Does Rule 53.03 (provision of expert reports) apply to only to experts retained by a party to the litigation?

A Commentary on *Westerhof v. Gee Estate*

by John D. Strung
Strung Mediations and Arbitrations Inc.

*** Note – Leave to appeal the Ontario Court of Appeal decision in *Westerhof v. Gee Estate* and in *Baker v. Mccallum*, which was heard together with *Westerhof* was denied by the Supreme Court of Canada on Oct. 29, 2015 ***

An important, and until now unresolved, issue is whether Rule 53.03 requires the provision of expert reports before an expert who was not retained by a party for the purposes of litigation is permitted to testify. Experts in this category would include "participant experts" who form opinions based on their participation in the underlying events rather than because they were engaged by a party to the litigation to form an opinion, as well as "non-party experts" retained by a non-party to the litigation

In the personal injury context "participant experts" would include treating physicians, and "non-party experts" would include experts retained by SABS insurers.

In other contexts, experts who were retained for remediation or loss prevention purposes, or were on-site at the time of a loss, might come within one of these two categories. For instance, in the case of a fire loss, the fire marshall or experts retained to rebuild could come within these categories. In the case of products liability, CSA experts would fall within the "non-party expert" category.

On March 26th the Ontario Court of Appeal released its reasons in *Westerhof v. Gee Estate*, 2015 ONCA 206 resolving this issue.

The Westerhof action was a personal injury case arising from a motor vehicle accident,. The trial judge had refused to allow testimony from various medical practitioners who were either participant experts or non-party experts, since no reports had been provided complying with Rule 53.03. The trial judge's decision was upheld by the Divisional Court. In the Divisional Court decision, that court held that for the purposes of Rule 53.03 there was no distinction between experts retained by the parties for the purposes of the litigation and "participant experts" or "non-party experts", stating:

> [21] The 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.

The Court of Appeal disagreed and ordered a new trial.

Simmons, J.A., writing on behalf of the Court of Appeal, held with respect to "participant witnesses":

> [60] … I conclude that a witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents without complying with rule 53.03 where:
>
> · the opinion to be given is based on the witness's observation of or participation in the events at issue; and
>
> · the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.
>
> [61] Such witnesses have sometimes been referred to as "fact witnesses" because their evidence is derived from their observations of or involvement in the underlying facts. Yet, describing such witnesses as "fact witness" risks confusion because the term "fact witness" does not make clear whether the witness's evidence must relate solely to their observations of the underlying facts or whether they may give opinion evidence admissible for its truth. I have therefore referred to such witnesses as "participant experts".

With respect to "non-party experts", Simmons, J.A. stated:

> [62] Similarly, I conclude that rule 53.03 does not apply to the opinion evidence of a non-party expert where the non-party expert has formed a relevant opinion based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than the litigation.

However, the Court added the following restrictions:

> [63] If participant experts or non-party experts also proffer opinion evidence extending beyond the limits I have described, they must comply with rule 53.03 with respect to the portion of their opinions extending beyond those limits.
>
> [64] 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.

Simmons, J.A. further observed:

> [86] … I agree with the submissions of the parties and interveners who say that the Divisional Court's ruling will actually exacerbate the problems of expense and delay that it purports to alleviate. Unlike an expert witness engaged by or on behalf of a party to provide opinion evidence in relation to the proceeding, participant experts and non-party experts do not testify because they are being paid an expert's fee to write the report contemplated by rule 53.03. Rather, they testify because they were involved in underlying events and, generally, have already documented their opinions in notes or summaries that do not comply with rule 53.03. Rule 53.03(2.1) contains strict requirements. Requiring participant witnesses and non-party experts to comply with rule 53.03 can only add to the cost of the litigation, create the possibility of delay because of potential difficulties in obtaining rule 53.03 compliant reports, and add unnecessarily to the workload of persons not expecting to have to write rule 53.03-compliant reports (e.g. emergency room physicians, surgeons and family doctors).

This decision, together with the recent Court of Appeal decision in *Moore v. Getahun* (see our Commentary #29) have gone a long way to clarify the rules with respect to expert evidence and have brought back some common sense to the procedure.