**CITATION:** Westerhof v. Gee (Estate), 2013 ONSC 2093
**DIVISIONAL COURT FILE NO.:** DC-11-330
**DATE:** 20130620

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**MATLOW, ASTON & LEDERER JJ.**

| | |
|---|---|
| **BETWEEN:** | |
| JEREMY WESTERHOF<br>Plaintiff<br>Appellant | *Jane Poproski*, for the Plaintiff/Appellant |
| **– and –** | |
| THE ESTATE OF WILLIAM GEE and KINGSWAY GENERAL INSURANCE<br>Defendant<br>Respondent | *Kieran Dickson*, for the Defendant/Respondent |
| | **HEARD:** in Hamilton on February 12, 2013 |

**LEDERER J.:**

Background

[1] The plaintiff appeals the October 24, 2011 dismissal of his claim for damages.

[2] The appellant was in a car accident on April 22, 2004. He sued. Liability was admitted. There was a trial before a jury to assess what, if any, compensation should be awarded. It lasted ten days. The jury awarded $22,000 in general damages and $13,000 for loss of income to the date of the trial. It made no award for future loss of economic opportunity or earning capacity. The claim was dismissed based on the subsequent determination, by the trial judge, that the claim of the plaintiff for non-pecuniary damages did not meet the threshold prescribed by s. 267.5 of the *Insurance Act*, R.S.O. 1990, c. 1.8.

[3] The appellant appeals both the verdict of the jury and the finding of the trial judge that the statutory threshold had not been met.

[4] The appeal relates to restrictive evidentiary rulings made by the trial judge which, for the most part, concern the application of rule 53.03 (expert evidence). The appellant asserts that these rulings denied the jury access to probative, relevant and material evidence. It was submitted that these rulings were wrong in law and, when taken as a whole and in combination with what was said to be findings of fact, made by the trial judge in his charge to the jury, resulted in a miscarriage of justice. Nothing was said by either party with respect to the standard of review. Evidentiary rulings are questions of law. The standard of review is correctness.

[5] Our courts have long afforded witnesses, recognized as experts, the privilege of giving evidence of their opinions in areas where their expertise has been demonstrated. This has not always worked in a way that assists the administration of justice. There are some who do not understand or accept that, with the privilege, comes responsibility to the court and its process. They offer opinions outside their expertise and testify with a predisposition in favour of the party on whose behalf they have been called. The *Rules of Civil Procedure* have been amended, in part to respond to these issues. This appeal is founded on the proposition that the trial judge has interpreted the applicable rule such that the solution will cause a fresh set of problems. We do not agree.

Rule 53.03

[6] Any witness to be called as an expert is required to be qualified as to his or her expertise and to produce a report that provides and demonstrates the basis for any opinion to be included in the evidence to be given at trial. The applicable rule states:

> ***Experts' Reports***
>
> **53.03**(1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference required under Rule 50, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48.
>
> (2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48.
>
> (2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:
>
> 1. The expert's name, address and area of expertise.
>
> 2. The expert's qualifications and employment and educational experiences in his or her area of expertise.

3. The instructions provided to the expert in relation to the proceeding.

4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

6. The expert's reasons for his or her opinion, including

i. a description of the factual assumptions on which the opinion is based,

ii. a description of any research conducted by the expert that led him or her to form the opinion, and

iii. a list of every document, if any, relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 53) signed by the expert. O. Reg. 438/08, s. 48.

[Emphasis added]

It is through reliance on this rule that the court can be assured that expert witnesses are aware of their responsibilities to the court. The preparation of the report according to the directive found in the rule confirms that the witness is prepared to provide the opinion and the other parties will not be taken by surprise by what is said.

The Witnesses

[7] During the trial, the judge was required to make rulings as to the admissibility of evidence of a series of witnesses called on behalf of the appellant (the plaintiff at the trial). These rulings concerned the evidence of:

- A driving counselor (Brian Hustler)

  This witness was not called "as an opinion witness but strictly as a lay witness". He was identified as someone who assists people "...who have anxieties or phobias with respect to motor vehicles" (*Trial Transript*, at p. 444). The judge expressed a concern that this witness would offer an opinion that the appellant had pathology of a psychiatric nature resulting from the motor vehicle accident. This was an opinion the witness was not qualified to give. It would have been given in circumstances where no report, as required by rule 53.03, had been prepared or served.

- A treating chiropractor (Frank Ramelli)

  This witness was not presented as an expert. Nonetheless, after he gave a history as to his diagnosis, counsel sought to have the witness provide an opinion as to prognosis. There had been no report delivered pursuant to rule 53.03. The judge limited the evidence of this witness to explaining his examinations of the appellant and the particulars of his treatment.

- An occupational therapist (Anita Gross) and a kinesiologist (Margaret Murray)

  These two witnesses were retained by an insurer "to assess the Appellant's Functional Abilities" (see *Factum of the Appellant*, at para. 36). A report was prepared some years in advance of the trial. It did not comply with the requirements of rule 53.03. These witnesses would have been permitted to testify as to their examinations and clinical observations, but not to provide expert (opinion) evidence. Counsel determined not to call them to give evidence before the jury.

- A psychiatrist (Dr. Bartolucci)

  This witness was described as a treating psychiatrist. He had "...not provided a medical-legal report that complied with rule 53.03" (*Trial Transcript*, at p. 624). The trial judge ruled that the witness could not provide evidence as to diagnosis or prognosis. He was allowed to give evidence as a treatment provider, regarding his clinical observations, his treatment and its progress.

- The appellant's family doctor (Dr. Black)

  This witness did provide evidence to the jury as to the treatment he provided to the appellant. He was taken to his clinical notes and given the opportunity to go "...through the shorthand form and put it into full sentences". The trial judge did not allow the clinical notes to be filed. He expressed the view that "...there is limited probative value to put in the notes ... when the jury has heard from Dr. Black" (*Trial Transcript*, at p. 758).

- A neurologist (Dr. Rathbone)

  This witness prepared the acknowledgement required by rule 53.03(2.1) clause 7. He undertook "...to provide an opinion [in] a fair, objective and non partisan manner [*sic*]". He prepared a report that was consistent with the instruction found in the rule. At trial, he was qualified and accepted as an expert in "...neurology, and the impact of trauma on the musculoskeletal system (*Trial Transcript*, at p. 770). He was not proffered

as an expert in the fields of psychiatry and psychology. Accordingly, the trial judge did not allow the witness to give evidence with respect to psychiatric or psychological issues. Specifically, the trial judge did not allow him to give evidence regarding an opinion from Dr. Bartolucci, the appellant's treating psychiatrist.

- Two MRI ("Magnetic Resonance Imaging") Reports

  These reports were made exhibits at the trial. The authors of the report were not called. Portions of the reports were redacted to remove an opinion given "at least implicitly" that the difficulties suffered by the appellant were from a car accident. The trial judge indicated that if the authors were called it was possible that they would not have been permitted to provide these opinions because they had not complied with the requirements of rule 53.03. The content of the reports was described by Dr. Rathbone and the findings were read in by Dr. Black.

[8] What is evident from this is that a substantial amount of the medical evidence the plaintiff intended to call was not admitted by the trial judge either because the witness was not qualified to provide it or because the requirements of rule 53.03 had not been complied with. The appellant says that the rulings, made by the trial judge, were flawed. They failed to recognize the distinction between witnesses called because they had treated the appellant and those called as experts who were retained for the purposes of the litigation.

Analysis

(i) *The Application of Rule 53*

[9] This case engages the question of how and in what circumstances rule 53.03 is to be applied. It appears that, in the aftermath of its promulgation, there have been several attempts to come to grips with this problem.

[10] In *McNeil v. Filthaut,* 2011 ONSC 2165 (CanLII), the trial judge concluded that rule 53.03 cannot be read on its own. It must be considered together with rule 4.1.01. This rule states:

> It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,
>
> (a) to provide opinion evidence that is fair, objective and non-partisan;
>
> (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
>
> (c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.
>
> [Emphasis added]

[11] By its introductory words, rule 4.1.01 only applies to experts who have been retained by a party to the proceeding. In *McNeil v. Filthaut, supra,* it was determined that this rule and rule 53.03 are part of a comprehensive "...framework for the duty of an expert called as witness at a trial". The judge held that the pre-condition that rule 4.1.01 applies only to experts engaged by or on behalf of a party extends to rule 53.03. It is only those experts who must comply with the latter rule. She held that assessors retained by an insurance company (as in this case, Anita Gross and Margaret Murray) are not bound by these rules (at paras. 39 and 44).

[12] In *Slaght v. Phillips* (18 May 2010, unreported, Court File No. 109/07), the trial judge conducted a *voir dire* to consider whether a vocational consultant, who had provided care to the plaintiff at the instance of the accident benefit insurer, could give evidence at the trial. He distinguished between experts engaged in treatment ("treating physicians, counsellors, psychologists, physiotherapists and other treating specialists") where the opinions expressed are with respect to "...the need for treatment, the recommended course of treatment and the next step to be taken" in that treatment (see pp. 9 and 10) and experts retained for the purpose of providing opinions at trial. The trial judge concluded that, while rule 53.03 should be strictly applied to the latter experts, it could be relaxed for the former (see: pp. 11 and 12). He allowed the vocational consultant to testify despite the fact that she had not complied with rule 53.03. (For a further discussion of *Slaght v. Phillips, supra*, see: *McNeil v. Filthaut, supra,* at para. 48).

[13] *Kusnierz v. Economical Mutual Insurance Company* 2010 ONSC 5749 also distinguishes witnesses who are treating physicians. The plaintiff sued his own insurer. He sought a declaration recognizing that he had sustained a "catastrophic impairment" and was, accordingly, entitled to enhanced benefits under the *Statutory Accident Benefits Schedule.* The witness was retained by counsel for the plaintiff to assist in preparing the claim. The trial judge observed that the doctor "... almost immediately moved from the status of an independent expert to something close to a treating physician". The trial judge held that it was reasonable to accept the doctor as such and went on to note that "...[s]uch a witness does not seem to fall squarely within either rule 4.1 .01 or rule 53.03, but is someone who has and exercises expertise routinely, and ought to be able to give relevant evidence about his or her patient" (see: paras. 114 and 118).

[14] The appellant, in this case, seeks to rely on these cases. It was submitted by counsel on his behalf that they demonstrate distinctions that the trial judge failed to take into account; distinctions that confirm that the requirements of rule 53.03 did not apply to the evidence he refused to admit. What is striking about these distinctions is that they arise from who the witnesses were (who retained them and for what purpose) rather than the nature of the evidence to be provided. (Is it fact-based evidence for which no special expertise is required or opinion evidence for which it is?) The proposition relied on by the appellant is that the rule does not apply to certain witnesses who are, thus, able to offer their opinions without the constraint provided by the rule. An indication of the risk in this approach was provided by the judge in *Kusnierz v. Economical Mutual Insurance Company, supra.* Having noted that a treating physician should be able to provide "relevant evidence" about a patient, the judge went on to observe:

> I will take into account that [the doctor] has been a passionate advocate for Mr. Kusnierz and has formed a therapeutic alliance with him. I must, therefore, take his evidence with the proverbial grain of salt that goes to its weight.
>
> (*Kusnierz v. Economical Mutual Insurance Company, supra*, at para. 118)

[15] In other words, having allowed the evidence to be admitted, the judge recognized that it might reflect a bias in favour of the plaintiff. Precisely a concern rule 53.03 was intended to guard against.

[16] I have not yet referred to *Beasley v. Barrand* 2010 CarswellOnt 2172 (S.C.J.). At least one judge has referred to it as the seminal case directed to unravelling the proper application of rule 53.03 (see: *McNeil v. Filthaut, supra*, at para. 40). The plaintiff was the operator of a motorcycle. It collided with a car. The plaintiff claimed damages for injuries suffered in the accident. Before the jury was selected, counsel for the defendants applied for a ruling as to whether certain expert witnesses could provide opinion evidence at the trial. Following the accident, the plaintiff had been examined by three medical doctors. They were each retained "... in connection with the claim that the plaintiff had made to his own insurer, a claim for accident benefits...[t]he doctors were not retained by a party to [the] proceeding". The reports authored by these three medical specialists did not comply with the provisions of rule 53.03. The experts had not seen the plaintiff since their reports had been prepared, over seven years before the trial was to begin (see: paras. 9, 13 and 10).

[17] The judge refused to allow the evidence to be presented to the jury. In his decision, he relied on the nature and impact of the evidence, not the standing or involvement of the witnesses:

> Surely, one of the important reasons for the rule change was to eliminate the practice of tendering opinion evidence of questionable value in a trial, particularly where, as is the case here, the evidence was created in another proceeding, at the instance of a party who is not before this court and to address matters that are beyond the scope of this trial.
>
> (*Beasley v. Barrand, supra*, at para. 62)

[18] The judge determined that, in the circumstances, compliance with rule 53.03 was required:

> In my view, having considered all of the circumstances of this case, I think that the application of Rule 53.03 to the proposed evidence of the three experts is necessary...
>
> [Emphasis added]
>
> (*Beasley v. Barrand, supra*, at para. 62)

[19] If the rule had been complied with, the evidence could have been helpful and admissible:

> I suggested that the defendants could invite the doctors, at the defendants' expense, to write meaningful, Rule 53.03 compliant, reports to plaintiff's counsel which, if relevant and producible, could help me to understand any opinions they might be able to express on issues between the parties before this court. That was not attempted. No request has been made for more time to redress the current situation.
>
> (*Beasley v. Barrand, supra*, at para. 68)

[20] There was no reason to distinguish between the three doctors and other expert witnesses:

> I see no reason to require a high standard be met by consulting medical experts retained by the parties and a different, lower standard from consulting medical experts who just happened to have been retained by a non-party but whose opinions might be read to assist one of the parties at this trial.
>
> I am not to be heard to state that experts retained by accident benefits insurers cannot give opinion evidence in a tort action; rather, I say that such experts should first comply with Rule 53.03...
>
> (*Beasley v. Barrand, supra*, at paras. 69 and 70)

[21] 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.

[22] Based on this distinction, it is not difficult to see that, where the expert has not been, qualified to give the opinions to be tendered or where the report relied on to advance the opinion does not comply with rule 53.03, it is correct for the trial judge to refuse to admit the evidence.

[23] There is more in *Beasley v. Barrand, supra*, that should be reviewed. It appears to distinguish witnesses who were engaged in treatment by noting that the three doctors whose reports were being considered were not involved in this way (see: paras. 64 and 65). This does not suggest that, if they had been treating physicians, the three doctors would have been free to offer opinions without concern for rule 53.03. Treating professionals do stand apart. They are present during the progress of any injury suffered by a plaintiff. They may give evidence as to their observations of the plaintiff and their description of the treatment provided. This is factual and not opinion evidence. Simply put, a treating physician or other treating professional who limits his or her evidence in this way does not need to be qualified and is not treated as an expert. It is when the witnesses seeks to offer opinions as to the cause of the injury, it's pathology or prognosis that the evidence enters into the area of expert opinion requiring compliance with rule 53.03.

[24] In her submissions, counsel for the plaintiff said that a diagnosis is a fact not an opinion. On this basis, treating physicians would be permitted to give evidence as to their diagnosis without the need to comply with rule 53.03. A diagnosis is not always a fact. In the law of evidence, an opinion is an "inference from observed facts" (see: *R. v. Abbey, supra*, at 409, as

quoted in *R. v. Collins, supra,* at para. 17). A diagnosis begins as an inference a doctor, relying on his or her expertise and experience, makes from observations and other information to identify an injury or disease. It may, as a result of further observation or the response to treatment, prove to be correct. It may also turn out to be wrong. Having said this, there are situations where evidence of a diagnosis may be treated as a fact. It depends on the purpose to which the evidence is put. If a physician gives evidence of his or her diagnosis to explain the treatment provided, it is a fact that the diagnosis was the catalyst for the treatment. The diagnosis may still have been wrong. The statement of the witness does not establish as a fact that it correctly diagnoses the injury or illness. It is only relevant and admissible to understand the basis of the treatment chosen. It may be that the inference to be drawn seems irrefutable as a result of observations that can be made, for example, by use of an x-ray. Even so, for the purposes of evidence, it remains an opinion. X-rays can be misread. In this case, it is opinions of the treating professionals that the judge required be supported by reports that complied with rule 53.03. He was correct in doing so.

[25] In *Beasley v. Barrand, supra*, the judge also suggested that there can be circumstances where it may be difficult to comply with rule 53.03:

> I can conceive of circumstances where an expert who is retained by a person outside of the litigation may be uncooperative or be professionally unable to communicate with one or more of the parties at trial but, in this case, the defendants have simply not made reasonable efforts to assist the three doctors to an understanding of the requirements of Rule 53.03 and to enlist their help to assist the court by properly reporting on their opinion evidence in advance of the trial.
>
> (*Beasley v. Barrand, supra*, at para. 66)

[26] There is nothing to suggest that these sorts of concerns arise here.

[27] When the requirements of the law are understood, as described above, it is evident that the decisions of the trial judge were correct. This is so with respect to each of the concerns raised by the appellant. In determining whether and how rule 53.03 is to be applied, there is no basis for distinguishing between witnesses who treated the plaintiff and those who were retained solely to provide an opinion at trial. Rule 53.03 has to be applied taking into account the nature of the evidence to be called. Is it factual or opinion evidence?

[28] The driving counsellor (Brian Hustler), and the chiropractor (Frank Ramelli) were not presented as experts or qualified as such. On that basis alone, there was no basis to allow them to provide opinion evidence as to the injuries suffered by the plaintiff. Neither of them produced a report that complied with rule 53.03. Had they been qualified, this would have been required before they would have been able to provide evidence of their professional opinions. There is no basis on which the ruling made by the trial judge could be set aside. As it is, the chiropractor was permitted to give factual evidence as to his examinations of the plaintiff and his treatment.

[29] The occupational therapist (Anita Gross) and the kinesiologist (Margaret Murray) were assessors retained by an insurance company with respect to the claim of the plaintiff, pursuant to the *Statutory Accident Benefits Schedule*. Their reports did not comply with rule 53.03. The judge would not permit them to give opinion evidence. They are in the same position as the three doctors in *Beasley v. Barrand, supra*. I do not accept the finding of the judge in *McNeil v. Filthaut, supra*, that rule 4.1.01 and rule 53.03 are part of a comprehensive scheme and that, as a result, the fact that these two witnesses were not "engaged by or on behalf of a party to provide evidence" (see: rule 4.1.01) excludes them from the requirements of the latter rule. In making this finding, the judge acknowledged that her decision conflicts with the reasons in *Beasley v. Barrand, supra*, and that she was unable to find that rule 53.03 can be extended to apply to experts engaged by non-parties to the litigation (see: *McNeil v. Filthaut, supra*, at para. 44). This is not a difficulty I share. I agree with the judge in *Beasley v. Barrand, supra*. On this basis, the decision of the trial judge should be left to stand.

[30] The psychiatrist (Dr. Batolucci) and the family doctor of the appellant (Dr. Black) were permitted to and gave evidence as treatment providers. This was not expert opinion evidence. It was a factual recounting of what they did and what they observed. The psychiatrist had not provided a report that complied with rule 53.03 and, accordingly, could not provide his diagnosis or prognosis. This would have been evidence of his opinions. Again, there is no basis to set aside the ruling of the trial judge.

[31] The neurologist (Dr. Rathbone) signed a report that complied with the requirements of rule 53.03. However, it was in areas in which he was not qualified as an expert (psychiatry and psychology). Accordingly, the trial judge properly did not admit his evidence in those spheres nor was he allowed to tell the jury about some other doctor's opinion that dealt with those areas of expertise.

[32] The trial judge's treatment of two MRI reports reflects similar problems. They contained opinions as to the cause of the difficulties suffered by the plaintiff. If the authors had been called to give evidence, the judge noted the possibility that they would have been required to comply with rule 53.03. It stands to reason that this requirement cannot be avoided by failing to call the author and putting the opinions into evidence through another witness. Hence, the opinions were redacted. It was appropriate for the trial judge to order that this be done.

(ii) *Form 53*

[33] Counsel for the plaintiff also submitted that treatment providers cannot comply with rule 53.03(2.1) clause 7. This is the clause that requires an expert witness to acknowledge that, in providing evidence, he or she owes a duty to the court. This is put in effect by requiring a witness to sign Form 53 which is incorporated into the rule (see: para. [6], above). The form is as follows:

**FORM 53**

COURTS OF JUSTICE ACT ACKNOWLEDGEMENT OF EXPERT'S DUTY

*(General Heading)*

ACKNOWLEDGEMENT OF EXPERT'S DUTY

1. My name is .....*(name)*. I live at .....*(city)*, in the *(province/state)* of.....*(name of province/state)*.

2. I have been engaged by or on behalf of ..... *(name of party/parties)* to provide evidence in relation to the above-noted court proceeding.

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:

   (a) to provide opinion evidence that is fair, objective and non-partisan;

   (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and

   (c) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date ..... *Signature*

**NOTE:** This form must be attached to any report signed by the expert and provided for the purposes of subrule 53.03(1) or (2) of the *Rules of Civil Procedure*.

RCP-E 53 (November 1, 2008)

[Emphasis added]

[34] Counsel for the plaintiff submitted that, unless a medical professional was specifically engaged to provide evidence in relation to the court proceeding, they cannot sign Form 53. However, there is nothing to suggest that, having been engaged to work on behalf of an insurer, an expert witness cannot subsequently be engaged to appear in court on behalf of a party to the proceeding and sign a form that confirms that fact. Counsel for the plaintiff submitted that, in such a situation, the prospective medical witness still cannot execute Form 53 if there was any doctor/patient relationship because he or she cannot attest to paragraph 4, which requires an acknowledgment that the duties referred to in paragraph 3 of Form 53 prevail over any obligation owed to the party that engaged him of her. In making this submission, counsel relied on the implication that, to adhere to the duty identified in Form 53, may require a doctor to breach the Hippocratic oath. The oath requires a doctor to swear, among other things:

> That whatsoever I shall see or hear of the lives of my patients that is not fitting to be spoken, I will keep in confidence;
>
> ....
>
> That I will maintain this sacred trust; holding myself far aloof from wrong...
>
> That above all else I will serve the highest interests of my patients through the practice of my science and my art;
>
> That I will be an advocate for patients in need and strive for justice in the care of the sick
>
> (*Hippocratic Oath*, Copyright 2005, Weill Cornell Medical College, New York, NY

[35] It is difficult to understand how these responsibilities can run contrary to, or compete with, the duties expressed in paragraph 3 of Form 53 (see: para. [34], above). There is no reason to assume any inherent conflict. I do not agree that, in executing Form 53, a doctor qualified as an expert to give opinion evidence necessarily runs a risk of being unable to act in the best interests of his patient. To the contrary, the submission, made by counsel for the plaintiff, leads to the understanding that such witnesses, not being bound by rule 53.03 and the concomitant responsibility to execute Form 53, should be left free to advocate for their patients without the constraint of being required to maintain their objectivity or to offer opinions restricted to their area of expertise – the very problems the amendment to the *Rules of Civil Procedure* were designed to cure. I do not accept these submissions. Counsel offered no valid reason why in this case Form 53 could not be signed by an expert witness who was to provide his or her opinions to the jury.

The Judge's Charge

[36] Counsel for the plaintiff also objected to portions of the judge's charge to the jury. It was the view of counsel that the trial judge urged the jury to accept certain findings of fact. In making this submission, counsel referred to two statements made by the judge in his charge:

> My comment on the evidence is that, even if one takes the labrum to have been torn in the motor vehicle accident, it was repaired and intact on Dr. Adili's surgery. So, following the surgery in June 2009, if not before, the labrum would not be a source of pain in the hip.
>
> (*Trial Transcript*, at pp. 1106-7)

and

> I think we have the evidence, I suggest to you that the hip and the spondylosis of the back are congenital and predate the accident.
>
> (*Trial Transcript*, at p. 1123

[37] It was the view of counsel for the plaintiff that the trial judge, in making these statements, effectively directed the jury to their conclusion, leaving them no option but to make the findings they did with respect to damages. These submissions ignore cautions given by the trial judge, both in his opening at the outset of the trial and as part of his charge at the end. In his opening, the trial judge stated:

> I am the sole judge of the law and you are obliged to take the law as I give it to you. You are the sole judges of the facts. So that, although I may comment on the evidence, you decide and you, and you alone decide what the facts of this case are. So you are the judge of the, of the facts.
>
> (*Trial Transcript*, at p. 37)

[38] As part of his charge, the trial judge said:

> While I am the judge so far as the law, you have the sole and exclusive authority to determine the facts. As jurors it is your exclusive duty to decide all questions of fact submitted to you, and for that purpose to determine the effect and value of the evidence.
>
> (*Trial Transcript*, at p. 1080)
>
> (see also: *Transcript*, at pp. 1086 and 1108)

[39] In light of these instructions, advising the jury of its exclusive fact-finding role and the qualifying of any comments made with respect to the evidence, I am unprepared to accept the

submission of counsel for the plaintiff that there were findings of fact "made by" the trial judge or that he usurped the jury's role.

Conclusion

[40] The appeal is dismissed.

Costs

[41] Pursuant to the agreement of counsel, costs are payable by the appellant to the respondent in the amount of $7,500.

LEDERER J.

I agree

MATLOW J.

ASTON J.

**Released: 20130620**

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**– and –**

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Defendant
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**JUDGMENT**

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**LEDERER J.**

**Released: 20130620**