

CITATION: Snodden v 2568832 Ontario Inc, 2023 ONSC 6759
OSHAWA COURT FILE NO.: CV 19-1664

DATE: 20231129

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Roger Snodden, Plaintiff

AND:

2568832 Ontario Inc., O/A Upper Canada Fuel & Burner and Norman Gourlie,
Defendants

BEFORE: Justice S. J. Woodley

COUNSEL: Martin Forget, Counsel for the Plaintiff Roger Snodden

Karyn Shapira, Counsel for the Defendant 2568832 Ontario Inc., O/A Upper
Canada Fuel & Burner

HEARD: November 27, 2023

RULING RE EXPERT WITNESS

OVERVIEW

1. On June 1, 2018, the Plaintiff discovered an oil escape event from his indoor tank located at his home in Uxbridge, Ontario.
2. Following discovery of the oil escape event, remediation of the home and property was completed and the damages incurred were approximately \$400,000.
3. A lawsuit was commenced by the Plaintiff as against the fuel supplier and the technician who attended at the property on various occasions to service and/or inspect the Plaintiff's oil burning system.
4. The trial of the action commenced on November 27, 2023.

5. The first witness called by the Plaintiff was Michael Flynn, who is an expert retained by the Plaintiff's insurer to determine the origin and cause of the oil spill.
6. Prior to attending court, Mr. Flynn prepared a report, dated October 8, 2018. He noted in his report that it was a "preliminary report" that did not comply with all requirements of Rule 53.03 (2.1) and that he would prepare a final report that would satisfy the Rule 53 requirements.
7. No final report was prepared.
8. The Plaintiff advised the Defendant that Mr. Flynn would appear at trial as a participant expert.
9. The Defendant objected to Mr. Flynn being qualified as a participant expert or as a Rule 53 expert.
10. Following receipt of the Defendant's objection, Mr. Flynn swore an Acknowledgment of Expert's Duty (Form 53), as mandated by Rule 53.03(2.1) (7). This form was served on the Defendant on November 23, 2023, the last day prior to the commencement of the trial.

ISSUES

11. The issues to be determined by this ruling are:
 - a. Does Mr. Flynn qualify as a participant expert?
 - b. Does Mr. Flynn qualify as a Rule 53 expert? If so, can his October 8, 2018, report qualify as an expert report?
 - c. If Mr. Flynn is qualified as an expert, can he provide expert opinion evidence relating to:
 - i. Origin and cause of the tank failure (oil spill)?
 - ii. Microbial Influenced Corrosion ("MIC") – development, consequences, and how MIC applies to the present case?

- iii. Standard of care applicable to an Oil Burner Technician (“OBT”)?
- iv. Standard of care applicable to a supplier? and/or
- v. Codes and regulations regulating proper supply, service, and maintenance of a heating appliance, i.e. oil tank?

THE LAW AND ANALYSIS

Participant Expert vs Rule 53 Expert

12. In *Westerhof v. Gee Estate*, 2015 ONCA 206, at paras. 59-60, the Ontario Court of Appeal held that the key factors in determining whether Rule 53 applies to a proposed expert is not dependent on the type of evidence that the witness intends to proffer – whether it be fact or opinion – instead the determining factors are:
1. Whether the person has been engaged by or on behalf of a party to the litigation;
 2. Whether the opinion to be given is based on the witness’ observation of or participation in the events at issue; and/or
 3. Whether the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training, and experience while observing or participating in such events.
13. Witnesses who satisfy these specific requirements are known as participant experts who are permitted to give opinion evidence without complying with Rule 53.03 (*Westerhof*, at para. 14).
14. In most cases, a participant expert can provide fact and limited opinion evidence. However, participant expert opinion evidence is only admissible if it’s based on the expert’s direct experience and participation: see *Westerhof*, at paras. 60 – 62.
15. It necessary to consider each of the factors discussed in *Westerhof* to determine whether Mr. Flynn qualifies as a participant expert.

Was Mr. Flynn engaged by or on behalf of a party to the litigation?

16. Counsel for the Plaintiff argued that Mr. Flynn was not engaged by or on behalf of a party to the litigation. Mr. Flynn was retained on June 5, 2018, three days following the oil spill and approximately 11 months prior to commencement of the litigation. Counsel submitted that in these circumstances Mr. Flynn was not engaged by or on behalf of a party to the litigation as no litigation had been commenced. Counsel also noted that the October 8, 2018, report was prepared prior to the commencement of this litigation. Further the first page of the report titled the report as a “preliminary report” and the final page of the report noted that the report was “kept as brief as requested,” did not conform with Rule 53.03, and that a “final report will satisfy the requirements for expert reports” as per Rule 53.
17. Counsel for the Defendant referenced *Heyworth v. Doyle Plumbing*, 2022 ONSC 677, and noted that the facts in present case are almost identical to *Heyworth*: Mr. Flynn was retained by the Plaintiff’s insurance company through their independent adjuster to prepare an origin and cause report. In *Heyworth*, Justice Smith found that despite any evidence of participation noted by Mr. Flynn in his report, Mr. Flynn was retained by the Plaintiff’s insurance company who themselves are a party to the action by way of their subrogation rights. Mr. Flynn was hired to give an opinion about who was responsible for the oil spill. In other words, he was engaged by or on behalf of a party to this litigation. As such, Justice Smith found that Mr. Smith was obligated to comply with Rule 53.
18. The facts of the present case are strikingly similar. Mr. Flynn was retained by Mr. Greg Madill – who is the Plaintiff’s independent adjuster - to prepare an origin and cause report. The Plaintiff’s insurance company is a party to the action by way of their subrogation rights. Mr. Flynn was hired to give an opinion about who was responsible for the oil spill. I reject the Plaintiff’s submission that the report’s reference to being a “preliminary review” that is not compliant with Rule 53 supports the position that Mr. Flynn is a participant expert. It does not. As per *Westerhof*, Mr. Flynn was engaged by or on behalf of a party to this litigation and therefore does not qualify as a participant expert.

Did Mr. Flynn base his opinion on his personal observations of or participation in the events at issue?

19. According to page two of Mr. Flynn’s report dated October 8, 2018, in carrying out his investigation, the scope and participation by Mr. Flynn was as follows:

- i. An on-site examination was *carried out by Glen Moreau – OBT – 2*, on June 5, 2018;
- ii. A discussion with the insured was undertaken;
- iii. The TSSA report issued to the Insured was reviewed;
- iv. A review of the comprehensive inspection document was carried out; and
- v. Evidence delivered to MFAL (Michael Flynn & Associates Ltd.) was secured pending further evaluation.

20. Excepting the notation, “a discussion with the Insured was undertaken,” which does not specify whether Mr. Flynn participated in the discussion, Mr. Flynn’s involvement was limited to receipt and review of information and documents compiled by third parties. There is no evidence that Mr. Flynn attended the site and there is no evidence that he otherwise “participated” in the events in issue.

21. Mr. Flynn’s involvement is not akin to a treating physician or surgeon who is engaged as a participant expert due to an injury or illness caused by a third party. Mr. Flynn’s involvement is also not akin to that of a fire inspector who attends to inspect a site as the result of their duty and professional obligations.

22. Instead, Mr. Flynn’s involvement appears to be akin to that of a classic Rule 53 expert. Mr. Flynn was provided with information and documents and prepared his opinion based on his review and observations of second-hand information, including the photographs referenced in his report.

23. I mention the photographs as while Mr. Flynn may make “personal observations” based on the photographs – there is no indication that he attended the site or took any of the photographs included in his report. As such, while Mr. Flynn may make observations based on the photographs, these observations are prefaced on choices made by the photographer including angles, items, and viewpoints.

24. This is not to say that Mr. Flynn cannot draw conclusions based on his review of the photographs – it is only to note that Mr. Flynn’s review of the photographs taken by another does not equate to “personal observations” sufficient to render him a participant expert.

Was the formation of the opinion done in the ordinary exercise of the expert’s skill, knowledge, training, and experience while observing or participating in the events?

25. As noted above, while Mr. Flynn is clearly an expert in his field, there is no evidence that his opinion was formed “while observing or participating in the events.”

26. For all of the foregoing reasons, I am of the view that:

1. Mr. Flynn was engaged by or on behalf of a party to this litigation;
2. Mr. Flynn based his report and opinion on a review of various forms of information compiled by others, not based on his personal observations of or participation in the events at issue; and
3. Mr. Flynn did not form his opinion while observing or participating in the events.

27. Any one of these factors disqualifies Mr. Flynn as a participant expert. In the circumstances, Mr. Flynn is not qualified as a participant expert.

Is the Expert Report Compliant: Rule 53.08(1)(5)?

28. The question that next arises is whether Mr. Flynn’s report, which admittedly does not comply with Rule 53.03(2.1), can be filed with the court thus permitting him to be qualified as an expert to give opinion evidence in this proceeding.

29. Rule 53.08(1) provides that if evidence is admissible only with leave of the court (as is required for expert reports) leave may be granted if the party responsible for the failure satisfies the judge that:
1. There is a reasonable explanation for the failure to comply;
 2. Granting leave would not cause prejudice to the opposing party that could not be compensated by costs or an adjournment; and
 3. Would not cause undue delay in the conduct of the trial.
30. Mr. Flynn’s report is dated October 8, 2018, and while much of the report complies with the provisions of Rule 53.03 (2.1), the following requirements are missing from the report: the expert’s area of expertise; and the expert’s qualifications, employment and educational experiences in his area of expertise.
31. Although Rule 53.03 (2.1) provides that the above noted information *shall* be contained in the expert report – Rule 53.08 allows the report to be admitted and allows the expert to be qualified in the absence of such information if there is a reasonable explanation provided and granting leave would not cause prejudice that could not be compensated or cause undue delay.
32. Mr. Flynn formed his opinion based on his skill, knowledge, training, and experience. He has previously been qualified to give expert evidence in other cases and his evidence has been accepted by the courts (see *Heyworth*, at para. 38).
33. Mr. Flynn’s report, dated October 8, 2018, was listed in Schedule “A” to the Plaintiff’s Affidavit of Documents, served on October 20, 2020. However, his resume and Acknowledgement of Expert’s Duty (Form 53) were not included in the Affidavit of Documents.
34. The Defendant’s counsel requested Mr. Flynn’s resume and received a copy of same on November 14, 2023.

35. On November 15, 2023, the Plaintiff served their Notice of Intent to file Business Records pursuant to s. 35 of the Ontario *Evidence Act* and included at Tab 13, Mr. Flynn's report.
36. On November 18, 2023, counsel for the Defendant objected to the inclusion of Mr. Flynn's report as a business record and counsel for the Plaintiff responded that the report was admissible as Mr. Flynn was a participant expert not a Rule 53 expert.
37. On November 23, 2023, counsel for the Defendant advised that she would object to Mr. Flynn's testimony as a participant expert or as a Rule 53 expert.
38. On November 23, 2023, counsel for the Plaintiff served Mr. Flynn's Form 53.
39. For the purposes of completeness, I note that Mr. Flynn's resume which was provided to the Defendant on November 14, 2023, and otherwise introduced as an exhibit on the expert *voire dire* provides all required information otherwise absent from Mr. Flynn's report.
40. In the circumstances, while the format contemplated by Rule 53.03(2.1) was not complied with, the substance of the required information was provided to counsel on November 14, 2023.
41. I am of the view that Plaintiff's counsel provided a reasonable explanation – in that the law regarding participant vs. expert witnesses was in a bit of a state of flux. Counsel only intended to call Mr. Flynn as a participant expert but filed the report and an Acknowledgement of Expert's Duty (Form 53) as a precaution after receiving notice from Defendant's counsel that they did not agree that Mr. Flynn was a participant expert.
42. It appears that the Defendant's counsel had sufficient opportunity to familiarize herself with the content of Mr. Flynn's report and was able to inform herself as to the basis for his expertise through the delivery of his resume.

43. As to prejudice, the required and omitted information, namely Mr. Flynn's area of expertise, his qualifications, employment, and education was already known to the Defendant's counsel who became familiar with Mr. Flynn, and the issues related to his testimony prior to him being called as a witness at trial. More particularly, the Defendant's counsel cited and relied upon the *Heyworth* decision throughout her submissions. In the circumstance, I do not perceive prejudice to the defendant as a result of the admission of Mr. Flynn's report pursuant to Rule 53.

44. For the foregoing reasons, Mr. Flynn shall be permitted to testify as an expert in the proceeding and his report dated October 8, 2018, and resume, shall be admitted into evidence.

Areas of Qualification Sought for the Expert Opinion

45. The next issue to be determined is the areas in which Mr. Flynn is sought to be qualified as an expert.

46. Counsel for the plaintiff seeks to have Mr. Flynn qualified in the following areas:

- i. Origin and cause of tank failure;
- ii. MIC development, consequences, as it applies to this case generally;
- iii. Standard of care applicable to an OBT;
- iv. Standard of care applicable to a fuel supplier related to supplying fuel, servicing, and maintaining a heating appliance (oil tank); and
- v. Code and regulations regulating proper supply, service, and maintenance of a heating appliance (oil tank).

The Legal Test for Admissibility

47. As noted by the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 82, at para. 19, the legal test for the admissibility of expert opinion evidence has two components. In the first stage, the proponent of the evidence must persuade the trial judge that the proposed expert opinion is:

- i. relevant;
- ii. necessary;
- iii. not barred by any other exclusionary rule; and
- iv. given by a properly qualified expert.

48. The Defendant agrees that Mr. Flynn meets these criteria insofar as his evidence relates to origin and cause, MIC – generally excepting the issue of the rate of corrosion, and compliance with the codes and regulations, noting that any interpretation of the law remains within the exclusive domain of the court. The Defendant objects to Mr. Flynn being qualified to provide opinion evidence on the standard of care applicable to an OBT and a fuel supplier on the basis that he is neither.
49. Having considered the submissions of counsel and having reviewed the expert report and the resume of Mr. Flynn, I have no difficulty in qualifying Mr. Flynn as an expert witness to provide evidence that relates to the origin and cause and to the issue of the MIC generally – excepting the issue of the rate of corrosion.
50. As for the issue of qualification with compliance with the codes and regulations, Mr. Flynn testified as to his expertise in this regard, which expertise is reflected by his resume. Mr. Flynn established that he is an expert in regulatory standards and will be permitted to provide expert testimony on the subject of codes and regulations relating to regulating proper supply, service and maintenance of heating appliances, and particularly oil tanks. However, similar to Justice Charney’s ruling in *Gendron v. Doug C. Thompson Ltd. (c.o.b. Thompson Fuels)* 2017 ONSC 4009 at para. 22, while I will consider Mr. Flynn’s evidence in this regard as it will assist with my understanding of the technical components that may not be otherwise comprehensible, my legal interpretation of the regulations will be based on the legal analysis and arguments of counsel rather than the opinions proffered by the technical experts.
51. As for the Plaintiff’s request to qualify Mr. Flynn to provide an opinion of the standard of care applicable to an OTB – Mr. Flynn is not an OTB, has never been employed or trained

as an OTB, and as such it is not appropriate that he provide an opinion as to the standard of care applicable to an OTB.

52. The normal rule is for experts to testify specialist to specialist. That is to say an OTB testifies about the standard of care applicable to OTBs. It is only otherwise in extraordinary cases, of which this is not one. This approach is grounded in basic principles associated with the standard of care. As the Supreme Court of Canada described the principle in *Ter Neuzen v Korn*, [1995] 3 SCR 674, at para. 33, “the doctor’s behaviour must be assessed in light of the conduct of other ordinary specialists, who possess a reasonable level of knowledge, competence and skill expected of professionals in Canada, in that field”.
53. With respect to the issue of whether Mr. Flynn can provide evidence as to the standard of care applicable to a supplier related to supplying fuel, servicing, and maintaining a heating appliance (oil tank) – this evidence is somewhat nuanced and is based on compliance with the various codes and regulations that govern the supply of oil. This distinction separates the issue of Mr. Flynn’s ability to provide evidence relating to the standard of care of a supplier as the standard is not established through practice and experience but through codes and regulations.
54. The courts have recognized that in a proper case, a specialist opinion on the standard of care expected from a non-specialist may be admissible having regard to the nature of the question at issue. In other words, the opinion of an expert regarding the appropriate standard of care of a supplier, may be admissible as necessary, relevant, and helpful to the trier of fact: see *Barber v. Humber River Regional Hospital*, 2016 ONCA 897, at para. 91.
55. It is my view that Mr. Flynn’s evidence regarding the standard of care relating to a supplier may be admissible as necessary. As such, Mr. Flynn may provide opinion evidence related to the standard of care applicable to a supplier and I will determine the weight to be applied to such evidence after I have had a chance to consider all the evidence in this case.

CONCLUSIONS

56. For the foregoing reasons:

1. Mr. Flynn will not be permitted to provide evidence as a participant expert.
2. Mr. Flynn will be permitted to provide expert opinion evidence as a Rule 53 expert, his report will be entered into evidence as an exhibit, and he will be expected to provide testimony compliant with Rule 53 and his Acknowledgment of Expert's Duty (Form 53).
3. Mr. Flynn is qualified to provide expert opinion evidence that relates to:
 - a. the origin and cause of the oil spill event;
 - b. the issue of the MIC generally and this case specifically but not the specific rate of corrosion;
 - c. compliance with the codes and regulations relating to regulating proper supply, service, and maintenance of heating appliances; and
 - d. the standard of care applicable to a service supplier as mandated by the codes and regulations.



Justice S. J. Woodley

Ruling released orally: November 28, 2023

Reasons released in writing: November 29, 2023