

EXPERT REPORTS REVISITED

Stephen Schwartz

On January 14, 2014, Madam Justice Wilson of the Superior Court Justice released her decision in *Moore v. Getahun*¹ (“Moore”) strongly criticizing the current practice of lawyers reviewing and commenting on draft expert reports prepared for use at trial.

Moore was a personal injury action. During the examination of an expert retained by the defendants at trial, plaintiff's counsel reviewed the expert's file and found notes referring to a telephone conversation between the expert and defence counsel. During the call, counsel reviewed the expert's report and suggested changes, which were made by the expert.

Madam Justice Wilson admonished counsel's common practice concerning the preparation of expert reports and held that the practice of reviewing draft reports should stop. She further held that discussions and meetings between counsel and an expert to review and shape a draft report are no longer acceptable.

COURT OF APPEAL

The trial decision was appealed to the Ontario Court of Appeal. On January 29 2015, the Ontario Court of Appeal released its reasons in the case.²

Mr. Justice Sharpe, writing for a unanimous panel, ruled that the trial judge was incorrect in her statements concerning her suggested changes with respect to the role of counsel in reviewing draft reports and in discussing matters with an expert to review the reports. At paragraph 62 of the reasons, Mr. Justice Sharp states:

“I agree with the submissions of the appellant and the interveners that 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.”³

At paragraph 63, the court held:

“Consultation and collaboration between counsel and expert witnesses is essential to ensure that the expert witness understands the duties reflected by Rule 4.1.01 and contained in the Form 53 acknowledgment of expert's duty. Reviewing a draft report enables counsel to ensure that the report (i) complies with the *Rules of Civil Procedure* and the rules of evidence (ii) addresses and is restricted to relevant issues, and (iii) is written in a manner and style that is accessible and comprehensible. Counsel needs to ensure that the expert witness understands matters such as the difference between the legal burden of

¹ 2014 ONSC 237

² 2015 ONCA 55

³ 2015 ONCA 55 at p. 62

proof and scientific certainty, the need to clarify the facts and assumptions underlying the expert's opinion, the need to confine the report to matters within the expert witness area of expertise and the need to avoid usurping the court's function of the ultimate arbiter of the issues."⁴

The Court went on to note that counsel play a crucial mediating role by explaining the legal issues to the expert witness's and then by presenting complex expert evidence to the Court.⁵ The court recognized that counsel could not easily perform this role without engaging in communications with the expert when the report was being prepared.⁶

CONCLUSION

As noted in our comment when the trial decision was released, the practice suggested by the trial judge if accepted, would have been a major detrimental change in practice.

The Court of Appeal clearly held that the changes suggested by the trial judge concerning the preparation of expert reports would not be in the best interest of justice and are rejected.⁷

Accordingly, the Court of Appeal has confirmed the correctness of the widely accepted practice of counsel and experts communicating with one another during the preparation of the reports. The decision is a welcome direction from the Court. The decision removed the uncertainty in the area that has existed since the release of the trial decision.

⁴ 2015 ONCA 55 at p. 63

⁵ 2015 ONCA 55 at p. 64

⁶ 2015 ONCA 55 at p. 64

⁷ 2015 ONCA 55 at p. 66