RULE 53 AND TREATING PRACTITIONERS

This paper will focus on the Rule 53 expert and the issue of the qualification of treating practitioners as expert witnesses under the new Rule 53.03 regime of the *Rules of Civil Procedure*[1] that took effect on January 1, 2010.

Generally, an exception to the inadmissibility of opinion evidence is made for "expert opinion", as described in *The Law of Evidence in Canada* in an often-quoted passage:

> As a general rule, a witness may not give opinion evidence but may testify only to facts within her or his knowledge, observation and experience. It is the province of the trier of fact to draw inferences from the proven facts. A qualified expert witness, however, may provide the trier of fact with a "ready-made inference" which the jury is unable to draw due to the technical nature of the subject matter. This, expert opinion evidence is permitted to assist the fact-finder form a correct judgment on a matter in issue since ordinary persons are unlikely to do so without the assistance of persons with special knowledge, skill or expertise.[2]

I note at the outset that there is some confusion surrounding whether all "opinion evidence" offered by individuals who could be considered "experts" is necessarily "expert evidence". In discussing when treating doctors can be "expert witnesses", I think it is also necessary to address judicial treatment of the issue of to whom Rule 53.03 applies. While there have been inconsistent holdings, it seems that the general rule is that only certain types of "experts" will be subject to Rule 53.03, or, more accurately, that only certain types of opinion evidence must be tendered by a qualified expert such that Rule 53.03 applies.

A backdrop of these issues involves the recommendations made in the Osborne Report.[3] Over the years, a primary concern was the development of an expert witness "industry": a culture of over-reliance on expert witnesses was developing, and there was worry that expert witnesses often were "hired guns who tailor their reports and evidence to suit the client's needs."[4] The report recommended more stringent standards for the contents of expert reports, a duty of the expert, expressed in the *Rules*, to be unbiased and primarily responsible to the court, along with a declaration on the part of the expert acknowledging the duty.

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[1] R.R.O. 1990, Reg. 194 [*Rules*].

[2] Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3d ed, (Markham, Ont: LexisNexis Canada, 2009), at §12.2, p. 771. There are other exceptions to the "opinion evidence" rule with respect to laypersons, and the distinction between exactly what is fact and what is opinion has been acknowledged to be unclear: see discussion at §§12.4-12.32.

[3] Honourable Coulter A. Osborne, Q.C., *Civil Justice Reform Project: Summary of Findings & Recommendations* (n.p: Queen's Printer for Ontario, 2007), online: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf.

[4] Osborne, *supra* note 3, at p. 71.

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When and to whom does Rule 53.03 apply?

The objectives of the amendments to Rule 53.03 were relatively clear, but what has remained unclear is exactly to whom the requirements apply. Broadly speaking, any professional with specialized expertise whose intended evidence includes some form of "opinion" could be considered an "expert witness". A treating doctor, for example, might testify to a diagnosis made prior to any contemplation of litigation; this diagnosis is necessarily an "opinion" derived from the underlying medical factual observations regarding which the doctor would also testify. The question of when and if a treating doctor must be qualified as an expert witness requires first addressing what kinds of witnesses are properly considered "expert witnesses" for the purposes of Rule 53.03, and what kinds of opinion evidence can only be proffered by expert witnesses.

Commentators have observed that there remains confusion between individuals with expertise who are fact witnesses and those who are properly called expert witnesses.[5] Brian J.E. Brock, Q.C., writes that "eminent jurists have failed to recognize a dramatic difference between fact witnesses and those who fit within the framework of the true 'expert.'"[6] Brock suggests the example a scientific specialist who publishes a report on potential environmental damage flowing from municipal activity. This hypothetical report was not specifically prepared for the municipality. Imagine, he suggests, that the municipality reads but ignores this report and a resident suffers property damage as a result of the activity discussed in the report. Could the resident, in a civil action, call the scientist as an expert to testify to the report? Under the current Rule 53.03 regime, this "expert" could not complete a Form 53. However, Brock suggests, this "expert" is more properly understood as "a fact witness and, while clearly an expert that has the ability to provide opinions, is not the type of expert contemplated by Rule 53.03."[7] Brock observes that doctors treating an injured plaintiff in a non-litigation context similarly form "opinions", but that in his view these should not be caught by 53.03.[8]

There is case law suggesting that this type of witness is to be considered an "expert witness". In the case of *Beasley v. Barrand*[9] the "experts" in question were three medical doctors, who were assessors retained by a non-party insurance company prior to litigation, and the defendants in the tort action sought "to elicit the opinions of these three experts regarding their physical examinations of the plaintiff, their diagnoses, and their prognoses."[10] The reports of these doctors were not Rule 53.03 compliant. Justice Moore gave the defendants an opportunity to consult with the doctors and have them prepare Form 53-compliant reports, but it was submitted the defendants could not have done this without asking that the doctors to breach their professional and statutory obligation of confidentiality to the plaintiff.[11]

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[5] Brian J.E. Brock, Q.C., "Expert reports: The 'expert' dilemma under the current rules – Rule 53.03" (2010) 29:3 Advocates' J. 20 (QL); John McNeil, "The Beasley Experts: Can the Bombshell be Defused?" (2011) 37 Advocates' Q. 466.
[6] Brock, *supra* note 5, at para. 1.
[7] Brock, *supra* note 5, at paras. 4-6; quotation at para. 5.
[8] *Ibid* at para. 9.
[9] 2010 ONSC 2095, 101 O.R. (3d) 452 [*Beasley*].
[10] *Ibid* at para. 4.
[11] *Ibid* at para. 68; see discussion in McNeil, *supra* note 5, at pp. 468-470. McNeil points out that although these doctors were not "treating doctors", a patient-doctor (and hence confidential) relationship was nonetheless formed.

Justice Moore in *Beasley* reviewed the purposes behind the amendments to Rule 53.03, and ultimately concluded that these witnesses must be compliant, and without compliance, their evidence was inadmissible. He found that "the rule advances the law that has been developing in recent years toward reining in the growing use of and reliance upon the evidence of experts at trial",[12] and ultimately that "I see no reason to require a high standard be met by consulting medical experts retained by the parties and a different, lower standard from consulting medical experts who just happened to have been retained by a non-party but whose opinions might be read to assist one of the parties at this trial."[13]

Justice Moore distinguished between the types of medical "experts" in that case and treating doctors.[14] However, John McNeil observes in his article that there is a sense in which it might be more reasonable to subject treating doctors to Rule 53.03 than no-fault assessors, in that "the opinions of no-fault assessors might be looked upon as being more objective than a treating doctor's opinion",[15] given the relationship between the treating doctor and the patient. Nonetheless, *Beasley* subjected similarly-positioned doctors to a more stringent standard; treating doctors offering fact evidence are not subject to Rule 53.03, but rather only s. 52 of the *Evidence Act*, R.S.O. 1990, c. E.23.[16] McNeil proposes that this makes sense, as it allows evidence that could not reasonably be expected to fall within the narrow constraints of Rule 53.03 to be adduced at trial.[17] McNeil's ultimate proposal regarding Rule 53.03 is that

> rule 53.03 [should have] application to persons who are engaged only for the purpose of providing opinion evidence in a proceeding, including physicians or anyone fitting the definition of "practitioner" in s. 52 of the *Evidence Act*, and who are otherwise strangers to the events of the action.[18]

McNeil also observes that in order to rebut an expert witness's critique of his or her fact evidence, a treating doctor would need to "put on an expert's hat and comply with rule 53.03", observing that in the decision of *Gutbir v.University Health Network*[19] a treating doctor in this position "was found to lack impartiality."[20]

Although treating doctors themselves have been parceled out in the case law, there is jurisprudential ambiguity regarding the area of "experts" into which the treating doctor conceptually falls, that being the expert who forms opinions outside of the litigation context. *Beasley* has been dealt with in other decisions.

Certain cases have offered both clarification and confusion. For example, the court in *McNeill v. Filthaut*[21] expressly declined to follow *Beasley*. In *Filthaut*, Justice MacLeod-Beliveau ordered

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[12] *Beasley*, *supra* note 9, at para. 52.
[13] *Ibid* at para. 69.
[14] *Ibid* at para. 65.
[15] McNeil, *supra* note 5, at p. 472.
[16] *Ibid* at pp. 471.
[17] *Ibid* at p. 471.
[18] McNeil, *supra* note 5, at p. 472.
[19] 2010 ONSC 6394 [*Gutbir*].
[20] McNeil, *surpa* note 5, at pp. 473-474, n. 25.
[21] 2011 ONSC 2165 [*Filthaut*].

a declaration "that the requirements outlined in *Rule* 53.03, as they relate to expert witnesses, do not apply to individuals retained by non-parties to the litigation."[22] In *Filthaut*, the defendant similarly sought to call accident benefit assessors who had assessed the plaintiff. In the view of the court, after reviewing the Osborne Report and the amendments to the *Rules* (including the addition r. 4.1.01), the recommendations in the Osborne Report were specific to the types of witnesses who could be "hired guns", and as such limited to expert witnesses "retained by or on behalf of the parties"; this did not "include experts such as the accident benefit assessors" before the court, as they had not been retained as such by the parties.[23] Justice MacLeod-Beliveau reviewed the legislation and observed that all of the language was specific to experts engaged by one or more of the parties to the action.

In the case of *Anand v. State Farm*,[24] assessors were permitted to testify with respect to factual observations but not offer opinion evidence. The court observed that "[i]n this approach, experts whose reports are not in compliance with *Rule* 53.03 could give evidence regarding their factual observations, but not the opinions they formed based on those factual observations."[25] The court then proceeded to overview distinctions that have been drawn at law between certain types of expert evidence, observing that there has been held to be such a category as the "treating expert", whose role is to be distinguished from that of the "litigation expert", and that the "treating expert" might be different for the purposes of Rule 53.03.[26] For the court's part, it was observed that "[i]n my view, unnecessary litigation is being generated on a case by case basis as to whether the expert intended to be called at trial is a treating expert or a litigation expert, and whether or not the expert is deserving of relief from non-compliance with *Rule* 53.03."[27] Without finally determining the issue of whether the opinions offered by a treating doctor necessarily involve the doctor acting as a "treating expert", Justice MacLeod-Beliveau drew the line for application of Rule 53.03 at whether or not the ostensible expert had been retained by a party.[28]

As well, the often-quoted passage from *Burgess (Litigation guardian) v. Wu*,[29] explains the distinction between "treatment opinions" and "litigation opinions". In *Burgess*, the issue was whether a physician who had seen the deceased plaintiff could be permitted to testify for the defence. In reaching the conclusion that the doctor could not be retained as an expert for the defence, but could testify as a treating doctor, the court observed the following:

> The qualification I have added to the previous rulings is to take account of the fact that when a physician attends on a patient the process typically involves making a diagnosis, formulating a treatment plan and making a prognosis. All three involve forming opinions. Those are different from the opinions an expert is asked to provide at trial as the latter usually involve a consideration of

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[22] *Ibid* at para. 7.
[23] *Ibid* at para. 23.
[24] *Anand*, *supra* note 21.
[25] *Filthaut*, *supra* note 22, at para. 46.
[26] *Filthaut*, *supra* note 22, at paras. 47-51.
[27] *Filthaut*, *supra* note 22, at para. 52.
[28] See also the case of *Hall v. Kawartha Karpet & Tile Co.*, 2007 CanLII 46915 (Ont. S.C.), which pre-dated the amendments to the *Rules*.
[29] (2003), 68 O.R. (3d) 710 [*Burgess*].

> much more information from various sources and are formed for the purpose of assisting the court at trial and not for the purpose of treatment. I shall call opinions formed at the time of treatment "treatment opinions" and those formed for the purpose of litigation "litigation opinions."
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> Consequently, where access to the healthcare provider is permitted under judicial supervision, that person may be asked for 'treatment opinions' formed at the time of the physician's original involvement for medical purposes but may not be asked for litigation opinions.[30]

It seems that there is a meaningful difference between drawing a distinction between "treating experts" and "litigation experts", on the one hand, and "treatment opinions" and "litigation opinions" on the other. Calling a treating doctor a "treating expert" leads to confusion, especially where a treating doctor has been retained by one of the parties. But suggesting that a treating doctor, who is testifying as a fact witness, is nonetheless permitted to offer "treatment opinion" flowing from those facts, avoids the confusion of whether he or she must be a properly qualified expert for the purpose of Rule 53.03.

The issue of a witness with a certain expertise and whether he or she ought to be subject to Rule 53 is not restricted to physicians. In fact, the clearest recent articulation of the distinction that I have encountered stems from a case not dealing with medical doctors. In *Continental Roofing Ltd. v. J.J's Hospitality Ltd.*,[31] Justice Koke was required to grapple in part with "whether Rule 53.03 applies to a person with expertise who was involved in the history of the subject matter of the action or applies only to persons retained as experts solely for the purpose of assisting in the litigation."[32]

In this case, the plaintiff brought a motion to disqualify an intended expert witness. The defendant sought call an architect and engineer as an expert witness. The intended expert had worked for the defendant on the roofing project that was the focus of the dispute. After reviewing the amendments to Rule 53.03 and the case law surrounding the application of the rule and purported distinctions between "treating" and "litigation" experts, Justice Koke clarified that this witness would be <u>permitted</u> to testify with respect to what could otherwise be called expert opinions formed in the process of his work for the defendant, but he would not do so as an "expert witness":

> In my view, Mr. Caughill is not to be regarded as an expert witness under Rule 53.03. He has not been retained by the defendant for the sole purpose of providing expert testimony of trial. He is not what we commonly refer to as a litigation expert. He has been directly involved in the events of this case. It is alleged that he approved the original design and method to be used to carry out the

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[30] *Ibid* at para. 80-81. This latter paragraph is specifically dealing with court-authorized communication between counsel for the defendant and the treating doctor of a plaintiff, and what kinds of information can be solicited. It is not dealing with questions asked at trial.

[31] 2012 ONSC 1751 [*Continental*].

[32] *Ibid* at para. 1.

> roof repairs and he was instrumental in arranging to have the work completed, using a different method and a different roofing company. Clearly, he is not a disinterested party.
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> The question therefore arises as to whether Mr. Caughill should be permitted to provide opinion evidence on the basis that in providing consulting services to the defendant, he was doing his ordinary work, very much like a treating physician is viewed as doing his or her own ordinary work in providing care to an injured party.
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> I am of the view that Mr. Caughill should be permitted to provide evidence with respect to his involvement in the subject matter of this action, and that his evidence can include both factual evidence and opinions which he formed concerning the methods employed by the plaintiff in carrying out the work and the cause of the water leakage into the building.[33]

Justice Koke also contemplated "opinion", in some respects, being offered by other non-expert witnesses:

> I expect that the plaintiff will likely call evidence from its employees and other onsite personnel, some of whom will have considerable expertise with respect to roofing systems and repairs...and I expect that that the plaintiff will seek to elicit evidence from them which will comprise not only factual evidence, but also opinion evidence. The line between opinion evidence and factual evidence is often blurred. The plaintiff's witnesses will be able to challenge Mr. Caughill's evidence and as such, the plaintiff should not be prejudiced.[34]

In finding that the witness in question could not be a Rule 53.03 "expert witness", and in drawing the analogy to a treating doctor, the ruling of Justice Koke can be read as suggesting that the treating doctor offering treatment-related opinions is better characterized as a "fact witness" who offers admissible opinion evidence as a non-expert, rather than as a separate and distinct kind of "expert witness".[35]

Importantly, the case also distinguished between "bias" or "lack of objectivity" and "difference of opinion or interpretation".[36] Justice Koke held that issues of bias in cases such as the case before him properly go to weight rather than admissibility.[37]

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[33] *Ibid* at paras. 40-42.
[34] *Continental*, *supra* note 32, at para. 47.
[35] This is not the only way to read *Continental*, however – given its discussion of "litigation experts" and "treating experts", and its citation and discussion of *Slaght*, it may simply agree with standard categorization.
[36] *Continental*, *supra* note 32, at para. 45.
[37] *Ibid* at paras. 45, 49.

While treating doctors themselves have been understood to be in a distinct category of witness entitled to give fact evidence, they share similarities with other types of "experts", the admissibility of whose evidence has been the subject of confusion and disagreement, and they similarly can offer evidence that, by virtue of the fact that it necessarily includes a form of opinion, can be difficult to properly categorize. Despite the fact that *Beasley* distinguished treating doctors from no-fault assessors, the *Beasley* analysis could, for reasons discussed, be applied to treating doctors.

The important issue, then, is specifically when a treating doctor can be and must be a Rule 53.03-compliant "expert witness", in that one of the parties seeks to adduce "litigation opinion" from the treating doctor.

From further review of the jurisprudence, there appear to be two key live issues regarding the application of Rule 53.03. The first question asks whether the conceptual distinction, for the purposes of the rule, is between types of experts or types of evidence. That is to say, does Rule 53.03 apply based on the role of the witness or his or her relationship to the parties, or rather based on the specific type of evidence being given? If Rule 53.03 applies based on the type of evidence, the second question is whether there remains a viable distinction between "treatment opinion" evidence and "litigation opinion" evidence, or whether the distinction is purely between opinion evidence and fact evidence, with "treatment opinion" being simply a limited form of fact evidence.

Recall that *Filthaut* held that the application of Rule 53.03 is based on the relationship of the purported expert to the litigation: experts retained by non-parties to the litigation do not fall within the scope of Rule 53.03. *Filthaut* questioned the principle coming out of *Beasley*, but two recent cases have preferred *Beasley* over *Filthaut*.

The first is *Michienzi v. Kuspira*,[38] a brief decision of A.D. Grace J.. The facts of *Michienzi* were similar to *Beasley*: the defence sought to potentially call the authors of reports commissioned by the plaintiff's accident benefit insurer. These four reports were authored by a neuropsychologist, a psychologist, an orthopaedic surgeon, and a certified vocational evaluator.[39] Justice Grace took the position that these individuals, in order to give opinion evidence, were required in the first instance to comply with Rule 53.03. In considering both *Filthaut* and *Beasley*, Justice Grace departed in a specific way from the reasoning in *Filthaut*. His Honour held that r. 4.1.01, which applies to "every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding",[40] is not to be read together with r. 53.03 in interpreting the latter provision:

> Rule 4.1.01 does not, with respect, qualify rule 53.03 (2.1). They appear in different locations for a reason. Rule 4.1.01 applies at every stage of the proceeding - from its commencement, through interlocutory stages and at trial. It is temporally broad but applies to a restricted group of experts.[41]

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[38] 2012 ONSC 2273 [*Michienzi*].
[39] *Ibid* at para. 4.
[40] *Ibid* at para. 16, quoting *Rules*, r. 4.1.01 (emphasis added).
[41] *Ibid* at para. 17.

Accordingly, Rule 53.03 "applies to every expert who is to testify *at trial* whether retained by a party or non-party."[42] Justice Grace waived compliance with the rule in the result, but for this paper the important point is that His Honour found that "the defendant should have but has not complied with Rule 53.03 (2.1)."[43] That is to say, the experts were caught by the rule absent the judge excusing non-compliance.

Justice Grace's analysis noted that, despite distinguishing between experts retained by parties and experts called at trial, the question remains: under what circumstances will a person with expertise be categorized as an "expert" in the first place? Rule 53.03 may only apply to "experts" called at trial, but will a treating doctor (an individual with substantial expertise) testifying only to treatment observations be an "expert"? Historically, the answer has been "no", as *Beasley* and other cases have observed.[44] But, on that logic, a neuropsychologist testifying only to observations outlined in a prior report is also not an "expert"; such an individual is a form of fact witness.[45]

This illustrates that the distinction is, arguably, not properly drawn between types of individuals (e.g. experts retained or not retained by parties; experts to be called or not called at trial), but rather types of evidence sought to be proffered. The question is not whether the individual will be "an expert", but rather the evidence sought from him or her is "expert evidence".

This is the analytical approach taken by Justice Lederer in *Westerhof v. Gee Estate*.[46] *Westerhof* is an appeal to a panel of the Divisional Court from the final order of a trial judge. The appeal considered determinations made by the trial judge regarding the admissibility of certain evidence that the plaintiff sought to adduce, and a number of the relevant witnesses were arguably "expert" in some fashion. There were several witnesses, and Justice Lederer described two. First, Justice Lederer described a chiropractor:

> This witness was not presented as an expert. Nonetheless, after he gave a history as to his diagnosis, counsel sought to have the witness provide an opinion as to prognosis. There had been no report delivered pursuant to rule 53.03. The judge limited the evidence of this witness to explaining his examinations of the appellant and the particulars of his treatment.[47]

Similarly, Justice Lederer described the treating psychiatrist:

> This witness was described as a treating psychiatrist. He had "...not provided a medical-legal report that complied with rule 53.03" (*Trial Transcript*, at p. 624). The trial judge ruled that the witness could not provide evidence as to diagnosis or prognosis. He was

[42] *Michienzi*, *supra* note 39 at para. 15 (original emphasis).
[43] *Ibid* at para. 22.
[44] See e.g. *Beasley*, *supra* note 9 at para. 64.
[45] Brock, *supra* note 5 at para. 5.
[46] 2013 ONSC 2093 (Div. Ct.) [*Westerhof*].
[47] *Ibid* at para. 7.

> allowed to give evidence as a treatment provider, regarding his clinical observations, his treatment and its progress.[48]

The plaintiff took the position that such witness evidence did not require compliance with Rule 53.03, as, following *Filthaut* (shorthanded in *Westerhof* as "*McNeill*"), the trial judge "failed to recognize the distinction between witnesses called because they had treated the appellant and those called as experts who were retained for the purposes of the litigation."[49]

Justice Lederer addressed *Filthaut* along with two similar cases. Before continuing to discuss *Westerhof*, I will briefly review these cases here.

The first other decision considered in *Westerhof* is *Slaght v. Phillips*.[50] In *Slaght*, the plaintiff sought to adduce opinion evidence from a vocational rehabilitation consultant who Turnbull J. found had worked with the plaintiff for three years and had assumed taken the role of a treating practitioner.[51] The defence objected, on *voir dire*, to the admissibility of the evidence on a few grounds, one of which was non-compliance with Rule 53.03. Justice Turnbull's analysis began with the test for the admissibility of expert evidence from *R. v. Mohan*,[52] requiring necessity in assisting the trier of fact, relevance, a properly qualified expert, and the absence of an exclusionary rule.[53] On the last branch, Justice Turnbull found that

> I am not aware of any exclusionary rule that would be offended by the admission of the opinion offered by Ms. Malacaria, particularly in light of the fact that we can consider her as essentially a treating expert witness. In other words, she is giving opinions based upon her work with the plaintiff as opposed to being hired as a litigation expert who has not had any involvement with either party in the litigation.[54]

Once the *Mohan* test was passed, Justice Turnbull observed that there remained the "further hurdle" of the application of Rule 53.03.[55] The defence asked for Justice Turnbull to apply *Beasley*. Justice Turnbull held that "I concur totally with the ruling of Justice Moore that, as a general rule, experts must comply with Rule 53.03."[56] However, His Honour further observed that "there are classifications of experts which come before our court."[57] First, there are "treating specialists" who "necessarily form opinions … as part of their ongoing work" and whose reports are produced to the other party.[58] Second, there are experts retained to express

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[48] *Westerhof*, *supra* note 47 at para. 7.
[49] *Ibid* at para. 8.
[50] *Slaght*, *supra* note 21.
[51] *Ibid* at para. 17.
[52] [1994] 2 S.C.R. 9.
[53] *Slaght*, *supra* note 21 at para. 15.
[54] *Ibid* at para. 17.
[55] *Ibid* at para. 20.
[56] *Ibid* at para. 23.
[57] *Ibid*.
[58] *Ibid*.

opinions in litigation; to these experts, Rule 53.03 "should be strictly applied".[59] Third, "there are experts who are retained by third parties", and fourth, "there are experts who are paid by third parties" but go on to work with the plaintiff.[60] Justice Turnbull found that those in the fourth category "fall within a different status of experts",[61] and proceeded to cite *Burgess* for the distinction between "treatment opinions" and "litigation opinions". His Honour held that "the purpose of Rule 53.03 is much more directed at the latter opinions rather than at [the] prior opinions"[62] and that "strict application of the requirements of Rule 53.03 is not nearly as necessary as in the case of proffering litigation opinions",[63] especially given that on the facts of the case no prejudice would flow from admission of the opinion evidence.

The second other decision considered in *Westerhof* is *Kusnierz v. Economical Mutual Assurance Co.*[64] *Kuznierz* was heard in part prior, and in part after, the amendments to the *Rules*. It was heard before *Beasley*, but the judgment was released after *Beasley*. Importantly, Justice Lauwers held that the amendments were not strictly applicable in the case.[65]

Nonetheless, Justice Lauwers was required to consider the admissibility of a plaintiff expert who "moved from the status of an independent expert to something close to a treating physician."[66] Justice Lauwers commented that His Honour "admire[d] his commitment to his patient", and that the expert "continues to be a passionate advocate for Mr. Kusnierz."[67] Nonetheless, the court was required to decide what to do in light of the fact that the expert might not be considered "independent". In deciding to admit the doctor's evidence, Justice Lauwers held as follows:

> It would be reasonable in these circumstances, to consider the evidence of Dr. Ameis as one would the evidence of a treating physician like a family doctor. Such a witness does not seem to fall squarely within either Rule 4.1.01 or Rule 53.03, but is someone who has and exercises expertise routinely, and ought to be able to give relevant evidence about his or her patient. I will take into account that Dr. Ameis has been a passionate advocate for Mr. Kusnierz and has formed a therapeutic alliance with him. I must, therefore, take his evidence with the proverbial grain of salt that goes to its weight.[68]

I return now to discussing *Westerhof*. After reviewing *Filthaut*, *Slaght*, and *Kusnierz*, Justice Lederer observed that "[w]hat is striking about these distinctions is that they arise from who the witnesses were (who retained them and for what purpose) rather than the nature of the evidence to be provided. (Is it fact-based evidence for which no special expertise is required or opinion

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[59] *Ibid*.
[60] *Ibid* at para. 24.
[61] *Ibid* at para. 24.
[62] *Ibid* at para. 26.
[63] *Ibid* at para. 28.
[64] 2010 ONSC 5749, 104 O.R. (3d) 113 [*Kusnierz*], rev'd on other grounds, 2011 ONCA 823, 108 O.R. (3d) 272.
[65] *Ibid* at para. 117.
[66] *Ibid* at para. 114.
[67] *Ibid* at para. 116.
[68] *Ibid* at para. 118.

evidence for which it is?)."[69] Contrary to this approach, His Honour reviewed *Beasley* and chose to follow that case in deciding that "[t]he important distinction is not in the role or involvement of the witness, but in the type of evidence sought to be admitted. If it is opinion evidence, compliance with Rule 53.03 is required; if it is factual evidence, it is not."[70]

Such a rule requires, in the context of a treating doctor or similar individual with expertise, some way to delineate between fact and opinion evidence in the first place. In the case of treating doctors or similar "expert" witnesses, the line might not be clear. Perhaps the most important passages in *Westerhof* are the following. First, Justice Lederer explains exactly where the line is to be drawn, with respect to treating doctors, between fact and opinion:

> [*Beasley*] appears to distinguish witnesses who were engaged in treatment by noting that the three doctors whose reports were being considered were not involved in this way (see: paras. 64 and 65). This does not suggest that, if they had been treating physicians, the three doctors would have been free to offer opinions without concern for Rule 53.03. Treating professionals do stand apart. They are present during the progress of any injury suffered by a plaintiff. They may give evidence as to their observations of the plaintiff and their description of the treatment provided. This is factual and not opinion evidence. Simply put, a treating physician or other treating professional who limits his or her evidence in this way does not need to be qualified and is not treated as an expert. It is when the witnesses seeks to offer opinions as to the cause of the injury, it's pathology or prognosis that the evidence enters into the area of expert opinion requiring compliance with Rule 53.03.[71]

Justice Lederer proceeds to respond to counsel's submission that a diagnosis is not opinion but fact evidence. His Honour explains that, as diagnoses entail medical inferences from observations, they are opinion, but there is a caveat:

> Having said this, there are situations where evidence of a diagnosis may be treated as a fact. It depends on the purpose to which the evidence is put. If a physician gives evidence of his or her diagnosis to explain the treatment provided, it is a fact that the diagnosis was the catalyst for the treatment. The diagnosis may still have been wrong. The statement of the witness does not establish as a fact that it correctly diagnoses the injury or illness. It is only relevant and admissible to understand the basis of the treatment chosen. It may be that the inference to be drawn seems irrefutable as a result of observations that can be made, for

[69] *Westerhof*, *supra* note 47 at para. 14.
[70] *Ibid* at para. 21.
[71] *Ibid* at para. 23.

> example, by use of an x-ray. Even so, for the purposes ofevidence, it remains an opinion. X-rays can be misread.[72]

Analytically, Justice Lederer's reasons make a great deal of sense. Evidence as to the fact of the existence of an opinion is distinct from opinion evidence proffered for the purposes of suggesting to the court that it ought to accept such an opinion. This could be considered analogous to the distinction with respect to hearsay evidence between testifying as to an out-of-court statement for the fact that the statement was made, as opposed to the truth of its contents. If the medical diagnosis is put forward for its truth by the witness, this is opinion evidence, and requires an expert witness. Justice Lederer put the rule this way: "[Rule 53.03] has to be applied taking into account the nature of the evidence to be called."[73]

Justice Lederer noted that both *Filthaut* and *Slaght* focus on who is giving the opinion evidence rather than the purpose the evidence is being put to, and thus asked the wrong question.[74] Moore J. focused on the purpose the evidence was being put to in *Beasley v. Barrand*[75] and decided not to admit treatment opinions that failed to comply with Rule 53.03 onto the record. Accordingly, *Beasley* was adopted in *Westerhof*. Since Rule 53.03 is concerned with ensuring the objectivity and impartiality of expert witnesses, there is no reason why a treating professional's opinion evidence should be treated differently than the opinion evidence of a medical expert retained by a party for litigation.[76] After *Westerhof*, it seems that treating professionals testifying as to their expert opinions must comply with Rule 53.03.

No decisions of any court in Canada have cited *Westerhof* since that decision was released on June 20, 2013. In fact, it was not referred to in the one case I could find that had an opportunity to apply it.

The recent decision of Edwards J. in *Spirito v. Trillium Health Centre*[77] applied *Filthaut* without referring to *Westerhof*. In that case the plaintiff sought to adduce expert evidence from two treating physicians. The plaintiff's argument was that the two treating doctors could testify as experts without complying with Rule 53.03. The court found that the two doctors were "'treating experts' as defined in *MacNeil v. Filthaut* … As such, they are entitled to testify as to treatment opinions that they formed in 2003, without strict compliance with rule 53.03".[78] The doctors were not permitted to provide expert opinion evidence outside of their treatment opinions.[79]

What *Westerhof* does not explicitly account for is the distinction at law between "treatment opinion" and "litigation opinion". Two recent out-of-province cases, each of which

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[72] *Ibid* at para. 24.
[73] *Westerhof*, *supra* note 47 at para. 27.
[74] *Ibid* at para. 14.
[75] 2010 ONSC 2095.
[76] *Westerhof*, *supra* note 47 at para. 21..
[77] 2013 ONSC 5138.
[78] *Ibid* at para. 31
[79] Nothing turned on the decision to allow the doctors to present their "treatment opinions" at trial. One of the doctors was not called as a witness and the other, Dr. Oh, deferred to one of the specially retained medical experts on the one issue where his opinion evidence was sought.

acknowledges *Beasley*, rely on this distinction (albeit in different contexts, given the different civil procedure schemes).

In the Alberta Court of Queen's Bench case of *Buckingham v. Schledt*,[80] the records of the treating physician general practitioner, which were entered at trial, contained a report from a neurosurgeon who had treated the plaintiff. The general practitioner was cross-examined on the report by the defence. The neurosurgeon author of the report was listed as a treating doctor and not an expert. The defence subpoenaed the neurosurgeon. The question was whether the defendant, in calling and examining the neurosurgeon, was required to comply with Rule 5.34 of the *Alberta Rules of Court*,[81] which reads:

> 5.34 An expert's report must
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> (a) be in Form 25 and contain the information required by the form, or any modification agreed on by the parties, and
> (b) be served in the sequence required by rule 5.35.

As the doctor appeared on the witness list as a treating physician rather than an expert, the report was not in compliance with Rule 5.34.[82] The civil procedure context was different than Ontario, but the case is relevant to the extent that in determining whether compliance was necessary, the court was assessing whether the report in question was properly categorized as an "expert" report.

Justice McMahon determined that compliance with Rule 5.34 was not necessary. The court explained the distinction between "treatment opinion" and "litigation opinion" as follows:

> I conclude that compliance with Rule 5.34 is not required. Treatment performed and recommended or not recommended is necessarily based upon the physician's diagnosis, observations and testing, all of which results in his opinion. The opinion is not provided in the context of litigation. Some authorities describe this distinction as "treatment opinion" as against "litigation opinion". *Burgess v. Wu*, [2003] O.J. No. 4826 at para. 80; *Beasley v. Barrand*, [2010] O.J. No. 1466 at para. 64.
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> It is different from opinion sought from experts for the sole purpose of giving evidence at trial or to opine upon the work or opinions of others. Rule 5. 34 applies to the latter only.[83]

The court further observed that "[w]hile it would be improper for [the treating neurosurgeon] to accept a retainer to testify against his patient, that is not what is occurring here. As a treating

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[80] 2011 ABQB 786, 532 A.R. 181 [*Buckingham*].
[81] Alta. Reg. 124/2010 [*Alberta Rules*].
[82] *Buckingham*, *supra* note 81 at para. 1.
[83] *Ibid* at paras. 4-5.

physician, he is being called to testify and to speak to his report. The fact that his report may not assist the Plaintiff does not preclude his testimony."[84]

The distinction endorsed in *Buckingham* was followed in *North Pacific Roadbuilders Ltd. v. Aecom Canada Ltd*[85] by the Saskatchewan Court of Queen's Bench. Again, the civil procedure context was different, as was the particular legal question. This was a case against "defendant engineers for the substantial cost overruns [the plaintiff] states it incurred in building 60 kilometres of a remote gravel haul road in northern Saskatchewan for Cameco Corporation".[86] The defendant became aware of the plaintiff's intention to call a professional engineer who had produced reports for Cameco, a non-party, with respect to the building of the haul road. The plaintiff sought to have the witness testify to the contents of his report. The question was whether expert witness notice, as required by Rule 284D of *The Queen's Bench Rules*, and which had not been provided, was necessary.

The plaintiff took the position that the proposed expert would only be functioning as a "treatment" expert rather than a "litigation" expert, in that "he is being called to testify only with respect to the report that he had prepared many years ago, which outlines the work he performed for Cameco, and the conclusions he reached as a result of that work", and further that "the reports in question emanated from the defendant's document disclosure".[87]

The court discussed the distinction raised in *Buckingham*, and held the following:

> Once reports, memos, notes or correspondence from professional persons who have previously rendered service to a party are relevant to a matter in trial, these reports, etc., will be disclosed as part of document disclosure. They "relate to a matter in question in the action" (Rule 212). As long as the witness's evidence is to be restricted to what is contained in the report, correspondence, etc., there is no reason to require a separate expert witness notice, and there is no basis to claim prejudice due to lack of notice.[88]

Further, the court explained that "the plaintiffs did not seek to elicit from the engineer in question anything more than an explanation of the reports he had prepared back in 1985 and 1993. For this reason, I concluded he was not an 'expert witness within the meaning of Rule 284D' or a 'professional or other expert' within the meaning of s. 21 of *The Evidence Act*."[89]

To the extent that the court emphasized that the point of expert witness notice was to avoid prejudice and accordingly rested its reasoning on the fact that the reports already formed part of the document disclosure, this case may not be on all fours with the central question at issue here. Nonetheless, the court was willing to accept a distinction between "litigation opinion" and

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[84] *Ibid* at para. 8.
[85] 2012 SKQB 522 [*North Pacific*].
[86] *Ibid* at para. 1.
[87] *Ibid* at para. 2.
[88] *North Pacific*, *supra* note 86 at para. 7.
[89] *Ibid* at para. 8.

"treatment opinion" for the purposes of determining who is an "expert witness" under the Saskatchewan *Rules*.

Considered against *Westerhof*, a crucial question is what the Saskatchewan Court of Queen's Bench meant in referring to "an explanation of the reports". On Justice Lederer's account, a pure "explanation" of the reports that was relevant for some other purpose than providing the trier of fact with what Bryant, Lederman & Fuerst call a "ready-made inference"[90] would not necessarily run afoul, in Ontario, of Rule 53.03. But recall how Justice Lederer framed the analysis: such evidence would be fact evidence. It would be "opinion" only in the sense that the fact of an opinion was described.

The lingering question will be whether there is a residual category of "treatment opinion" that is not strictly considered fact evidence, but which does not attract the strict requirements of Rule 53.03. It may occupy an analytically cloudy space that the clarity of the *Westerhof* decision does not permit.

Brock, observed that *Beasley* made room for opinion evidence from treating physicians that was not Rule 53.03-compliant: "The court in *Beasley* did allow that the evidence of treating physicians who provide 'treatment related opinions' may be able to testify on those opinions. That is, presumably, because they are fact witnesses with relevant information to provide to the court."[91] Brock, who appears to classify "treatment related opinions" as a form of fact evidence, nonetheless gives an example that would be difficult to square with *Westerhof*:

> In a personal injury case, the individuals who provide medical evidence in a non-litigious context can include every medical expert that may treat or examine an injured plaintiff. Each of these individuals is engaged in the formulation of opinions because it is his or her duty to do so…. If it is a surgeon's opinion that the patient would require a knee replacement within two years and would not thereafter be able to work as a railway lineman, is that opinion to be excluded because it does not fit within Rule 53.03? I would say no.[92]

If the opinion is put before the court as an inference that the court might rely upon, on Justice Lederer's account in *Westerhof*, this is the exact kind of circumstance where a treating doctor would be caught by the requirements of 53.03. Further, there may be no getting around that *Westerhof* cannot be reconciled with a case like *Slaght*: there was no question in *Slaght* that the evidence that the plaintiff wanted admitted was opinion evidence. There was no suggestion that the evidence was merely a form of fact evidence. The distinction between "treatment opinion" and "litigation opinion" was not a fact/opinion distinction; the ruling was that the former type of expert evidence was less likely to require strict adherence to Rule 53.03.

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[90] *Supra* note 2.
[91] Brock, *supra* note 5 at para. 24; see *Beasley*, *supra* note 9 at para. 64.
[92] Brock, *supra* note 5 at para. 9.

Finally, another example of the line being blurred between fact and opinion in the context of "treatment opinion" can be found in *Brandiferri v. Wawanesa Mutual Insurance Co.*[93] This judge-alone case did not deal with a treating doctor, but rather the owner and operator of an "insurance restorer" who had been involved in the background events of a case where the plaintiffs alleged that, following a fire at their home, the insurer was "responsible for deficient remedial work carried out" by a construction company.[94] Justice Lauwers determined that the witness, Mr. Jones, could not testify as an expert under Rule 53.03 as he lacked the requisite independence: "He ha[s] been directly involved in the events of the case and was not disinterested in the outcome".[95] Mr. Jones' involvement had included an estimate provided in 2004. Defence counsel conceded that the witness could be a fact witness, regarding "the work that [his company] actually did to the Brandiferri home and why that work was done", but insisted that "Mr. Jones could not give evidence about the generation of the 2004 estimate."[96]

Justice Lauwers ruled "that Mr. Jones could give his evidence without distinction as to what was fact evidence and what was opinion evidence, leaving me to determine the credibility and weight of his evidence."[97] Justice Lauwers reviewed relevant case law including *Slaght*, *Burgess*, and *Filthaut*, noted the distinction between "treatment opinions" and "litigation opinions", and concluded that "[l]ooking at the mischief that rule 53.03 was intended to address, I do not find Mr. Jones to be a typical 'hired gun' or just a litigation expert in this case."[98]

In reaching a relatively pragmatic determination, Justice Lawuers' conclusion left some open questions:

> There is clearly an element of opinion in Mr. Jones's assessment of the work that needed to be done and in his pricing of the repairs. The nature of the opinion evidence also needs to be considered. It is not especially arcane or "scientific". There is no jury here and it is quite unlikely that Mr. Jones' evidence would be able to gull me in the context of the totality of the evidence in the case. This is one of those instances where I needed to hear the evidence before deciding whether to admit it, so the bell has been rung, in Justice Goudge's evocative phrase in his 2008 *Report on the Inquiry into Pediatric Forensic Pathology in Ontario* in Vol. 3, ch. 18 at p. 474. That said, in this context it can quite easily be "unrung" by the evidence of other witnesses who can challenge or corroborate the evidence.[99]

The fact that there was no jury to be influenced was clearly at the forefront of Justice Lauwers' consideration of the matter. One can understand why pragmatically it may have been useful to

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[93] 2011 ONSC 3464, 16 C.P.C. (7th) 187 [*Brandiferri*].
[94] *Ibid* at para. 1.
[95] *Ibid* at para. 10 (citation omitted).
[96] *Ibid* at para. 32.
[97] *Ibid* at para. 2.
[98] *Ibid* at para. 42.
[99] *Ibid* at para. 45 (footnote omitted).

leave all of the relevant considerations to go to weight. But the decision, unfortunately, offers little to help explain whether "treatment opinion" is properly understood as a form of fact evidence.

What circumstances will lead to a treating doctor being disqualified as a Rule 53.03 expert witness, meaning that the doctor's "litigation opinion" will be deemed inadmissible?

This particular issue has been dealt with much more narrowly, and in fewer cases, than the issue above of what types of witnesses are generally caught by the new Rule 53.03.

In *Gutbir, supra*, the difficult distinction between a treating doctor's "fact" evidence and "expert" opinion was a live topic, as counsel for the defendant urged that it would be difficult for a jury to tell the difference in the course of testimony.[100]

In that case, the central issue was whether or not the treating doctor had the requisite objectivity necessary to discharge his obligation to be an impartial assistant to the court, specifically with respect to the issue of causation, in the event that he was qualified as an expert witness.

I found that the expert reports of the treating doctor, Dr. Perlman, revealed that he was not impartial, and that the role he took in portions of his reports was that "of an advocate", and that his comments suggested that "he ha[d] an interest in the court finding that his conclusion reached in 1984 was indeed the correct one".[101]

In Gutbir, I rejected the proposition "that the amendments to Rule 53 do not change an expert's obligations to the Court but simply codify what was the existing practice."[102] Additionally, it was noted that the "gatekeeper" function of the trial judge must be emphasized, and accordingly that "the correct and preferable approach is to consider the proffered evidence and make the determination at the present time as to the admissibility of the expert testimony",[103] rather than leave the evidence to be weighed by the jury.

Other cases have addressed the qualification of treating doctors as expert witnesses under Rule 53.03, and address some of the principles that animated *Gutbir*.

The case of *Farooq v. Miceli*[104] involved a motion for summary judgment, in part on the basis that without any expert witness, there was no genuine issue for trial, and the plaintiff lacked such a witness. One question was whether a treating doctor of the plaintiff, a Dr. Sidhu, could be an expert witness.

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[100] *Gutbir*, *supra* note 19, at para. 4.
[101] *Ibid* at para. 29.
[102] *Ibid* at para. 9.
[103] *Ibid* at para. 24.
[104] 2012 ONSC 558 [*Farooq*].

In finding that Dr. Sidhu was, subject to the determination of the trial judge, "not incapable of providing an expert opinion to the court on the standard of care applicable to" the defendant,[105] Justice Lauwers [as he then was] reviewed relevant case law including *Gutbir*. By way of general observation, Justice Lauwers noted that "[i]t seems to me that one of the regrettable side effects of the changes to the rules has been to sow some confusion about the evidence that can be given by individuals who may not be qualified to be experts under the rule 53.03 but who nonetheless have relevant evidence to give that includes an element of expertise. The best example of such a witness is a treating physician."[106]

Observing that Justice Moore in *Beasley* drew a distinction between treating doctors and other witnesses who might offer "opinion" evidence but were not "experts" under Rule 53.03,[107] Justice Lauwers acknowledged that the "opinions" of treating doctors are not necessarily *per se* "expert" opinions: "For practical purposes, treating physicians have always been allowed to give evidence and have been allowed to give opinion evidence about their working diagnosis and working prognosis. Treating physicians use their expertise to form opinions routinely in the examination of patients, in their assessment of patients and in their treatment."[108]

The court accepted the proposition that in certain circumstances treating doctors may be qualified as experts, but also, in citing other cases, acknowledged that there may be issues to do with impartiality and consequently reliability that go to weight.[109]

In the costs endorsement in *Hossny v. Belair Insurance*,[110] the plaintiff made submissions to the effect that a main expert witness, whose unavailability had resulted in a mistrial, would not have been permitted to testify as he was a treating doctor of the plaintiff, on the authority of *Gutbir*.[111]

Justice Sanderson held the following with respect to the eligibility of treating doctors to testify as expert witnesses:

> I do not agree as a general proposition that treating doctors cannot give independent expert evidence. I see no reason to exclude the expert opinion of treating doctors so long as their reports are Rule 53 compliant, so long as they are otherwise expert, so long as their treatment is not under attack and so long as there are no other specific bases grounding a lack of independence. Indeed, treating doctors may well have greater depth of knowledge and be better able to assist the Court than experts who have been retained only to provide opinion evidence.[112]

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[105] *Ibid* at para. 29.
[106] *Ibid* at para. 23.
[107] *Farooq*, *supra* note 105, at para. 25. As I note above in this paper, the principled basis for the distinction in *Beasley* is not entirely clear.
[108] *Farooq*, *supra* note 105, at para. 25.
[109] *Ibid* paras. 26-28.
[110] 2011 ONSC 6440 [*Hossny*].
[111] *Ibid* at para. 6. The reason why the plaintiff was making this submission is somewhat off point for the purposes of this paper; *Hossny* is valuable specifically for the judge's explanation of his understanding of the law following *Gutbir*.
[112] *Hossny*, *supra* note 111, at para. 9.

This holding seems consonant with *Gutbir* and *Farooq*—depending on the circumstances, treating doctors may lack the independence to be qualified as expert witnesses, but inadmissibility does not flow only and directly from a treating doctor's involvement with a patient. In *Gutbir*, it was not found that Dr. Perlman was ineligible to be a Rule 53.03-compliant witness simply on the basis of his involvement with the plaintiff, but rather that there were specific aspects of his expert reports that called his impartiality seriously into question.

There appears to be less agreement, however, on whether Rule 53.03 added to or merely codified responsibilities of the expert witness, and whether questions under this regime of bias properly go to admissibility or weight.

In *Gardner v. Hann*,[113] the importance of the "gatekeeper" function of the trial judge was emphasized, and it was noted that,

> it is the role of the trial judge to scrutinize the proffered expert and the opinion and make a determination on the issue of compliance with the requirements set out in Rule 53.03 and whether it ought to be admitted into evidence, rather than letting the impugned evidence in with the caveat that the "proper weight" will be attached to it. In my view, the trial judge must exercise the gatekeeper function with rigor, taking into account the issues to be determined in the case, whether expert opinion is necessary and whether the particular expert has the necessary expertise to assist the fact finder.[114]

The holding in *Brandiferri v. Wawanesa Mutual Insurance Co.*[115] was in partial agreement with this proposition. In considering defence counsel's submissions that certain (non-treating-doctor) expert reports were "not formally or substantively compliant with rule 53.03"[116] in a case that had begun prior to the amendments to the *Rules*, Justice Lauwers agreed that "[i]t is better if inadmissible evidence is simply not heard"[117] and that "[t]he law is clear that an expert who lacks impartiality and independence should be disqualified".[118] Justice Lauwers made a point of nothing that this law pre-dates the amended *Rules*.[119] At the same time, however, "the degree of impartiality and independence required of an expert has always been and will continue to be an open question to be explored in cross-examination."[120] Justice Lauwers ultimately found insufficient evidence that there was bias, despite certain questionable wording in the reports, and admitted the reports with the caveat that "[i]n the future, Mr. Fisher and experts like him will

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[113] 2011 ONSC 4105 [*Gardner*].
[114] *Ibid* at para. 13.
[115] 2011 ONSC 3200 [*Brandiferri* 2]. This is a different *Brandiferri* than the one cited earlier in this paper; they are different decisions from the same proceeding.
[116] *Ibid* at para. 3.
[117] *Ibid* at para. 31.
[118] *Ibid* at para. 34 (citation omitted).
[119] *Ibid* (citation omitted).
[120] *Ibid*.

need to adapt the style of their reports to more closely hue to the requirements of rule 4.1.01 and rule 53.03."[121]

Henderson v. Risi[122] is another case that, while it does not deal with medical experts, offers some reasons on point. In that case, an individual was being proffered as a financial expert to opine on certain share values and critique another expert opinion, but it was identified that he was a partner at a firm, and had a professional relationship, with an individual whose conduct as a trustee in bankruptcy was at issue in the proceeding.[123] The plaintiff suggested that the individual's expert evidence was inadmissible, in part on the basis of "institutional bias".

Justice S.N. Lederman discussed the standard for institutional bias, and discussed the Newfoundland Court of Appeal's holding in *Gallant v. Brake-Patten*[124] that reliability issues resulting from alleged institutional bias go to weight rather than admissibility.[125] The plaintiff submitted that as a result of the amendments to the *Rules* in Ontario, "there is a higher level of duty on an expert... than exists at common law".[126] But Justice Lederman rejected this proposition, holding that "[t]he new rule amendments and certification requirement impose no higher duties than already existed at common law on an expert to provide opinion that is fair, objective and non-partisan. The purpose of the reform was to remind experts of their already existing obligations."[127]

Furthermore, Justice Lederman held that the question of institutional bias "is best left to be a matter of weight and not admissibility."[128] His Honour allowed the witness to be an expert witness.

In *Carmen Alfano Family Trust (Trustee of) v. Pierstanti*,[129] which did not deal with medical experts, the Court of Appeal considered whether to overturn the decision of a trial judge not to admit expert evidence on the basis of bias. The court upheld the trial judge's decision, but set out the applicable approach as follows:

> In most cases, the issue of whether an expert lacks independence or objectivity is addressed as a matter of weight to be attached to the expert's evidence rather than as a matter of the

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[121] *Ibid* at para. 48.
[122] 2012 ONSC 3459, 111 O.R. (3d) 554 [*Henderson*].
[123] *Ibid* at paras. 3-10.
[124] 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77, leave to appeal to S.C.C. refused, [2012] S.C.C.A. No. 257 [*Gallant*].
[125] *Henderson*, *supra* note 123, at para. 14. *Gallant* discussed expert bias and admissibility more broadly, and observed, at para. 89, that "[w]hen a challenge to expert evidence is based on the expert witness having a connection to a party or an issue in the case or a possible predetermined position on the case, the essence of the challenge is that the evidence is not reliable because the expert has tailored his evidence to suit the position of the particular party or the expert's personal views. This kind of reliability is not an admissibility issue... [r]ather, it is an ultimate reliability issue".
[126] *Henderson*, *supra* note 123, at para. 16.
[127] *Ibid* at para. 19 (citation omitted). For discussion of the effects of the changes to Rule 53.03, see Adrian C. Lang & Paloma Ellard, "The recent amendments to the Rules of Civil Procedure: Changing rules and roles for expert witnesses" (2010) 29:1 Advocates' J. 15.
[128] *Henderson*, *supra* note 123, at para. 20.
[129] 2012 ONCA 297, 291 O.A.C. 62 [*Alfano*].

> admissibility. Typically, when such an attack is mounted, the court will admit the evidence and weigh it in light of the independence concerns. Generally, admitting the evidence will not only be the path of least resistance, but also accord with common sense and efficiency.
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> That said, the court retains a residual discretion to exclude the evidence of a proposed expert witness when the court is satisfied that the evidence is so tainted by bias or partiality as to render it of minimal or no assistance. In reaching such a conclusion, a trial judge may take into account whether admitting the evidence would compromise the trial process by unduly protracting and complicating the proceeding: see *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 91. If a trial judge determines that the probative value of the evidence is so diminished by the independence concerns, then he or she has a discretion to exclude the evidence.[130]

Conclusion

Treating doctors have been separated out as comprising a particular category of witness, distinct from "expert witnesses", but also distinct from general "fact witnesses". As has been discussed, there has been uncertainty surrounding what types of witnesses attract the stringent requirements of the amended *Rules*. Certain types of witnesses who have been held to necessarily attract those requirements are not conceptually dissimilar to treating doctors despite ostensible categorical differences. Attempts to clarify these distinctions are relevant to the issue of how the evidence of treating doctors is to be generally understood, and there is precedent suggesting that the best way to understand "treating doctors", especially under the new regime, is that they are a kind of "fact witness" who is permitted to adduce limited "treatment opinion" evidence. Insofar as they also are sought by a party to provide "litigation opinion" evidence, they must be Rule 53.03-compliant.

Treating doctors appear to not be automatically disqualified on the basis of non-impartiality because of their prior involvement with a litigation party. Their eligibility to offer litigation opinion will depend on the circumstances of the case.

While treating physicians have been conceptually parceled out of the controversy surrounding the application of Rule 53.03, their role is sufficiently analogous to others. The decision of the Divisonal Court in *Westerhof v. Gee* decision considers this issue and suggests it may be the case that there is no exception for treating doctors regarding when compliance with Rule 53.03 is required.

There appear to be two key questions in light of the clear disagreement between *Beasley* and *Filthaut*. The first is this: Is the application of Rule 53.03 based on the nature of the individual

[130] *Ibid* at paras. 110-111.

and their relationship to the litigation, or rather the nature of the evidence? The second is this: Does a distinction remain at law in Ontario between "treatment opinion" and "litigation opinion", and if it does, is it simply that "treatment opinion" must actually be fact evidence and "litigation opinion" is opinion evidence?

I do not think there is a clear answer to these questions, but Westerhof's approach would suggest that compliance with Rule 53.03 is required by the nature of the evidence, and that even for treating physicians, only fact evidence will escape the strict requirements of the rule. What might be called "treatment opinion" on this account must only involve evidence of the fact of a diagnosis, for example, rather than an inference that the doctor is offering the court for acceptance. That is to say, it is merely fact evidence.

The Westerhof case was recently argued in the Court of Appeal along with *Moore v. Getahun*. It is hoped that much needed clarity will be provided as to the ambit of evidence that can be elicited from witnesses who are not litigation experts but the nature of their testimony includes a certain amount of opinion evidence.