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DATE: 2007-11-06

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Brian Hall and Sharon Hall v. Kawartha Karpet & Tile Company Limited and David Crozier

AND

Phillip Edgar v. Kawartha Karpet & Tile Co.

BEFORE: D. Ferguson J.

COUNSEL: Tamar Agopian, for the Halls
John Russell, for Edgar
Robert W. Becker, for the Defendants

ENDORSEMENT ON ISSUE OF ADMISSIBILITY OF EXPERT EVIDENCE

[1] I made a ruling on this motion during the trial and am now giving my reasons.

ISSUE

[2] The issue on this motion is whether or not Rule 53.03 applies to a person with expertise who was involved in the history of the subject matter of the action or applies only to persons retained as experts by a party for the purpose of assisting in the litigation.

BACKGROUND

[3] The plaintiffs allege that the defendants negligently caused a fire in a building owned by the Halls. At the time of the fire an assistant fire chief attended at the scene, assisted in commanding the firefighters and then conducted an investigation of the origin and source of the fire. As part of that process he prepared a one page standard occurrence report in which he set out brief conclusions. That report would not satisfy the requirements of Rule 53.03 because it does not contain the substance of, or basis for, his opinions.

[4] The plaintiffs wish to call him as a witness and elicit opinion evidence from him.

[5] The defendants object that the plaintiffs have not complied with Rule 53.03.

To Whom Does Rule 53.08 Apply?

[6] In my view Rule 53.08 was intended to apply to persons with special expertise who are retained by a party to assist in litigation. I appreciate that there is a chicken and egg analysis here and that one could argue that the rule should apply to anyone whom the court finds qualified to provide opinion evidence and that leave should be granted where it may be impractical to comply with the rule. However, I think a consideration of all the circumstances favours the conclusion that the rule does not apply here at all.

[7] The purpose of the rule was stated in *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham*, 51 O.R. (3d) 97 (C.A.) at para. 38:

> …the purpose of the rule, … is to facilitate orderly trial preparation by providing opposing parties with adequate notice of opinion evidence to be adduced at trial.

[8] That purpose does not really assist in determining if the rule applies here. Even if the rule does not apply the parties could obtain disclosure of the same information in an action in which oral discovery is permitted. These are proceedings under the simplified procedure and so such discovery would not provide such disclosure in this case.

[9] In my view the scope of Rule 53.08 should be the same as that for other provisions relating to the calling of expert witnesses at trial.

[10] Section 12 of the Ontario *Evidence Act* limits to three the number of experts a party can call without leave. That statute does not define the term 'expert'. However, I do not think anyone would suggest that a person who was involved in the history of the matter in the normal course should be included in the maximum of three. For instance, if the action were a professional negligence case against an engineer I do not think anyone would suggest that the defendant engineer was to be counted as one of the three permitted experts. Similarly, if the action involved a personal injury I don't think anyone would suggest that a physician who had treated the plaintiff in the normal course, say in the emergency department of a hospital, should be counted as one of the three permitted experts.

[11] I note in passing that where such a witness falls within s. 52 of the *Evidence Act* (ie. the witness is a 'practitioner' as defined in the section and has signed a report for a party), then the party calling that witness would have to deliver the report required by s. 52.

[12] In addition, a witness who has been involved in the history of a matter might well not be qualified to be an expert under Rule 53.08 because the witness is not independent. For example, the expert witness in a malpractice case who had some role in the history (for example, an anaesthetist who witnessed the surgery performed by a defendant surgeon) might be a colleague of the defendant professional or even his or her partner. A number of cases have now established that an expert has a duty to the court and must provide "independent" opinion rather than just a "hired gun" opinion for the purpose of assisting the party who retained him or her: Ferguson, *Ontario Courtroom Procedure*, LexisNexis, 2007, at p. 930 ff. Consequently, the case law indicates that where a person with expertise may have knowledge or an opinion about a case, that

person should not be considered an expert witness in this sense. This tends to suggest that such a witness would not fall under Rule 53.08.

[13] Finally, it appears to me that Rule 53.08 was not intended to apply to witnesses where a party could not be expected or even be able to comply with the requirements of the rule.. For instance, if the witness were like the one here, a professional who was fulfilling a duty when involved in the history of the background story, that person would not likely be willing or even able to prepare a report at the instance of a party in order to permit that party to comply with Rule 53.08. In some cases the party might not even be able to speak with the witness before trial. Where, as in the example of the personal injury case, the witness had a professional relationship with the opposite party, then the professional would have a duty of confidentiality to the opposite party (the patient) and the witness would not be permitted to speak to the party wishing to call him or her and would not be permitted to disclose any information or opinion necessary to prepare a report.

[14] For these reasons I conclude that Rule 53.03 does not apply to the assistant fire chief.

Alternative Conclusion

[15] If Rule 53.03 does apply then I would grant leave to call the witness pursuant to 53.08.

[16] The expert retained for the defendant was present at the trial to hear the testimony of the assistant fire chief and I would permit that defendant's expert to give evidence dealing with the same matters. At most, the defendant would require a brief adjournment to consider how to deal with the assistant fire chief's testimony and, therefore, I can see no significant prejudice.

CONCLUSION

[17] For these reasons I dismiss the motion.

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D. S. Ferguson J.

DATE: November 6, 2007.