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THE USE OF NO-FAULT REPORTS BY A TORT DEFENDANT

BEASLEY REVISITED, ONE YEAR LATER

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Date: November 10, 2011

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Introduction

The case of *Beasley and Scott v. Barrand*,[1] decided by Moore J. of the Ontario Superior Court, appears at first blush to be a bar to the use at trial by a tort defendant of expert reports commissioned by a no-fault insurer. However, a careful review of this case reveals that it provides guidance on the proper practice to be followed by defence counsel when they seek to do so. Since 2010, the *Beasley* case has been considered and distinguished by further caselaw, including the cases of *Grigoroff v. Wawanesa Mutual Insurance Co.*[2] and *McNeill v. Filthaut.*[3] Those cases provide alternate means by which a defendant can rely on the evidence of doctors retained by the no-fault insurers.

Beasley and Scott v. Barrand

(a) Facts

The action arose from a motor vehicle accident that occurred when the plaintiff was the operator of a motorcycle involved in a collision with a car. Before the jury was selected, defence counsel applied for a ruling on the issue of whether certain expert medical witnesses retained by the no-fault insurer of the plaintiff could be called by a tort defendant to provide expert opinion evidence at trial.

(b) Issue

The relevant Rule governing the admissibility of expert reports in civil proceedings is Rule 53.03 of the *Rules of Civil Procedure.* Rule 53.03 was recently amended on January 1, 2010.

The central dilemma faced by Moore J. in this matter was whether the 2002 / 2003 medical reports, which were prepared for the purposes of the plaintiff's no-fault claim, were in compliance with the recently amended Rule 53.03.

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[1] 2010 ONSC 2095.
[2] 2011 ONSC 2279.
[3] 2011 ONSC 3996.

The legal test which Moore J. considered in order to determine whether to admit expert testimony of the three experts was whether or not the probative value of the opinion evidence proffered outweighed the prejudicial effect to the plaintiff. The defendants in this case asserted that the three medical experts held expert opinions that were highly probative.

Rule 53.03(3) provides that an expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set down in a report. Thus, in making his determination on the probative value of the expert testimony, Moore J. had to undertake an analysis of the doctors' reports themselves and determine whether those reports met the requirements mandated in Rule 53.03.

After considering various factors, Moore J. held that the expert reports were more prejudicial than probative, thereby disallowing the medical experts from testifying at trial.

(c) Failure to Comply with Rule 53.03

The fact that the reports were not in compliance with Rule 53.03 of the recently amended *Rules of Civil Procedure*, was undoubtedly the most important factor in Moore J.'s holding that the expert reports were more prejudicial than probative. In the opinion of Moore J., one of the important reasons for the Rule change was to eliminate the practice of tendering opinion evidence of questionable value at trial, particularly where the evidence was created in another proceeding at the request of a party who was not before the court to address the matter.

Pursuant to Rule 53.03 a party who intends to call an expert witness at trial shall serve on every other party to the action a report containing all of the information listed in sub rule 2.1.[4]

In holding that the expert reports themselves did not comply with Rule 53.03, Moore J found a number of problems with their content. He held that none of the three doctors stated in their reports whether they were qualified to opine, on the basis of the information and documentation available to them, that the plaintiff was physically or psychologically capable of returning to every aspect of his activities of daily living and pre-accident employment. Also, efforts were not made to bring the three doctors into compliance with Rule 53.03. For example, none of the doctors had completed a Form 53 Acknowledgment of Expert Duty Form. However, Moore J. noted that completion of this form alone was inadequate for the purposes of compliance with Rule 53.03.

In considering the test of the whether an expert report is more probative than prejudicial, Moore J. assessed various factors associated with the expert reports. The question for Mr. Justice Moore was whether or not prejudice was outweighed by the probative value of the evidence to be called. In the view of Moore J. the reports at issue were problematic in a number of respects.

The reports at issue were authored approximately seven years prior to Moore J.'s decision. Moore J. held that the assessments can be of little, if any, help to the jury in assessing the plaintiff's medical and vocational progress over the past ten years.

[4] The specific requirements of sub rule 2.1 are as follows: (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, a description of the factual assumptions on which the opinion is based, a description of any research conducted by the expert that led him or her to form the opinion, and 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.

Moore J. also found it significant that these doctors were not retained by a party to the present proceeding, and that their reports were not prepared in the context of the current dispute. Moore J. further questioned the probative value of these reports on the basis that they were not formed in the course of providing primary care to the plaintiff. He further opined that none of the opinions provided were determinative of or central to the outcome of the litigation. Moore J. also found fault with the failure of the doctors to state the reasons or basis for their opinions.

(e) Roadmap to Using No-Fault Reports

In his conclusion, in light of the above cited prejudice to the plaintiff and the many problems with the reports, Moore J. ruled to exclude the reports. However, far from barring the admissibility of such reports in all future cases, at page 14 of his decision he wrote, "I am not to be heard to state that experts retained by accident benefits insurers cannot give opinion evidence in a tort action; rather, I say that such experts should first comply with Rule 53.03".

Instead, Moore J. provided a roadmap by which a tort defendant might successfully introduce the evidence contained in reports commissioned by a no fault insurer. In suggesting this route, it is significant that Moore J. left the door open for defence counsel to successfully introduce these reports in the future.

Specifically, it was suggested that in order to meet the technical requirements of Rule 53, the expert could be requested to prepare a supplementary report in compliance with the Rule. In outlining his suggestion, Moore J stated that "the defendants could invite the doctors, at the defendant's expense, to write meaningful, Rule 53.03 compliant, reports to plaintiff's counsel, which, if relevant and producible, could help me understand any opinions they might be able to express on issues between the parties before this court". Practically speaking, ensuring such compliance would require sending the expert a new and updated medical brief and the issuance of a supplemental report meeting each of the specific requirements of Rule 53.

Regardless, even if such reports were deemed not to have been prepared for a party to the action, the relevance of such a report to the action might, depending upon the facts, be a key factor in favour of admission. Specifically, while in this case, the reports at issue were aged and flawed in several respects, if the reports at issue could be shown as directly probative and comparatively current (that is, in compliance with Rule 53.03), there would be a strong argument that such reports would be significantly more probative than prejudicial and should not be excluded.

Subsequent Caselaw

Since the decision in *Beasley,* the current jurisprudence relating to whether an expert witness must comply with Rule 53.03 is in a state of flux. Several decisions have distinguished *Beasley* on its facts, resulting in uncertainty as to the appropriate circumstances in which a court will permit the use of no-fault medical reports.

Grigoroff v. Wawanesa

The case of *Grigoroff v. Wawanesa Mutual Insurance Co.,*[5] involved a plaintiff who was seeking payment of various types of Accident Benefits. At trial, the defendant retained all three experts from the related tort action and sought to have their testimony and reports admitted into evidence in the Accident Benefits trial. All three experts' reports pre-dated the amendments to Rule 53. The plaintiff brought a motion to exclude the expert evidence the defendant intended to elicit at trial.

The plaintiff argued that the intent of the amendments to rule 53 was to eliminate evidence from individuals not qualified to opine on issues in a trial or that would be of limited or questionable value. The defendant argued that the purpose of Rule 53.03 is to prevent the old style "trial by ambush," and further noted that the *Beasley* decision does

[5] 2011 ONSC 2279.

not stand for the proposition that experts retained in one action can never give expert opinion in a related proceeding.

The facts in this case were directly opposite to those in *Beasley.* The case involved an Accident Benefits trial in which the plaintiff was seeking to have the expert reports from the related tort action excluded. *Beasley* involved a tort trial in which the defendant was seeking to have the expert reports from the related Accident Benefits action included. In *Grigoroff*, the court allowed expert evidence and reports that did not technically comply with Rule 53.03. The court distinguished *Beasley* on its facts and held the expert medical reports in question were in fact relevant to the ultimate issue before the court. As such, the expert opinions would be of great assistance to the jury in understanding the nature of the injuries sustained and their consequences.

The court argued that it could relieve technical requirements in the interests of justice and there was no resulting prejudice to the plaintiff by the admission of these expert opinions, since the plaintiff had been in possession of reports for over a year.[6] Wilson J. agreed with the statements of Moore J. in *Beasley*, that experts should comply with Rule 53.03 and it will then be determined whether the expert retained by accident benefits insurer can give opinion evidence in a tort claim.[7] However, in this case, Wilson J. goes on to state that if an expert report does not comply with Rule 53.03, but is compelling and relevant then it should still be admitted as expert evidence.[8]

[6] Ibid., at par. 23.
[7] Ibid., at par. 22.
[8] Similarly in *Brandiferri v. Wawanesa Mutual Insurance* (2011) ONSC 3200, while the court stated that the new rules are to have retrospective effect, it found that rules 1.04 and 2.03 together gave it the discretion to relieve the plaintiffs from strict compliance with Rule 53.03 where trial fairness so demands (at para. 15).

Slaght v. Phillips

In the unreported ruling of *Slaght v. Phillips,*[9] another motor vehicle accident tort trial, the court distinguishes between treatment opinions and litigation opinions. The plaintiff wanted to call as an expert witness a vocational rehabilitation consultant who treated the plaintiff under coverage provided by the accident benefits insurer. The defendant objected to the admission of this expert evidence on the basis of non-compliance with Rule 53.03. Turnbull J. distinguished this case from *Beasley* on the basis that the expert in question was a treating specialist, and thus was providing a "treatment opinion" as opposed to a "litigation opinion" (a distinction made in the case of *Burgess v. Wu*[10]*).* In the view of the court, the rationale behind Rule 53.03 is aimed at "litigation opinions," those expert opinions retained for the sole purpose of evaluating a plaintiff for the litigation, as opposed to "treatment opinions." In this case, the court held that this "treatment opinion" should be allowed even if it did not strictly comply with Rule 53.03. Thus, this case distinguishes *Beasley*, as it stands for the proposition that "treatment opinions," regardless of the source, should be allowed as expert testimony even if they do not fully comply with Rule 53.03.

Anand v. State Farm

In the unreported case of *Anand v. State Farm,*[11] the court ruled that it is not improper for persons who have direct knowledge of the plaintiff's condition to testify about those facts at trial, even if the knowledge is obtained through an Accident Benefits claim-based examination. The court however held that the AB assessors may be called to testify in the tort trial, but only as fact witnesses and not as expert witnesses. In this case, counsel had to confine their examinations of these witnesses to their observations and could not ask them their conclusions and opinions.

[9] (May 18, 2010), No 109/07 (Ont. S.C.J.).
[10] (2003) 68 O.R. (3d) 710 (Ont. S.C.J.)
[11] April 23, 2010, (Ont. S.C.J.)

McNeill v. Filthaut

The recent case of *McNeill v. Filthaut*[12] further expands on several key issues from the *Beasley* case. *McNeill* arises out a motor vehicle accident. The defendant in the tort action sought to call as expert witnesses some of the expert professionals retained by the accident benefit insurer of the plaintiff to give both factual and opinion evidence at trial. In *McNeill*, the defendant brought a motion to determine whether they could call these experts as witnesses at trial. Each of those experts had been retained to complete AB assessments by the AB insurer who was not a party to the action.

The defendant argued that rule 53.03 applies strictly to experts engaged by parties to the litigation, and does not apply to experts engaged by non-parties. The plaintiff argued that Rule 53.03 applies to all experts, regardless of whether they have been engaged by non-parties to the litigation.

The court disagreed with the decision in *Beasley* and held that Rule 53.03 does not apply to experts engaged by non-parties to the litigation, namely accident benefit assessors.[13] The court states that Rule 4.1.01, Rule 53.03 and form 53 provide a comprehensive framework for dealing with expert witnesses at trial and that the requirements of Rule 53.03 were intended to and should only apply to experts that are engaged on behalf of a party. Further, the accident benefits insurer was not a party to the litigation. It had no interest in the tort proceeding and did not stand to be affected by the outcome.

The court notes that the definition of "party" cannot be reasonably interpreted to extend to or include accident benefit insurers. Such an interpretation would extend the reach of the *Rule* beyond that which is required to achieve its purpose. It would have the potential effect of excluding highly probative evidence from the trier of fact, in circumstances where there are no valid concerns regarding expert bias because the experts were not

[12] 2011 ONSC 3996.
[13] Ibid., at par. 7.

retained by the parties. Moreover, accident benefit assessors are bound by their own internal guidelines which impose an obligation of neutrality.[14]

Thus, the defendant was free to call at trial the experts retained by the accident benefits insurer.

With regards to *Beasley*, Macleod-Beliveau J. is mindful that she is disagreeing with its finding. However, the judge notes that in her reading and interpretation of rule 53.03, its application is limited to experts engaged by or on behalf of a party. The ultimate purpose of rule 53.03 is to limit and control the proliferation of experts retained by litigants by imposing on those experts a duty of fairness, objectivity, and non-partisanship to the court, which prevails over any other obligations owed by the expert to a party. The introduction of the new Rule about expert witnesses is an effort to eliminate the use of "hired guns" or "opinions for sale" in civil litigation, In the past, this has resulted in potentially biased expert evidence being given at trial.[15]

Conclusion

It is clear that there are divergent lines of cases dealing with the issue of how no-fault expert reports can be admitted into evidence. From a defence standpoint, the recent caselaw represents a favourable shift. That caselaw provides a tort defendant with additional guidance and legal mechanisms by which the evidence of a no-fault medical expert can be relied upon.[16] For instance, in the *Grigoroff* decision, Wilson J. finds that an expert report need not technically comply with Rule 53.03 if its probative value outweighs its prejudicial effect. However, it is important to keep in mind that the *Beasley*

[14] Ibid., at par. 35.

[15] Ibid., at par. 44.

[16] For example, if an expert report does not comply with Rule 53.03, but is compelling and will be relevant and helpful to the case at issue, then it should still be admitted as expert evidence (*Grigoroff*). "Treatment opinions" that are not in compliance with Rule 53.03 can be admitted (*Slaght*). Rule 53.03 does not apply to experts engaged by non-parties to litigation, namely accident benefit assessors, who should be permitted to testify at trial if their testimony is relevant to the tort case (*McNeill*).

decision has not been overturned by a higher court. As such, the "roadmap" set out in that case continues to be applicable. That is, *Beasley* provides a formula for lawyers to follow in terms of expert reports and compliance with Rule 53.03 that is applicable regardless of whether the subsequent caselaw follows the *Beasley* line of argument.

Given the foregoing, a tort defendant could theoretically take steps which are in compliance with *Beasley* and the subsequent case law. In doing so, a tort defendant should a) file a Notice of Intention to rely on the no-fault report as soon as practicable, b) send the no-fault assessor a copy of the updated medical reports and have him/her complete a supplemental report, c) ask the no-fault assessor to execute a Form 53, d) ensure that the expert's report speaks to a relevant issue in the tort action and e) make submissions that the report and its conclusions would be useful to the trier of fact. In this way, the tort defendant would have their bases covered in the event that the judge hearing their motion prefers one line of cases over the other.