Dr. Michael Lacerte - Physical Medicine and Rehabilitation

Murray and Aviva Canada Arbitration, 2007-09-07

While it is not known exactly why Dr. Lacerte's team decided not to involve a psychologist in Mr. Murray's assessment, it is clear that they made the decision in the light of complaints that may well have had a psychological perspective. According to the *Guidelines* Dr. Lacerte had to decide whether there were "Mental and Behavioural Disorders" present [See note 10 below], and if so, structure the panel of examiners in a certain way...

..The reality is that Dr. Lacerte's team was not structured appropriately for an assessment with a psychological component. Now the Insurer intends to cure that shortcoming by retroactively adding another assessor to the team to deal with the psychological aspects of the claim...

...The Lacerte DAC, having already misdirected itself in not recognizing a psychological component to Mr. Murray's claim and in failing to have the necessary assessors as part of the team, does not inspire any confidence that they would be more proficient the second time around.

I decline to refer the matter back to the Lacerte DAC, with or without a further psychological component to the assessment.

....

Fisher and Allstate Arbitration, 2006-07-19

Consequently, Allstate arranged for an assessment to be provided by a DAC headed by Dr. Lacerte, which operated out of London Ontario. The DAC conducted a paper review of Mr. Fisher's case, while Ms. Moira Hunter, an occupational therapist, met briefly with Mr. Fisher in Thunder Bay and examined Mr. Fisher in person....

...The assessment team assembled by Independent Claims Evaluators Inc. consisted of Dr. Michael Lacerte, a specialist in physical medicine and rehabilitation, Dr. Paul Cooper, a neurologist, and Ms. Moira Hunter, an Occupational Therapist. There was no psychiatrist. As well, there is no dispute that, of this team, only Ms. Hunter met with and assessed Mr. Fisher.

A second, perhaps even more serious problem with the approach taken by the DAC is their failure to conduct an in-person assessment of Mr. Fisher. While the protocol clearly allowed a record review only where the records clearly supported a finding of catastrophic impairment, and the DAC so found, a negative finding demanded an in-person assessment.

While Mr. Kirby pointed to the participation of the occupational therapist as satisfying any mandate for an in-person assessment, I do not agree that the assessment by one member of the DAC team, who is not a mandatory discipline for such an examination, constituted the necessary in-person examination for the purposes of the guidelines. [See note 5 below.]

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Note 5: I also accept that Ms. Hunter's report appears to reach conclusions significantly at odds with the conclusions of other examiners without accounting for such differences. However, given my findings as to the technical shortcomings of the DAC, I need make no specific finding as to the actual conclusions made by any of the assessors.

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Having found that the record review would likely lead to a finding of not catastrophically impaired, the assessment team should have moved on to an in-person assessment. Apart from sending Ms. Hunter to Thunder Bay, it did not take this step. Indeed, its own characterization of the assessment was as a "paper review."

Consequently, whatever the conclusion reached by the DAC team assigned to Mr. Fisher's case, the process of assessment was doubly flawed.

These flaws in Mr. Fisher's case are not inconsequential. The failure of the DAC to have the capacity to properly evaluate Mr. Fisher's claimed cognitive, behavioural and psychological deficits, meant simply that he could not get either a fair or adequate assessment, something to which he had an absolute right under the *Schedule*.

Counsel for Mr. Fisher also points to the need for a new examination based on the Glasgow Outcome Scale, once Mr. Fisher's condition was stabilized and more than three years from the date of the accident. Indeed, according to the Guidelines, a DAC should not rule on a catastrophic impairment based on the Glasgow Outcome Scale until those two pre-conditions have been met.

In this case, the DAC on its face based its conclusions as to catastrophic status on "s. 21(1.1) (e)(i)" (score of 9 or less on Glasgow Coma scale) "or (e)(ii)" (score of 2 or 3 on the Glasgow Outcome Scale).

Mr. Fisher's accident took place on August 31, 2002. The DAC report is dated July 13, 2004. As of the date of this motion, the three-year period has passed. The Application for catastrophic impairment completed by Dr. Chaudhuri indicated that Mr. Fisher's clinical condition was stabilized and that the degree of impairment was unlikely to change substantially within the next year.

It would appear from the DAC's conclusions that the DAC purported to rule on catastrophic impairment based on the Glasgow Outcome Scale. However, I find that in the context of this motion I need make no finding as to the correctness of the DAC's decision to issue a report on this issue, or the right of Mr. Fisher to have a further assessment based on this criterion.

Nor do I find it necessary to address the question of whether or not the DAC properly dealt with the analysis of Mr. Fisher's case based on the Glasgow Outcome Scale or not. While criticism might also be made of the methodology of the assessment, the examination of Mr. Fisher by the O.T. and the overall conclusions of the DAC, such an analysis is not necessary in this case. Whatever the conclusion of the DAC assessment, the assessment process itself was so flawed in its conception as to amount to no assessment at all.

Mr. Fisher was entitled to a proper catastrophic DAC. His ongoing care depends on such an assessment, since more than two years have elapsed since the accident. I note that another DAC has found a real need for further attendant care benefits, which absent a catastrophic finding may not be funded. [See note 6 below.]

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Note 6: DAC at *Sudbury Physio Centre* dated November 3, 2004

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At this stage, relatively early in the arbitration process, a new DAC could offer more than just another medical-legal opinion. It offers the possibility of a just and fair determination of the issue. On the balance, I find that another, properly directed, catastrophic DAC assessment would be both useful and appropriate.

While there may be some internal tension between the binding nature of the DAC and the lack of specific restriction on the number of DACs that may be requested, I do not accept that the legislation, read as a whole, creates a barrier to a second assessment under the fact situation in this case.

I note that, since the original application for assessment was completed prior to the legislative reforms eliminating DACs, and I have found that the attempted assessment fell so short of the standard expected as to be no assessment at all, Mr. Fisher remains entitled to have this assessment completed, notwithstanding any legislative change.

While I have no direct authority over the DAC assessors, nor power to order them to do or refrain from doing any action, I do have authority over the actions of the parties in relation to the issues in this arbitration. As Director's Delegate Makepeace noted:

> Moreover, arbitrators have authority to adjourn a hearing pending completion of an assessment that is required for a fair hearing. [See note 7 below.] Indeed, arbitrators have taken this step in a number of cases, deferring final adjudication pending a properly completed DAC assessment, with or without an interim benefits order...I conclude it was well within the arbitrator's authority to adjourn the hearing to allow a CAT DAC to be completed in accordance with the *SABS* and the Guidelines. [See note 8 below.]

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Note 7: *F.S. and Belair Insurance Company Inc.* (Appeal Order OIC P96-000039, June 11, 1996).

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Note 8: *Villers and Pilot Insurance Company* (Appeal Order FSCO P05-00010, January 30, 2006)

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I accept that I have jurisdiction to make the appropriate order.

On May 26, 2006, I made the following order:

> While I do not accept that an insured is entitled to request multiple catastrophic assessments, I find that in this case, Mr. Fisher is entitled to have the determination of such an important issue carried out in a manner that is respectful of the spirit and the intent of the legislation.
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> ....

Barreira and Allstate Insurance - 2 Arbitration, 2000-06-30

Allstate submitted Dr. Michel Lacerte's report, dated August 12, 1998, as part of its submissions, presumably to buttress the need to re-examine Mrs. Barreira's diagnosis of fibromyalgia.

Dr. Lacerte concludes in his opinion that "... Ms. Barreira could have returned to her normal occupation within two weeks from the accident without exposing herself or others to any serious health and safety risk."

Arbitrator Evans has already ruled that Mrs. Barreira suffered from an ongoing disability arising from the accident. This issue has been decided, and may not be re-visited by Allstate through Dr. Lacerte or any other means. Clearly Dr. Lacerte has mis-directed himself in re-examining the issue of her original disability and I find that his conclusions lend little credibility to Allstate's submissions.

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Peters and Guarantee - 2 Arbitration, 1999-11-18

I also found Dr. Lacerte's report, dated June 8, 1999, to be of little assistance. He relied on pre-accident clinical notes and records to identify what he concluded to be a pre-accident history of fibromyalgia (diagnosed in 1991), mild focal degenerative changes in the right knee and ankle joints (based on a 1994 full body scan), and self-reported diabetes. However, Mrs. Peters testified that she did not suffer from any of these conditions. While she had been referred by her family physician for assessment by a rheumatologist, her family doctor told her it was nothing serious, and no further treatment was recommended. Since that time she had continued to function both working in a restaurant (a business which she ran for approximately two years), and in caring for Carlos. She never received treatment for her leg complaints, which she testified did not interfere with her ability to function. She also confirmed that she has never been diagnosed as having diabetes. Her family physician had warned her to watch her diet or she could develop this condition. None of Mrs. Peters' evidence was contradicted. Dr. Lacerte did not testify. His report was admitted on the consent of both counsel, as Guarantee had conceded that it was not relying on Dr. Lacerte's opinion that Mrs. Peters' pre-accident medical condition

was the cause of her post-accident difficulties. It is clear from Dr. Lacerte's report that he considered that Mrs. Peters' pre-accident medical history (as described above) probably precluded her from performing many of the more physically demanding activities related to her son's care. He concluded that she was not disabled because she could perform the verbal cueing and supervision necessary to direct her son's self-care activities and behaviour. On the evidence, I find he made an erroneous assumption. Consequently, Dr.Lacerte's opinion is misinformed, and I place no weight on this evidence.

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L.C. and Wawanesa Arbitration, 1999-10-13

Dr. Michel Lacerte, a physiatrist examining LC for Wawanesa, reported in May 1995 that she dramatically overreacted. Dr. Lacerte found no organic pathology to explain her physical symptoms. Because he found no organic basis for her complaints, Dr. Lacerte said LC should be able to resume caregiving and housekeeping. Like Dr. Finestone, he also recommended psychological counselling....

...I also do not rely on Dr. Lacerte or Dr. Freedman. On the one hand, Dr. Lacerte's opinion is simply based on his lack of organic findings. His recommendation for counselling recognizes LC's mental problems, but he did not account for them in his opinion. On the other hand, Dr. Freedman limits his opinion to the psychological component, and does not account for LC's physical problems. None of these experts evaluates her chronic pain and depression together in a functional analysis. After August 1996, Wawanesa withdrew funding for LC's psychological counselling, and she did not continue treatment.

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Villneuve and Royal Arbitration, 1999-04-07

Dr. Lacerte reported that "without clearly documented trauma over the right sartorious and adductor longus muscle, it is difficult at this time to establish with reasonable medical certainty a causal relationship between Mr. Villeneuve's current right groin and thigh pain and the October 14, 1993 motor vehicle accident." Trauma need not be documented to establish a causal connection. I understand that Dr. Lacerte was speaking from the perspective of giving a medical opinion on causation five years after the injury based on the medical documentation he reviewed. I do not find this opinion as useful as the observations of one who had seen Mr. Villeneuve work.

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Urquhart and Zurich [+] Arbitration, 1997-06-04

With respect to loss of strength in Mrs. Urquhart's abductor muscles, the Insurer's counsel urged me to accept the opinion of Dr. Lacerte over all others. He suggested that few of the other physicians had done formal testing, and that when such testing was done it demonstrated a grade of 4 or 4- at worst, which in Dr. Lacerte's view would not result in any impairment. I do not accept this opinion. A review of the medical records filed, and the testimony of the physicians who appeared, reveals that most physicians did do formal testing, though not all chose to report the findings using a numerical grade. Secondly, regardless of what grade the physicians used, be it numerical or descriptive, it was apparent that most of the doctors considered the loss of strength as noteworthy. Many commented directly upon the loss of strength, in relation to the troubles with Mrs. Urquhart's gait.

As part of the IME performed by Dr. Lacerte, Mrs. Urquhart was asked to complete a number of self-evaluations. She routinely reported an inability or difficulty with virtually every household and child care activity listed on the forms. When asked to rate her disability, she tended to select the more severe, and frequently most severe categories. She also believed her condition had worsened over time and she was pessimistic concerning the future.

Dr. Lacerte, refuted the suggestion that Mrs. Urquhart was disabled. Dr. Lacerte indicated that her-self reported functional disability was disproportionate to her mild physical impairment, and could not be justified. He postulated that there were "psychosocial barriers to rehabilitation with possible secondary gains." In closing he stated that he found "it very distressing to see a young woman adopting such disabling behaviour."

In reaching his conclusions, Dr. Lacerte relied upon photos taken of Mrs. Urquhart by a private investigator. The photographs are still photos reproduced from a videotape. The pictures depict Mrs. Urquhart standing just inside her door while her children are playing out in the yard. In one photo she is shown stooping to pick up her infant child. Dr. Lacerte testified that the movements and lack of visible pain behaviours are inconsistent with Mrs. Urquhart's claims. I am not prepared to accept Dr. Lacerte's conclusion. In my view, other equally consistent conclusions can be drawn from the photos. For example it appears that Mrs. Urquhart is leaning on a door, which is consistent with her claims that she cannot stand unaided for any length of time. It is also noteworthy that she remains indoors while her children play outside. It is unfortunate that the Insurer chose to present only a few photos rather than the entire tape and all of the investigators reports which might have provided a more complete and useful depiction of Mrs. Urquhart's activities..

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