocate should consider an agreement with opposing counsel related to the non-disclosure of draft expert reports and communications with experts.

Commentary

An appropriate degree of consultation between an advocate and an expert witness normally is beneficial to both sides in a dispute and is consistent with the proper and efficient administration of justice. Moreover, if counsel for one party to a dispute demands production of the files of experts, counsel for other parties in the same proceedings will likely follow suit. Cross-examination may ensue that in some cases will be time-consuming but bear little, if any, fruit. In other cases, cross-examination on the contents of an expert's file may be important in demonstrating a lack of objectivity or independence. As the cost, expense and delays associated with contested litigation have continued to escalate, courts have become increasingly insistent that counsel conduct cases on a reasonably constrained and proportional basis. For all of these reasons, in appropriate cases an advocate should consider entering into an agreement with opposing counsel prior to trials or contested hearings regarding such matters as agreed limits on disclosure of draft reports and communications with experts, and limits on demands for production of the files of experts. Agreements of this nature have been entered into from time-to-time in complex commercial cases, and are consistent with existing practice, procedural rules or jurisprudence in some jurisdictions.[24] Such agreements should reflect these *Principles*.

Securities Act, S.N.B. c. S-5.5, s. 177; Alberta *Securities Act*, R.S.A. 2000, c. S-4, s. 45; Prince Edward Island *Securities Act*, R.S.P.E.I. 1988, c. S-3.1, s. 29; Yukon *Securities Act*, S.Y. 2007, c. 16, s. 29; Nunavut, *Securities Act*, S. Nu. 2008, c. 12, s. 29; North West Territories *Securities Act*, S.N.W.T. 2008, c. 10, s. 29. See also the deemed undertaking rule: *Ontario Rules*, *supra* note 2 r. 30.1; *P.E.I. Rules, supra* note 3 r. 30.1; Manitoba, *Queen's Bench Rules*, r. 30.1.

[24] For example, see Rule 26, F.R.C.P. These Rules were amended in 2010 and gave new protections to draft expert reports and communications between experts and counsel. Rule 26 now requires disclosure of facts or data considered by the expert witness, but protects from disclosure certain communications between counsel and experts. The Committee Notes concerning this amendment suggest that the work-product protection for attorney-expert communications (whether oral, written, electronic, or otherwise) are "designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery." See also the recent decision of Master Muir in *Thermapan Structural Insulated Panels Inc. v. Ottawa (City)*, 2014 ONSC 2365.

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