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Plaintiff's counsel may be forced to rely more on legal experts

PERSONAL INJURY

The Ontario Divisional Court recently clarified the rules surrounding treating health practitioners providing opinion evidence at trial and they must provide a written report prior to trial, Toronto plaintiff's personal injury lawyer Darcy Merkur writes in *Lawyers Weekly*.

"Until recently, there has been conflicting case law on whether the onerous expert report rules applied beyond medical-legal experts hired by a party to the litigation," Merkur, a partner of Thomson, Rogers, writes in the article. "The Ontario Superior Court, in *Beasley v. Barrand* [2010] 101 O.R. (3d) 452, had taken a strict compliance approach to the need for formal expert reports, while a more flexible approach to opinions by non-retained experts was taken in *McNeil v. Filthaut* [2011] O.J. No. 1863."

In *Westerhof v. Gee Estate*, the court concluded the expert report rules apply to all opinion evidence, regardless of the person's role or involvement in the case.

Justice Thomas Lederer, writing for the Ontario Divisional Court, "makes it clear that all those providing opinion evidence are bound by the rules regardless of how they became involved," writes Merkur.

The *Westerhof* decision will have unfortunate effects on forcing plaintiff's counsel, "to become more reliant on medical-legal experts out of fear that they will not be able to secure compliant reports

from the key treatment providers," writes Merkur.

In Lederer's decision, the article says, "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."

Rule 53.03 of the *Ontario Rules for Civil Procedure* requires a party calling an expert witness at trial to serve a report well before trial that addresses fundamental issues associated with the opinion sought and provided, he writes, "and imposes an obligation on the expert to sign an expert's duty form confirming the expert's overarching duty to the court, as opposed to the party that retained them."

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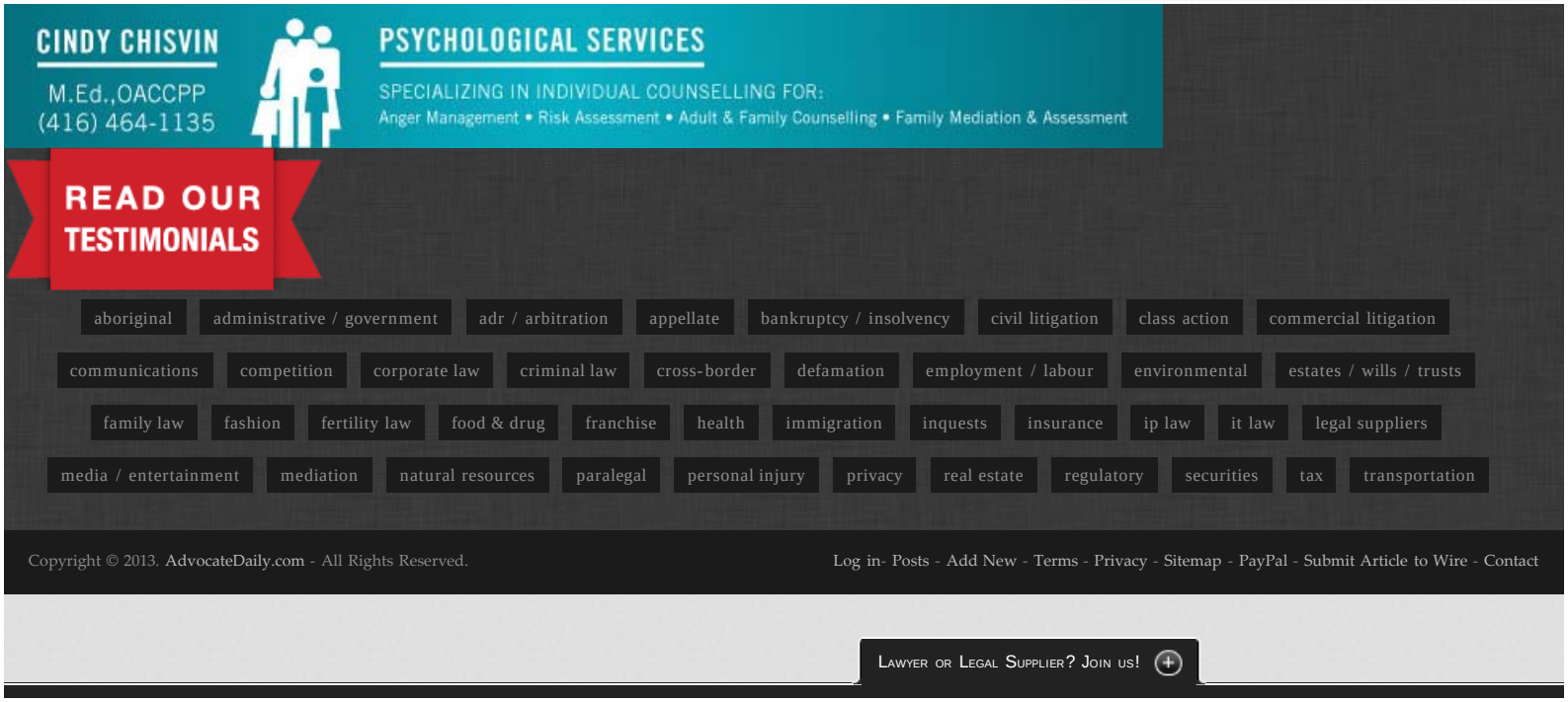

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