

'FAIR – supporting auto accident victims through advocacy and education'

FAIR Association of Victims for Accident Insurance Reform
579A Lakeshore Rd. East, PO Box 39522
Mississauga, ON, L5G 4S6
<http://www.fairassociation.ca/>

January 15, 2016

Dear Dr. Gerace

I am writing in respect to the unacceptable quality of Ontario's third party medico-legal reports that Ontario's insurers commission from your members during the course of an auto insurance claim. Our concern is that the lack of action on the part of CPSO to enforce quality control and take MVA victim complaints about assessors seriously is harming innocent patients along with the reputation of the College and Ontario's physicians overall.

I am attaching several recent Ontario court decisions that your office ought to be investigating with the purpose of protecting the public. A review of recent Health Professions Appeal and Review Board decisions reveals that many of these opinion vendors-for-hire have more than one complaint on file in respect to their work product quality.

At what point does the College intend to take action to protect vulnerable Ontarians? There are tens of thousands of these medical examinations taking place every year and the third party physician assessors are immune from public scrutiny through secret college cautions and through HPARB decisions where their names are reduced to initials on public decisions. Worse yet, they seem to act with impunity with the confidence that the CPSO itself will do nothing to rein them in and impose sanctions that are meaningful and will protect the vulnerable and often cognitively impaired MVA victims who are legislated to attend these examinations.

Ontario's MVA victim is the third-party client of the medical expert while simultaneously the patient of the treating physician whose best efforts to aid in their patient's recovery is being undermined.

How is that some of the experts in the decisions below are not held accountable by the CPSO in order to protect the public's safety and in the interest of the many good physicians who provide treatment and are not in the business of causing harm?

I look forward to hearing back from you about these concerns.

Rhona DesRoches
FAIR, Board Chair

Bruff-Murphy v Gunawardena, 2016 ONSC 7 <http://canlii.ca/t/gmr5x>

[54] The plaintiff during the trial sought to prevent Dr. Bail from testifying as an expert on the basis of bias as evidenced in his expert's report and several reported decisions which held that Dr. Bail had:

- (a) Become an advocate for the party calling him as a witness which is not the role of an expert: *Morrison v. Greig*, 2007 CarswellOnt 343; [2007] O.J. No. 225 (ONSC) paras. 47-48.
- (b) Appropriated the role of advocate of the insurer rather than an impartial witness. His partisan approach and focus on inconsistencies are troubling, seriously weaken his credibility and weight of his testimony which should be disregarded: *Gabremichael v. Zurich Insurance Co.*, [1999] O.F.S.C.I.D. No. 198, paras. 31-33.
- (c) Presented as a notably partisan witness: *Sohi v. ING Insurance Co. of Canada*, [2004] O.F.S.C.D. No. 106, para. 38.

[77] Dr. Bail in the engagement letter from counsel was retained in 2013 "to provide his opinion as to the nature of injuries suffered by the plaintiff in the MVA, her current condition and his prognosis for the future."

[78] Subsequent to its ruling, the court noted that Dr. Bail's report cites terms of engagement different than those communicated to him by legal counsel. Dr. Bail's report states he was engaged "to provide his psychiatric opinion in relation to the issue of damages." Damages are normally a focus of legal counsel, not a psychiatrist.

[79] Dr. Bail did not have the authority to re-write his terms of engagement. He testified he has conducted 5,500 IME during his career. Dr. Bail was very experienced in IME engagements.

[80] This alteration of the terms of engagement directly impacts the expert's obligation in R. 53.03 (2.1), to include in his report the instructions provided to him or her, the nature of the opinion sought and each issue in the proceeding to which the opinion relates.

[122] Dr. Bail was not a credible witness. He failed to honor his obligation and written undertaking to be fair, objective and non-partisan pursuant to R. 4.1.01. He did not meet the requirements under R. 53.03. The vast majority of his report and testimony in chief is not of a psychiatric nature but was presented under the guise of expert medical testimony and the common initial presumption that a member of the medical profession will be objective and tell the truth.

[123] The vast majority of Dr. Bail's testimony to the jury amounted to nothing other than the following:

- (a) The plaintiff did not tell me the truth in my interview;
- (b) Here are all the instances I found in my 10 to 12 hour review of her medical records which prove that she did not tell me the truth;
- (c) If I as a psychiatrist cannot believe her; how can you?

[124] The primary purpose of R. 4.1.01 is to prohibit and prevent such testimony in the guise of an expert. Dr. Bail undertook and thereby promised to not do what he did in front of this jury.

[125] I will not qualify witnesses as experts in the future whose reports present an approach similar to that of Dr. Bail in this case.

Waldock and State Farm [+] Arbitration, 2014-11-10, Reg 403/96. Preliminary Issue FSCO 4315.

Dr. Cashman's assessment was deficient in several areas. As earlier stated, I find that these deficiencies fail to support the position of State Farm in refusing to accept the assessment that Mr. Waldock is catastrophically impaired. During cross-examination of Dr. Waisman, counsel for State Farm, perhaps inadvertently, emphasized that Dr. Cashman's assessments did not follow the requirements of the *Schedule* and the *AMAGuides*. Thus, I find I must give a little weight to Dr. Cashman's assessments (as expressed in his written report), for there is no evidence offered by the insurer to contradict Dr. Waisman's evidence.

MICHEL LACERTE, MD and **GHOLAM DEWARI** <http://canlii.ca/t/gft8q>

51. The Committee considered the information in the Record and concluded that it remained extremely troubled by the Applicant's apparent lack of understanding of his role as independent medical examiner or third party assessor.

52. The Committee noted that the Applicant conducted the appointments with the Respondent without obtaining the express consent and clarifying the purposes of the assessments; he communicated certain aspects of the Respondent's health information directly to the Respondent's employer also without the express consent of the Respondent; he provided medical treatment over several appointments to an individual whom he had been hired to assess by that individual's employer, creating a conflict of interest between his role as third party assessor and treating physician to the individual; 13 and he did not document the treatment provided to the Respondent nor the rationale for such treatment.

53. The Committee determined to issue a caution in person to the Applicant as he acted far beyond the scope of what is appropriate for an examiner or assessor, and appeared not to have an adequate understanding of the role of such a physician.

54. The Committee required the Applicant to attend the College to be cautioned regarding his obligations as an independent medical examiner or third party assessor and particularly with respect to:

- assessing a patient without adequate, informed consent;
- treating an individual who was not a patient;
- failing to obtain written consent to discuss his findings with the employer of the individual being assessed; and
- failing to document the treatment provided.

55. The Applicant and his Counsel made strong objections to the Committee's analysis of the Applicant's actions and submitted that he should not be judged by the *Third Party Policy* as he is a "company doctor" and practices in the Occupational Health and Safety Field and does not view himself as being subject to that policy.

JOHN L. DIMOCK, MD and LISA EGAN <http://canlii.ca/t/q7d26>

33. The Committee indicated it had an opportunity to review the IME report that the Applicant produced following the Applicant's assessment of the Respondent. The Committee stated that it "found [the report] skimpy, almost casual, and simply unacceptable as a serious and credible psychiatric evaluation." In the Committee's view, "it showed many deficiencies of diagnosis and formulation." The Committee stated that its concerns about the Applicant's approach in this case was compounded by the fact that it was aware that the Applicant had, in the past, been the subject of complaints to the College regarding his approach to psychiatric IMEs, and that the Committee had sanctioned him in the past regarding aspects of his practice. The Committee also stated that the Applicant's "approach betrays deficiencies in his management of patients who may have PTSD. He needs to be aware of all criteria for PTSD so he can screen for it, and manage it, if found."

<http://www.cpso.on.ca/About-Us>

This system of self-regulation is based on the premise that the College must act first and foremost in the interest of the public. All doctors in Ontario must be members of the College in order to practise medicine. The duties of the College include:

- issuing certificates of registration to doctors to allow them to practise medicine
- monitoring and maintaining standards of practice through peer assessment and remediation
- investigating complaints about doctors on behalf of the public, and
- conducting discipline hearings when doctors may have committed an act of professional misconduct or may be incompetent.