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Moore v. Getahun: Advocates and Experts, the Evidentiary Paradox

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The Court of Appeal provided a unanimous decision with respect to the long awaited appeal in *Moore v. Getahun*, 2015 ONCA 55.

The appeal centred around findings by the trial judge with respect to expert evidence and the conduct of defence counsel in her dealings with a defence expert. There were other, less significant evidentiary issues also raised.

The main questions for the court were: 1) whether the trial judge made any errors of law with respect to her findings on expert evidence; 2) whether any such errors made by the trial judge gave rise to a substantial wrong or miscarriage of justice, such that a new trial should be ordered.

The court concluded that the judge made a number of errors with respect to expert evidence and otherwise. However, the court found that the errors made did not give rise to a substantial wrong or miscarriage of justice, and as a result the appeal was dismissed.

In reaching its conclusion, the court made a number of important pronouncements, particularly with respect to expert evidence. Although arguably *obiter*, the comments are likely to have a major impact as it relates to communications between advocates and experts. The most salient of these edicts with importance for all litigators, and particularly personal injury litigation lawyers, are as follows:

- It is widely accepted that consultation between counsel and expert witness in the preparation of Rule 53.03 reports, within certain limits, is necessary to ensure the efficient and orderly presentation of expert evidence in the timely, affordable and just resolution of claims. [para 49]
- The court disagreed with the trial judge's statement that the 2010 amendments to the *Rules* introduced a change in the role of expert witnesses. Instead the court held "that these changes represent a restatement of the basic common law

principal that it is a duty of an expert witness to provide opinion evidence that is fair, objective and non-partisan." [para 52]

- Consultation and collaboration between counsel and expert witnesses is essential to ensure the expert witness understands the duties reflected by Rule 4.1.01 and contained in the From 53 acknowledgement of expert's duty. [para 63]
- Counsel needs to ensure that the expert witness understands matters such as the difference between the legal burden of proof and scientific uncertainty, 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 as the ultimate arbiter of these issues. [para 63]
- Counsel play a crucial mediating role by explaining the legal issues to the expert witness and then by presenting complex expert evidence to the court. It is difficult to see how counsel could perform this role without engaging in communication with the expert as the report is being prepared. [para 64]
- Leaving the expert witness entirely to his or her own devices, requiring all changes to be documented in a formalized written exchange, would result in increased delay and cost in a regime already struggling to deliver justice in a timely and efficient manner. [para 65]
- The changes suggested by the trial judge would not be in the interest of justice and would frustrate the timely and cost effective adjudication of civil disputes. [para 65]
- 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. [para 62]

With respect to documentation and the disclosure of consultations and communications with experts, particularly regarding draft reports, the court held:

- As explained by the Supreme Court in *Blank v. Canada*, the object of litigation and privilege is to ensure the efficacy of the adversarial process, and to achieve this purpose, parties to litigation must be left to prepare their contending positions in private, without adversarial interference and without fear of premature

disclosure. These concerns are important in the context of the preparation of expert witnesses and their reports. [para 68]

- Litigation privilege creates a zone of privacy in relation to pending or apprehended litigation. The careful and thorough preparation of a case for trial requires an umbrella of protection that allows counsel to work with third parties such as experts while they make notes, test hypothesis and write and edit draft reports. [para 69]

- Pursuant to Rule 31.06(3), the draft reports of experts that the party does not intend to call are privileged and need not be disclosed. Under the protection of litigation privilege the same holds for the draft reports, notes and records or any consultation between experts and counsel, even if the party intends to call the expert as a witness. [para 70]

- Allowing an open-ended inquiry into the difference between a final report and an earlier draft would unduly interfere with the orderly operation of a party's case and would run the risk of needlessly prolonging proceedings. [para 71]

- The law currently poses no routine obligation to produce draft expert reports. [para 72]

As it relates to the materials and circumstances on which disclosure may be required, the court noted that the litigation privilege attaching to expert reports is "qualified, and disclosure may be required in certain situations." [para 73]

The Court of Appeal cites, with apparent approval, the disclosure of only foundational information from an opposing party's expert. This flows from the alleged implied waiver of privilege over the facts underlying an expert's opinion that results from calling the expert as a witness.

The Court of Appeal notes, with apparent approval, that authors favour restricting the implied waiver "to material relating to the formulation of the expressed opinion." Such authors note that caution should be exercised before requiring "wide-ranging disclosure of all solicitor-expert communications and drafts of reports", as such a practice could

encourage “general practice among solicitors of destroying drafts after they are no longer needed just to avoid the problem.” [para 75]

As a result, it would appear that the Court of Appeal has established that at the discovery phase only the foundational information or documentation relied upon by the expert in formulating the expert opinion will be required to be produced. This is contrasted with all documentation listed in the expert’s report, all documentation reviewed by the expert, and appears far from all documents provided to the expert by counsel.

The court noted, however, that the zone of privacy is not absolute:

- A second qualification to the zone of privacy is that: litigation privilege must yield where required to meet the ends of justice and “is not a black hole from which evidence of one’s own misconduct can never be exposed to the light of day.” [para 76]

The test employed by the Court of Appeal for determining when disclosure may be required is as follows:

- Where the party seeking production of draft reports or notes of discussions between counsel and expert can show reasonable grounds to suspect that counsel communicated with an expert witness in a manner likely to interfere with the expert witness’s duty of independence and objectivity, the court can order disclosure in such discussions.

The court goes on to state that, absent a factual foundation to support a reasonable suspicion that counsel improperly influenced the expert, a party should not be allowed to demand production of draft reports or notes, or interactions between counsel and an expert witness.

One wonders where the factual foundation is to be derived from as it appears one must have at least some evidence of impropriety before any evidence which might reveal such impropriety will be produced. This evidentiary paradox will likely only be solved when the most fortunate of counsel encounters the most hapless of experts.

For context the court indicates:

- Evidence of an hour and a half conference call plainly does not meet the threshold of constituting a factual foundation for an allegation of improper influence. In my view the trial judge erred in law by stating that all changes in the reports of expert witnesses should be routinely documented and disclosed. She should not have ordered the production of the opposing expert's drafts and notes. [para 78]

Other Evidentiary Issues: The Use of the report as an *Aide Memoire*

The trial judge was provided with copies of expert reports as an *aide memoire*. The reports were not tendered as exhibits by either party despite the repeated requests of the trial judge. As a result, the Court of Appeal found it was improper for the trial judge to note and rely upon inconsistencies between the expert's oral testimony and the reports provided.

In so finding the court held:

- Inconsistencies between the *viva voce* evidence of an expert witness and his or her expert report are the proper subject of examination. However, if the expert witness was not cross-examined as to the inconsistency between his or her viva voce evidence and the contents of their report, it is not open to a trial judge to place any weight in assessing the expert's credibility on this perceived inconsistency.

- This is not a mere technicality but rather a matter of trial fairness.

- The expert witness is entitled to be openly confronted with what may appear to be contradictions so that he or she has the opportunity to explain or clarify the apparent inconsistencies. [para 86]

The *Res Gestae* Ruling

The trial judge permitted evidence with respect to certain utterances which would otherwise be classified as hearsay on the grounds that the contemporaneous circumstances made the utterance reliable and less prone to misrepresentation.

The court concludes that the trial judge misapplied the doctrine of *res gestae*. In that regard the court held:

- The *res gestae* doctrine would permit a court to admit the hearsay evidence for the truth of its contents. That was not what was done in this case. The trial judge in both instances in which he admitted such evidence stated that she was not admitting the hearsay evidence for its truth, but only as part of the narrative.
- The *res gestae* doctrine operates as an exception to the hearsay rule and allows a court to admit certain utterances for their truth. The *res gestae* doctrine has no application to the admission of evidence as part of the narrative. The trial judge's error is relatively common. It was a harmless error of nomenclature rather than substance.

In essence, the Court of Appeal is indicating that it is appropriate for a judge to admit certain hearsay evidence into evidence, not for the truth of its contents, but as part of the narrative. This is not to be confused with the *res gestae* doctrine which would permit such hearsay evidence to go in for the truth of its contents.

The court indicated that it was also appropriate for the judge to have admitted this hearsay evidence into evidence in that fashion (as part of the narrative) because other experts had referred to it in their reports and it would assist her in her understanding of the evidence. Although it was wrong for the judge to describe this as *res gestae* it was held to be appropriate for her to use the hearsay report in this manner.

The Causation Analysis

The court also concluded that the judge made no error of law with respect to the issue of causation. The court accepted the plaintiff's position and the trial judge's determination that the crumbling skull doctrine did not apply to the case. Prior to the defendant's negligence, there was no pre-existing compartment syndrome. The Court of Appeal indicated that they saw no error in the trial judge's conclusion that the crumbling skull doctrine had no application to the facts of the case. [para 100]

<u>Other Issues</u>

The trial judge strongly urged counsel to have their experts meet in what has been described as a “hot tubbing” exercise. Counsel resisted the court’s pressure and incurred her wrath and criticism in return.

Importantly for defence counsel in this case, the Court of Appeal speaks of the unfair criticism made of counsel by the trial judge with respect to counsel's handling of the expert evidence or otherwise.

<u>Court of Appeal's Conclusion</u>

The Court of Appeal, despite finding several errors by the trial judge, particularly with respect to her handling of expert evidence, found there had been no miscarriage of justice and hence no need for a new trial.

In the end, the appeal was dismissed and the plaintiff's success at trial upheld with the ground rules regarding advocates communicating with experts codified in the process. As discussed more fully below, it is this author's view that the court went too far in relaxing the judicial restraint on counsel's communications with experts and created some (new) interesting duties on advocates as it relates to the creation of the expert report and on expert's testimony at trial. Only time, the conduct of counsel, and subsequent case law, will tell.

<u>Author’s Commentary on the Impact of *Getahun*</u>

As indicated, the court may have gone too far in relaxing the rules and the scrutiny with respect to such rules as it relates to advocates and experts. The province's top court has now indicated that it is not only appropriate, but expected, that counsel will assist their experts in the formulation of their report. This new duty is not reserved for correcting typos or moving commas around. In various parts of the decision, the court states the outlines to the scope of counsel’s expected influence over their expert and the drafting of the expert's report. Counsel are expected to:

- Assist in efficient and orderly presentation of evidence;

- Assist experts in framing reports in a way that is comprehensible and responsive to pertinent legal issues;
- Ensure that the expert complies with the *Rules of Civil Procedure* and the rules of evidence;
- Ensure that the expert's report addresses, and is restricted to, the relevant issues;
- Ensure that the report is written in a manner and style that is accessible and comprehensible;
- Ensure that the expert understands the difference between the burden of proof and scientific certainty;
- Ensure that the expert confines the report to the witness's areas of expertise and does not usurp the court's function as the ultimate arbiter of the issues.

One might interpret the court's decision as a mandate on counsel to co-write (at least) the expert's report. Indeed, there may be no other way to interpret this decision.

If counsel actually drafted the expert report (ensuring that it is comprehensive, accessible and confined to the expert's area of expertise) and sent it to the expert and asked the expert to only sign the report if he or she genuinely held the opinions expressed therein, then arguably, counsel would not be in violation of the advocate's duty in dealing with experts, at least so far as the duty is defined by the Court of Appeal in *Getahun*.

To be clear, this is not a practice the writer would endorse or follow, but it is one that is arguably consistent, or at least is not inconsistent, with the principles articulated by the court in *Getahun*. This is a concerning observation to say the least.

The only boundary the court imposed on counsel's involvement is counsel's duty not to communicate with an expert in any manner likely to interfere with the expert's duties of independence and objectivity. Counsel is cautioned by the court that it is inappropriate for counsel to persuade or attempt to persuade experts to articulate opinions they do not genuinely hold.

So it appears that anything short of suborning perjury may be permitted. It seems counsel can test the expert's belief and attempt to persuade the expert to a certain point of view. Counsel is only prohibited from permitting, or forcing, the expert to articulate an opinion the expert does not genuinely hold.

The potential for abuse seems real, and the mechanism for shining light on impropriety appears most elusive. If documents evidencing an expert's communication with counsel are privileged - and not producible – it seems to follow that cross-examination questions relating to such communications will not be permitted as treading upon the same privilege.

The need to have evidence of impropriety before production of an expert's file will be ordered will likely create an impenetrable evidentiary paradox which may leave any occurrences of such impropriety unexposed. Resultantly, the absence of any means to enforce accountability may encourage some to engage in potentially inappropriate conduct with their experts.

I suspect in the post-*Getahun* era that there may be a difficult adjustment period for experts accustomed to writing their reports without involvement of counsel.

Perhaps a better approach might have been one that fell short of a new mandate on counsel to co-write experts' reports, and one which provides some mechanism for adverse counsel to test or unearth any potential impropriety.

The new mandate, combined with no practical monitoring or enforcement mechanism, may produce unexposed abuses.

Like most paradigm-changing pronouncements from appellate courts, the actual impact will depend upon how it is interpreted and applied by lower courts.

If the bar for the evidentiary foundation of impropriety is set low, and communications evidencing improper conduct are exposed and sanctions imposed by trial judges, then perhaps the line dividing proper and improper communication with experts will get pushed back towards the middle.

Until then, and only if then, a new era of counsel co-authoring, at the least, of expert reports has likely been ushered in by the Ontario Court of Appeal in *Getahun*. Only time will tell.