Fair Association of Victims for Accident Insurance Reform
579A Lakeshore Rd. E, P.O. Box 39522
Mississauga, ON, L5G 4S6
fairautoinsurance@gmail.com
http://www.fairassociation.ca/

Submission to:

The Standing Committee on General Government

BILL 171

CHRISTMAS COMES EARLY FOR THE INSURANCE COMPANIES ACT

April 30 2014

FAIR Association of Victims for Accident Insurance Reform is a not-for-profit consumer organization whose members are accident victims, their supporters and consumers who have an interest in Ontario's insurance system.

Normally our submissions begin with thanking the Standing Committee and our elected legislators for the opportunity to present the views of accident victims and consumers to our government.

Today we start with a question - What happened to this hearing on Bill 171?

We were told on late Monday afternoon that we had a spot in the mere 2 hours that was allotted for only 8 presenters on these important changes contained in Bill 171 on Wednesday afternoon. With only 48 hours of notice we scrambled to make travel arrangements and a speech, galvanized our members to respond with their concerns – only to find out late yesterday afternoon that our appallingly short 15 minutes of presentation time had disappeared.

How can it be that such a substantive change to our justice system that affects all of Ontario's citizens in some way is given so little public consideration? Where is the fairness in our legislative process?

Whether the government intends this or not, it looks like a done deal or that the 'fix' is in when so little time is allotted to the public's interest in legislation that affects the 9 million drivers in Ontario.

Of the eight presenters listed on the Committee Agenda for today – none represent the accident victims that are the end users of this poorly designed auto insurance product. A product or policy of coverage that is so complicated and adversarial that one requires legal representation just to fill out the forms.

It may be easier to not listen to stories of seriously injured or cognitively impaired accident victims who can't access treatment or are unable to feed themselves or support their families or those whose lives have been made a living hell by the insurance company they've paid to assist them in their time of need. But the reality in Ontario is that approximately half of all accident victims are not getting what they need for recovery.

Why is there no effort on the part of our government to fix this dishonest insurance system that at best can be described as run by insurance companies who are incompetent at handling the claims of their own customers and at worst as a dysfunctional corrupt system that is harming vulnerable injured Ontarians. Bill 171 further entrenches the existing abuses and then makes it more attractive to insurers to increase their rate of denials by rewarding them financially for doing so. By reducing the prejudgement interest insurers owe on payments to MVA victims that they failed to make in the first place, it is the insurers who will benefit. Bill 171 rewards those unscrupulous or incompetent insurers.

How does that fit in with an elected official's duty to protect the best interests of Ontarians?

How does that fight fraud? It doesn't. But it punishes accident victims financially and rewards insurers. The Christmas present that keeps on giving, year after year.

The complete and utter failure to address the issue of the quality of the medical examination process and the reports and testimony that result from these reports by both the DRS Review and the Anti-Fraud Task Force has guaranteed that the status quo of abusing accident victims in Bill 171.

Rather than addressing the WHY of why there are so many people lined up for hearings - Bill 171 will just block the access to justice and make it harder to qualify.

HOW does this happen to so many accident victims? HOW does the unfair denial system work? Through the use of the bogus medical report, where, for the price of a few thousand dollars, an insurer can postpone payment to an accident victim for many years and thereby make increased profits.

If the evidence or medical report that is the basis on which benefits are decided is flawed, biased, or unqualified and the person is legitimately injured, they end up in the line-up for hearings. Not a problem for insurers who, with Bill 171, will only increase profits, but a big problem for accident victims. Bill 171 is a recommendation for a system that continues to tolerate this disgusting practice of deflating a person's injuries and the continuation of legal decisions based on this flawed evidence. Our members want to know why our legislators are looking the other way.

What we are getting with Bill 171 is legislation that restricts the right to fair hearings and violates our rights – is that any way to treat injured accident victims?

Equality Rights http://laws-lois.justice.gc.ca/eng/const/page-15.html

Equality before and under law and equal protection and benefit of law

- **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

BILL OF RIGHTS http://laws-lois.justice.gc.ca/eng/acts/c-12.3/page-1.html

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(*b*) the right of the individual to equality before the law and the protection of the law;

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

At FAIR we are thinking that we probably won't ever see the Standing Committee report on Auto Insurance and we've been waiting for that report since 2012. Why is Bill 171 being rammed through without the benefit of that report or the information that might be gleaned from the 3 Year Review that also has not completed their report to the public?

Are these consultations nothing more than a farce? Are today's 2 hours of consultative hearings without consumer input, without MVA victims participation nothing more than a sham?

Accident victims know things have to change and the committee/consultation process at the Ministry of Finance has been stacked with pro-insurer stakeholders since we began attending in 2012. That needs to change if we are to make any improvements – something Bill 171 won't accomplish.

We know that changes to legislation that benefit only insurers will not fix the problem or change the fact that Ontario's accident victims are stuck in a broken system that no longer serves them. Accident victims are being starved out by their insurers and are unable to access medical or rehabilitation treatments in record numbers. Cases continue to be heard and benefits continue to be decided upon flawed and unregulated medical opinions of pro-insurer assessors whose only allegiance is the insurer that pays them. We need to change that.

Access to justice for Ontario's accident victims shouldn't be compromised to fit an industry's need for higher profits or as a solution to control the claims of those who are legitimately injured and wrongfully denied what they paid for.

Removing interest penalties for insurers for claims mishandling and deceptive business practices is an incentive to abuse and guarantees the use of these bogus medical reports in the future. The failure by the Anti-Fraud Task Force and the DRS Panel to regulate for-hire medical opinion assessors and address the concerns in respect to their qualifications, their medical reports and subsequent testimony in court will make certain that the system will favour insurers through the passing of Bill 171. The failure of consistently partisan panels guarantees that our insurance system remains dysfunctional going forward.

We expect more of our government run panels and consultations than we are getting with these recommendations for reform in Bill 171. We expect that our legislators will do what is right for Ontario and its citizens, and not for insurance industry profit margins. Turn down Bill 171.

Coverage is already abysmal, the process is harmful, the outcomes for MVA victims are bleaker than ever before and the choice is yours, will you, our legislators, make it even more punishing to get what accident victims need to recover.

FAIR Association of Victims for Accident Insurance Reform

http://www.fairassociation.ca/wp-content/uploads/2014/01/FAIR-submission-to-2014-Pre-Budget-Consultations-Jan-23-2014.pdf

http://www.fairassociation.ca/wp-content/uploads/2014/01/FAIR-letter-to-the-DRS-Panel-January-15-2014.pdf

From http://www.fairassociation.ca/the-independent-medical-examination-imeie/

Singh and State Farm [+] Arbitration, 2014-02-21, Reg 403/96.
Expenses FSCO 4128.
I also found that State Farm did unreasonably delay the IRBs to which Mrs. Singh was ultimately entitled. It had no reasonable answer for not reconsidering her benefits after May 2, 2008 and relied on defective or incomplete reports to terminate those benefits, hence the special award.

4. As part of her practice as a registered physiotherapist, the Respondent is regularly retained by medical assessment companies and insurers as an independent third party assessor to perform examinations to assist in determining the reasonableness and necessity of continued coverage for physiotherapy treatment.

5. In performing her assessments, the Respondent reviews the medical records provided to her by the insurer and may conduct an examination, which includes taking a history, and performing a physical examination and testing of the subject. In other cases, the Respondent bases her assessment solely on a paper review of the subject's medical file. The nature of the assessment and the content of the medical record reviewed by the Respondent are determined by the insurer.

6. The Applicant was referred to the Respondent for six independent assessments. The Respondent provided in-person, physical examinations of the Applicant on four occasions and conducted two assessments based on a paper review of the Applicant's medical records.

7. The Respondent's assessments of the Applicant done on December 7, 2010 and May 17, 2012 each concluded that the proposed treatment plans were entirely reasonable and necessary. The assessments done on March 24, 2011 and July 14, 2011 concluded that the proposed treatment plans were partially reasonable and necessary. The paper review assessments done on August 29, 2011 and March 12, 2012 concluded that the proposed treatment plans were not reasonably necessary.

The Complaint and the Response

8. The Applicant complained:

- The Respondent repeatedly made negative comments about the Applicant's treating physiotherapist. The Respondent stated that his physiotherapist's "lack of information provided in reports is hurting [the Applicant] and [resulting in him] having to go through IME after IME";
- The Respondent submitted reports that were "riddled with mistakes" and she quoted him making statements that are "completely ludicrous";
- He believes that the Respondent's "opinion seems to be favouring [his] insurance company's bottom line";
- The Respondent failed to amend her report dated March 13, 2012 after additional documentation was provided to her; and
- At his assessment on July 14, 2011, the Respondent "suggested to [him] that it might be in the best interest for [her] to call [his treating physiotherapist] directly" for clarification of an OCF-18 form; however, the Respondent failed to follow up with the treating physiotherapist.

9. The Respondent responded to the areas of concern raised by the Applicant as follows:

- She advised the Applicant that some of the treatment plans submitted by his treating physiotherapist lacked an explanation as to why the proposed treatment was reasonable and necessary, and that this resulted in the Applicant having to undergo repeated assessments. She meant no disrespect to the Applicant's treating physiotherapist

and, in fact, complimented the progress the Applicant was making under his treating physiotherapist.

- The Respondent acknowledged that there were some minor inaccuracies in her reports but stated that she relied on information the insurer and the Applicant provided to her and noted that none of the inaccuracies was material to the conclusions in her assessment reports.
- The Respondent acknowledged that she does copy basic information from one report to another, citing that this is common practice, and thus avoids having to cover this prior ground each time.
- The Respondent stated that her reports were not biased in favour of the insurer and noted that her opinions were, for the most part, favourable to the Applicant.
- The Respondent stated that she was not aware of any further information being provided to her after the paper review of March 13, 2012 and noted that she was never asked by the insurer to complete an addendum report based on new information.
- The Respondent denied that she offered to contact the Applicant's treating physiotherapist and stated that it was not her usual practice to do so during the assessment process. She suggested that the Applicant may have confused this point with her willingness to speak with treating medical professionals *after* her assessment and report were completed.

The Committee's Investigation and Decision

10. The Committee investigated the complaint and decided to provide the Respondent advice about ensuring the accuracy of her reports and the need to ensure that her practice in this regard is appropriate and to take no further action.

JV v HAP, 2013 CanLII 59329 (ON HPARB) — 2013-09-20 http://canlii.ca/t/g0n2f

The Complaint and the Response

5. The Applicant complained about the Respondent's examination and conclusion. She took issue with many aspects of the assessment. For example, the Respondent concluded that the Applicant suffered from significant lower back pain several times a month while the Applicant asserted she experiences such pain every day. The Respondent noted a curvature of the spine in the IME report, which the Applicant complained was false. The Respondent concluded that the Applicant was not impaired by any accident related injury from continuing her schooling and the Applicant complained that this assessment was false.

6. In addition, the Applicant complained about the way in which the Respondent conducted the IME, alleging that the Respondent rushed through the assessment, failed to conduct a physical examination, and failed to consider x-ray and radiographic reports.

7. The Respondent provided a detailed rebuttal of the allegations, explaining the basis for each conclusion in his observations during the IME or the available medical records. He noted that all available records were reviewed, and that a physical examination was not necessary for the IME. Further, he denied that the IME was rushed, or conducted in an improper fashion.

MC v KE, 2013 CanLII 55435 (ON HPARB), 2013-09-04 http://canlii.ca/t/g0c3g

7. [...]The Respondent notified the Committee that, through the complaints process, she had discovered that Riverfront Medical Services (Riverfront), the company through which the Applicant's assessment was contracted, had changed the Respondent's report without her prior knowledge or consent.

9. As a result of its investigation, the Committee decided to take no further action, noting that the Respondent reported information that she considered to be accurate and that there did not appear to be any indication that the Respondent intentionally falsified factual information in the report or that she misrepresented information about the Applicant's abilities during the assessment.

10. However, the Committee did express concern about the information uncovered during the course of the investigation related to Riverfront having altered the Respondent's report. The Committee noted the "egregious" impact that these changes could have had on the Applicant's entitlement to benefits. In the result, the Committee decided to offer advice to the Respondent about the importance of ensuring that she personally reviews and approves any assessment report she completes prior to the report being issued.

Macdonald v. Sun Life Assurance Company of Canada, 2006 CanLII 41669 (ON SC),http://canlii.ca/t/1q596 2006-12-13

[1] In the course of this jury trial I ruled that Dr. Frank Lipson, who had conducted a defence medical of the plaintiff, not be permitted to testify as an expert witness on behalf of the defence. Dr. Lipson had testified that a medical report purportedly signed by him had not been signed by him. He stated that his signature stamp had been affixed to the report without his authority by an individual at Riverfront Medical Evaluations Limited (Riverfront) the company who had retained him to conduct the defence medical. [...]

[2] I have deliberated for a very long time before delivering these reasons. Although the action out of which the problem arose has long been concluded, this case raises vexing issues as to what role may be properly played by organizations such as Riverfront in the formulation of an expert witness' opinion.

[43] Twenty percent of their physicians conduct their assessments off site in which case the physicians will prepare their reports and send it to Riverfront by fax or other electronic means. Riverfront performs its quality control function and sends the report to the physician for comments if required. After consultation with the physician, the report will be prepared on Riverfront's letterhead and signed by the physician or as in the case at bar a signature stamp is affixed to the report, which is sent to the referring client.

[44] In many cases Riverfront has a signature stamp of the doctor, which the doctor authorizes them in writing to use. Dr. Levy produced a letter dated January 5, 2004 in which Dr. Lipson authorized Riverfront to utilize a signature stamp/electronic signature when issuing assessment reports – "when I am unable to directly provide my signature". The authorization provides that signature stamp would only be used "once I have approved the final copy of my report".

[88] It is stating the obvious that an expert's report delivered for the purpose of compliance with the *Rules of Civil Procedure* and the *Evidence Act* is an extremely important document. Anyone involved in the preparation of such reports must know that courts place a very strong reliance on the contents of these reports and that the proper administration of justice demands that these reports accurately reflect the opinion of the expert who has written them. The requirement in the *Rules of Civil Procedure* and the *Evidence Act* that the expert sign the report is intended to provide assurance that the statements in the report are those of the expert.

[100] Expert witnesses play a vital role in proceedings before the courts both in civil and in criminal matters. In personal injury actions in particular, the evidence of the expert witness may be the determining factor in the resolution of the plaintiff's claim In the case of health practitioners, section 52 of the *Evidence Act* provides under certain conditions, the report may be filed in place of the *viva voce* evidence of the health practitioners. The court is entitled to assume that the report represents the impartial opinion of the expert.

[101] In my view Riverfront in this case, went far beyond what can be considered a proper "quality control" function. While I am not prepared to find that they were motivated by a desire to assist the defendant, nonetheless I find their actions constituted an unwarranted and undesirable interference with the proper function of an expert witness.

[102] The function of an expert witness is to provide an independent and unbiased opinion for the assistance of the court. An expert witness' evidence should be and should be seen to be the independent product of the expert uninfluenced as to form and content by the exigencies of litigation.[2] This principle has often been cited with approval in our courts, and has been considered a factor to be considered in asessing the weight to be given to the expert's testimony. It has occasionally been treated as the basis for the disqualification of the witness entirely.[3]

[103] In my view any activity that may tend to detract from this all-important objective diminishes the integrity of the litigation and trial process and should be met with appropriate sanctions designed to send a clear message that such conduct will not be tolerated.

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