

CITATION: Aherne v. Chang, 2011 ONSC 2067
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SUPERIOR COURT OF JUSTICE – ONTARIO

RE:

JULIE AHERNE, DEVIN AHERNE, MARY
JANET KASPERSKI and JACK AHERNE and
LUCAS AHERNE, minors, by their Litigation
Guardian, Julie Aherne

Plaintiffs

-and-

P. CHANG, STEPHEN POWER, JOHN DOE and
LONDON HEALTH SCIENCES CENTRE

Defendants

BEFORE: MASTER D. E. SHORT

COUNSEL: Deanna S. Gilbert
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HEARD: August 31, 2010

Reasons for Decision

I. Overview

[1] This is the third instalment of a trilogy of decisions by me dealing with the duties and responsibilities of expert witnesses appointed by counsel for defendants, with respect to the appropriate manner of conducting what historically have been referred to as "defence medicals" under the "new" *Rules*.

[2] Originally this motion addressed the following questions:

- (a) Is a party being examined for discovery obliged to disclose the particulars of surveillance undertaken, even though privilege is claimed over the surveillance video or photographs?
- (b) Is a party being examined for discovery obliged, if asked, to provide the particulars of surveillance if undertaken in the future?

(c) If a party sends the privileged surveillance to a defence medical expert, has that party waived privilege over the surveillance?

[3] The parties were able to resolve the first two of these issues prior to the argument of the motion, such that only the final item, relating to one outstanding refusal, remains to be addressed by me.

[4] The question to which the counsel for the defendant, Dr. Chang, refused to provide an answer and the ensuing discussion of counsel reads:

“Q363 Mr MANDEL: Okay, if you release surveillance to a physician or healthcare practitioner that you’ve retained to do a defence medical of the plaintiff, will you provide to me a copy of the surveillance concurrent with your release of that information to the physician or healthcare practitioner?”

Mr LERNER: No

[5] That answer lead to a discussion between counsel regarding the appropriate point for the disclosure of any surveillance undertaken of the plaintiff, which concluded for all practical purposes with this exchange:

Q368. Mr. MANDEL: When is the appropriate time to do it so I am not learning about surveillance after a defence medical has already been conducted, if not now?

Mr. LERNER: Well, Mr Mandel, as I said before and as I said yesterday, I’ll comply with the Rules of Civil Procedure as it relates to the disclosure of surveillance.”

[6] It would thus appear that my central task is simply to determine what, in fact, is appropriate compliance with the Rules that came into force roughly 90 days before the examination for discovery was held.

[7] However, I as well feel it is appropriate to continue the exposition of my views on the appropriate approaches to the obtaining and presenting of evidence by experts retained to provide report to the court at the instance of those representing a defendant’s interests.

[8] To a large extent, I have already set out my views in the first two cases in this trilogy. Those cases can be found at *Girao v. Cunningham*, [2010] O.J. No. 3642; 2010 ONSC 4607 and *Bakalenikov v. Semkiw*, [2010] O.J. No. 3877; 2010 ONSC 4928. I will not repeat, in the same degree of detail, the basis for my conclusions as set out in those cases, but do rely upon the contents of both decisions in support of my decision here.

II. The Plaintiffs’ Claims

[9] The plaintiff Julie Aherne sues on her own behalf together with her husband, her mother and her children for injuries alleged to have been caused as a result of her medical treatment.

[10] It is alleged that Dr. Chang provided treatment and care to Julie between the years 2006 and 2008. It is further alleged that Dr. Chang knew or ought to have known of Julie’s allergy to latex and nevertheless repeatedly exposed her to same, causing her to suffer severe anaphylactic reactions.

[11] The plaintiffs assert that as “a result of being repeatedly exposed to latex, Julie suffers from cognitive impairments, chronic pain, anxiety, emotional distress, confusion, fatigue, and limited functioning. Julie's enjoyment of life has been reduced and her ability to earn a livelihood impaired.”

[12] The Defendants have alleged, amongst other things, that Julie's impairments are exaggerated.

[13] Dr. Chang was examined for discovery on April 7, 2010. At that time, Dr. Chang's counsel confirmed that, as of the date of the discovery, there had been no surveillance undertaken but refused to answer questions pertaining to the disclosure of any future surveillance that might be undertaken after the discoveries.

[14] What obligations should flow, in the event that surveillance is provided to an expert for his or her review?

III. Role of Masters

[15] MacPherson J.A., at the outset of his reasons in the Court of Appeal's recently released judgment in *Masters' Association of Ontario v. Ontario*, 2011 ONCA 243 observed:

As the application judge pointed out in his judgment, the office of Master has a lengthy pedigree in Ontario. Its roots are in the office of Clerk of the Crown and Pleas in the late 18th and early 19th centuries. The title and office of “Master” was created in 1837 as part of the establishment of the Chancery Court in Upper Canada....

[16] A.H. Manchester, in his book *Modern Legal History of England and Wales, 1750-1950* (at pp.135-36) describes the traditions of Courts of Chancery:

“Chancery's jurisdiction was complementary to that of the courts of common law – it sought to do justice in cases for which there was no adequate remedy at common law, it had originated in the petition, not the writ, of the party who felt aggrieved to the Lord Chancellor as ‘keeper of the King's conscience.’ In its origins, therefore, Chancery's flexible concern for justice complemented admirably the formalism of a medieval system of common law which had begun to adhere strictly, perhaps overstrictly on occasion, to prescribed forms. By 1800, however, Chancery's system was itself regarded as being both consistent and certain.”

[17] It is in pursuit of the goals of consistency and certainty that I have undertaken the analysis and observation contained in these reasons.

[18] In 1996 the legislature implemented the recommendations of the *Ontario Civil Justice Review* by adding sections to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, to create the new and distinct office of Case Management Master. Justice MacPherson notes that these were:

“Provisions that were intended to give jurisdiction to Case Management Masters as well as to grandfathered traditional Masters were amended to refer to the two different offices separately. Case Management Masters exercise the same powers

as traditional Masters, with the additional responsibility of case management....”

[19] One of the historic roles played by Masters has involved turning each set of newly enacted rules of civil procedure in Ontario into living, breathing documents that can be appropriately followed and utilized by the practicing bar.

[20] While appellate levels may clarify and determine the ultimate intent of the legislature and the Rules Committee, it is for we Masters and our judicial colleagues to consider, at first instance, the meaning in practice of each newly issued rule amendment.

[21] As a consequence, these early decisions not only affect the parties, but also have a broader impact on future approaches by counsel to similar cases governed by the *Rules*.

[22] While seminars were held prior to the new rules coming into force, often the commentators confessed some uncertainty and expressed the view that, “we will have to see how this gets implemented in practice.”

[23] In my view, when opportunities for giving an indication of direction to the bar present themselves, they ought to be taken. When the *Rules* have matured and many more interpretations in decided cases are extant in an area, then I would be inclined to a more narrow determination of the finite issue.

[24] Thus, these reasons will of necessity, stray from what the late Justice Archie Campbell sagely described as “The Beauty of the Short Endorsement”.

IV. Background to New Rules

[25] As of January 1, 2010, entirely new obligations are placed upon all experts. In particular, it is made explicit that their duty is to the court, rather than to any party or their insurer (or any otherwise financially responsible party).

[26] In *Girao*, I also reviewed the intent of the rules revisions as contemplated by the Honourable Coulter Osborne in his report on Ontario’s Civil Justice System.

[27] I also had regard to the reasons of Justice J.P. Moore, in *Beasley v. Barrand*, 2010 ONSC 2095, where he highlighted certain observations made by the Honourable Coulter Osborne in his Report:

“58. Mr. Osborne authored a Report to which I will make selective reference, especially to portions of interest on the subject of expert evidence. I endorse the views he expressed, views that I conclude inform any reasonable understanding of the purpose underlying Rule 53.03. He found that:

There is general agreement that the increased use of experts is a factor that increases the cost of litigation and causes delay through trial adjournments. There is very little agreement on what to do about it. ...

Consistent with the views of the CBA Task Force on Systems of Civil Justice, the Discovery Task Force and the Advocates’ Society Policy Forum, the vast majority of those consulted in the course of this Review identified the

proliferation of experts as a significant problem that often leads to a battle of competing experts. Some observed that as soon as one party retains an expert, an opposing party is forced to retain an expert. The expert witness merry-go-round bears with it an advantage to a litigant who has significant financial resources.

There is also the issue of partiality. A common complaint was that too many experts are no more than hired guns who tailor their reports and evidence to suit the client's needs. I know that this problem exists, but I hasten to add that not all experts should be tarred with the same brush.

....
The issue of "hired guns" and "opinions for sale" was repeatedly identified as a problem during consultations. To help curb expert bias, there does not appear to be any sound policy reason why the Rules of Civil Procedure should not expressly impose on experts an overriding duty to the court, rather than to the parties who pay or instruct them. The primary criticism of such an approach is that, without a clear enforcement mechanism, it may have no significant impact on experts unduly swayed by the parties who retain them.

An expressly prescribed overriding duty to provide the court with a true and complete professional opinion will, at minimum, cause experts to pause and consider the content of their reports and the extent to which their opinions may have been subjected to subtle or overt pressures. Matched with a certification requirement in the expert's report, it will reinforce the fact that expert evidence is intended to assist the court with its neutral evaluation of issues. At the end of the day, such a reform cannot hurt the process and will hopefully help limit the extent of expert bias....

... the most relevant organizations on this issue, including the medical experts and actuaries who participated in this Review, endorsed imposing an overriding duty to the court on experts, along with a certification that they understand that duty...."

V. Three Card Monte?

[28] In my reasons in *Metropolitan Toronto Condominium Corp No. 1250 v. Mastercraft Group Inc.*, 2010 ONSC 5947; 98 R.P.R. (4th) 253; 2010 CarswellOnt 8547, I made reference in passing to my consideration of the now more clearly defined duties owed to the court by expert witnesses. One of the cases which I reviewed, clearly presented the problems inherent in the previous approach of some experts to their role in the litigation process. While the extracts cited are perhaps longer than might usually be the case, I believe the rationale for the changes to Ontario's new rules in this area and the requirement for a clearly defined approach to expert evidence under the present *Rules*, justifies this degree of citation.

[29] Commenting on an expert who asserted that he was entitled to omit relevant facts in his evidence, if it helped his side's case, in *Cala Homes (South) Ltd v. Alfred McAlpine Homes East Ltd.*, [1995] FSR 818, (1995) IP & T Digest 18, Justice Laddie, of the Chancery Division observed:

"The position of the expert witness

Before ending this judgment there is one other matter which deserves comment. The defendants submitted as their expert Mr Goodall. He is an eminent architect. He prepared a lengthy report which was served in this action.

In August 1990, Mr Goodall wrote an article in the Journal of the Chartered Institute of Arbitrators. Its title is "*The Expert Witness: Partisan with a Conscience*". It sets out, among other things, what Mr Goodall believes is the appropriate approach an expert should adopt when preparing a report for use in litigation. He confirmed in court that the principles set out there were applied to the drafting of the report on which the defendants relied in this action.

Mr Goodall speaks from a position of some experience. His involvement in civil arbitration and litigation work has been extensive. In 1971 he joined what was then the Institute and is now the Chartered Institute of Arbitrators and has served on its Council. He is a Fellow and Registered Arbitrator. He is on the Committee of the Society of Construction Arbitrators. He is a member of the 'Diploma in Arbitration Advisory Board' to the College of Estate Management; a member of the UK Chapter of the Construction Disputes Resolution Group and a Fellow of the Academy of Experts. He has been called upon to advise on over a hundred and twenty proceedings in litigation or arbitration and he has been appointed arbitrator in over fifty references. In his article, Mr Goodall said the following:

"How should the expert avoid becoming partisan in a process that makes no pretence of determining the truth but seeks only to weigh the persuasive effect of arguments deployed by one adversary or the other?"

... the man who works the Three Card Trick is not cheating, nor does he incur any moral opprobrium, when he uses his sleight of hand to deceive the eye of the innocent rustic and to deny him the information he needs for a correct appraisal of what has gone on. The rustic does not have to join in: but if he chooses to, he is 'fair game'.

If by an analogous 'sleight of mind' an expert witness is able so to present the data that they seem to suggest an interpretation favourable to the side instructing him, that is, it seems to me, within the rules of our particular game, even if it means playing down or omitting some material consideration. '*Celatio veri*' is, as the maxim has it, '*suggestio falsi*', and concealing what is true does indeed suggest what is false; but it is no more than a suggestion, just as the Three Card Trick was only a suggestion about the data, not an outright misrepresentation of them.

....

Thus there are three phases in the expert's work. In the first he has to be the client's 'candid friend', telling him all the faults in his case. In the second he will, with appropriate subtlety, be almost what the Honorary Editor's American counsel called 'a hired gun' so that client and counsel, when considering the other side's argument can say, with Marcellus in Hamlet, 'Shall I strike at it with my partisan?'. The third phase, which happens more rarely than is acknowledged in much of the comment on expert witness work, is when the action comes to court or arbitration.

Then, indeed, the earlier pragmatic flexibility is brought under a sharp curb, whether of conscience, or fear of perjury, or fear of losing professional credibility. It is no longer enough for the expert like the 'virtuous youth' in the Mikado to 'tell the truth whenever he finds it pays': shades of moral and other constraints begin to close upon on him."

[30] In reaction to this clearly stated approach, the trial judge continues:

No doubt it is currently fashionable to say that our legal system makes no pretence to determining the truth. I accept that some people not only say it but also believe it. If it were true then Mr Goodall would be right in thinking that anything short of outright

misrepresentation is permissible in an expert's report and that not only the other party but also the person trying to decide the issue, the 'rustics', are fair game. On reflection, if Mr Goodall were right, I am not sure that even outright misrepresentation should be avoided. If litigation is to be conducted as if it were a game of Three Card Trick, what is wrong with having a couple of aces up your sleeve?

[31] Justice Laddie's frustration with this approach is clear:

In support of his approach, Mr Goodall relied in his article on a quotation from the Official Referee in a publication called *Construction Disputes: Liability and the Expert Witness* (Butterworths) as follows:

"... since the procedure in both courts and arbitrations is adversarial, an expert is not obliged to speak out, or write in his report, about matters concerning which he has not been asked at all, either by his client's opponent's counsel or by the Official Referee or arbitrator."

It is apparent that this provides scant support for Mr Goodall's approach. There is a world of difference between not volunteering evidence on topics on which you have not been asked to express a view and giving misleading answers on topics where you have.

The whole basis of Mr Goodall's approach to the drafting of an expert's report is wrong. The function of a court of law is to discover the truth relating to the issues before it. In doing that it has to assess the evidence adduced by the parties. The judge is not a rustic who has chosen to play a game of Three Card Trick. He is not fair game. Nor is the truth. That some witnesses of fact, driven by a desire to achieve a particular outcome to the litigation, feel it necessary to sacrifice truth in pursuit of victory is a fact of life. The court tries to discover it when it happens. But in the case of expert witnesses the court is likely to lower its guard. Of course the court will be aware that a party is likely to choose as its expert someone whose view is most sympathetic to its position. Subject to that caveat, the court is likely to assume that the expert witness is more interested in being honest and right than in ensuring that one side or another wins. An expert should not consider that it is his job to stand shoulder-to-shoulder through thick and thin with the side which is paying his bill. 'Pragmatic flexibility' as used by Mr Goodall is a euphemism for 'misleading selectivity'. According to this approach the flexibility will give place to something closer to the true and balanced view of the expert only when he is being cross-examined and is faced with the possibility of being 'found out'. The reality, of course, will be somewhat different. An expert who has committed himself in

writing to a report which is selectively misleading may feel obliged to stick to the views he expressed there when he is cross-examined. Most witnesses would not be prepared to admit at the beginning of cross examination, as Mr Goodall effectively did that he was approaching the drafting of his report as a partisan hired gun. The result is that the expert's report and then his oral evidence will be contaminated by this attempted sleight of mind. This deprives the evidence of much of its value. I would like to think that in most cases cross-examination exposes the bias. Where there is no cross-examination, the court is clearly at much greater risk of being misled." [my emphasis]

[32] I agree with this trial judge that, in view of the above, it is relevant to remind those concerned with the preparation of experts' reports of some of what Cresswell J said in *The Ikarian Reefer* [1993] 2 EGLR 183, [1993] FSR 563:

"The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation: *Whitehouse v Jordan* [1981] 1 WLR 246 at 256, per Lord Wilberforce.
2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise: *Polivitte Ltd v Commercial Union Assurance Co Plc* [1987] 1 Lloyd's Rep 379 at 386, Garland J and *Re J* [1990] FCR 193, Cazalet J. An expert witness in the High Court should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (*Re J, supra*).

[33] In my view, Justice Cresswell's enumerated principles ought to apply equally to experts involved in Ontario cases.

[34] Lastly, Justice Laddie observes:

Near the beginning of his report, Mr Goodall says the following:

"I believe that the inspections I have made and the graphic and other material that I have seen are sufficient to enable me to reach an informed opinion on the matters in dispute in the present action that fall within my discipline.

I have no connexion with either of the parties in this action, nor have I any prior acquaintance with instructing solicitors or Counsel. I have no pecuniary or other interest in the outcome of the current litigation."

The clear purpose of these statements was to convey the impression to the plaintiffs and the court that the report was the independent unbiased product of the expert. Some may characterise this as pragmatic flexibility. In my view that impression is simply false.

In the light of the matters set out above, during the preparation of this judgment I re-read Mr Goodall's report on the understanding that it was drafted as a partisan tract with the objective of selling the defendant's case to the court and ignoring virtually everything which could harm that objective. I did not find it of significant assistance in deciding the issues. I should point out that there is no material before me which suggests that the defendants' solicitors or counsel, or the defendants themselves, were aware of Mr Goodall's attitude to the drafting of his report."

[35] I stress that I believe that this expert's approach may have been unique to him and undoubtedly most experts are entirely above reproach with respect to their contributions to the litigation process. Nevertheless, it is clear that in the past, the public and the bar had an impression that some experts were prepared to engage in "pragmatic flexibility".

VI. New Expert Obligations

[36] Section 9 of the Civil Justice Reform Project: Summary of Findings and Recommendations deals with "Expert Evidence". The views of a number of professional organizations in the province canvassed by the author are discussed together with solutions attempted around the world. While the sixteen page summary was helpful to my analysis, I particularly note the views expressed at page 77 by Justice Osborne regarding the value of all the experts before the court being able to understand the underlying facts and assumptions upon which the other opinions are based:

During consultations, medical experts noted that doctors often work well in forming consensus. They suggested that it would be very useful to have experts meet to consider whether issues can be agreed upon and determine which are still in dispute. For all experts, this reform would provide a level of peer review that expert opinions do not now routinely undergo. It may also assist in clarifying disparate interpretations of underlying facts and assumptions and would introduce a level of accountability that may deter "hired guns".

[37] The response to the Osborne Report was a wide ranging number of amendments to the Rules. In particular, Rule 53 was the subject of changes to address the concerns raised in the report.

VII. Applicable Rule

[38] The resulting amendments to the rules in this area are found in Rule 53:

53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference required under Rule 50, serve on every other party to the action a

report, signed by the expert, containing the information listed in subrule (2.1).

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

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,
 - i. a description of the factual assumptions on which the opinion is based,
 - ii. a description of any research conducted by the expert that led him or her to form the opinion, and
 - iii. 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. [my emphasis]

[39] In light of those requirements and the goals of legal reform of the role of all experts as described above, I turn to a consideration of the specific issues raised in this motion.

VIII. Caselaw Considered

[40] Clearly a very important recent decision in this area is *Adams v. Cook*, 100 O.R. (3d) 1; 2010 ONCA 293; 261 O.A.C. 51; 318 D.L.R. (4th) 716; 84 C.P.C. (6th) 1; 2010 CarswellOnt 2408. There, in October of 2009, in a five person panel of the Court of Appeal consisting of Justices Laskin, Sharpe, Gillese, Armstrong and Lang had occasion to address issues surrounding the recording of defence medical examinations which had been considered by that Court, eighteen years earlier, in *Bellamy v. Johnson* (1992), 8 O.R. (3d) 591. In my reasons in *Bakalenikov*, I examined these decisions in detail and thus I only propose to note my approach to the facts in this case is guided by the comments contained in the reasons in those cases.

[41] In *Bellamy*, Doherty J.A. delivered concurring reasons wherein he set out the factors that he thought the court should take into account when deciding to permit the recording of a defence medical examination:

1. the opposing parties' ability to learn the case it has to meet by obtaining an effective medical examination;
2. the likelihood of achieving a reasonable pre-trial settlement;
3. the fairness and effectiveness of the trial.

[42] These factors, in my view, continue to apply to any expert's evidence.

[43] Justice Armstrong, writing for the majority in *Adams*, recognized that "arguably" the litigation landscape had changed since the Court of Appeal last addressed this specific area of practice and concluded:

"28 That said, I recognize that this court constituted as a panel of five judges is in a position to broaden the application of *Bellamy* and, in effect, make the recording of defence medicals a more or less routine practice. No doubt a case can be made for doing so. Arguably, the litigation landscape has changed in the 18 years since *Bellamy* was decided. Legitimate concerns have been expressed by the Honourable Coulter Osborne and others in respect of the role of experts in the civil litigation process. The findings and recommendations of my colleague, Justice Goudge in his report, *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (Toronto: Ontario Ministry of the Attorney General, 2008) suggest similar concerns arise in criminal cases. Some contend that the routine recording of defence medicals and the transparency it produces would improve the discovery process. Given the electronic world in which we now live, it is perhaps at least questionable whether the presence of a small recording device is likely to have any adverse affect on a medical specialist's examination.

29 However, in my view, the record in this case is insufficient to broaden and set new parameters for the making of orders requiring the recording of defence medical examinations, which would take into account all of the complexities and nuances that go with the conduct of such examinations. First of all, I do not accept that the evidence of alleged systemic bias, as testified to by the plaintiff's lawyer in this case, is sufficient to draw any general conclusions. The evidence here provides the lawyer's opinion of systemic bias in one area of the province and gives four specific examples. The lawyer was not cross-examined on his affidavit because counsel for the defendant was of the view that little would be accomplished given the likely limits that would be placed on such cross-examination by the deemed undertaking rule and solicitor/client privilege. In my view, a number of other

questions arise should the court attempt to define the expanded parameters of an order for the recording of defence medicals:

1. If such an order is made on a more or less routine basis, should the court order that subsequent medical examinations by expert doctors retained by the plaintiff be subject to the same requirement?
2. What else can be done to "level the playing field" for the defendant in respect of medical examinations by plaintiff's experts?
3. What about unrecorded medical examinations that have been done by the plaintiffs' experts prior to the defence seeking an order for a medical? The concern here is that routine recording of the defence medical will give the plaintiff an unfair tactical advantage.
4. What obstacles, if any, are there to the conduct of an effective medical examination if all examinations are routinely recorded? Is it possible to generalize or are we driven back to the position of Doherty J.A. that what is involved is a case specific analysis?
5. Why did the Honourable Coulter Osborne not make a recommendation that defence medicals be routinely recorded?
6. Will the reforms related to expert witnesses recommended by Coulter Osborne and implemented by amendments to the *Rules of Civil Procedure* be sufficient to deal with the perceived problems concerning defence medical experts?
7. How can the views of the medical profession be comprehensively canvassed together with the views of The Advocates' Society, the Ontario Trial Lawyers Association, the American College of Trial Lawyers, the Canadian Medical Protective Association, the Medico-Legal Society and other interested organizations?

[44] Justice Armstrong went on to express the view that,

A case such as this is not the best place to address these issues. This is a matter that is best studied by the Civil Rules Committee, which has just spent more than a year considering the Osborne recommendations. The Rules Committee is better able to canvass the views of the interested groups province-wide and make reasonable recommendations, if so advised.

[45] We have now been provided with new *Rules*. I regard it as my duty to provide guidance as to the proper approach to be taken in applying those *Rules* while being mindful of the concerns identified by Justice Armstrong.

[46] Justices Lang and Gillese disagreed with the majority in *Adams*. In her dissenting reasons, S.E. Lang J.A. addressed the potential problems with partisan experts and noted:

35 In my view, the record in this case, together with increased awareness about the partisan nature of expert evidence, supports the conclusion that a plaintiff should be allowed to audio record a defence medical if that recording would advance the interests of justice. Generally, a recording advances the interests of justice by providing the parties with a reliable record of the examination, which will serve to enhance their settlement discussions as well as the effectiveness of trial. However, the interests of justice are not enhanced if the recording would compromise the examiner's ability to conduct an effective medical examination.

[47] She also analyzes the reasons of Justice Armstrong in determining not to re-visit *Bellamy* in *Adams*. For the purposes of my analysis of the expert evidence environment which has now come into force, I particularly made note of the following portions of her reasons:

"Is the Rules Committee an appropriate forum to decide the question?"

73. I agree with Armstrong J.A. that the Rules Committee, if it chooses to do so, is well-placed to undertake a full consultation with a wide variety of interested organizations about the merits of recording defence medicals. Nonetheless, the silence of the *Rules of Civil Procedure* on this issue leaves the inclusion of a recording condition within the inherent jurisdiction of the court to control the discovery process....

The scope of the Osborne Report

79. The Osborne Report did not address the recording of defence medicals as an issue one way or the other, although it raised concerns about "hired guns". In any event, the Osborne Report recommendations were not meant to be exhaustive. In addition, the law is a continually evolving process.

IX. "The Law is a Continually Evolving Process"

[48] Clearly the evolution in the *Rules* is an important part of that process. The key new component of a paramount concern for "proportionality" needs to be addressed in issues such as this.

[49] In coming to my conclusion, I have also endeavoured to consider the impact of the newly specified requirement set out in Rule 1.04:

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

[50] In *Access to Justice* in 1995 Lord Woolf noted in a chapter entitled "*The role of the courts and the parties in the conduct of civil litigation*":

"1. The overall aim of my Inquiry is to improve access to justice by reducing the inequalities, cost, delay and complexity of civil litigation and to introduce greater certainty as to timescales and costs. My specific objectives are:

- (a) to provide appropriate and proportionate means of resolving disputes;
- (b) to establish "equality of arms" between the parties involved in civil cases;
- (c) to assist the parties to resolve their disputes by agreement at the earliest possible date; and
- (d) to ensure that the limited resources available to the courts can be deployed in the most effective manner for the benefit of everyone involved in civil litigation."

[51] I intend to exercise the discretion which I am permitted to best establish the appropriate and proportionate means of resolving this specific dispute, to endeavour to ensure that the limited resources available to the courts and the appropriate degree of investigation by the parties may be deployed in the most effective manner for the benefit of everyone involved with a view to having the dispute resolved at the earliest possible date?

X. What is to be Done?

[52] Rule 53.03 has been amended. In my view, it tries to bridge the chasm between the previously perceived inherent biases contained in Plaintiffs' and Defendants' expert witness reports. The new provision requires experts to give the following specific Undertaking, which reflects the requirements of new rule 4.1.01 and reads in part :

"3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:

- (a) to provide opinion evidence that is **fair, objective and non-partisan**;
- (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and

(c) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.

4. I acknowledge that **the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.**" [my emphasis]

[53] This Undertaking requires experts, counsel retaining them, and the Court to reconsider their respective roles and practices. This Undertaking must be read as seeking to *improve* the way expert evidence is procured. Now, by her or his Undertaking accompanying any report, the norm must be that "the Expert is the Court's Expert". She or he must not be an advocate for either side.

[54] As Mr Goodall's article noted, some experts have, in the past, seen themselves as having shifting roles at various stages in a dispute. Thus at different phases in the expert's work he may move from 'candid friend', to 'a hired gun' and then to the point where "shades of moral and other constraints begin to close upon on him".

[55] At what point must the expert cease to be a candid friend? It remains for future cases (or perhaps the Rules Committee) to define the acceptable degree of involvement in a case prior to being retained to conduct a defence medical.

[56] Whether retained by plaintiff or defendant, experts are called upon to assist the Court to understand technical issues from an independent perspective. In the matter now before me, the extent of the plaintiff's injuries and her future prognosis are at issue.

[57] It needs to be clearly stated that each of the plaintiff and the defendant is entitled to select an expert in whose credentials and reputation they have confidence. They must choose and pay that expert, and provide her or him with all relevant material. The expert must state what information, whether written or not, she or he has been given, and by whom. Counsel must update the expert they have retained with fresh evidence or reports as they come in. As a consequence, experts may well be expected to provide updated and other opinions as matters develop.

[58] But beyond such proper contact, I believe the Expert's Undertaking requires that she or he be seen to be independent of those who retained the expert. Counsel and those ultimately responsible for funding the payment of any potential judgment, must restrain their contact. In my view, under this new structure, the expert must be, and must be seen to be, detached and independent.

[59] As a consequence, I have doubt as to whether defence counsel or their direct or indirect clients should have access or participation in the preparation of any draft reports. But again, that clearly is an issue for another day.

[60] I leave open the issue of whether that independence means that consultation between the expert and the Party, counsel, insurer or other defender or indemnifier, must be restricted to the proper and demonstrably transparent passage of information, the asking of questions and receipt of reports, answering the questions asked.

[61] The Court now expects and relies upon frank and unbiased opinions from its experts. This is a major sea change which requires practical improvements to past opaque processes. How

are long time plaintiffs' and defendants' experts to be "trusted" to change their stripes? At the initial stages, skilled, licenced professionals clearly must be taken at their word that, on principle, they take their Form 53 Undertaking to the Court seriously. It is certainly my expectation that they are clearly promising to bring a new, transparent and objective mindset to the drafting of their reports and to their subsequent testimony.

XI. Is Litigation Privilege Waived and if so, When?

[62] Against this admittedly overly wordy analysis, I come to the specific dispute in this case.

[63] The position taken on the motion by counsel the defendant, Dr. Chang, is summarized in this way:

"However, as discussed above, privilege over documents released to a medical examiner is waived only if the document is relied upon by the medical examiner, and not at the time that the document is released to the medical examiner.

To ask that future surveillance be released to the plaintiff at the same time as release to a medical examiner is to ignore any possibility that an examiner may produce a report without relying on the surveillance that was released to the examiner. For example, the defendant may release the surveillance to the examiner, but the examiner may never review it. The examiner may also review the surveillance after compiling a report and never amend the report after reviewing the surveillance. Also the examiner may review the surveillance before, but not rely on the surveillance.

This is not an exhaustive list of the hypothetical situations in which the defendant submits the surveillance may not need to be produced by the defendant, standing that it has been provided to a defence medical examiner. But, the existence of these situations shows that the waiver of privilege and release of surveillance to the examiner do not necessarily occur at the same time."

[64] Their factum concludes with the submission that:

For these reasons, the defendant is not obliged to undertake to simultaneously release future surveillance to the plaintiff and a medical examiner by the defendant.

[65] Counsel for Dr Cheng forcefully and effectively presented the jurisprudence and arguments supporting this proposed conclusion. I am satisfied, on the basis of the submissions made, that this interpretation might, in some cases, conform to the manner in which counsel could "comply with the *Rules of Civil Procedure* as it relates to the disclosure of surveillance" prior to the January 1, 2010 amendments? Does it now?

[66] Here the plaintiff seeks an undertaking agreeing that if surveillance is undertaken, and if it is released by Dr. Chang to a physician or healthcare practitioner retained for purposes of a defence medical assessment, then such release be concurrently a copy of that surveillance material will be released to counsel for the plaintiffs.

[67] This request raises two issues:

- On the one hand, it deals with what can be considered a document underpinning an expert's "finding", such that it might need to be produced.
- On the other hand, it deals with when privilege may be considered waived by virtue of the document being sent to the expert - even if not relied upon by the expert.

[68] Amongst the cases referred to me by the defendants were *Beausoleil v. Canadian General Insurance Company*, 1993 O.J. No. 2200 (Gen. Div.); *Binkle v. Lockhart* (1994), 24 C.P.C. (3d) 11 (Ont. Gen. Div.), and *Green v. Clarke* (1995), 143 N.S.R. (2d) 74 (N.S. Sup. Ct.). While these cases were helpful in providing historical perspective, I did not find them particularly persuasive in my evaluation of the present requirements.

[69] Counsel for the parties relied upon a number of the same cases and those cases which I found most helpful are discussed below.

[70] In *Browne (Litigation guardian of) v. Lavery*, [2002] O.J. No. 564; 58 O.R. (3d) 49; [2002] O.T.C. 109; 37 C.C.L.I. (3d) 86; 18 C.P.C. (5th) 241, Mr. Justice Ferguson dealt with a situation not involving a defence medical. In that case, a second expert retained by a party was provided with a copy of the report delivered by a previous expert. Justice Ferguson determined that the previous expert's report (the "first report") formed part of the "findings" relied upon by the second expert and, therefore, had to be produced, even though it would have, otherwise, remained privileged.

[71] In arriving at his conclusion, Justice Ferguson considered whether or not the first report could be a "finding" since it was supposedly not relied upon by the second expert. In that regard, he reasoned:

"In my view, that is no longer a proper restriction. The fundamental difficulty with that principle is that there is no practical and fair way to determine what documents (either in whole or in part) have been influential or relied upon.

It seems logical that if counsel sends the expert information counsel does so because he or she believes this information is relevant to the expert's task. If it is relevant to the task then it seems to me it should be available to counsel who must test the opinion." [my emphasis]

[72] The Court of Appeal examined what may be considered a "finding" in such circumstances in *Conceicao Farms Inc. v. Zeneca Corp.*, [2006] CanLII 31976; 83 O.R. (3d) 792; 272 D.L.R. (4th) 545; 215 O.A.C. 233. The concept of waiver of privilege, however, was not considered. *Conceicao* involved a motion by counsel, in preparation for an appeal of the trial decision, for production of a privileged memorandum that the opposing party's lawyer had made following a telephone conversation with an expert witness who testified at trial.

[73] The Court ruled in *Conceicao* that rule 31.06(3) "clearly encompasses not only the expert's opinion but the facts on which the opinion is based". Justice Goudge writing for the Court of Appeal in 2006, observed that the rule entitles a party to obtain, on discovery, the *foundational information* of the expert's final opinion:

[13] In *Holmsted and Watson* at p. 31-106, the learned authors clearly and concisely summarize these aspects of the rule:

Rule 31.06(3) is concerned with fact disclosure, not with documentary production. If prepared in contemplation of litigation an expert's report is privileged and the report itself (*i.e.*, the document) remains technically privileged, notwithstanding rule 31.06(3). However, in practice the parties often waive this privilege and deliver or exchange expert's reports in lieu of, or in fulfillment of their obligations under rule 31.06(3).

[14] There is an area of debate concerning the scope of information that may be obtained pursuant to this rule. It clearly encompasses not only the expert's opinion but the facts on which the opinion is based, the instructions upon which the expert proceeded, and the expert's name and address. How far beyond this the right to obtain foundational information (as our colleague called it) extends, need not be determined here. Suffice it to say that we are of the view that it **does not yet extend as far as is tentatively suggested in *Browne (Litigation Guardian of) v. Lavery* 2002 CanLII 49411 (ON S.C.), (2002), 58 O.R. (3d) 49.** We simply proceed on the basis that the rule entitles the appellant to obtain on discovery the foundational information for Dr. Grafius' final opinion. As will become clear, we need not decide in this case the precise extent of the information that is discoverable. [my emphasis]

[74] Before me the Plaintiffs relied upon on Justice Ferguson's conclusion in *Browne* that, specifically, a report sent to an expert to review amounts to a "finding" relied upon by the expert. The plaintiff's factum submitted that the view "tentatively suggested" in *Browne* that the Court of Appeal rejects in *Conceicao* is the view mentioned in *obiter* by Justice Ferguson, wherein he stated:

It is my tentative view that our system of civil litigation would function more fairly and effectively if parties were required to produce all communications which take place between counsel and an expert before the completion of a report of an expert whose opinion is going to be used at trial.

[75] I agree with his (then tentative) view and based on my analysis of the intent and purpose of the 2010 *Rules* amendments, it is my belief that his tentative view makes even more sense in 2011.

[76] Both *Browne* and *Conceicao* involved the question of disclosure over two entirely different privileged documents. *Conceicao* considers production of a privileged memorandum that might set out the opinion of the expert, but was not relied upon by the expert. Conversely, *Browne* considers the production of a privileged document that was suggested to be a finding relied upon by the expert in forming his opinion. Accordingly, the Court of Appeal was not asked to decide in *Conceicao* the real issue present in both *Browne* and in the case at bar, which

is whether a "finding" can or cannot constitute a document that was provided to an expert but supposedly not considered by him.

[77] Virtually the same set of facts that appeared in *Browne* also arose in *Bazinet v. Davidson*, [2007] CanLII 23158. There, Justice Power of this court, considered the interaction involved between two reports, by different experts. In that case, only the second expert report commissioned by a party was originally produced to the opposite side. The second report, however, mentioned the existence of the first. The expert filed a letter with the Court indicating that he did read the first report, but that it did not play any role in his opinion. Was the first report subject to production?

[78] Justice Power held that privilege over a document is not waived simply by virtue of sending the document to an expert; however, it was waived by virtue of the second expert's report being delivered. It made no difference that the privileged document allegedly had not played a role in the expert's final opinion. These extracts from Justice Power's reasons outline the basis for his views :

[18] There is nothing in the record before me that would suggest that the plaintiff has expressly waived his privilege over the 2001 report of Mr. Gray nor is there anything to suggest that the privilege was improperly claimed at the outset. However, in my opinion, the fact that the report was subsequently provided to Mr. Sack, referenced by him in his report, and read by him, constitutes a waiver of privilege at the time when Mr. Sack's report was produced and privilege was waived over it.

[22] The trend in the law over many years now has been to encourage complete discovery. On the other hand, there is no trend of which I am aware to discourage or limit established privileges including the litigation privilege.....

[26] In the instant case, however, we do not have a situation where some of the information in a document has been disclosed. Initially, the disclosure was to someone within privileged circumstances. There is nothing in the second report disclosing any of the contents of the first report. However, as aforesaid, I do not accept the logic of Mr. Sack's statement that in reaching his conclusions he did not consider the contents of the first report. If he read it, he considered it. Therefore, in this context, while initially there was no waiver, there was a waiver of privilege at the time it was decided to produce the second report and rely on the second expert's opinion.

[32] The law appears settled that a report of one expert that was apparently used and considered by another expert is subject to disclosure to an opposite party in circumstances where the privilege is waived concerning the report of the second expert. Courts have reasoned that the first report is a "finding" within the meaning of Rule 31.06(3). The term "findings", has been held to include the information and data obtained by an expert contained in documents where it appears that the expert reached his or her

conclusion and opinions apparently based, in part at least, on such findings.

[33] The plaintiff's decision to rely on the Sack report constitutes a waiver of privilege over that report and, by inference, over the report of Mr. Gray even if a waiver of privilege with respect to the Gray report was an inadvertent one." [my emphasis throughout]

[79] It seems to me those possibilities are eliminated in this case, by virtue of the mandatory provisions relating to the disclosure of defence medical reports. A defendant who chooses to refer the injured plaintiff to a defence medical examination is, in doing so, waiving privilege over that report. The reason being that the operation of section 105 of the *Courts of Justice Act* together with section 33 of the Rules, provides a means for the defendant to force the plaintiff to attend before experts of the defendant's choosing (in most circumstances).

[80] The *quid pro quo* for the usual mandatory obligation to attend the defence medical examination, if requested, is the plaintiff's entitlement in all cases to disclosure of the resulting report.

[81] This is required by rule 33.06, which directs, with respect to defence medical examinations:

Preparation of Report

33.06(1) After conducting an examination, the examining health practitioner shall prepare a written report setting out his or her observations, the results of any tests made and his or her conclusions, diagnosis and prognosis and shall forthwith provide the report to the party who obtained the order.

Service of Report

(2) The party who obtained the order shall forthwith serve the report on every other party.

[82] My colleague, Master Glustein in *Dumaliang v. Cheng*, [2006] CanLII 36356, dealt with the plaintiffs' request for production of surveillance. It appears that in that in *Dumaliang* the defence medical expert had been sent and had relied upon some still surveillance photographs. The question before Master Glustein was whether the photographs remained privileged or whether it had been waived by virtue of being sent to the defence medical expert.

[83] Master Glustein found as follows:

By providing Dr. Berbreder with the surveillance photographs the defendants waived litigation privilege with respect to such photographs....

While the defendants acknowledge that they have waived privilege with respect to the photographs (and provided same to the plaintiffs after being served with the notice of motion), they submit that there is no such waiver with respect to the videotape. However, since the defendants seek to rely on a portion of the privileged surveillance evidence, principles of fairness require that the defendants produce the full videotape surveillance evidence of those events.

In the present case, Dr. Berbreuer, on behalf of the defendants, relies on certain still photographs from the videotape, provided to him by the defendants, to seek to establish that Dumliang has not suffered catastrophic impairment. The defendants have opened the door on this otherwise privileged evidence and "it is opened for all purposes related to the topic" of the events relied upon by Dr. Berbreuer. The plaintiffs and the court "must have the opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question." [my emphasis]

[84] In my view the situation is even clearer now. I take the position that from the moment of his retainer to conduct a Rule 37 examination, a defence medical examiner owes his or her primary duty to the court. It is inappropriate and unseemly for the court to prevent any party before it from having contemporary access to the information provided to that expert.

XII. Summary of Principles Emerging from Case Law

[85] The following principles emerge from the rules and previous jurisprudence:

(a) if information is sent to an expert, then the same information should be sent to the opposing party to allow that party to test the expert's opinion;

(b) an opposing party is entitled to the facts on which the expert's opinion is based;

(c) so long as an expert read a document sent to him or her, then that document was considered, such that it is a "finding" that must be produced;

(d) the privilege claimed over a document sent to an expert is waived at the time that it was decided to rely on that expert's opinion or in circumstances where privilege is waived over the report, even if the waiver was inadvertent;

(e) by sending a defence medical assessor portions of surveillance, privilege over the full surveillance video or all photographs is waived.

[86] To these I now add the presumption that in the case of a defence medical examination the privilege is lost at the point the material is sent to an expert retained for the purpose of a Rule 37 examination.

[87] To be clear I regard "surveillance" as including any reports whether written or oral together with any photos, video or other electronic records commissioned with respect to the plaintiff.

[88] Accordingly, in future, should Dr. Chang's counsel decide to send Julie Aherne to a defence medical examination and should the examiner be provided any surveillance of this plaintiff, the defendant will have concurrently decided by virtue of the present *Rules* to rely on that defence medical report. In doing so, the party will have also, *at that time*, waived privilege over the surveillance. As such, it is appropriate and in the interests of justice that Julie receive a copy of the surveillance at the same time that it is sent to the defence medical examiner.

[89] It does not seem appropriate to me that a non-party, whose duty is to the Court, should have access to relevant documents before the injured party has been granted equivalent access.

XIII. Disposition

[90] Based on the foregoing reasons and exercising what I believe is an informed discretion, to clarify and set out what I regard to be the requirements of the *Rules of Civil Procedure* regarding production of any "surveillance" in the circumstances of this case.

[91] I therefore find that the defendant, Dr. Chang, should the circumstances arise, is obliged to provide a copy of any surveillance of the plaintiff, to counsel for the plaintiff, concurrently with its release to any defence medical examiner.

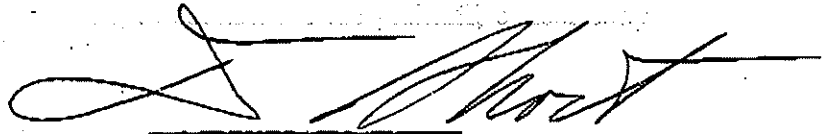
XIV. Costs.

[92] The bulk of these reasons dealt with what I regard as an important area of trial practice which because of the recent rule changes remains in a state of flux.

[93] The Cost Outline filed by the Plaintiff identified total costs on a substantial indemnity basis of \$7,025. The plaintiff was obliged to prepare materials and a factum on elements that were resolved on the eve of the motion. I feel an award to the plaintiff on account of that portion of the motion, in the all-in amount of \$1750, payable within 60 days, is justified.

[94] Turning to the portion of the motion that gave rise to these reasons, the defendant was unsuccessful in resisting the plaintiffs' motion for disclosure but based upon a refusal that was made early in the implementation of the new *Rules*. It seems to me in all the circumstances, a fair and proportional result, with respect to this portion of the original motion, would be "costs to the plaintiffs in the cause" and so hold. If the parties cannot agree on an appropriate quantum within 30 days, I may be contacted through my Registrar to resolve the issue.

[95] I thank both counsel for their skilled advocacy in defining the issues to be addressed by me in this case.



Master D. E. Short

DATE: April 14, 2011

DS/R37