How to Work and Communicate Effectively with Experts to Build a Strong Evidentiary Record

Presented at The Canadian Institute's 13th Annual
Managing and Litigating Disability Insurance Claims

April 9 – April 10, 2013

William Simpson

Partner | Personal Injury Lawyer

2012 Lexpert® Rising Star Award Winner

Telephone: 519.672.4510
Toll Free: 1.800.263.5583
Email: wsimpson@lerners.ca
www.lernerspersonalinjury.ca

INDEX

Topic:

INTRODUCTION[1]

Most cases are not "clear-cut". I believe that most lawyers and claims examiners genuinely try their best to be objective and fair to their clients and/or employers. What sways the outcome of most cases is the strength of the evidentiary record. Put another way, the party with the most compelling evidence, in all of the circumstances, usually succeeds.

The evidence used in successful cases is not like fruit that grows from a tree and simply needs to be picked when needed. It must be sought out, cultivated, understood and presented. In short, putting together a winning evidentiary record is hard work.

This paper provides proven strategies for selecting the best expert witness and how to ensure you get a helpful opinion while maintaining your ethical responsibilities. In particular, this paper will focus on medical experts generally relied upon in disability claims.

ANALYSING EXPERT REPORTS

In "the old days", in a personal injury case, an expert witness would provide a written report and show-up later in court to expand upon its contents during oral testimony. The old days are over (or should be). Today, medical experts serve several functions:

(a) they help to identify the correct diagnosis and treatment regimen;

(b) they provide a short-term and long-term prognosis;

(c) they identify other potential medical issues that need to be examined or considered;

(d) they can comment upon, and where necessary, provide a critique of an opposing medical opinion;

(e) they put an opinion into context; for example, commenting upon the impact a condition may have on a person's ability to raise children or perform housekeeping responsibilities;

(f) they communicate their opinion in front of a court, or arbitrator, in a way that is easy to follow and understand; and

(g) they assist counsel by identifying areas of potential cross-examination in another expert witness and point out any vulnerabilities in their own possession.

---

[1] The author wishes to thank Cassandra M. Tarrataca, student-at-law, for her valuable assistance in the preparation of this paper.

Experts are retained because they have acquired special knowledge of the subject, which they undertake to testify about. The purpose of expert evidence is "...to assist the trier of fact to understand evidence outside of his or her range of experience so that a correct conclusion can be reached."[2]

Once classified as an expert, the witness is allowed to make inferences and state their opinion.[3] It is important, however, that the opinions offered relate to the witness' expertise: it is not appropriate for a physiatrist to give an opinion on a patient's mental health. Learning to analyse opposing counsel's expert reports for these kinds of "opinions" is just one key to obtaining a successful result for your client.

It is also important to realize that opinion evidence may properly be formed on the basis of second-hand evidence. In the context of long-term disability benefit claims, this second-hand evidence may come from other medical practitioners, vocational experts, or actuaries. This is to be differentiated from opinions given outside of an expert's area of specialised knowledge. In the former, the concluding opinion is one that falls within the expert's range of expertise. In the latter, the opinion formed does not.

RULE 53 AND THE IMPACT ON MEDICAL EXPERT TESTIMONY

In 2010, the *Rules of Civil Procedure* saw their most comprehensive change in twenty-five years. Justice Coulter Osborne championed these changes, in a report to the Ministry of the Attorney General.[4] Of special interest to this seminar are the changes made to Rule 53.03, relating to expert testimony. Rule 53.03 now reads as follows:

> **EXPERT WITNESSES**
>
> ***Experts' Reports***
>
> **53.03** (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference required under Rule 50, serve on every other party to the action a report, signed by the expert, containing the information listed in sub rule (2.1). O. Reg. 438/08, s. 48.
>
> (2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the

---

[2] *R. v D.(D.)*, [2000] 2 SCC.

[3] It is also required that the expert's evidence be admissible, as per the common law rules for admissibility established in *R. v Mohan* (1994), 114 DLR (4th) 419.

[4] Civil Justice Review, Report of the Honorable Coulter Osborne, QC, p. 76.

action a report, signed by the expert, containing the information listed in sub rule (2.1). O. Reg. 438/08, s. 48.

(2.1) A report provided for the purposes of sub rule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.

2. The expert's qualifications and employment and educational experiences in his or her area of expertise.

3. The instructions provided to the expert in relation to the proceeding.

4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

6. The expert's reasons for his or her opinion, including,

i. a description of the factual assumptions on which the opinion is based,

ii. a description of any research conducted by the expert that led him or her to form the opinion, and

iii. a list of every document, if any, relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 53) signed by the expert. O. Reg. 438/08, s. 48.

Schedule for Service of Reports

(2.2) Within 60 days after an action is set down for trial, the parties shall agree to a schedule setting out dates for the service of experts' reports in order to meet the requirements of sub rules (1) and (2), unless the court orders otherwise. O. Reg. 438/08, s. 48.

Sanction for Failure to Address Issue in Report or Supplementary Report

(3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,

(a) a report served under this rule; or

(b) a supplementary report served on every other party to the action not less than 30 days before the commencement of the trial. O. Reg. 348/97, s. 3.

Extension or Abridgment of Time

(4) The time provided for service of a report or supplementary report under this rule may be extended or abridged,

> (a) by the judge or case management master at the pre-trial conference or at any conference under Rule 77; or
>
> (b) by the court, on motion. O. Reg. 570/98. s. 3; O. Reg. 186/10, s. 4.

In addition to changing the default dates for the exchange of expert reports to 90, 60, and 30 days before pre-trial or settlement conference, the new Rule 53.03 attempts to curb expert bias by requiring the expert themselves to certify to the court that they will remain impartial and objective. This is done through signature of an "acknowledgment of expert's duty" form. An example Form 53 can be found as **Tab A**. The court has specifically rejected the notion that these changes simply codify the existing case law.[5] Moreover, if the expert is going to testify at trial, he or she must comply with this rule – regardless of when they wrote the report.

These changes came about after concerns from counsel on both sides of personal injury cases that major problems exist in Ontario surrounding the use of experts. Among the stated issues was the proliferation of experts, bias, and uncontrolled expert testimony. The issue was framed as follows by Justice Osborne:

> "...the vast majority of those consulted in the course of this Review identified the proliferation of experts as a significant problem that often leads to a battle of competing experts. Some observed that as soon as one party retains an expert, an opposing party is forced to retain an expert. The expert witness merry-go-round bears with it an advantage to a litigant who has significant financial resources."

The courts have repeatedly emphasized that impartiality and the provision of non-partisan evidence is of paramount importance in cases of medical-legal evidence.[6] This sentiment is again echoed in the recent amendments to the *Rules* by way of Rule 4.1. This change attempts to undermine expert bias, by stating:

> **DUTY OF EXPERT**
>
> **4.1.01** (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,
>
> (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. O. Reg. 438/08, s. 8.

---

[5] *Gutbir (Litigation guardian of) v University Health Network,* [2010] OJ No 4982.
[6] *Dennis v Ontario Lottery & Gaming Corp.* (2011), 2011 ONSC 7024.

Duty Prevails

(2) The duty in sub rule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged. O. Reg. 438/08, s. 8.

Justice Osborne noted in his report that the inclusion of this *Rule* would - at a minimum – cause experts to "pause and consider the content of their report and the extent to which their opinions may have been subjected to subtle or overt pressures."[7] The obvious pitfall to this new rule, however, is that there is no enforcement mechanism. Justice Osborne acknowledged this directly within his report. He contends that bias may be curbed with more subtle mechanisms, such as a reduction in income stemming from a chilling effect should the expert be openly criticized in a judgment.

It is for this reason that a treating physician will sometimes be disallowed from providing "expert" evidence.[8] In the example of a medical malpractice claim, the treating physician is under attack for alleged negligence. While he or she may testify as a factual witness, on things such as the patient presenting with high blood pressure or their pupil dilation, the physician will not be entitled to testify as to whether his or her actions in treating that patient were reasonable. Comparatively, in a long-term disability benefits claim, the treating physician often is the best witness to opine on the patient's diagnosis and prognosis. So long as he or she maintains objectivity in coming to this conclusion, Rule 53.03 seemingly allows his or her classification as an expert. Practically speaking, however, this may not happen regularly as a treating medical practitioner is required by their Hippocratic oath to treat and advocate for their patient. This oath may therefore allow one to reasonably assume partiality on the part of the treating physician.

It is an understatement to say that balancing the requirement of objectivity with the desire to successfully advocate your client's case is a difficult task to master. However, counsel should find comfort in the fact that a truly objective report lends credibility to your expert, and by extension, to your case. For this reason, it is also likely to be more persuasive to the trier of fact.

DRAFTING INSTRUCTION LETTERS TO MEDICAL EXPERTS

When drafting instruction letters to medical experts, the golden rule of good advocacy under the new Rule 53.03 regime is to remind them of their primary duty to the court. This duty requires an expert to provide specialized knowledge to assist the trier of fact in understanding scientific or

---

[7] *Supra*, note 3.
[8] *Gutbir*, *supra* note 4.

technical matters. The courts require the expert to be both impartial and independent, despite which party is paying their bill. The duties imposed upon witness experts have been distilled from a 1993 English decision.[9] Many Canadian courts have since adopted these principles.[10] These principles include:

- An uninfluenced and independent product created by the expert;
- Independent assistance to the court by objective and unbiased opinions of experts within their areas of expertise, which does not allow for this witness to act as advocate;
- A statement of the facts or assumptions used in basing their opinion;
- Acting as an independent aid to the court, an acknowledgment by the expert witness when a particular question or issue falls outside of their expertise; and
- An acknowledgment by the expert witness if their opinion cannot be fully substantiated due to a lack of available data.

In *Fraser v Haukioja*,[11] these principles are forcefully repeated when the court states:

> "At trial, the expert must be and appear to be independent of the party or counsel who retained the services of the expert and must demonstrate objectivity and impartiality in the analyses and opinions that she or he is allowed to give. Because the opinions stated by an expert are predicated upon expertise that the court does not possess, the court must be confident in relying upon the expert to provide a thorough, balanced and technically sound analysis. *Independence and impartiality; the court expects nothing more and it will accept nothing less."* (emphasis is mine)

A sample copy of an instruction letter I have drafted, which may be of use, can be found at **Tab B**.

---

[9] *National Justice Compania Naviera S.A. v Prudential Assurance Co. Ltd ("Ikarian Reefer")*, [1993] 2 Lloyd's Rep. 68 at 81-82, rev'd on other grounds but aff'd on this point [1995] 1 Lloyd's Rep. 455 at 496 (CA).

[10] *Bank of Montreal v Citak*, [2001] OJ No 1096 at para. 1; *Rudberg v Ishaky*, [2000] OJ No 376 (SCJ); *Jacobson v Sveen*, [2000] AJ No 365 at paras. 6, 32; *Beasley v Barran*, [2010] OJ No 1466 at para. 55.

[11] [2008] OJ No 3277 (Sup. Ct.) at paras. 138-140 [*Fraser*].

COMMUNICATION WITH EXPERTS

An additional change to the *Rules* comes by way of Rule 53.03(2.1)(3). This Rule ensures that experts include in their reports the instructions provided to them by the party who has hired their services. While the codification of this requirement is new, the rule itself is not. Ontario case law suggests that judges did not always consider instructions provided to an expert to be privileged.[12] In any event, the codification of this requirement means disclosure should include letters, a summary of telephone communications and a summary of any meeting between the two parties. In *Fraser*, an expert's impartiality was called into question when it was revealed that he had several hours of telephone conversations with counsel before trial. Moving forward, the question seems to be: how much of those discussions will be relevant?

In the most extreme of examples, *MacDonald v Sun Life Assurance Co. of Canada*[13] serves as a cautionary tale. The court found that the testimony of the medical expert, reading from his report from the witness box, differed in a material way from the medical report submitted to the parties prior to trial and provided to the court at trial. It is obvious that the reports should have been identical. After much investigation and review, the court discovered that the physician had indeed conducted the examination for which he was retained; however, he had then simply submitted his draft report to the company which had engaged him to conduct the examination, purportedly to correct any spelling or grammatical errors prior to its submission to court. The danger in such action lies in what may be done with the report after it is out of the medical expert's hands. In this case, the company revised the doctor's report, including some of his findings and conclusions, affixed a rubber stamp of the physician's signature to the document - apparently without the physician's knowledge or permission - and submitted it to the court as the doctor's official medical report.

The result of this discovery was that the court excluded the evidence of the doctor. In making its ruling, the court used very strong language that amply demonstrates the importance of the relationship between medical and legal professionals, and in particular how vital it is that expert witnesses provide independent and unbiased opinions, regardless of who has retained their services.

When corresponding with a potential expert witness, it is imperative that counsel does not appear to persuade them in any manner when coming to their conclusions. In *Carmen Alfano*

---

[12] *Fraser*, *supra* note 7.
[13] (2005), 154 ACWS (3d) 4977 (SCJ) [*MacDonald*].

Family Trust v Piersanti,[14] the defendant's forensic accounting expert was rejected as a result of the court's finding of bias on the part of the expert. The e-mail correspondence between the expert and the defendant's counsel was tendered as evidence, and based on this review, the court found that the expert had tailored his analysis on the theories advanced by defence counsel.

DETERMINING WHAT INFORMATION TO PROVIDE PRIOR TO THE ASSESSMENT

This can be another tricky task, as counsel is well advised to note the uncertainty surrounding what information from an expert's file must be disclosed to the other party. It is likely that the file will be ordered for production prior to trial, in an attempt to facilitate opposing counsel in preparing for cross-examination. As such, counsel should ensure that all information provided to the expert prior to assessment is suitable for disclosure. Put another way, write nothing to an expert witness that you would be embarrassed to read later on the front page of the *Globe & Mail*.

On the other end of the spectrum, it is trite to point out that production encourages early settlement. In the end, save for the application of an exclusionary rule of evidence, it is likely that the information will need to be disclosed prior to trial. It may be advantageous for counsel to provide any relevant information to the expert in an attempt at reaching this early resolution. This approach more properly gives meaning to the spirit of the *Rules* to secure the "just, most expeditious and least expensive determination of every civil proceedings".[15]

SOME PRACTICAL CONSIDERATIONS

I am aware of an increasing number of lawyers acting for plaintiffs who are asking expert witnesses to "hold their accounts" until a case resolves. In my view, this is a very risky step to take in any case. An expert witness who appears at trial, or in an arbitration hearing, is extremely vulnerable under cross-examination to the suggestion that his or her opinion is influenced by the financial outcome of a case when it is disclosed that their account is unpaid. This becomes an added litigation risk that is usually unnecessary. I always want my expert witnesses to be paid promptly after they render their report so that the expert witness is financially disconnected from the eventual outcome.

---

[14] 2009 CarswellOnt 1576 (SCJ).
[15] Rule 1.04(1) of the *Rules*.

In my experience, expert witnesses loath being taken by surprise. If surveillance evidence is disclosed by the other side, immediately provide it to your expert witness and ask for confirmation in writing that the content of the surveillance does not alter his or her opinion. If the surveillance does cause a change in opinion than make sure that change is communicated to any other related experts. For example, if defence surveillance causes a physiatrist to change his or her opinion in writing, then make sure that changed opinion is sent to the expert preparing the future care report and to the expert who provided a valuation of the future care report. A change in underlying medical opinion will usually have a ripple effect on other expert witnesses. Be pro-active in bringing to an expert's attention the kind of information that may cause their opinion to change.

Keep in mind that not all experts have experience in court and that many will appreciate and benefit from some degree of preparation prior to trial.

Beware the industry of experts: the keen observer will note a proliferation of assessment companies who provide a roster of "experts" in almost every kind of case. Relying upon an assessment company to "select" the right expert for your case can be dangerous. Before retaining an expert witness ask to review his or her *curriculum vitae*. If you do not understand it fully then it is likely that a court or arbitrator will not understand it either and questions need to be asked and answered before going further. If an expert medical witness is long-removed from the actual practice of medicine consider whether a physician more active in actual patient care would be appropriate and increase that expert witnesses' objectivity.

One of the most effective expert medical opinions I have received recently came from a younger orthopaedic trauma surgeon who quoted certain medical journals in support of the future prognosis he provided. Consider whether there is any expert medical research that further bolsters your expert's opinion and discuss with your expert how best to incorporate it into his or her opinion. It may be nicely dealt with in a supplementary report, which could be highly influential at trial. The opinion of an expert medical witness is less likely to be isolated or compromised when it is supported by peer-reviewed research.

The *Rules* now require that expert reports be served in advance of a scheduled pre-trial conference. Yet, in my experience, very few pre-trial memorandums appropriately summarize the evidence to come from an expert witness at trial. Too often, pre-trial discussions focus on a mechanism of injury and then jump to a discussion of pecuniary damages. If the pre-trial conference is to have any chance of success, then it is incumbent upon counsel to place the

expert evidence at the heart of the pre-trial discussion and to persuade the pre-trial judge to endorse it.

CONCLUSION

If this is a new area of legal practice for you, or one in which you wish to practice more heavily, start by understanding the context into which Rule 53 was written. Get behind the spirit of the new rule and roll-up your sleeves to marshal the evidence you need to succeed on behalf of your client. Hard work is almost always rewarded.

TAB A

FORM 53

Courts of Justice Act

ACKNOWLEDGMENT OF EXPERT'S DUTY

(General heading)

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

NOTE: This form must be attached to any report signed by the expert and provided for the purposes of subrule 53.03(1) or (2) of the *Rules of Civil Procedure*.

RCP-E 53 (November 1, 2008)

William A. G. Simpson
Direct Line: 519.640.6366
wsimpson@lerners.ca

March 6, 2013

FILE NUMBER 98391-00001

Dr. Joe Doe
123 Any Street
Anywhere, ON N6B 2R3

Dear Dr. Doe:

Re: Our Client: John Smith
D.O.B.: April 9, 1969
Assessment: April 10, 2013

We confirm and thank you in advance for agreeing to assess our client, John Smith.

Requested Assistance:

At this time, we wish to retain you to prepare a report that answers the following questions:

1) What diagnosis, if any, is appropriate for Mr. Smith's current psychological condition?
2) What is your short-term prognosis with respect to Mr. Smith's condition?
3) What is your long-term prognosis with respect to Mr. Smith's condition?
4) Is there any treatment, including counseling or suggested medication, that you would recommend at this time?
5) Mr. Smith has access to Long-Term Disability Benefits from Manulife. These benefits are payable under the contract of insurance if Mr. Smith satisfies the definition of "totally disabled", which means:

> Totally disabled means a restriction or lack of ability due to an illness or injury which prevents you from performing the essential duties of:
>
> - your own occupation, during the Qualifying Period and the 2 years immediately following the Qualifying Period
> - any occupation for which you are qualified, or may reasonably become qualified, by training, education or experience after the 2 years specified above

In your opinion, does Mr. Smith meet the definition of "totally disabled" under the Manulife Policy?

Our Relationship and Your Role as Expert

As an expert, you have certain duties and responsibilities. You will be providing us with advice and assistance. Our communications with you are initially privileged, meaning that they will not be available for review by the other parties involved in the lawsuit. However, you should assume that, at some point, that privilege may be lost and the details of those communications will become public and available to other parties and the Court. We would ask that you keep this in mind when you prepare notes, records, e-mails or other correspondence about this matter.

Changes to the *Rules of Civil Procedure*

Please be advised that there are new changes to the *Rules of Civil Procedure* (which govern most of the litigation in Ontario), which come into effect on January 1, 2010. Pursuant to those changes, there are new obligations placed on experts, particularly in terms of the contents of expert reports. The *Rules* also emphasize the duties by experts to be fair, impartial and objective and to render assistance to the Court, which duties prevail over any duties owed to our firm, as the retaining party.

As a result of these changes, expert reports are now specifically required to include the following:

1. Your name, address (which can be your business address) and your area of expertise;

2. Your qualifications, employment and education experiences in your area of expertise (a summary in the report will suffice, with more detail in your *Curriculum Vitae*);

3. The instructions that were provided to you;

4. The nature of the opinion that was sought of you, and the issue in the litigation to which it relates;

5. Your opinion on the issue. If there is a range of opinions given, a summary of the range, as well as your reasons for your opinion being in the range, is required;

6. Your reasons for the opinion, including:

   (a) a description of any factual assumptions you made;

   (b) a description of any research you conducted to lead you to form your opinion;

   (c) a list of the documents you relied on in making your opinion; and

7. The *Acknowledgment of Expert's Duty* form (Form 53), which is enclosed wherein you will acknowledge that you understand that these are your duties. The Court requires that you complete the form and attach it to your report.

If you have any questions about your role as an expert, please contact me and I would be pleased to review it with you.

In addition to the above, I would ask that you also kindly provide us with your current *Curriculum Vitae*. In providing your *Curriculum Vitae*, please take into consideration that all personal information be eliminated for personal safety and security reasons. Accordingly, we suggest that you refrain from including the following information: birth dates, home address, home e-mail address, home telephone number, identification of spouse or children, social insurance number, any registration numbers, citizenship/immigration information and any specifics on research funding.

If you have any questions or concerns about the nature of our request or the above noted requirements, please do not hesitate to contact me.

If necessary, Mr. Smith can be reached at 1 Lawyers Avenue, P.O. Box 1224, Lawyerville, ON, 519-123-4567.

As always, we appreciate your assistance in this matter.

Yours truly,

William A. G. Simpson
WAGS/cf