

CITATION: Wallis. v. Wawanesa Mutual Insurance Company, 2026 ONSC 2423
FILE NO.: CV 18-00002594-0000
DATE: 20260422

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Linda Wallis, Plaintiff

AND

John/Jane Doe, Jack/Jill Doe and The Wawanesa Mutual Insurance Company,
Defendants

BEFORE: Justice Spencer Nicholson

COUNSEL: Karl Arvai for the Plaintiff

Laura Emmett and Emily Rasic for the Defendant, Wawanesa Mutual Insurance
Company

HEARD: April 22, 2026

MID-TRIAL RULING RE DR. McDERMID

**Correction Notice: An edit was made after releasing to counsel at para.
53. This edited version should be considered as the Reasons for the ruling.**

NICHOLSON J.:

[1] Dr. Anne McDermid is a psychologist. She has been treating the plaintiff, Linda Wallis, with respect to her psychological injuries following a motor vehicle accident that occurred on December 22, 2016, over a roughly nine-year period.

[2] This is the fourth week of what is supposed to be a five-week jury trial.

[3] The plaintiff intends to call Dr. McDermid as, at least, a participant expert witness. Dr. McDermid's clinical notes and records are already in evidence. From those notes, it appears that Dr. McDermid has been treating the plaintiff since April of 2017 and that treatment continues to date. I have reviewed those notes in anticipation of the arguments on this motion and generally, I would describe that Dr. McDermid recounts the plaintiff's subjective reporting and the subject matter of their discussion during the treatment session. The notes describe life events that Ms.

Wallis is experiencing, such as housing issues. Most notes do not contain any specific diagnosis or prognosis.

[4] None of what I have just stated is to diminish the value of Dr. McDermid’s treatment of the plaintiff. However, I am not sure what particular value these records will have on the outcome of the case, other than the jury will be made aware that Ms. Wallis has had extensive psychological treatment with Dr. McDermid for years after the accident, including ongoing. The weight of these notes is particularly unknown, since Ms. Wallis’ self-reports are not admissible as evidence of the truth of her symptoms, but only to understand how Dr. McDermid reached any diagnosis, and to understand the treatment recommendations made by Dr. McDermid.

[5] Dr. McDermid would be a participant expert pursuant to *Westerhof v. Gee Estate*, 2015 ONCA 206. In *Westerhof*, the Court of Appeal distinguished between “participant” expert witnesses, non-party expert witnesses and “litigation” experts. Litigation experts are those experts engaged by or on behalf of a party to provide opinion evidence in relation to the proceeding. Participant experts are those treating physicians who form opinions based on their participation in the underlying events (in this case Ms. Wallis’ treatment post collision).

[6] Participant experts are usually permitted to give opinion evidence concerning history, diagnosis and prognosis formed in the course of treating the plaintiff. They are not required to comply with Rules 4.1.01 or 53.03, like litigation experts are. In *Westerhof*, Simmons J.A., for the Court of Appeal, at para. 60, stated:

[60] Instead, I conclude that a witness with special skill, knowledge, training or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents without complying with rule 53.03 where,

- The opinion to be given is based on the witness’ observation of or participation in the events at issue; and
- 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.

[7] The Court, at para. 63, makes it clear that participant witnesses may proffer opinion evidence extending beyond those limits if they comply with rule 53.03 with respect to the portion of their opinions expressed beyond those limits.

[8] In *Imeson v. Maryvale*, 2018 ONCA 888, the Court of Appeal reiterated that a participant expert's exemption from Rule 53.03 is lost to the extent that the expert's opinion is not based on the expert's observation of or participation in the relevant events and not formed as part of the ordinary exercise of her skill, knowledge, training and experience while observing or participating in such events.

[9] In addition to her clinical notes, Dr. McDermid has also prepared three narrative reports, plus signed a Form 53 Acknowledgment, and plaintiff's counsel seeks to adduce opinion evidence from those reports. Those reports are dated March 2, 2018, February 20, 2025 and February 6, 2026. There is also an online questionnaire to Ms. Wallis' disability insurer that it appears Dr. McDermid completed on Ms. Wallis' behalf.

[10] The defendant objects to Dr. McDermid testifying as a "litigation expert" on the basis that the reports do not comply with Rule 53.03, and that leave was not sought to call more than three expert witnesses. They also take the position that Dr. McDermid lacks the requisite impartiality to be a litigation expert.

Rule 53.03 Compliant?

[11] An expert report delivered under Rule 53.01(2.1) must contain the following:

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.
- 6.1. A statement certifying that the expert is satisfied as the authenticity of documents reviewed or referred to in the report;
- 6.2. Details of any doubts the expert has respecting authenticity of any document; and
7. An acknowledgment of expert's duty signed by the expert.

[12] I have reviewed each of the reports and make the following comments.

[13] The March 2, 2018, report references five questions that Dr. McDermid was asked to provide an opinion on, as follows:

1. Dr. McDermid's diagnosis and prognosis with respect to Ms. Wallis, as well as any restrictions or limitations that might affect Ms. Wallis' employability.
2. Is Ms. Wallis capable of working on a part-time or full-time basis as a Canada Postal worker?
3. Do you consider Ms. Wallis to be completely disabled from her pre-accident employment, or any employment from a psychological perspective?
4. If she is unable to work at this time, how long do you anticipate her disability will prevent her from returning to work?
5. If you are unable to provide a prognosis at this time in terms of any workplace disability, at what point would re-evaluation of her condition be appropriate?

[14] In Dr. McDermid's report, she addresses each of these questions. She provides a cogent explanation for why she reaches her conclusions. On my reading of the report, Dr. McDermid does not exhibit any obvious lack of objectivity that would be disqualifying. That comment does

not foreclose a later finding that any oral evidence lacked objectivity should that prove to be the case.

[15] The 2018 report does not contain a statement of Dr. McDermid's qualifications and employment and educational experiences in her area of expertise. It does not reference any documentation that Dr. McDermid might have relied upon in forming her opinion. Thus, this report is not compliant with Rule 53.03.

[16] The February 20, 2025, report, however, does set out Dr. McDermid's qualifications, employment and educational experiences in quite some detail. She also lists the documents that she has reviewed, including two expert reports, as well as a medical brief index. During oral submissions, it came to my attention that the medical brief index was not actually included with her report. I agree that this is problematic. Dr. McDermid then sets out her diagnosis, prognosis, comments about employability and the accident's impact on Ms. Wallis' day to day activities. There are detailed reasons for her opinion. Again, there is nothing about the manner in which this report was authored that causes me any concern about Dr. McDermid's objectivity.

[17] In her final report, dated February 6, 2026, Dr. McDermid responds to the defense medical opinion of Dr. Abeare, as well as a Future Care Costs Report of Occupational Therapist, Ms. Farrell, who was retained by plaintiff's counsel. The report contains a statement of her qualifications. Dr. McDermid gives a considered opinion and explains the reasons for her opinion. I reiterate that there is a Form 53 Acknowledgment that has been signed.

[18] It is my view that, collectively, these reports are compliant with Rule 53, although there may have been deficiencies within each of the individual reports.

[19] One of the purposes of Rule 53, in my opinion, is to ensure that the opposing side knows the opinions that they have to rebut and is not ambushed at trial. There is no question that Dr. McDermid's reports provide all of the necessary information to allow the defendant to understand her opinion(s) and how she arrived at her opinion(s). Furthermore, the first two reports were delivered in a timely fashion so that the defendant's experts could review and opine on Dr.

McDermid's opinion. In fact, Dr. Abeare has included comments directed at all of Dr. McDermid's reports. The third report is a rebuttal report. The defendant is not suggesting that an adjournment is necessary. The defendant's position is simply that the evidence should be excluded.

[20] In *Doran v. Melhado*, 2015 ONSC 2845, Emery J. dealt with a report that was allegedly deficient under Rule 53. He stated as follows at paras. 19-22:

[19] I find that Dr. Eisenstat has met all of the required elements to comply with Rule 53.03(2.1) in a general way. Subrule 53.03(2.1) was added to Rule 53.03 in 2010 and is therefore remedial in nature. As a remedial rule, it should be interpreted in a liberal and generous manner. The test for compliance under the amended rule must surely be to require that sufficient information is given to the opposing party on which to test the qualifications of the expert in a *voir dire* to determine if, and for what field, that doctor should be accepted as an expert witness by the court.

[20] Presuming the basis of Rule 53.03 in its form prior to 2010 continues to provide the foundation for the addition of subrule (2.1), the substance of the proposed testimony of the proposed expert in a report is required for any responding expert to assess that evidence and to prepare a responding report if his or her opinion differs. Giving fair and informed notice of the expert's proposed testimony also enables counsel for the adverse party to cross-examine the expert on his or her opinion, and the underlying facts and assumptions for that opinion at trial.

[21] Mr. Wickham takes issue with Dr. Eisenstat's failure to articulate his instructions for the purpose of providing opinion evidence as an expert. I equate his description of the purpose for which he was engaged as the instructions he received to examine Mr. Doran, carry out all tests and to prepare his report.

[22] I find that Dr. Eisenstat's report meets the burden required of him under paragraphs 1 to 6 of Rule 53.03 (2.1). ...

[21] I entirely reject the argument that the defendant is being deprived of the opportunity to know the case to meet. That assertion is without merit. Dr. McDermid's reports make it amply

clear what Dr. McDermid’s opinions are, and how she arrived at them. Any deficiencies in her reasons can be attacked on cross-examination. I do not find that her reasons are merely conclusory, but must be read as a whole keeping in mind that she has been the treating psychologist of the plaintiff and has the knowledge as set out in her clinical notes and records. There is no surprise here, this is not trial by ambush, and I find that there is no prejudice to the defendant if Dr. McDermid is permitted to not only testify in her capacity as a participant witness, but also offer opinions ordinarily reserved for a litigation witness, given the defence experts have had notice of her opinions and have responded to them. I find no leave is required under Rule 53.08 because the reports, collectively, are compliant with the Rule. To require an expert to re-write three reports into one compliant report would be contradictory to securing the least expensive and most expeditious determination of the case on its merits.

[22] I have instructed plaintiff’s counsel to forthwith provide a copy of the medical brief index referred to by Dr. McDermid in her report of February 2025. While I recognize that it takes time to prepare for cross-examination, if the medical index discloses no new records, then defense counsel is not disadvantaged in a way that I could not address by an adjournment. If that list is significantly different than the medical records already before the court, I am prepared to revisit my decision. In my view, the main concern would be if Dr. McDermid relied upon some document that had not been produced to the defendant.

[23] In my view, any failure to strictly comply with the requirements of Rule 53.03 in the first report were cured in the subsequent reports. Most importantly, there is no evidence of prejudice to the opposing party as a result of any alleged deficiencies, but merely bald assertions of prejudice. The defendant has had adequate notice of Dr. McDermid’s opinions, they are not unlike other opinions in this case on any material issues and the defense experts have all provided a response to her opinion, or commented upon her opinion(s), or at least have had a chance to do so.

[24] I do not read *Doran, supra*, as standing for the proposition argued by the defendant. The defendant relies on the quote at paragraph 13, “A litigation expert would not be a medical practitioner who treated [the plaintiff] for the injuries or affects he allegedly [suffered] as a result of the assault”. I do not believe that what was intended by that statement was that a treating

physician could never meet the requirements of a litigation expert. It is clear from reading both *Westerhof* and *Imeson*, that a participant expert may comply with Rule 53 and proffer opinions beyond what the normal constraints on a participant expert would be. I reiterate what Simmons J.A. stated at para. 63 in *Westerhof*,

[63] If participant experts or non-party experts also proffer opinion evidence extending beyond the limits I have described, they must comply with rule 53.03 with respect to the portion of their opinions extending beyond those limits.

[25] This is also made clear by Edwards J. in *Davies v. The Corporation of the Municipality of Clarington*, 2016 ONSC 1079, at paragraphs 36 and 37, relied upon by the defendant, but with respect to another issue. Edwards J. stated as follows:

[36] As the facts of this case and of this motion makes clear, there is a fine line between when a treating doctor may testify as a fact witness offering opinion evidence and when a treating doctor becomes a litigation expert. It has been long recognized by the courts that not all evidence from a treating doctor is simply a recitation of dates of treatment, history taking from the patient and a diagnosis. There is a significant body of case law, that even pre-*Westerhof* accepted, that opinion evidence from a treating doctor as a fact witness was admissible where the opinion evidence was limited to the witness' involvement in the matter, or the exercise of the witness' judgment, or where the proposed evidence was to explain facts that the doctor perceived. (See *Farooq v. Miceli*, 2012 ONSC 558 at para. 25, *Continental Roofing Ltd. v. J.J.'s Hospitality Ltd.*, 2012 ONSC 1751, 12 C.L.R. (4th) 90 at para. 28).

[37] Prior to *Westerhof*, there was a divergence of view amongst the judiciary as to whether a treating doctor was only a fact witness with no right to offer opinion evidence. A review of the pre-*Westerhof* jurisprudence suggests that many judges were of the view that a treating doctor should be able to give evidence, which included opinion evidence with the proviso that the opinion evidence was limited to the involvement of the treating doctor in the diagnosis, treatment and prognosis of the patient. Where the opinion of the treating doctor was formed later, or was unrelated to the involvement of the doctor in the treatment of the patient, the opinion was not admissible. *Westerhof* has not changed the law in that regard. *Westerhof* has now clarified

that where a treating doctor goes beyond diagnosis, treatment and prognosis type evidence, the requirements of Rule 53.03 must be complied with. This is so because that treating doctor has essentially taken on the role of a litigation expert. (emphasis added by me)

[26] I note *Taylor v. Zents*, 2025 ONCA 662, where a treating psychologist was permitted to also give evidence contained in a Rule 53 compliant report beyond simply being a participant expert and *Fraser v. Persaud*, 2023 ONSC 1449, where a treating physician was also permitted to give opinion evidence contained in a report served under Rule 53. In both cases, the courts emphasized the need to ensure that the treating physicians complied with their duty to the court in providing those opinions.

[27] That is precisely what Dr. McDermid has done in this case as a treating physician, by preparing reports that expand on her opinion. So long as she gives her evidence in a fair and objective fashion, she should be permitted to provide that opinion evidence, subject to my comments below about s. 12 of the *Evidence Act*, R.S.O. 1990, c. E. 23.

[28] The defendant relies upon *Cozza v. Venneri*, 2022 ONSC 7053, an estates case. Gilmore J. in that case refused to allow a proposed expert to testify as a litigation expert because he had failed to provide a report under Rule 53.03, but did permit the witness to testify as a participant expert. If anything, *Cozza* is detrimental to the defendant's position. The participant expert, the deceased's family physician, in *Cozza* prepared a non-compliant written report six months after his visits but was nonetheless permitted to give opinion evidence contained in the report that was based on his observations at the time of the assessments he had done.

[29] I also address the defendant's position that a participant expert is limited to providing opinions only if the opinion is specifically written down in the clinical notes. In other words, the argument that amounts to saying that if a participating expert cardiologist wrote down "shortness of breath, chest pain, fatigue, pain radiating down the left arm", but failed to write down the diagnosis of "heart attack", she would be precluded from later testifying that the plaintiff was, in fact, diagnosed with a heart attack.

[30] Nothing specifically stated in *Westerhof*, in my opinion, so limits a participating witness to offering their opinion to only those matters written down in their notes or records. Opinions can be formed and not reduced to writing, but still gleaned from a review of one's own clinical notes by the participant expert. Participating experts are often real-world medical practitioners that are focussed on treating their patients and not contemplating what their notes must contain in this event that they are later called upon to testify at trial. In the companion case with *Westerhof*, *McCallum*, it is apparent at paras. 162-175, that the Court of Appeal did not reverse the trial judge's decision to allow participant experts to provide opinion evidence about the plaintiff's employability, despite that evidence not being in their actual notes (particularly paras. 167-168).

[31] In *Imeson*, at para. 61, the Court of Appeal stated, “[t]ypically, any opinions that are sought to be introduced are found in the clinician's clinical notes and records, or in reports prepared for the purpose of consultation and treatment.”. The word “typically” does not mean that the opinions must invariably be written down, but does indicate that usually that is where a participant expert's opinions are found.

[32] During oral submissions, counsel for the defendant relied on *Fraser, supra*, as requiring the diagnosis or prognosis to be *written* within the participant expert's records. I do not see that reference within *Fraser*. In *Davies*, Edwards J., at para. 40, described that the opinion must be “revealed” by the clinical notes and records. Clearly that would include being actually written within the notes, but, in my view, if the notes allow the participant witness to recall their diagnosis or prognosis as of the time of the note, the actual diagnosis need not be written within the note. In my “heart attack” example, I would allow the participant expert to also disclose his or her opinion with respect to the patient's anticipated recovery at that time, or their ability to work, as formed at that time if the participant expert could recall that opinion.

[33] I do agree that there is a temporal element to the opinion evidence that a participant expert can give, as set out in *Imeson*, at para. 73. The participant expert can testify as to the opinion that was formed at the time of their treatment of the plaintiff. In the case of Dr. McDermid, I note that her treatment is ongoing.

[34] Accordingly, even if Dr. McDermid was limited to providing opinion evidence in her capacity as a participant expert, she would not be precluded from providing a diagnosis or prognosis, or comment upon the employability of the plaintiff, contemporaneous with her treatment of the plaintiff. In this particular case, the defendant has the benefit of Dr. McDermid's reports to understand and assess that opinion, to prepare for cross-examination.

[35] In any event, I am satisfied that Dr. McDermid has provided a series of reports sufficiently compliant with Rule 53.03(2.1) that she may expand upon her role as a participant expert and testify as to the opinions contained within those reports, so long as the *Mohan* test is met, she adheres to her duty to the court and the opinions are within the scope of her expertise as a psychologist.

S. 12 of the Evidence Act:

[36] Section 12 of the *Evidence Act* provides as follows:

12. Where it is intended by a party to examine as witnesses' persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the judge or other person presiding.

[37] The plaintiff has not sought leave to call more than three witnesses, although arguing this motion effectively constitutes seeking leave. To date, she has called Dr. Iezzi, a psychologist and Dr. Kumbhare, a physiatrist, both as litigation experts. She still intends to call an Occupational Therapist, Ms. Farrell and an economic loss expert. Those would also be litigation experts. There have been a myriad of participant experts. Dr. McDermid would be the only psychologist called as a participant expert. The plaintiff intends to file reports done at the behest of the accident benefits insurer, including a report from psychologist, Dr. Derry, a non-party expert. I note that two chiropractors have testified as participant experts without any concerns being raised by the defendant pursuant to s. 12 of the *Evidence Act*.

[38] The defendant relies on several cases that make it clear that a party cannot expect to call as many litigation experts as they wish. In *Davies supra*, Edwards J. referred to "piling on". He then, at para. 32, quoted from *Burgess (Litigation Guardian of) v. Wu*, 2005 CanLII 5874 (ON SC), a

decision of Ferguson J., for “guidance” on the factors to be considered. Edwards J., at para. 39, noted that it would be a rare occasion where leave should be granted where a plaintiff intends to call more than one expert in the same specialty. It was his view in *Davies* that this duplicative evidence was unnecessary, given that necessity is required by *Mohan*. He was clearly very concerned about judicial economy given the extraordinary length of that trial and that unnecessary duplication would only lengthen that trial.

[39] Edwards J. also, on my reading, concluded that the plaintiff did not have to seek leave to call participant experts, but that leave was required to call the evidence of a litigation expert of the same specialty as a litigation expert already called, and where a participant witness assumes the role of a litigation expert (at para. 40). On my interpretation of Edwards J.’s decision, he also makes it clear that regardless of the status of the expert, the trial judge has the ability to limit duplicative evidence to control the trial process.

[40] I note that in *Burgess*, one of the considerations was whether there was an objection to the number of expert witnesses. Ferguson J. notes that where there is no opposition then leave is usually granted. Obviously, here, the defendant objects. However, the timing of that objection, in my view, is problematic, which I will discuss below.

[41] Other valid considerations include duplication as well as whether, if one party has more witnesses than the other party, there is trial unfairness. Both of those considerations are factors in this case.

[42] I have considered *McNamee v. Oickle*, 2020 ONSC 432, where Beaudoin J. relies heavily upon Edwards J.’s remarks in *Davies*. In *McNamee*, many of the expert reports were late served, which is not an issue in the case before me. In *McNamee*, Beaudoin J. held that s. 12 of the *Evidence Act* applied to both participant and litigation experts.

[43] I note that the issue of whether s. 12 precludes more than three participant expert witnesses was addressed in *Higashi v. Chiarot*, 2021 ONSC 2399, by Smith J. Smith J. interpreted *Davies*, as I do, in distinguishing between participant experts and litigation experts for the purpose of s.

12. Smith J. held that participant experts do not count towards the three experts provided for in s. 12 of the *Evidence Act*.

[44] However, given that the plaintiff seeks to call Dr. McDermid to give opinion evidence contained in her reports that go beyond her role as a participant expert, I will assume that leave is required.

[45] There are important distinctions between this case and *Davies* and *McNamee*. In *Davies*, none of the experts had yet been called. The same is true in *McNamee*. In other words, the objection by the opposing party was made at a time when the plaintiff could still determine which of the experts in any one particular area of expertise the plaintiff wished to call. Here, the defendant's objection is done only on the eve of Dr. McDermid testifying, depriving the plaintiff from deciding which of Dr. McDermid or Dr. Iezzi she would have preferred to call as a litigation expert.

[46] It is true that the *Evidence Act* makes it incumbent upon the party wishing to call more than three experts to seek leave. However, rightly or wrongly, it has become perhaps customary for such leave not to be contested, and thus, not always sought.

[47] So how should "blame" be attributed to the situation in which this case now finds itself? More important than finding fault, what is the fairest way to unwind this problem so that the jury hears all of the relevant evidence with as little prejudice to either party.

[48] In my view it has been clear from the outset of this trial that the plaintiff intended to call Dr. McDermid to give expert opinion in accordance with the reports she prepared. Those reports were obviously served for a reason. A participant witness who has treated the plaintiff for some nine years has a far greater understanding of the plaintiff than a litigation expert who assesses the plaintiff on one occasion.

[49] I do not have a report from any pre-trials that were conducted in this case. Accordingly, I do not know whether the issue of leave to call more than 3 expert witnesses was canvassed at the pre-trial(s).

[50] This trial commenced on March 30, 2026. I am advised, and accept, that plaintiff's counsel wrote to defence counsel on April 2, 2026, inquiring whether defence counsel intended to challenge the qualifications of any of the plaintiff's expert witnesses. On April 6, 2026, defence emailed plaintiff's counsel and advised that the defendant intended to challenge Dr. McDermid's ability to testify as a litigation expert. No rationale was given for that challenge.

[51] I note, parenthetically, that plaintiff's counsel has indicated to date that he intends to challenge the ability of the defense expert witnesses to provide opinion evidence and to date has not given any basis for those challenges to defense counsel. In other words, both parties are conducting themselves in a similar fashion in this regard.

[52] In any event, this exchange took place while the plaintiff was still testifying, and no expert witnesses had yet been called by the plaintiff.

[53] I also accept that, in a perfect world, the plaintiff would have called Dr. McDermid to testify before Dr. Iezzi, as she was a treating physician. However, this trial has had starts and stops due to problems with jurors. Witnesses have taken longer than anticipated and scheduling expert witnesses, who have busy practices with patients to treat, has been difficult. I am aware from trial scheduling discussions with counsel that Dr. McDermid has been in attendance on earlier occasions and could not get reached. Accordingly, it was owing to chance that Dr. Iezzi was called as a witness before Dr. McDermid. He was available and she was not.

[54] I also accept that, had the plaintiff been put to an election of whether to call only one of Dr. McDermid or Dr. Iezzi, she would have called Dr. McDermid. Their opinions are very similar, but Dr. McDermid, as a treating physician, had the benefit of familiarity with the plaintiff that would be an advantage over Dr. Iezzi.

[55] I have reviewed Dr. Iezzi's two reports, keeping in mind that he has completed his testimony and it may or may not mirror his reports. He diagnosed moderate Pain Disorder, Cognitive Disorder and mild Major Depressive Disorder. He opined that Ms. Wallis' prognosis was poor and would continue to be poor into the distant future. He opined that her injuries were caused directly by the motor vehicle accident and that but for the accident, she would be a lot more functional from a physical, psychological and cognitive standpoint. He also opined that she is competitively unemployable on a permanent basis. He opined that her injuries meet the statutory threshold. He opined that she requires further treatment by Dr. McDermid but deferred to Dr. McDermid's opinion with respect to the number of sessions that would be necessary.

[56] Dr. Iezzi also provided an opinion, in his second report, disagreeing with the opinion of Dr. Abeare, the defense neuropsychologist, with respect to the plaintiff's sleep habits being largely responsible for the plaintiff's cognitive impairment, if any. During his examination-in-chief, Dr. Iezzi was asked a hypothetical question about sleep that elicited this opinion.

[57] In her three reports, Dr. McDermid diagnoses Pain Disorder, Major Depressive Disorder with Anxious Distress, Posttraumatic stress symptoms and Cognitive Disorder. It is her view that the prognosis is poor, and Ms. Wallis is unable to return to any form of employment. Dr. McDermid recommended that she undergo long-term psychological treatment on a regular basis (estimated monthly sessions for the foreseeable future). She opined that the cause of her psychological symptoms was the motor vehicle accident.

[58] In her February 6, 2026, report, Dr. McDermid specifically addresses the future care costs report by Ms. Farrell as well as the defense neuropsychological report of Dr. Abeare. While Dr. Iezzi was asked a hypothetical question during his examination by plaintiff's counsel about any expert testifying about Ms. Wallis' symptoms being sleep related, Dr. McDermid clearly takes the opinion "head-on". However, I agree that Dr. Iezzi was in position to do so, and plaintiff's counsel decided to approach it by way of hypothetical.

[59] There is substantial duplication between the opinions of Dr. McDermid and Dr. Iezzi. One distinction is with respect to recommended future treatment.

[60] This case has been a lengthy one, and frankly, it will likely go over the estimated time for completion. It is not, however, unusually long for a personal injury case where the accident took place over nine years ago. Importantly, unlike *Davies*, the timing of this objection offers no real savings to court time. Dr. McDermid is going to be testifying in any event about matters properly within the purview of a participant expert. Excluding her from testifying as to her full opinion as contained in her reports does not result in substantial savings of valuable court resources.

[61] Thus, the real issue is whether the defendant is unfairly disadvantaged by the duplication that will occur. In my view, the answer is “no”. I agree that the onus was upon plaintiff’s counsel to seek leave to call more than three expert witnesses, and he failed to do so. Although my initial reaction was that the defendant should not have “laid in the weeds”, I agree it was not their obligation to point out that leave was required. Nevertheless, the defendant has contributed to this situation to some extent by not raising this concern at the outset of trial, as was done in *Davies* and *McNamee*.

[62] Ultimately, I am loathe to deprive the jury with relevant evidence in these circumstances. As described in *Girao v. Cunningham*, 2020 ONCA 260, at para. 59:

[59] There is an actuating judicial perspective within which these principles operate, well-expressed by Barr J.: “[I]t should be remembered that any time a court excludes relevant evidence the Court’s ability to reach a just verdict is compromised”: *Hunter v. Ellenberger* (1988), 25 C.P.C. (2d) 14 (Ont. H.C.).

[63] Again, the defendant has responded amply to the opinion evidence of Dr. McDermid, who is a treating physician with an important perspective of her patient’s treatment, through its own defense experts. Defense counsel has had to prepare for the cross-examination of Dr. McDermid in any event. I do not accept that the defendant is caught by surprise by any of this evidence.

[64] Accordingly, I would grant leave to the plaintiff to call more than three expert witnesses in the circumstances.

Impartial Evidence:

[65] The last issue raised by the defendant, which I have briefly touched upon above, is whether Dr. McDermid can be fair and objective, living up to her duty to the court as a litigation expert, when she has also been the treating physician of the plaintiff for nine years. This point was not strenuously argued but is important to address, so I will.

[66] I begin by reiterating for a third time that *Westerhof* explicitly recognizes that participant experts can testify to matters outside the usual areas for such witnesses by complying with Rule 53. There was no suggestion in that case that a treating physician could never be a litigation expert because of an inability to be objective.

[67] In *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 SCR 182, it was described that the expert must be aware of their duty to the court, and willing to carry it out. Once the court is satisfied of that threshold requirement, concerns about a witness' impartiality or independence goes to the overall weighing of the cost benefit analysis of the court exercising its gatekeeper function and admitting the evidence. So, the real issue is whether I should hold that Dr. McDermid is incapable of placing her duty to the court to provide objective evidence above any duty owed to her patient, Ms. Wallis. I pause here to note that objective evidence does not mean evidence that favours the defendant, but rather evidence that takes an impartial approach. In other words, a treating physician can feel a duty to their patient, but still be objective and balanced in their approach to providing an opinion with respect to that patient.

[68] At paragraph 49 of *White Burgess*, the Court noted that "the existence of some interest or relationship does not automatically render the evidence of the proposed expert inadmissible". Exclusion at the threshold stage should only happen in very clear cases where the expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. The Court does not even rule out a familial relationship. "Anything less than clear unwillingness or inability to do so should not lead to exclusion", but should go to weighing of the costs and benefits of admitting the evidence.

[69] In *Taylor v. Zents*, *supra*, the treating psychologist was qualified to give expert evidence as both a participant expert and a Rule 53 expert by the trial judge. The Court of Appeal noted that a participant expert may also be qualified to give Rule 53 opinion evidence if the court is satisfied that their relationship does not preclude them from adhering to their duty to the court to provide objective, non-partisan evidence. At para. 75, the Court stated:

[75] An expert occupying that dual role is subject to the same impartiality inquiry as any other r. 53 expert. When it comes to the expert's relationship with a litigant, "the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance": *White Burgess*, at para. 50. Once an expert acknowledges their duty of impartiality, the party opposing the admission of their evidence bears the burden of showing a realistic concern that they are unable or unwilling to comply with that duty. If they succeed, the burden shifts to the proponent of the expert's evidence to demonstrate the expert's impartiality on a balance of probabilities: *White Burgess*, at para. 48.

[70] Applying the *White Burgess* test, I am satisfied that the evidence of Dr. McDermid is relevant to an issue, namely the plaintiff's psychological condition following the motor vehicle accident and the extent of her impairment and subsequent treatment. I am also satisfied that Dr. McDermid possesses expertise on this issue that is beyond the ordinary knowledge of the court, or the jury such that her opinion would assist the trier of fact. Accordingly, her opinion is necessary from that perspective. I have also considered necessity from the perspective that Dr. Iezzi has already given similar evidence and recognizing that from that perspective, her evidence may not be considered "necessary". However, there are gaps in his testimony in certain areas that Dr. McDermid can fill. Furthermore, there are advantages to hearing from treating physicians, provided that they can maintain their objectivity. There is no exclusionary rule and I find that her qualifications are sufficient to be qualified as an expert witness in psychology.

[71] I must recognize that Dr. McDermid has a doctor-patient relationship with the plaintiff that undoubtedly has some impact on her ability to be objective. As I have noted, Dr. McDermid's written reports do not take on the appearance of advocacy in my opinion. However, if she were to

demonstrate inappropriate bias in her *viva voce* evidence, I would have to exercise my gatekeeper function to halt her testimony. I also consider, objectively, that there exists a conflict in her duty to the court, as a Rule 53 expert, and her duty to her patient. However, I am not (yet) satisfied that she cannot recognize and overcome that conflict.

[72] Dr. McDermid has signed the Form 53 and testified that she is able to adhere to her duty to the court. The onus is thus on the defendant. Having reviewed her report, the reasons provided for reaching the opinions that she did are, in the words from *Taylor v. Zent*, fair and even-handed.

[73] I will assess her evidence at the qualification *voir dire*, including her understanding of her duty to the court. I will engage in the costs/benefit analysis of her evidence, as a litigation expert, at that time.

Disposition:

[74] Accordingly, it is my view that Dr. McDermid should be permitted to testify with respect to her diagnosis and prognosis, in her capacity as both a litigation expert and a participant expert. While there is some duplication with Dr. Iezzi's opinion, it would be difficult for the jury to understand why a treating physician is not providing a diagnosis. I note that Dr. McDermid continues to treat Ms. Wallis, so her diagnosis and prognosis are current. Similarly, Dr. McDermid will be permitted to testify with respect to Ms. Wallis' employability throughout her treatment, as well as causation given that she continues to treat Ms. Wallis and has provided Rule 53.03 compliant reports. There is, as I noted, no surprise at all to the defendant.

[75] Furthermore, Dr. McDermid shall be permitted to respond to Dr. Abeare's opinion, in accordance with what she has said in her report dated February 6, 2026. The defendant has had ample notice, Dr. Abeare has responded to this response, and Dr. Iezzi's response to a hypothetical is not comprehensive enough to be entirely duplicative.

[76] Dr. McDermid shall be permitted to testify with respect to future psychological treatment, as Dr. Iezzi deferred to her opinion in that regard.

Justice Spencer Nicholson

Justice Spencer Nicholson

Date: April 22, 2026

CITATION: Wallis. v. Wawanesa Mutual Insurance Company, 2026 ONSC 2423
FILE NO.: CV 18-00002594-0000
DATE: 20260422

ONTARIO

SUPERIOR COURT OF JUSTICE-ONTARIO

B E T W E E N :

Linda Wallis

Plaintiff

- and -

John/Jane Doe, Jack/Jill Doe and The Wawanesa
Mutual Insurance Company

Defendants

MID-TRIAL RULING RE DR.

McDERMID

NICHOLSON J.

Released: April 22, 2026