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Cross-Examination of a Sympathetic Family Doctor

These materials were prepared by Alison L. Murray, QC, of Murray Jamieson, Vancouver, BC, for the Continuing Legal Education Society of British Columbia, February 2016.

CROSS-EXAMINATION OF A SYMPATHETIC FAMILY DOCTOR

I. Introduction

The purpose of this paper is to provide a bit of a road map about how to prepare to cross-examine a sympathetic family doctor who has provided an expert medical legal opinion. I venture to say that virtually every family doctor you find yourself facing in a trial will be sympathetic to their patient. It is a function of the doctor-patient relationship; it is a relationship based on trust and respect. Often a family doctor has treated the plaintiff for many years before an accident and has seen the plaintiff through a number of significant life events. Sometimes the family doctor treats the plaintiff's whole family or may even have delivered the plaintiff. Of course, the doctor is going to have some sympathy towards their patient when they have been injured in an accident. I always start from the premise that the family doctor is going to be sympathetic. However, just because a family doctor has some sympathy towards their patient does not necessarily equate to that doctor having assumed the role of an advocate.

II. The Family Doctor's Unique Role as an Expert

The unique role that a family doctor plays in litigation as both a treating physician and an expert has recently been recognized in the Ontario case of *Westerof v. Gee Estate*, 2015 ONCA 206. During the *Westerof* trial, some of the treating physicians' expert reports were excluded on the basis that the experts had failed to comply with Ontario Rule 53.03 which is similar to our British Columbia Supreme Court Civil Rule 11-2. The Ontario Rule requires an expert to sign a Form 53

which sets out that he or she, *inter alia*, acknowledges and understands the duty of an expert is to provide fair, objective and non-partisan evidence and that duty prevails over any other obligation he or she may owe to any party by whom they are engaged. Plaintiff's counsel argued that to adhere to the duty identified in Form 53 may require a doctor to breach the Hippocratic oath sworn by a doctor to "advocate for patients in need and strive for justice in the case of the sick."

In reversing the trial decision, the Ontario Court of Appeal recognized that there are different categories of experts; one category being that which treating physicians often fall into as "participant experts" or "non-party experts." They are experts who have opinions that arise directly from their treatment of the plaintiff and not as a result of having been engaged by either party for the purpose of litigation. The Court of Appeal determined that those expert witnesses did not need to comply with Ontario Rule 53.03. The court may receive opinion evidence absent compliance with Rule 53.03 where that opinion is based on the witnesses' observations of, or participating in, the events at issue and the witness formed the opinion as part of his or her ordinary exercise of skill, training and experience while observing or participating in the events. The reasoning being that a participant expert has come to their expert opinions independently of the litigation and, generally, already documented those opinions in notes or summaries. They are not a stranger to the underlying events nor are they being asked to give an opinion based on a review of the documents or statements from others concerning what had taken place. The court found that the ultimate purpose of Rule 53.03 was to limit and control the proliferation of experts as hired guns or opinions for sale. It was not intended to apply to participant or non-party witnesses.

The Court of Appeal still emphasized the court's role as a gatekeeper in relation to opinion evidence including that the court could require that a participant or non-party expert be required to comply with Rule 53.03 if he or she went beyond the scope of opinion formed in the course of treatment or observation.

Westerof has been applied or considered in Manitoba, Alberta and Nova Scotia but not yet in British Columbia.

Thus, family doctors find themselves in a particularly unique role. They often have important evidence. Typically, they have much more contact with the plaintiff and will be the only expert with observations of the plaintiff from both before and after the accident and provided the first line treatment to the plaintiff. Because of the frequency and the nature of the family doctor's contact with a plaintiff, their evidence can be particularly compelling. Judges will often place great weight on a GP's evidence by virtue of their experience with the plaintiff and their contemporaneous observations of the plaintiff's functioning before and after an accident: they can be persuasive experts.

III. Family Doctor as Advocate

There are times when the general practitioner clearly crosses the line into advocacy. A recent example is *Brown v. Raffan*, 2013 BCSC 114 in which Mr. Justice Verhoeven found that he could not rely on the evidence from the family doctor, Dr. Campbell, because his sympathy for his patient resulted in him advocating as an expert. The theme that emerged from the GP's report and evidence was that he was in "solidarity" with the plaintiff's complaints about poor treatment by ICBC. His report mentioned several times that the plaintiff was "blameless" or a "blameless victim" who was badly treated by ICBC and deserved compensation. Such comments have no proper place in an expert's report and His Lordship was satisfied that such comments demonstrated a conflict with the duty of the expert to assist the court and not to be an advocate.

Mr. Justice Verhoeven noted that the plaintiff had arranged for and attended on Dr. Campbell regularly every two weeks since the accident and that the visits had nothing to do with any actual medical need but were, instead, to document the claim.

Dr. Campbell's evidence was also rejected because his medical legal report was incomplete and inconsistent with the evidence at trial. For example, Dr. Campbell opined that the plaintiff was permanently partially disabled due to her injuries and omitted to mention her pre-existing COPD and fully acknowledge her lung issue. Subsequent to his medical legal opinion, Dr. Campbell provided a medical note to assist the plaintiff to claim welfare benefits on the basis that she had severe COPD and was unable to work, with no mention of the accident. Under cross-examination, he offered a nonsensical explanation about the welfare medical note. Dr. Campbell's report and evidence at trial were inconsistent with his clinical records and large parts of his report were unsupported by contemporaneous notes in his clinical records. Lastly, although he diagnosed a number of conditions, he never referred the plaintiff for any treatment; initially testifying that she could not afford it and then acknowledging that the treatment would be covered under MSP.

Reading *Brown v. Raffan* is a study about the role that proper preparation plays in exposing an expert as an advocate. It is important to leave no stone unturned when you are preparing to cross-examine a doctor. The case is also a study in virtually everything a family doctor could do to reveal themselves as an advocate.

IV. Preparing to Cross-examine the Family Doctor

Preparing to cross-examine a family doctor is no different from preparing to cross-examine any medical expert, or really any expert for that matter. You have to start with a theory of your case; what are the medical issues and what is the evidence that you need to prove the theory of the defence and discredit the theory of the plaintiff. There is no point in cross-examining a witness for the sheer pleasure of cross-examination. It is a very rare case that you are going to be able to get a doctor to admit that they are being an advocate, so you have to concentrate on undermining their opinions or the factual foundations upon which they have based their opinions. In the course of that process, you can hope that their demeanour in the witness box will reveal them to be an advocate.

Skilful cross-examination is a time intensive process. You are going to be questioning someone about a subject matter on which they have the upper hand by being much more knowledgeable than you. So there needs to be careful planning about how you are going to go about the task. You need a purpose and a means to achieve that purpose. Often you need the assistance of your own expert to identify the opinions which are inconsistent with your theory of the case.

Typically as you prepare to cross-examine a family doctor, you want to consider these four areas:

(1) what admissions can be elicited from the doctor which assist in your case;

(2) how can you undermine the doctor's qualifications to weaken his or her medical opinions;

(3) how can you undermine the factual assumptions upon which the doctor has based his or her opinion; and,

(4) how can you undermine the methodology or science relied upon by the doctor in coming to his or her opinion.

V. Some Practical Tips on How to Prepare to Cross-examine a Family Doctor

The following are a few practical tips that might assist you in preparing to cross-examine the sympathetic family doctor. There is no cookie cutter format that I can offer about the right way to prepare. There certainly is a wrong way; and that is to under prepare or to think you might "wing it."

A. Read the Cases on Bias and Advocacy

When you are preparing to cross-examine any expert you believe is advocating, a good starting point is to go to the case law. Reading some of the recent cases that address bias in expert reports will help you frame your objections to the admissibility of the doctor's report as well as craft cross-examination questions. The case law gets you thinking about other potential cues about bias. I have found it helpful to see some of the language that Judges find offensive and indicative of advocacy, which I might not have otherwise thought were troublesome. Some of the cases have significant extracts from the impugned medical legal reports or the doctor's oral evidence about what constitutes advocacy. For example have a look at: *Warkentin v. Riggs*, 2010 BCSC 1706; *Thibeault v. MacGregor*, 2013 BCSC 808; *Sekihara v. Gill*, 2013 BCSC 1387; Mattice *v. Kirby*, 2014 BCSC 657; *Zhibawi v. Anslow*, 2015 BCSC 1824; *Bricker v. Danyk*, 2015 BCSC 2404; *Litt v. Guo*, 2015 BCSC 2207; *Cogar Estate v. Central Mountain Air Services Ltd.*, 1990 CarswellBC 1736; and the Supreme Court of Canada's decision in *White v. Burgess*, 2015 SCC 23.

B. Know the Doctor's Background

Typically most family doctors end up participating in litigation not because they have sought out the role of expert but because their patient has had the misfortune of having been in a car accident. Their involvement is not something that they are necessarily pleased about. It is not likely that you are going to get any helpful background information about the day to day treating physicians by doing internet searches, but you never know. So I start with googling the doctor. Sometimes you can find information about their speaking engagements on medical issues or something about their special interests. My philosophy is that the more you know about a witness the better. There are those occasions in which you will find a family doctor with a website containing some interesting fodder for cross-examination, such as their approach towards ICBC claims. Sometimes you can find a case in which the family doctor had previously testified and that defence counsel may have some tips for you in terms of how to approach that doctor.

What does seem to becoming slightly more common these days are those family doctors that specialize in car accident claims and are the equivalent of an "expert" GP. They have become the plaintiff's GP on referral from the plaintiff's lawyer. I expect that plaintiff's counsel steer their clients to these GPs because they are good doctors and possibly because they are good witnesses. I am going to suppress comment from my cynical side about any other motivation for pairing a client with any particular doctor. However, I do think that the trier of fact should about a relationship between a treating physician and counsel for the same reason that a judge or jury might be influenced by close or longstanding relationships between defence counsel and a regularly retained defence expert. It is important that any time you learn a plaintiff has changed their family doctor after the accident to spend time on discovery exploring why and who referred them to that doctor.

Searches of the Supreme Court judgment website can reveal that a particular doctor seems to have a history of giving evidence on behalf of patients represented by particular counsel.

Another interesting avenue to explore is whether the referrals being made by the family doctor to certain specialists were actually coming from plaintiff's counsel. You might be able to get a sense of that from a search on the Supreme Court website to see whether any particular experts regularly testify on behalf of plaintiff's counsel. Even better, is if you have the opportunity to ask the plaintiff on discovery about how the referrals to any of the specialists came about. A family doctor who lets the plaintiff's lawyer direct them in the medical investigation of their patient can certainly show a level of advocacy; particularly, if you carefully set the doctor up in cross-examination to reveal that they had not felt the referrals were medically necessary.

C. Know More about the Facts of the Case than does the Doctor

There is no substitute for hard work in trial preparation (did I mention that?). Any preparation for cross-examination of a family doctor starts with you being intimately familiar with the facts of the case. That means having a command of the details of the medical evidence and the lay evidence. I don't think it is that difficult for a lawyer to know much more about the facts of the case than a family doctor. The doctor is not going to have access to all of the same information that determined defence counsel will have uncovered.

I start my preparation to cross-examine a family doctor by looking to see if there are inconsistencies between the doctor's own medical legal report and his or her clinical records. You want to look to see if the doctor has left anything out of the medical legal report that is contained in the clinical records. I go through each and every clinical entry and compare how each particular visit is summarized in the medical legal report. Was the information that was left out unhelpful to the plaintiff's case? Or does the medical legal report contain information not found anywhere in the clinical records? As demonstrated by the *Brown v. Raffan* case, demonstrating that the family doctor has "cherry picked" the evidence can be devastating to his or her opinion and reveal them to be an advocate.

You also want to look for any inconsistencies between what the doctor understands to be the plaintiff's abilities and functioning versus what the evidence demonstrates. Has the doctor seen any surveillance of the plaintiff? Was the doctor aware of the plaintiff's activities? The most effective way to neutralize a sympathetic family doctor's opinion is to demonstrate that their picture of the plaintiff's functioning from office visits is very different from the plaintiff's true functioning.

Are there any differences between the family doctor's opinions and what the other experts have opined? Have an understanding of the other expert's opinions and any differences between the GP's understanding of the medical evidence and what other expert's have opined.

D. What are the Doctor's Opinions Versus What has been Adopted

Some family doctors have a way of writing their reports so that it seems they came to an independent opinion when the reality is that they have merely adopted the opinion of a specialist either after they had referred the plaintiff to see that specialist or they received a medical legal report from an IME. Most family doctors are quite willing to concede that they have done so.

It is usually pretty obvious in that the diagnosis or other opinion only makes its way into the family doctor's medical legal report or chart after the particular consultation report was received by the family doctor. Often there is nothing in the clinical notes to substantiate the family doctor's ability to have come to that opinion independently. For example, the family doctor only opines that the plaintiff suffered PTSD after receiving a psychiatric consult or medical legal report in which PTSD was diagnosed. Meanwhile, there are no notations in the family doctor's clinical records about such

a diagnosis, recommended treatment nor any of the symptoms to support such a diagnosis. This sort of cross-examination requires a careful foundation be laid that there is no such support in the clinical records and that the doctor's practice is to record important information to support a diagnosis in their records.

Most family doctors, but not always, will agree that they defer to the opinions expressed by the specialists involved in the case. Those family doctors who dispute that premise, usually do not fare well when confronted with the details of the further education, internship and day to day practice undertaken by the specialists versus the family doctor who is a generalist. After all, they felt the need to refer the patient to a specialist for input into their medical condition. I see these kinds of questions as a "win win" situation; either the doctor agrees with the premise or you are well enough prepared to cross examine them on why the specialist is in a superior position to have formed their opinions. In the latter circumstance, the doctor is probably going to come off as being arrogant or argumentative. These are some of the building blocks to demonstrate advocacy.

Family doctors also have a habit of adopting the plaintiff's advice and presenting it as if it were a medical opinion. For example, family doctors will often opine about how a plaintiff is disabled from their job without knowing anything about the particular tasks or demands of the job or the plaintiff's real functional limitations. The opinion is not a scientific one but typically is based on the plaintiff's advice that they cannot return to work.

It can be very difficult to cross-examine a doctor on that sort of opinion. It may involve having the doctor confirm that they conducted no particular testing and that they have relied solely on the plaintiff's subjective complaints. Most family doctors will agree that they have accepted their patient's advice and subjective complaints as being true. You, of course, only want to challenge a doctor on the reliance of their patient's subjective complaints where there is some controversy about the plaintiff's reliability. If you are going to challenge the doctor on their reliance on the plaintiff's subjective descriptions of functioning and disability, you will want to make sure that you have objective contrary evidence (i.e., such as surveillance in which the plaintiff is seen doing something that they have said they cannot do, or a functional capacity evaluation that demonstrates the plaintiff is not an accurate reporter of their abilities). This evidence may not reveal the doctor to be an advocate but it certainly is effective at neutralizing their opinions.

E. Inconsistencies with the Doctor's Own Opinion on Other Occasions.

The holy grail of cross-examination is when you have a doctor that has provided inconsistent opinions. For example, the family doctor may report to ICBC that the plaintiff is disabled from working due to their injuries and at the same time have provided a report to Employment Insurance to the contrary so that the plaintiff can recover regular EI or so that they can be admitted to school, or apply for other insurance.

It is important that you ensure that you have received the doctor's entire file before you cross-examine them. Make sure that the lawyer's letters of instruction requesting any medical legal reports has been produced.

You should also be aware that some family doctors do not keep copies of forms that are filled out for other agencies. For example, if you know that a plaintiff has applied for EI you should obtain those records directly from EI and review them carefully to see whether the GP has provided any inconsistent reports. Sometimes doctors do not keep copies of the CL-19 forms prepared for ICBC.

Also, be aware that some information is kept on the inside of the folder holding the patient's chart (this is likely less common these days with most doctors moving towards computerized clinical records).

F. Offering Opinions Outside of Area of Expertise

Family doctors often fall into the trap of offering opinion on matters that are well outside their area of expertise. This is one of the fruitful areas of cross-examination because what they are doing is providing comment, in the guise of opinion, for the purpose of assisting the plaintiff in the law suit. The willingness to do so reflects classic advocacy.

Read the report carefully and ask yourself whether any particular opinions are really medical opinions or more just the doctor wanting to help the plaintiff in the lawsuit.

In the cross-examination, you have to dissect the source for the "opinion." When I do this sort of cross-examination, I put to the doctor that they included that information because they were wanting to help the plaintiff in the lawsuit. In the right circumstances, no matter what the doctor answers, it is a "win win" situation. If they concede they were trying to help the plaintiff that goes some distance to show their advocacy and if they dispute that being their intent, it is often not very credible.

G. Conduct Swirski Interviews

I encourage the use of *Swirski* interviews (*Swirski v. Hachey*, (1995) 16 B.C.L.R. (3d) 281) in those cases in which the family doctor's evidence is likely to play a major role in the litigation. I have conducted quite a number of *Swirski* interviews and have never been disappointed that I did, nor have I ever felt that I wasted my client's money in doing so. They can be a wealth of information and lets you size up what kind of witness the GP is going to be and get a feel for their relationship with the plaintiff.

Ideally, I try to conduct *Swirski* interviews earlier in the litigation before the GP has had the benefit of receiving all of the plaintiff's expert reports, but I certainly would not shy away from doing one shortly before trial.

I do not approach the interview as any sort of cross-examination. Instead, I try to play a relatively passive role and have the family doctor walk me through their clinical records and tell me what they think is going on. The less talking you do and the more talking the doctor does, the better.

I always ask questions about whether the doctor has had opportunity to observe the plaintiff outside of the office. This is a way to find out whether there is any sort of social relationship. I ask questions that will elicit how long the doctor has known the plaintiff.

I try to bring an associate with me to the interview, even though plaintiff's counsel is typically present, so that I would never find myself having to be a witness should the doctor later contradict his or her advice from the interview. It is also helpful to have two people taking notes of the doctor's evidence. I have the notes transcribed and sent to the doctor, inviting them to make any changes.

On those few occasions that I have had doctors refuse to meet with me, I have pursued an application to compel them to attend a pre-trial witness examination pursuant to Rule 7-5. I have never had those examinations be anything other than a gold mine of information. Having the doctor's evidence under oath is a fantastic foundation to prepare for cross-examination.

Sometimes you can spin a doctor's refusal to informally meet with you in the presence of plaintiff's counsel as indicative of advocacy; particularly if they have met with, or had regular contact with, plaintiff's counsel

H. Explore the Doctor's Sympathies

Consider the language that is used by the doctor in the report; is the plaintiff called by their first name throughout the report? is there emotive or flamboyant language used to describe the plaintiff's complaints?

Has the doctor had a long history of treating the plaintiff or has there been any sort of social contact with the plaintiff. This information can sometimes be gleaned through the clinical records but, as mentioned above, can be explored in a *Swirski* interview.

When the doctor is in the stand, put questions to them about being sympathetic with the plaintiff. Although it is not likely that you will get a doctor to admit that they are an advocate, most doctors will admit having some sympathy to the plaintiff's plight following a car accident.

I. Think About Your Tone

It is my belief (and hopefully my practice) that counsel should be polite, but firm, when cross-examining any witness and, particularly, a doctor. If you are rude or condescending, it will probably immediately alienate any reasonable witness who might be prepared to agree with some, if not all, of the propositions you put to him or her. It will also surely alienate the judge.

You have to remember that a family doctor has taken time out of their busy schedule to attend in court and that they are probably not very happy to be there. Certainly that is likely the way the Judge is going to view their attendance. If you are arrogant or demeaning in your approach, you will quickly get the doctor's back up and the judge will sympathize with them having to undergo the ordeal. If, in those circumstances, they reveal themselves to be argumentative or arrogant, the judge is less likely to find that they come across as an advocate but someone who is, rightfully indignant at being subjected to this form of questioning.

It is much more effective to have the questions be posed in a calm fair manner and have the doctor lose their composure because you are politely pinning them into a corner. If the doctor is really an advocate they are going to reveal their argumentativeness or arrogance in response to proper questions. It will be much more dramatic and effective to have a witness revealed as an advocate in response to reasonable questioning.

When a doctor is not being responsive, calmly ask exactly the same question again and continue to do so until the doctor provides the proper response. The more times the doctor has to be calmly pressed for a responsive answer the more argumentative they appear. It can be effective to point out to the doctor that they are not answering the question that you are asking and could they please listen to the question and answer that question. I would never ask the judge to direct any witness answer my question. It is much more effective when the judge, on his or her own initiative, steps in to admonish a witness and instructs them to answer the question being asked.

J. Remember the Trial is on Your Turf

It is normal to be nervous about having to cross-examine a doctor. I think it is helpful to remember that they are probably as nervous, if not even more so, about being cross-examined. Even the most seasoned experts will still get nervous. When you are well prepared and know the case intimately, you will be able to overcome your nervousness quickly once the questioning starts going in your favour!

K. Do you Really Need to Cross-Examine?

You should begin and end your preparation to cross-examine any witness, and particularly a sympathetic family doctor, with asking yourself do you need to cross-examine this witness. If their evidence is not controversial and you have not identified any strong points you anticipate getting out of the witness, re-think asking that they be called for cross-examination. Giving a sympathetic family doctor a platform to talk about their observations of the horrendous impact that the accident has had on the plaintiff's life is not helpful to the defence.