IS IT SAFE TO TALK NOW? ONTARIO COURT OF APPEAL DECISION IN MOORE ON COUNSEL/EXPERT INTERACTION

Posted on January 31, 2015

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Earlier this week, the Ontario Court of Appeal (the "Court") released its much anticipated decision *Moore v Getahun*.[1] Moore was a medical malpractice claim. At trial, the defendant physician was found negligent and the plaintiff was awarded damages.[2]

It was not the outcome of the *Moore* trial decision that sparked controversy, but rather Justice Wilson's treatment of expert evidence and the blunt directive that "counsel's practise of discussing draft reports should stop."[3] Justice Wilson's decision marked a dramatic departure from commonly accepted practices and caused members of both defence and plaintiffs' bars to express concern and, in some cases, defiance to these changes. On appeal, Moore was heard in conjunction with two other cases relevant to the law of expert witnesses; *Westerhof v Gee Estate Divisional Court*[4]and *McCallum v Baker*. The appeal decisions of *Westerhof* and *McCallum* have yet to be released.

Although the Court ultimately dismissed the appeal on the basis that the errors regarding the expert evidence had not affected the outcome, it rejected Justice Wilson's treatment of expert evidence. The Court explains why consultation and collaboration between an expert and counsel is necessary. The decision appears to implicitly endorse the Advocates' Society Positional Paper.

Counsel Instruction

For counsel, the decision will affect the role counsel takes in the report drafting process as well as the scope of litigation privilege within this process. The Court held that Justice Wilson had erred in holding that it was unacceptable for counsel to review these reports and, instead, urged counsel to take an active role in the drafting process. Collaboration is necessary as between counsel and experts, many of whom are unfamiliar with legal procedures, to ensure that a report is comprehensive and addresses only the relevant issues in a well organized and structured manner.[5]

The Court also rejected Justice Wilson's instruction to formally record all changes to draft reports as this would increase litigation costs and delays. Litigants might resort to retaining "shadow experts", individuals retained on the premise that no testimony will be required, as these individuals would be protected by litigation

privilege. Shadow witnesses are prohibitively expensive as they must be retained in conjunction with a testifying witness. Further, formal recording requirements will encourage litigants to limit expert retainers to highly experienced witnesses or "hired guns" since they need less guidance and preparation. This would, again, increase costs and delays.[6]

In addition to its draft reports discussion, the Court also clarified the scope of litigation privilege within the context of expert files. In brief, no automatic disclosure requirement attaches to drafts or prepatory discussions as these documents are presumptively protected by litigation privilege. As the Court explained, automatic disclosure requirements inhibit careful preparation and discourage participants from reducing preliminary or tentative views to writing.[7]

Importantly, litigation privilege is not absolute and is subject to several qualifications. For example, the party who intends to call the expert witness must still adhere to the requirements set forth in the *Rules of Civil Procedure* and litigation privilege may not be used to shield improper conduct. If a party can show, on reasonable grounds, that counsel's communications with its expert is likely to interfere with the expert's duties of independence and objectivity, disclosure will be required.[8]

Judicial Instruction

The Court also held that Justice Wilson erred by using 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.[9] The Court clarified that an expert report, not entered into evidence as an exhibit, has no evidentiary value, even if provided to the judge as an aide memoire. Accordingly, it is not open to a trial judge to make credibility findings based on inconsistencies between viva voce evidence and aide memories. As a matter of trial fairness, an expert must be confronted and permitted to respond to inconsistencies.10

Although the impact of Moore is yet to be seen, its clarification of procedures and practices related to expert witnesses will undoubtedly be welcomed by counsel. Counsel are now free to discuss and guide witnesses appropriately, without the overarching risk of being subjected to full disclosure. In addition, given the presumption of litigation privilege, counsel will be able to save time as the tedious practice of closely monitoring the expert's written file will no longer be required.

by Lindsay Lorimer and Anna Tombs

1 2015 ONCA 55 [*Moore*].[ps2id id='1' target='/]

2 *Moore v Getahun*, 2014 ONSC 237 at paras 526-533.

3 *Ibid* at para 52.[ps2id id='3' target='/]

4 2013 ONSC 2093 [Westerhof].[ps2id id='4' target='/]

5 Moore at para 63.[ps2id id='5' target='/]

6 Moore at para 65.[ps2id id='6' target='/]

7 Moore at para 77.[ps2id id='7' target='/]

8 Moore at paras 77-78.[ps2id id='8' target='/]

9 Moore, at para 7[ps2id id='9' target='/]

10 Moore at para 88.[ps2id id='10' target='/]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.