To Admit or Not to Admit – That is the Question

2017 marks a decade since the release of the Report on Civil Justice Reform Project by the Honourable Mr. Justice Osborne. This article reviews the jurisprudence dealing with the proliferation of experts and expert bias to examine whether the Osborne Report's objective of early dispute resolution and reducing use of judicial resources, has been advanced.

In 2015, in the case of the *White v Burgess,*[1] the Supreme Court of Canada affirmed the previously established test for admitting expert evidence, which requires two steps: (1) meeting the *Mohan* factors, and (2) the court's gatekeeping role.[2] The Supreme Court noted the "unmistakable trend of the jurisprudence…has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role". Unfortunately, this trend has not been demonstrated in the subsequent jurisprudence and instead the issue of bias continues to be dealt with at trial, with some exceptions.

Two recent lower court decisions, *Giordano*[3] and *Bruff-Murphy*[4], dealt with the issue of bias in the context of a threshold motion and both addressed the concern through the weighting of evidence rather than admissibility of the evidence. In *Bruff-Murphy,* the court addressed admissibility of a defence expert who had been found to be biased in several prior cases. The court determined, despite concerns with the expert's report, that the evidence should be proffered. At the threshold motion, Mr. Justice Kane raised significant concerns about the expert's impartiality. The expert doctor testified that he saw his role as determining whether the plaintiff's description of their condition was accurate by looking for inconsistencies. Justice Kane commented that the doctor:

- failed to put to the person the inconsistencies;
- would not allow any audio recording of the assessment;
- in addressing credibility of the party, the doctor went outside his terms of engagement;
- conducted no testing nor requested treating doctors test results;
- made comments out of context;

[1] 2015 SCC 23 (CanLII), <http://canlii.ca/t/ghd4f>.
[2] In *R v Abbey,* 2016 ONSC 7 (CanLII), http://canlii.ca/t/gmr5x, the Court of Appeal introduced a two step inquiry to admit evidence.
[3] 2014 ONSC 7516 (CanLII), <http://canlii.ca/t/gg2d0>.
[4] 2016 ONSC 7 (CanLII), <http://canlii.ca/t/gmr5x>.

- had a good memory for the points he was defending but not on other points.

Justice Kane was clear that in future cases he would not qualify witnesses as experts whose reports present an approach similar to what was seen in that case. The case highlights the high threshold to have an expert disqualified.

The same expert was the subject of another motion, in *Daggit v Campbell*,[5] where defence sought an Order to appoint this doctor to do an Independent Medical Examination ("IME"). Madame Justice MacLeod-Beliveau commented in *obiter* that an extension of the court's right to name a doctor for an IME is the discretion not to name a particular health practitioner if he/she is found to be biased, which would be uncommon.

These recent cases show clear judicial direction that this level of bias will not be tolerated and will be excluded at trial reinforcing that the "hired gun" methodology of choosing an expert is likely an unsuccessful strategy. However, leaving the determination of bias till the trial, or even after trial does nothing to address the objective to cut down the time and costs spent getting to trial.

A slow shift in addressing these concerns earlier in the process has been seen through parties imposing terms on court ordered assessments. Although, this movement could have its benefits, little is to be gained where the opposing counsel unilaterally imposes restrictive terms not required by the *Rules*.

The terms often incorporate uncontroversial requirements such as providing the expert's CV, content in the report, form to be completed, an index of the documents or payment of reasonable expenses. Production of the doctor's notes and recording the assessment are often requested and can, at times, be contested. However, parties often request much more invasive terms. *Lavecchia v. McGinn*[6] dealt with an IME motion where the plaintiff requested that defence agree to the following additional terms:

a) plaintiff was not to be asked to complete any documents such as questionnaires at the examination;
b) doctor was not to express any opinions dealing directly or indirectly with liability;

[5] 2016 ONSC 2742 (CanLII), <http://canlii.ca/t/gpqm3>.
[6] 2016 ONSC 2193 (CanLII), <http://canlii.ca/t/gp6zq>.

c) doctor was not to express any opinion on the credibility, character or truthfulness of the plaintiff;
d) health records and information of the plaintiff were not to be disclosed to any other person or entity other than defense counsel

The court opined that term (a) has to be decided case by case given that some disciplines utilize standard diagnostic tools and tests which would be appropriate. The plaintiff conceded that terms (b) and (c) were too broad and as such were not ordered. Although, it was recognized that determining issues of credibility are properly the adjudicator's role. Term (d) is of particular interest; it was an indirect way to prevent a "ghost written" report. The parties agreed that the expert report must be written by the expert herself/himself and not by administrative staff or other individuals. The court commented on the need for greater rigour and predictability concerning the role and use of experts so as to save time at trial and promote settlements; it noted the cases of *El-Khodr v. Lackie* and *Elbakhiet v. Palmer* which raised concerns at trial about ghost writing and an expert opining on credibility. Master Macleod, in *Lavecchia*, *supra*, stated:

> I do not, however. accept that the best approach is to be found in plaintiffs seeking to unilaterally impose restrictive terms on the conduct of defence medicals. Nor is it reasonable to have actions grind to a halt while the parties attempt to negotiate terms of a consent order as has happened here. A standard form of order may well be a very good idea.

The 2017 case of *Kushnir v. Macari*[7] addressed the issue of terms relating to ghost writing. The plaintiff sought an Order, inter alia, that the expert report be drafted solely and entirely by the assessing doctor, the research and medical record review be done by the assessing doctor and the records not be shared with any third parties. Defence argued that this was an attack on the integrity of the assessor and that the assessor takes responsibility for the report in signing it. Plaintiff argued that these terms were needed to ensure trial fairness. No specific wrongdoing was alleged against the proposed assessor.

Citing the facts of *El-Khodr,* where the expert testified at trial that part of the report was written by somebody else, the court acknowledged the problem of ghost writing. The court was prepared

[7] 2017 ONSC 307 (CanLII), <http://canlii.ca/t/gx9g6>.

to address same but found the conditions sought were overreaching and suggestive of inappropriate behaviour by the assessor. The Order encompassed a term that the report shall be written solely by its author and health records should not be disclosed to anyone other than defence counsel. The decision was not appealed.

Unfortunately, in the broader context there is little progress in terms of achieving the long term goals of early dispute resolution in order to reduce costs and conserve judicial resources. In the past 2-3 years, there is clear judicial commentary suggesting a slow shift towards addressing the issue of admissibility and the treatment of bias at an earlier stage of the action in the specific context of court ordered IMEs. At this juncture, this issue often entails the same amount of judicial and legal resources to address the terms and conditions requested by parties. Further, this also fails to have broader implication outside of the medical expert's field. It is yet to be seen whether courts will provide clear guidance that can result in a standard form terms and conditions for IMEs - which would at least have the effect of leveling the playing field such that experts on both sides of the dispute would be subject to the same terms. Suffice it to say that the courts have clearly indicated that they will take a position on admissibility of experts in those extreme cases where it is warranted. Accordingly, it is incumbent upon the parties on both sides of the dispute to do their due diligence in advance of selecting an expert to ensure that that expert will uphold their duty to the court.

Author's Biography: Debbie Orth is a partner at Bertschi Orth Solicitors and Barristers LLP. Debbie was called to the bar in Ontario in 1993. She practices in the areas of Insurance Defence and Commercial Defence focusing on accident benefits, personal injury coverage, educational malfeasance and property and casualty. Debbie is also a frequent lecturer for various professional organizations.