CASE SUMMARY

Jay Nathwani
Glaholt LLP

COURT OF APPEAL PROTECTS ABILITY OF LAWYERS AND EXPERTS TO CONFER

Moore v. Getahun

In a recent decision that will have important consequences for litigants in construction disputes, the Ontario Court of Appeal has protected the right of lawyers and experts to communicate when that communication is for the purpose of ensuring that experts' reports are clear and responsive to the questions in issue in a trial. In rendering its decision in *Moore v. Getahun*, the Court of Appeal disagreed with comments made by the trial judge—comments that had been widely criticized in the legal community and that if taken to be law would have made it much more difficult for parties in construction disputes to present their evidence clearly and cost-effectively to a court.

Background

While the case reverberated through the world of construction litigation, it was in fact a medical malpractice suit. The plaintiff, Blake Moore, was 21 years old when he seriously injured his wrist in a motorcycle accident. With the fractured bones partially reset, his wrist was wrapped in a full cast. Shortly thereafter, Moore developed compartment syndrome, a dangerous build-up in pressure within the muscles and nerves. Compartment syndrome is common following high-impact injuries. Moore suffered permanent muscle damage in his forearm. The trial judge found that Moore's injuries were made worse as a result of improper use of a full cast, which did not allow for any pressure relief in the affected tissues. The defendant doctor was found liable.

Trial Judge's Findings on Expert Evidence

What took this case out of the realm of medical malpractice and made it relevant to civil ligation in general were the trial judge's comments on expert evidence. The defendant called several experts. One of them, Dr. Ronald Taylor, filed two reports. He acknowledged that he had spent an hour and a half on the phone, discussing his second report with lawyers for the defendant. The trial judge held that this telephone conversation was improper. In her reasons, the trial judge wrote, "The practice of discussing draft reports with counsel is improper and undermines both the purpose of [the *Rules of Civil Procedure*] as well as the expert's credibility and neutrality".

In the trial judge's view, the role of an expert changed when amendments to Ontario's *Rules* were introduced in 2010. These changes imposed new obligations on experts, including a duty to sign an explicit acknowledgement of their duty to the court rather than to the party retaining them. In the view of the trial judge, the amendments to the *Rules* mean that an expert's "primary duty is to assist the court". Accordingly, she concluded that "counsel's [prior] practice of reviewing draft reports should stop. Discussions or meetings between counsel and an expert to review and shape a draft expert report are no longer acceptable".

The trial judge also imposed significant disclosure obligations on communications between lawyers

and experts, finding that there should be "full disclosure in writing of any changes to an expert's final report as a result of counsel's corrections, suggestions, or clarifications, to ensure transparency in the process and to ensure that the expert witness is neutral".

Reaction in the Legal Community

The trial judge's comments attracted criticism from a broad spectrum of the legal community. The Advocates' Society, a non-profit organization representing over 5,000 litigators across Canada, produced a position paper arguing that the trial judge went "too far" in categorically rejecting communication between lawyers and experts to revise expert reports. Criticism of the trial decision came from across the legal spectrum as well as from organizations whose members often give expert evidence in court. Six organizations were granted intervener status on the appeal; all argued that the trial judge had erred in her comments on the proper relationship between lawyers and experts.

Appeal

The Court of Appeal disagreed with the trial judge's comments on expert evidence. Writing for a unanimous three-person panel, Justice Sharpe found there is nothing improper with lawyers and experts discussing an expert's draft report. In the Court of Appeal's view,

> it would be bad policy to disturb the well-established practice of counsel meeting with expert witnesses to review draft reports. Just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case.

This, of course, does not mean that lawyers are free to shape the experts' opinions or conclusions—those are for the experts alone. But "consultation and collaboration" are entirely appropriate to ensure a report "addresses and is restricted to the relevant issues and […] is written in a manner and style that is accessible and comprehensible".

The Court of Appeal also disagreed with the trial judge's view that the law had been changed in 2010 by the amendments to the *Rules*. The Court of Appeal found that those changes did not create any new duties but simply reinforced those that already existed in the common law—namely, the duty of the expert to be independent and the duty of the expert to assist the court rather than his or her client.

The Court of Appeal also clarified when drafts of expert reports need to be produced. In so doing, the court actually approved the standard that is less onerous than the one many litigators have been following in recent years. The recent practice, following a number of lower-court decisions, has been to produce all drafts of expert reports. This practice will likely now come to an end, as the Court of Appeal found that draft reports will only need to be produced when a party can show that a lawyer and an expert communicated in a way likely to interfere with the expert's duty to be independent and objective. The Court of Appeal cited, as an example, a recent case in which an expert admitted under cross-examination that he did not actually draft the report containing his expert opinion.

Absent this sort of factual foundation, however, draft reports and communications between a lawyer and a witness will attract litigation privilege and will not routinely need to be disclosed. The Court of Appeal found that on the facts of this case, there was no evidence that the changes made by Dr. Taylor were anything more than "minor editorial and stylistic modifications" made to improve the clarity of the reports.

Conclusion

The Court of Appeal's decision will be welcome news to many litigants in construction disputes. As industry participants well know, construction litigation frequently turns on complex technical issues that judges are not equipped to understand without

the assistance of expert witnesses. Those who have been involved in litigation involving expert witnesses will also know that the first drafts of experts' reports do not always address all of the necessary issues or do so in sufficiently clear language. Lawyers are hired to present a case clearly to a court, and one of the areas in which they can be most valuable is in ensuring that expert evidence is presented concisely and intelligibly. While expert evidence must always be that of the expert—never of the lawyer—the Court of Appeal's decision has affirmed the common-sense proposition that changes to the style rather than the substance of expert evidence are proper and should not attract the disapproval of a court.

Ontario Court of Appeal

Laskin, Sharpe and Simmons JJ.A.
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