[Davies v. Clarington (Municipality), [2016] O.J. No. 768]

Ontario Judgments

Ontario Superior Court of Justice

M.L. Edwards J.

Heard: February 4, 2016.

Judgment: February 12, 2016.

Court File No.: 1075/2000

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Between Bonnie Davies, Plaintiff, and The Corporation of the Municipality of Clarington, VIA Rail Canada Inc., Canadian National Railway Company, Timothy Garnham, The BLM Group Inc., Apache Transportation Services Inc., Blue Circle Canada Inc., and Hydro One Networks Inc., Defendants

(49 paras.)

Case Summary

Civil litigation — Civil evidence — Opinion evidence — Expert evidence — Application by the defendants for a ruling with respect to whether the plaintiff must seek leave to call more than three treating physicians who would offer opinion evidence — The plaintiff sought to call 18 medical experts — The plaintiff would need leave to call treating doctors who would give opinion evidence going beyond the history taken from the plaintiff, the treatment offered, and their diagnosis and prognosis — The ultimate issue was whether the evidence was necessary to assist the trier of fact, particularly where they overlapped as to subject matter — Evidence Act, s. 12.

Application by the defendants for a ruling with respect to whether the plaintiff must seek leave to call more than three treating physicians who would offer opinion evidence. The treating physicians, mostly from Poland, would offer expert evidence as "participant experts". The defendants argued that, where they intended to offer opinion evidence beyond their direct treatment of the plaintiff, they should be subject to the s. 12 of the Evidence Act, which required that leave was required to call more than three expert witnesses. The plaintiff argued that the participant experts were not caught by the three-expert rule. The plaintiff claimed that there was a clear differentiation between an opinion expert and a participant expert. The plaintiff planned to call 18 experts, some of whom were in the same fields. The trial was in its fourteenth week, and evidence would be heard for a further eight to 10 weeks.

HELD: Application allowed.

The plaintiff must seek leave to call more than three participant experts, where their evidence would offer opinion evidence. The plaintiff would not require leave to call, as participant experts, treating doctors who would give evidence as to the history taken from the plaintiff, the treatment offered and their diagnosis and prognosis. The ultimate issue was whether the evidence of all of the participant experts was necessary to assist the trier of fact, particularly where they overlapped as to subject matter. The volume of material relating to medical opinions in this case was immense, and the plaintiff sought to call 18 medical experts. Further, this trial had already been very lengthy, at 14 weeks, and another eight to 10 weeks of evidence was planned. Requiring leave to call more than three participant experts who would give opinion evidence would therefore be reasonable.

Statutes, Regulations and Rules Cited:

Evidence Act, R.S.O. 1990, s. E.23, s. 12

Rules, Rule 53.03

Counsel

Jeffrey W. Strype and Kyle Smith, for Class Member Zuber.

James M. Regan, Q.C. and Angelo Sciacca, for the Defendants Apache Specialized Equipment Inc., Apache Transportation Services Inc., and Timothy Garnham.

Weston Pollard, for the Defendant Hydro One Networks Inc.

David Merner, for the Defendants VIA Rail Canada Inc. and Canadian National Railway Company.

Alon Barda, for the Defendant BLM Group Inc.

REASONS FOR RULING

M.L. EDWARDS J.

Overview

1 The plaintiff was a passenger on a VIA Rail passenger car when the train derailed on November 1999. He claims for damages arising out of the injuries he says he suffered in that accident. Liability is not an issue this court is concerned with. The sole issue is damages.

2 The trial commenced in November 2014; resumed in May 2015 and again in November 2015. The most recent sittings commenced in January 2016, and the expectation is that this trial will continue in May and June of this year. To this point in the trial, the court has heard from the plaintiff and a number of lay witnesses. The court has yet to hear from any experts. The trial has, to date, consumed approximately 10 weeks of court time, with an anticipated 8 to 10 weeks of further trial time. In a recent Court of Appeal decision, that in part dealt with the correctness of a judge's charge to a criminal jury, Watt J.A. stated: "In a criminal prosecution before a jury, the parties, including but not only the person charged, are entitled to a ***properly***, but not a ***perfectly*** instructed jury..." **[Emphasis added]** (See *R. v. Bradey*, *2015 ONCA 738*, *127 O.R. (3d) 721* at para. 127)

3 Those comments, while made in the context of a criminal jury trial, are instructive in the context of a civil trial. The parties to a civil trial are entitled to a fair trial. They are not, in my view, entitled to a trial that will hear every relevant piece of evidence, where the evidence becomes repetitive of other evidence already heard. In short a trial must be fair, but the evidence - which is in the control of the parties, must be placed before the court in a cost effective and timely fashion.

4 The defendants seek a ruling on the interpretation of *Westerhof v. Gee Estate*, 2015 ONCA 206, 124 O.R. (3d) 721, specifically as it relates to what are now described by the Court of Appeal in *Westerhof*, *supra*, as "participant experts who profer opinion evidence". The defendants argue that "participant" experts who profer opinion evidence are caught by the three expert rule set forth in s. 12 of the Ontario *Evidence Act*, *R.S.O. 1990, c. E.23*. The defendants argue that the plaintiff must seek leave of the court to call more than three expert witnesses.

The Facts

5 The evidence of the plaintiff alone occupied nine weeks in chief and cross examination. To be fair to the plaintiff, some of that time was not continuous due to his health reasons. Regardless, when it became evident that the plaintiff's evidence was going to take much longer than the norm, I decided to engage counsel in trial management discussions and ultimately directed that the balance of the plaintiff's case in chief would be done by affidavit. A witness would be called. His affidavit would be filed, and the witness then tendered for cross examination.

6 The plaintiff is a citizen of Poland, and many of the witnesses who have testified to date are Polish and reside in Poland. Their evidence has been heard via video link from Warsaw. The video link has, for the most part, been no impediment to the orderly conduct of the trial. In short, it has been just as effective as if the evidence had been heard live in the courtroom.

7 The plaintiff has testified to the many injuries he says he has suffered from due to the railway accident. He has seen numerous doctors both in Poland and in Canada. The plaintiff intends to call experts who have specialties in the following areas: psychology, neurology, physiarty, occupational therapy, neuropsychiatry, orthopaedics, neuroradiology, accounting, Polish taxation, pipeline and tariffs.

8 Prior to the hearing of this motion, I asked for, and was provided with, the parties extensive Experts Briefs, as well as extensive Medical Briefs. It is also worth noting that to this point in the trial the court has entered approximately 230 exhibits, many of which are 3- ring binders containing a significant volume of material. Having reviewed the material given to me, it would appear that the plaintiff has 18 "Litigation Experts", i.e. experts who have been engaged by plaintiff's counsel to provide opinion evidence, and 18 "participant experts" or what might be more commonly known as treating doctors.

9 In order to get a full appreciation of the multitude of proposed experts -- i.e. the combined total of litigation experts and participatory experts the plaintiff has reports from, and/or clinical notes and records from:

a) three experts who will address the economic losses of the plaintiff, or what may be more commonly referred to as the damages for past and future loss of income;

b) four orthopaedic surgeons and one orthopaedic "traumatologist";

c) five neurologists;

d) one neuropsychologist;

e) one neuroradiologist;

f) two neurosurgeons;

g) one psychologist;

h) one physiatrist;

i) one occupational therapist;

j) one chiropractor;

k) one kinesiologist;

l) four rehabilitation specialists;

m) two urologists;

n) three physiotherapists;

o) one internal medicine specialist; and

p) one laryngoloist.

Position of the Defendants

10 The defendants brought this motion seeking an order that would clarify if the plaintiff requires leave to call more than one expert per issue, as it particularly relates to the participatory experts -- primarily as it relates to treating doctors from Poland. While no real issue is taken with respect to the right of the plaintiff to call a treating doctor from Poland as a fact witness, issue is taken when that fact witness elects to offer opinion evidence that goes beyond what is routinely expected from a treating doctor. By way of example, Mr. Regan took me to the report of Dr. Baranowski dated October 24, 2015. Dr. Baranowski is a treating neurosurgeon. In his report, amongst other things, he states:

> I fully agree with the opinions of Prof. Michael P. Rathbone of McMaster University...The clinical symptoms experienced by Mr. Krzysztof Zuber have a fully substantiated post-traumatic background relating to the serious accident of 23 November 1999. My 30 years' experience of spine diseases and injuries treatment allows me to fully agree with opinion of Professor Bob Karabatsos. The accident caused permanent decrease in the quality of the patient's personal, professional and social life and its further consequences may lead to progression of changes which are already visible throughout the 12 years of observation.

11 Objection is taken to that part of Dr. Baranowski's proposed expert evidence as a participant expert, where Dr. Baranowski offers an opinion on causation and an opinion regarding the opinion of a litigation expert engaged by plaintiff's counsel, i.e. Dr. Rathbone. It is clear that Dr. Baranowski is not a litigation expert, as there has been non-compliance with Rule 53.03. His evidence, if it is to be received in its present state will be as a treating doctor, not as a litigation expert. There are other examples of a treating doctor offering opinion evidence similar to that of Dr. Baranowski.

12 Counsel for the defendants argues that if a treating doctor is going to testify as a participatory expert there is an obligation on the part of the proffering party, the plaintiff in this case, to properly qualify the doctor as an expert. While it is conceded the treating doctor does not have to meet the requirements of Rule 53.03, it is argued that a participant expert falls within the ambit of s. 12 of the Ontario *Evidence Act*, which provides:

> Where it is intended by a party to examine as witnesses persons entitled according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without leave of the judge or other person presiding.

13 It is argued on behalf of the defendants that the fact that an expert is sufficiently qualified and participated in the event is not sufficient to render the opinion admissible. This is, it is argued, is confirmed in the following paragraph of *Westerhof*, wherein the court stated:

> As with all evidence, and especially all opinion evidence, **the court retains its gatekeeper function** in relation to opinion evidence from participant experts and non-party experts. **In exercising that function, a court could, if the evidence did not meet the test for admissibility, exclude all or part of the opinion evidence of a participant expert or non-party expert or rule that all or part of such evidence is not admissible for the truth of its contents**. The court could also require that the participant expert or non-party expert comply with rule 53.03 if the participant or non-party expert's opinion went beyond the scope of

> an opinion formed in the course of treatment or observation for purposes other than the litigation. **[Emphasis added]**.

Fundamentally, the defendants argue that the same rules apply to "participant" experts as to "litigation" experts.

14 *R. v. Mohan, 1994 CanLII 80* (SCC), *[1994] 2 S.C.R. 9*, is the leading authority on the admissibility of expert evidence. In order to be admissible, a party must satisfy the following four requirements:

a. relevance;

b. necessity in assisting the trier of fact;

c. the absence of any exclusionary rule; and

d. a properly qualified expert.

15 Relevance is a threshold requirement for the admission of expert evidence, as with all other evidence. Relevance is a matter to be decided by a judge as a question of law. Necessity refers to the ability of the expert to assist the court in coming to a determination on a particular issue, because the court lacks the expertise to do so in the absence of the expert. (See *Mohan, supra,* at paras. 22, 26 and 27). Even if relevant and necessary, to be admissible the proposed expert evidence must still comply with the rules of evidence and not be disqualified by an exclusionary rule. Finally, the proposed expert must be properly qualified to render an opinion to the court. The expert's qualification may be acquired through study or experience in respect of the matters on which he or she undertakes to testify.

16 In determining whether the plaintiff must seek leave to call more than three experts, counsel for the defendants emphasizes the interplay between s. 12 of the *Evidence Act* and the application of *Mohan* and *Westerhof*. It is argued that:

a. The *Evidence Act* requires "leave" where a party intends to call more than three "witnesses" to give "opinion evidence";

b. *Westerhof* permits witnesses who are not Rule 53.03 compliant to give "opinion evidence" where they are properly qualified to do so and participated in the event;

c. *Westerhof* confirmed that all the rules governing the admissibility of "opinion evidence" continue to apply, and that the trial judge retains his or her gatekeeper role in determining the admissibility of "opinion evidence";

d. In order for "opinion evidence" to be admissible it must meet all of the criteria for admissibility set out in *Mohan,* with particular emphasis on whether the evidence of the expert is necessary.

17 As such, the defendants argue that any treating doctors that the plaintiff intends to call to give "opinion evidence", whether they are Rule 53.03 compliant or not, must be included in any motion for leave to call more than three experts under s. 12 of the *Evidence Act*.

Position of the Plaintiff

18 In his argument, plaintiff's counsel notes that prior to the decision of the Court of Appeal in *Westerhof* there was no dispute that a fact witness, such as a treating doctor, did not count towards the three expert rule even where their evidence included opinion evidence. In that regard, counsel pointed to the decision of Ferguson J. in *Hall v. Kawartha Karpet & Tile Co*., *2007 CarswellOnt 7135* at para. 10:

> Section 12 of the Ontario *Evidence Act* limits to three the number of experts a party can call without leave. That statute does not define the term 'expert'. However, I do not think anyone would suggest that a person

> who was involved in the history of the matter in the normal course should be included in the maximum of three...Similarly, if the action involved a personal injury I don't think anyone would suggest that a physician who had treated the plaintiff in the normal course, say in the emergency department of a hospital, should be counted as one of the three permitted experts.

19 Counsel for the plaintiff, in part, frames the issue by asking rhetorically the question of whether the Court of Appeal in *Westerhof* intended to change the law and, if so, whether they intended to change the law to make it harder or easier for the court to receive the evidence of a participant expert. Not surprisingly, counsel for the plaintiff argues that the Court of Appeal did not intend to change the status of a fact witness by using the designation of a participant expert, with the result that s. 12 was engaged to possibly preclude the number of treating doctors who could give evidence in a personal injury trial.

20 It is argued, on behalf of the plaintiff, that what *Westerhof* does is make a clear differentiation between a Rule 53.03 expert and a "participant expert". A Rule 53.03 expert is someone who has been engaged solely to offer an opinion for the purpose of the litigation. A litigation expert will usually have access to a far larger volume of information than a treating doctor and, therefore, will have the ability to offer an opinion that covers the "big picture". A treating doctor, or participant expert as they are now called, will be restricted in the opinion they can give in a manner that a litigation expert would not be. As such, it is argued the participant expert should not count as an expert for the purposes of the application of s. 12 of the *Evidence Act.*

Analysis

21 Within the last few years, the Supreme Court of Canada has sent a very strong message to trial judges that change has to occur within the civil justice system of this country. The recent seminal decision of *Hryniak v. Mauldin*, *2014 SCC 7*, *[2014] 1 S.C.R. 87*, begins with the following strong admonition:

> Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
>
> Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

22 While recognizing that the motion before me is to determine how, if at all, s. 12 of the *Evidence Act* is engaged vis a vis the treating doctors whom the plaintiff wishes to call in this trial, nonetheless the guidance provided by *Hryniak, supra,* suggests to me that a party simply cannot, in this day and age, expect to call every witness they want in a civil trial even if that witness may have relevant evidence to give the court. As Karakatsanis J. said in *Hryniak* at para. 24:

> However, undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available, [1] ordinary Canadians cannot afford to access the adjudication of civil disputes. [2] The cost and delay associated with the traditional process means that, as counsel for the intervener the Advocates' Society (in *Bruno Appliance*), *[2014] 1 S.C.R. 126* stated at the hearing of this appeal, the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.

23 *Hryniak* was, of course, decided in the context of an appeal of a summary judgement motion. But the comments of the Supreme Court, as it relates to how a trial judge must come to a decision that is fair and just to the parties, in my view, are equally applicable to the case before me now. At para. 28 of her Reasons, Karakatsanis J. stated:

> This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible -- proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

24 This trial demonstrates, in my view, how and why trial judges need to be more proactive by putting in place a structure within which counsel may call their case. In years gone by trial judges, at the conclusion of their opening comments to a jury, would say something to the effect:

> And now, it is our duty as judges to sit back and be keen, patient listeners, leaving it to the lawyers to present the case to us, to examine and cross-examine the witnesses. At all times we will remain completely objective, approaching our duties without sympathy, without prejudice, being prepared to decide the case only on the evidence, and on the law. If we do that to the best of our ability, our task will be properly carried out and a just and proper verdict will be arrived at in this case.

25 It can be beyond doubt that counsel must know that they call the case they feel will ensure that justice will be done for their client. That case, however, cannot include a multitude of evidence that is duplicative of other evidence already called. The lawyers will always, so says the traditional final admonition to the jury, be left to present the case. The trial judge will always now have a more fundamental gatekeeper role to play in the evidence that is called and the length of the trial. As this case before me amply demonstrates, a trial that is now in its fourteenth week is a trial few, if any, Canadian citizens could afford to mount.

26 A treating doctor can now be both a fact witness and an expert offering opinion evidence. If that treating doctor is to offer opinion evidence, then in my view the fundamental rules as they relate to expert evidence are engaged. As such, opinion evidence must meet the requirements laid down by the Supreme Court of Canada in *R. v. Mohan*, *supra*, at para. 17, to be admissible. They are (a) necessity in assisting the trier of fact; (b) relevance; (c) the absence of any exclusionary rule; and (d) a properly qualified expert. For the purposes of the following discussion, I am going to assume that all of the proposed treating doctors that the plaintiff wishes to call can meet the requirements of relevance. As well, I assume they can be properly qualified as an expert and that there is no exclusionary rule that would preclude their evidence. I focus my discussion on whether the evidence of the proposed treating doctors, who might offer opinion evidence, is necessary to assist me as the trier of fact.

27 Trial judges are constantly reminded of their obligation to act as the gatekeeper when it comes to the admission of expert evidence. That gatekeeper function involves a cost benefit analysis. In this case, accepting the various treating doctors may be properly qualified and may offer relevant evidence, acting as the gatekeeper I fundamentally ask the question, is their evidence necessary. Will their evidence add anything to what may already be before the court, or is it simply duplicative and for want of a better expression, is it an example of "piling on".

28 In a different context, Justice Moldaver added the following admonition when it came to the question of the admissibility of expert evidence:

> Permitting experts to give evidence on matters that are commonplace or for which they have no special skill, knowledge or training wastes both time and resources and adds stress to an already overburdened justice system. It is also legally incorrect. (See *Johnson v. Milton* (*Town*), 2008 ONCA 440, 91 O.R. (3d) 190)

29 Fundamentally then, I ask, will the additional evidence of the various treating doctors whom the plaintiff wishes to call add anything to this case that I will not already have, and equally as important will their evidence waste time and resources.

30 The policy behind s. 12 of the *Evidence Act* also helps to inform my decision regarding the necessity of calling more than one expert on any given issue. While some may think that the proliferation of experts is something new to civil litigation, this in fact is an issue that has been around for nearly 100 years. Ferguson J.A. in *Buttrum v. Udell*, *[1925] 3 D.L.R. 45* p. 48 at para. 5, commented:

> I am unable to agree in the result proposed by him. So much money was expended in securing and paying witnesses qualified and called to give opinion evidence, and so much of the time of the Court was taken up in hearing their evidence that it became necessary for the Legislature to provide a remedy hence section 10 of the *Evidence Act*, R.S.O. 1914, ch. 76, which reads:
>
>> Where it is intended by any party to examine persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the judge or other person presiding, to be applied for before the examination of such witnesses.

31 Section 10 of the *Evidence Act*, which became law in 1914, is for all intents and purposes the same as s. 12 of the *Evidence Act*, which today governs the need to seek leave to call more than three expert witnesses. Given the comments of our Court of Appeal which date back to 1925, it appears that the policy and purpose behind s. 10 and now s. 12 was, and remains, to grant leave only where the time and expense involved in calling more than three experts is justified.

32 What then are the factors that a trial judge should consider when deciding whether to grant leave to call more than three expert witnesses? The often cited decision of Ferguson J. in *Burgess (Litigation Guardian of) v. Wu*, *2005 CanLII 5874* (ON SC), provides some guidance to my decision, where at para. 35 he stated:

> A decision on motions like this will necessarily be fact driven and consequently it is not possible to identify a fixed list of relevant factors. However, I conclude the following are relevant factors in this case taking into account the caselaw and the circumstances of this case:
>
> a. Whether the opposing party objects to leave being granted. While I can imagine situations where both parties are "overkilling" the evidence, I think that if both parties have agreed on certain numbers of experts or on filing reports from some experts in addition to calling others then this is a significant factor. While there is certainly public expense involved, in civil cases the parties bear a very substantial portion of the costs of trial which is the crux of the rule. I believe contested motions on the issue of granting leave are rare. I think that where there is no opposition then leave is usually granted;
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> b. The number of expert subjects in issue;
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> c. The number of experts each side proposes to have opine on each subject;
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> d. How many experts are customarily called in cases with similar issues?
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> e. Will the opposing party be disadvantaged if leave is granted because the applying party will then have more experts than the opposing party?
>
> f. Is it necessary to call more than three experts in order to adduce evidence on the issues in dispute?
>
> g. How much duplication is there in the proposed opinions of different experts?
>
> h. Is the time and cost involved in calling the additional experts disproportionate to the amount at stake in the trial?

33 I have had the benefit of reviewing the defendants' Brief of Experts, and for the most part it is fair to say that for every expert the plaintiff intends to call, in any particular area of specialty, the defence will have a responding expert available to testify. If, however, the plaintiff is allowed to call all of its treating doctors, or who should be perhaps better described now as participant experts, it would be fair to suggest the defence might be significantly outnumbered. As such, applying the fifth factor referenced above by Ferguson J., I am reasonably satisfied the defendants would be disadvantaged.

34 The sixth factor suggested by Ferguson J. dovetails nicely with the focus of my decision, and perhaps more importantly is a key factor in the application of *Mohan* to the admission of expert evidence. Is the evidence of all the treating doctors necessary? This question can be posed both with respect to the necessity of their evidence as a participant expert but equally, I suggest, as a fact witness.

35 The plaintiff has a total of 18 litigation experts and 18 participant experts. In two key areas, orthopaedics and neurology, the plaintiff has two orthopaedic surgeons who are litigation experts and two who are participant experts. The same applies in the field of neurology, except the plaintiff has three litigation experts. The plaintiff will have to decide which of these experts will best assist the court in coming to an informed and just decision. It was never the intention of s. 12 of the *Evidence Act*, that leave should be given to allow such duplicative evidence. To the extent that the plaintiff intends to call any of the proposed participant experts to give opinion evidence that strays beyond the opinion evidence of a treating doctor, leave will not be granted. In that regard, I offer as an example the opinions reproduced above in para. 10, where Dr. Baranowski offers his opinion on causation and agrees with the opinions of various litigation experts engaged by the plaintiff to offer opinion evidence to this court.

The Fine Line Between Litigation Expert and Participant Expert

36 As the facts of this case and of this motion make clear, there is a fine line between when a treating doctor may testify as a fact witness offering opinion evidence and when a treating doctor becomes a litigation expert. It has been long recognized by the courts that not all evidence from a treating doctor is simply a recitation of dates of treatment, history taking from the patient and a diagnosis. There is a significant body of case law, that even pre-*Westerhof* accepted, that opinion evidence from a treating doctor as a fact witness was admissible where the opinion evidence was limited to the witness' involvement in the matter, or the exercise of the witness' judgement, or where the proposed evidence was to explain facts that the doctor perceived. (See *Farooq v. Miceli*, *2012 ONSC 558* at para. 25, *Continental Roofing Ltd. v. J.J.'s Hospitality Ltd.*, *2012 ONSC 1751*, *12 C.L.R. (4th) 90* at para. 28)

37 Prior to *Westerhof*, there was a divergence of view amongst the judiciary as to whether a treating doctor was only a fact witness with no right to offer opinion evidence. A review of the pre-*Westerhof* jurisprudence suggests that many judges were of the view that a treating doctor should be able to give evidence, which included opinion evidence with the proviso that the opinion evidence was limited to the involvement of the treating doctor in the diagnosis, treatment and prognosis of the patient. Where the opinion of the treating doctor was formed later, or was unrelated to the involvement of the doctor in the treatment of the patient, the opinion was not admissible. *Westerhof* has not changed the law in that regard. *Westerhof* has now clarified that where a treating doctor goes beyond diagnosis, treatment and prognosis type evidence, the requirements of Rule 53.03 must be complied with. This is so because that treating doctor has essentially taken on the role of a litigation expert.

38 It might be argued that to exclude the opinion evidence of a participant expert will be to deny the plaintiff the opportunity to properly place before the court relevant evidence that will ultimately assist me in the assessment of the plaintiffs damage claim. Perhaps another way of looking at this argument would be to suggest that the court should simply allow the evidence in and let it all go to weight. Fundamentally, to adopt such an approach would be an abrogation of this court's role as gatekeeper, a role that has been emphasized for many years. In *R. v. J. (J.-L.),* *2000 SCC 51*, *[2000] 2 S.C.R. 600*, Justice Binnie stated:

> The court has emphasized that the trial judge should take seriously the role of "gatekeeper". The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties can go at the end of the day to weight rather than admissibility...

39 Having reviewed some of the reports of the treating doctors that the plaintiff wishes to call, I have come to the conclusion that many of these doctors are pure fact witnesses whose evidence falls clearly within the definition of a participatory witness. Others do not, and offer opinion evidence that goes well beyond the normal role of a treating doctor in terms of history, treatment and prognosis. Those experts, such as Dr. Baranowki, would have to comply with the requirements of Rule 53.03. Even assuming they had prepared reports that complied with Rule 53.03, leave would still have been required under s. 12 of the *Evidence Act*. In a situation where the plaintiff intends to call more than one expert in the same specialty, it would be a rare occasion where that leave should be granted. The party seeking to call more than one expert in the same specialty has, in my view, a very high onus to establish why the court should allow evidence that would be repetitious of evidence already received. Such expert evidence would not be necessary, as it would not assist the court in coming to its decision on what damages to award. Fundamentally, it would fail to meet one of the important requirements of *Mohan*.

Conclusion

40 The plaintiff does not have to seek leave to call, as a participatory expert, any of the plaintiffs treating doctors to the extent their evidence relates to the history taken from the plaintiff; the treatment afforded the plaintiff; the diagnosis of the doctor; and the doctor's prognosis as revealed in his clinical notes. To the extent a doctor proceeds to offer opinion evidence, along the lines set forth in the report of Dr. Baranowski, the plaintiff will have to seek leave to call that evidence if the plaintiff also intends to call the evidence of a litigation expert in the same specialty. In short, the plaintiff and the defendants will be limited to one expert per specialty unless leave is first sought from the court.

Trial Management

41 This trial is now in its fourteenth week. I have already made my views known about the length of this trial. I am told that there will be at least a further 8 to 10 weeks of evidence. Much of the evidence will be medical evidence. Many of the treating doctors have produced extensive clinical notes and records, that have been reviewed by litigation experts who will be called by the plaintiff and the defense.

42 In general terms, there will undoubtedly be some treating doctors who may be considered more important to the outcome in a personal injury trial. A family doctor who may have had extensive responsibility for the treatment of a plaintiff will likely assist the trier of fact in understanding the "big picture". A treating specialist who has only seen a plaintiff on a few occasions may be in a different category, particularly where plaintiff's counsel intends to call a litigation expert in the same specialty.

43 Often in a personal injury trial, whether jury or non-jury, plaintiff's counsel will file, on consent, a brief of medical records which will include hospital records, diagnostic test results, clinical notes and records. The Medical Brief will also often include assessment reports sent by a specialist to a family doctor. These records will often be placed into evidence for the truth of their contents, and not just for the purposes of authenticity.

44 Counsel in this case, and for that matter counsel in all personal injury actions, are encouraged to consider the extent to which the medical records of the plaintiff's treating doctors can be admitted into evidence for the truth of their contents. Counsel should also be encouraged to consider the extent to which any or all of the treating doctors are required to testify, and how those doctors will assist the court in its ultimate decision. Where a litigation expert is going to testify and offer opinion evidence that relies heavily on the medical records of the treating doctors, I question the need to hear from the treating doctor if the medical records are not in dispute. Conversely, I question the need for a litigation expert to testify; where a treating doctor will testify and is thus deemed important enough that his or her evidence is necessary.

45 The solution, in most cases, to the question that I posed in paragraph 29 above, can be found in s. 52 of the *Evidence Act*. As it relates to this case, most of the treating doctors reside and practice in Poland. They could not, therefore, meet the definition of "practitioner" set forth in section 52(1) of the *Evidence Act*, as I suspect they are not members of the Ontario College of Physicians and Surgeons, or any other college as defined by the regulated *Health Professions Act*, 1991.

46 In most personal injury cases, however, where a doctor does meet the definition of s. 52(1) of the *Evidence Act*, I would suggest that counsel may wish to consider the simple approach of having the doctor prepare a brief medical report that sets forth his or her opinion, and attach the clinical notes and records as an exhibit to the report. Counsel on the opposing side would then have to give serious consideration to the cost consequences of section 52(5), of requiring the doctor to give *viva voce* evidence.

47 As it relates to this case, because s. 52(1) of the *Evidence Act* likely would not allow the admission of opinion evidence of Polish doctors without strict compliance with Rule 53.03, I nonetheless urge counsel to consider a consensual method of getting all relevant, necessary and non-duplicative opinion evidence before the court, in a manner that is cost effective and results in some judicial economy of time and effort. While s. 52(5) of the *Evidence Act* may not directly apply, given the medical evidence will be from Polish doctors who are not a member of a regulated college, the question of which party should bear the cost of putting duplicative evidence before the court will become a significant issue at the conclusion of this trial.

48 I also pause to reflect on the sheer volume of medical records that may become evidence in this trial, and typically become evidence in many personal injury trials that come before our courts in this province every day. Many trees have been killed to photocopy a mountain of evidence, much of which will never be referred to in final argument. While one cannot understate the importance of a complete evidentiary record, everyone associated with the civil trial process needs to take a deep breath and ask the fundamental question; what are the important records that are necessary to ensure a fair and just decision. Experience suggests that out of the mythical 3-ring binder containing hundreds of pages of medical records, only a fraction of these pages are really relevant and important and will ever be referred to in closing argument, let alone referred to by the trier of fact. Those key documents need to find their way into a compendium; the rest of the records need to stay where they are, in the possession of the doctor or record keeper, not in a cluttered court record.

49 Civil trials have become so complex and time consuming that everyone associated with the civil trial process, counsel and judges alike, must begin to "think outside the box". We must all take the comments of the Supreme Court in *Hryniak* to heart. As I said at the beginning of these Reasons, litigants are entitled to insist on a fair trial - they are not entitled to a trial that consumes an inordinate amount of judicial resources. I bear responsibility in part for allowing this trial to take on a life of its own. That life now needs to be controlled. Part of the control I can bring to bear is by limiting the number of litigation experts and participant experts in the manner set forth in para. 35 above. Part of the control I now leave in the hands of counsel, by rhetorically asking what records can go into evidence on consent, and which treating doctors and litigation experts are fundamental to the plaintiff's case. By asking this question, hopefully everyone will be focused on what the trial judge needs to render a fair and just decision to all concerned.

M.L. EDWARDS J.