

Dr. Monte Bail – Psychiatrist

Bruff-Murphy v Gunawardena, 2016 ONSC 7 (CanLII), <<http://canlii.ca/t/qmr5x>
Dr. M. Bail

Qualifications As Expert Witness

[53] Unlike Dr. Maistrelli and numerous medical doctors and experts called by the plaintiff, Dr. Bail is of the belief that the plaintiff is faking and is not credible in her description of her injuries and incapacity as a result of the MVA.

[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.

[55] On the authority of *R. v. Karaibrahimovic*, 2002 ABCA 102 (CanLII) paras. 7-8; *R. v. Ghorvei* (1999), 1999 CanLII 19941 (ON CA), 46 O.R. (3d) 63 (ONCA), para. 31 and *Desbiens v. Mordini*, 2004 CanLII 41166 (ON SC), [2004] O.J. No. 4735, paras. 273-274, I ruled Dr. Bail could not be cross-examined as to these prior court determinations rejecting his testimony and role as an expert witness in those cases.

[69] The only semi-psychiatric element of Dr. Bail's report is entitled "Mental Status Examination" which consumes one half a page of the 20 page report.

[70] Had Dr. Bail read any of the plaintiff's medical records before interviewing her, he would have known her medical records during the six years before the MVA contained numerous periodic notations of anxiety, neck and back pain and prescriptions in relation to the same. In order to be fair and objective, someone like Dr. Bail would have asked the plaintiff why her verbal reporting of her prior medical condition was so vastly different from her prior medical records. Dr. Bail could not do that because his alleged "methodology" in conducting IMEs is to not read such medical records before the interview. When asked why, unlike other physicians, he does not read the medical records before the IME interview, Dr. Bail responded that some people scheduled for IMEs do not attend.

[73] Dr. Bail testified that he discarded any notes he may have made during his interview of the plaintiff as to what the plaintiff allegedly told him. His only record of her comments is contained in his report dictated after he interviewed the plaintiff and after his subsequent lengthy review of her medical records.

[74] The above quoting for 10 pages by Dr. Bail of excerpts from prior medical records and comparing that to what the plaintiff told him, resembles work legal defence counsel might do in identifying potential discrepancies between the plaintiff's transcript from discovery and her medical records. The difference in this analogy however is the existence of a discovery transcript to evaluate the reported discrepancies.

[75] A psychiatrist brings no particular knowledge or expertise to this 10 page portion of his report.

[76] Dr. Bail in testimony stated he told the plaintiff that she could not audio record his assessment. Without notes or a recording of what was said in the assessment, the expert becomes a witness as to what the plaintiff said to the expert which then becomes an issue as to the expert's alleged discrepancies as to what the plaintiff told him.

[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.

[81] In the conclusions of his report, Dr. Bail states that the plaintiff:

- (a) Was not forthright with him as to her accident related claims, her prior medical and psychological history;
- (b) Her reported medical history since the MVA cannot be relied upon;
- (c) Has serious credibility issues as to her MVA claim; and
- (d) Lacks reliability, credibility and validity.

[82] The above credibility conclusions are not part of the terms of engagement from defence counsel, nor in Dr. Bail's misstatement of his terms of engagement. These conclusions reflect points made in submissions made by defence counsel to the jury. They are issues for determination by the jury. The court on the motion to exclude him for bias, ordered that Dr. Bail could not express these conclusion opinions directly.

[90] It is not credible that the plaintiff in two defence IMEs conducted within 2 weeks, reported multiple areas of pain and inability to move to Dr. Maistrelli and then reported feeling no immediate neck

or back pain to Dr. Bail, who concludes she is exaggerating her post-MVA condition. One obvious explanation for this discrepancy is that Dr. Bail is not accurately reporting what the plaintiff said to him.

[104] Dr. Bail testified these question results demonstrated internal inconsistencies which caused him doubt as to what she was reporting and why he concluded there was something going on with the plaintiff. This constitutes the quasi-psychiatric extent of Dr. Bail's analysis in this IME.

[105] Dr. Bail has no record of the above questions asked, or answers given, except as recorded in his report. His testimony that the plaintiff correctly subtracted by 7s to 93, but incorrectly subtracted 7 in her answers of 81 and 17, are not facts recorded in his report as required under R. 53.03(5). It is not credible that Dr. Bail in 2015 recalled these specific correct and incorrect details two years after this IME in 2013 given the number of IMEs he subsequently conducted.

[120] Dr. Bail includes reference in his report to the plaintiff reporting back pain in July 2008, as showing she had the same prior complaint and not admitting that to him in regards to this MVA. He admitted in cross-examination that this reference omits her doctor's then notation that it was "diagnosis of pregnancy related back pain", which is obviously different from post-MVA, non-pregnancy related back pain.

[121] Dr. Bail in his report refers to a clinical notation on July 12, 2008 of "complains of intermittent back pain." He admitted in cross-examination that the plaintiff at that time was in labor. That added detail is not mentioned in his report.

[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.

Nguyen v Economical Mutual Insurance Company et al., 2015 ONSC 6543 (CanLII),
<<http://canlii.ca/t/glsct>

[1] The defendant seeks various orders in the face of various actions commenced by the plaintiff arising from her involvement in a motor vehicle accident on January 27, 2003. This led to a decision by Arbitrator Richards of the Financial Services Commission of Ontario August 28, 2013, which denied her claim for additional statutory automobile accident benefits. The decision was upheld on appeal by Director's Delegate Evans with reasons released October 3, 2014. Director's Delegate Evans also awarded costs payable by the plaintiff to the insurer, Economical, in the amount of \$5,000 (which Economical advises remains unpaid).

[2] The plaintiff's actions, in addition to this one, include a libel action against the defendant Economical and Dr. Monte Bail (file No. CV-14-503198) hereinafter referred to as the "Bail action") that has been the subject of various interlocutory matters. Dr. Bail examined the plaintiff at the request of Economical and gave evidence at the Financial Services Commission arbitration. It is noteworthy that Arbitrator Richards concluded Dr. Bail did not fairly assess the plaintiff and did not assign great weight to his opinion. This action was dismissed by Justice Faieta August 26, 2015, and is the subject of a motion apparently filed with the Court of Appeal returnable November 27, 2015, to extend the time for the filing of an appeal.

[3] There is also an action against the lawyer and his firm which represented Economical in the Financial Services Commission matter. This action was dismissed by Justice Hood with reasons September 11, 2015, with costs, presumably in favour of Economical, pending.

Nguyen v Economical Mutual Insurance Company et al., 2015 ONSC 2646 (CanLII),
<<http://canlii.ca/t/ghcmh>

[4] In this regard, it should be noted Arbitrator Richards found the plaintiff's impairments primarily psychological in nature. In this regard, the defendant insurer relied on an examination at their request and the evidence of Dr. Monte Bail, psychiatrist. However, Arbitrator Richards concluded Dr. Bail did not fairly assess the plaintiff and did not assign great weight to his opinion.

[5] The plaintiff appealed the decision of Arbitrator Richards which was heard on September 9, 2014 by Directors Delegate David Evans. His reasons were released October 3, 2014 which confirmed the Arbitrator's order and dismissed the appeal.

[6] The plaintiff commenced an action in this Court on April 30, 2014 against the defendant insurer and Dr. Bail (court file CV14 503198) which is being defended and is the subject of a November 21, 2014 endorsement by Justice Stinson regarding an appropriate discovery plan.

[7] This action against the defendant insurer and three of its employees, Smith, Davy and Shewchuk is commenced on December 3, 2014, Discovery plans have been exchanged, not apparently agreed upon, and is the subject of a motion by the plaintiff to proceed on June 17,

2015. The key aspects of this action are the plaintiff's allegation that the defendants, Smith, Davy and Shewchuk were the defendant's Claim Adjuster, Ontario Region Claims Team Leader and Accident Benefits Technical Advisor respectively, and that they and the plaintiff reached a settlement agreement on August 22, 2013 in the amount of \$157,500 in exchange for a full and final release (see paragraphs 3, 4, 5 and 9 of the Statement of Claim).

[8] Paragraph 11 of the defendant's Statement of Defence admits the defendants Smith, Davy and Shewchuk were at all material times employed by the defendant insurer and that they were acting in the course of their employment.

.....

[Sohi and ING Insurance](#)

The Insurer, in taking its position, was bolstered by the opinions of Dr. Monte **Bail**, a psychiatrist who assessed Mr. Sohi as part of the West Park Attendant Care DAC.

Dr. **Bail** stated:

From a review of the extensive medical file material, and the assessment today, it seems that Mr. Sohi was suffering from a Major Depressive Disorder, Anxiety, and Alcoholism for a long time prior to the motor vehicle accident, even though he denied all of these things today...

While Dr. **Bail** accepted that Mr. Sohi suffers from serious psychiatric disorders, including a Major Depressive Order, he concluded:

I do not feel that the aftermath of his burn injury, including the scars, and restricted range of motion, is significantly related to the motor vehicle accident, and as such, from a psychiatric point of view, the psychiatric aftermath of living with the results of his self immolation [suicide attempt] are not related to the motor vehicle accident.

In his testimony, Dr. **Bail** downplayed the likelihood of suicide as the result of motor vehicle accidents, stating that he had never seen a similar situation in his examination of some 4,000 motor vehicle accident cases. Dr. **Bail's** observation, while perhaps literally correct, is at the very least, somewhat misleading.

While the specific act of self immolation following a motor vehicle accident may well be a rarity, attempts at suicide in that context are not unheard of, even in Dr. **Bail's** practice. Nor are they unknown to accident-related jurisprudence. [See note 10 below.] [See note 11 below.]

* * * * *

Note 10: See *Gabremichael and Zurich Insurance Company* (FSCO A97-002061, October 12, 1999).

* * * * *

* * * * *

Note 11: In the case of *Cotic v. Gray* , 33 O.R. (2d) 356, the Court of Appeal dealt with a suicide taking place some 16 months after a motor vehicle accident, upholding a finding that the suicide directly resulted from the motor vehicle accident, notwithstanding the passage of time. See also *Murdoch v. British Israel World Federation (New Zealand) Inc . et al.* [1942] 61 N.Z.L.R. 600.

* * * * *

Counsel for Mr. Sohi introduced as an exhibit, a copy of an interview with Dr. Bail posted on the website of Riverfront Evaluations, a medical assessment company which uses his services. In the interview, Dr. Bail focussed on opportunistic claims and his view of motivating factors for what he saw as an increase in claims involving "*psychosocial gain* ." While I accept that the excerpt of an interview by itself does not conclusively establish bias on the part of Dr. Bail, I find the attitudes expressed disquieting when taken in conjunction with his testimony in this hearing.

Dr. **Bail** testified at the hearing that he discounted much of Mr. Sohi's stated concerns, because of perceived inconsistencies in the materials provided to him as well as his presentation during the interview. His reports and testimony featured a listing of Mr. Sohi's supposed inconsistencies and contradictions. He also, in his testimony, derided the opinions of psychologists, characterizing them as little more than psychometrists, capable, if at all, of administering tests. Indeed, Dr. Bail presented as a notably partisan witness.

In *Harrison and Wellington Insurance Company* (FSCO A96-000785, July 23, 1998), Arbitrator Makepeace dealt with the testimony of a partisan medical examiner. She stated: "I reject Dr. Costa's report in all other respects because he appears to have focussed mainly on identifying discrepancies in the Applicant's claim." Likewise, Dr. Bail's partisan approach and his focus on inconsistencies are troubling and seriously weaken the credibility and weight of his testimony.

By way of contrast, I found both Dr. Pilowsky and Dr. Koepfler to be more balanced and professional in their assessments and their approach to Mr. Sohi's history, even when their opinions diverged. Rather than attempting to discredit Mr. Sohi by searching for inconsistencies and divergencies, they sifted through his records, statements and history, looking for a credible explanation for his presentation.

I give little weight to Dr. **Bail**'s conclusions concerning the characterization of Mr. Sohi's suicide attempt, and its triggers, especially when they conflict with the opinions of Drs. Pilowsky and Koepfler.

Even had Dr. Bail's assessment been even-handed and unprejudiced, I would tend to discount his conclusion that the "self immolation" as he termed Mr. Sohi's suicide attempt was due only to pre-existing and co-existing causes, and unrelated to the accident.

.....
[Sohi and ING Insurance - Appeal](#)

The causation issue was the main dispute at arbitration. Mr. Sohi testified, and called two psychologists who supported his claimB Dr. J. Pilowsky, his treating psychologist, and

Dr. Louise Koepfler, a psychologist who assessed him as part of a Medical-Rehabilitation DAC. ING's position was supported by Dr. Monte **Bail**, a psychiatrist who assessed Mr. Sohi as part of an Attendant Care DAC. The arbitrator rejected the evidence of Dr. **Bail**, whom he found to be a partisan witness.

.....

Gabremichael and Zurich Insurance

Just under two years from the date of the accident, Zurich gave notice to Ms. Gabremichael that her benefits would cease on September 19, 1997. Zurich based its decision on a report of a psychiatrist, Dr. M. Bail, and of a chiropractor, Dr. J.A. Nathanson, both of whom had examined Ms. Gabremichael at the behest of the Insurer...

...The Insurer's position that Ms. Gabremichael is not psychologically disabled is supported principally by Dr. Bail's report. Since Dr. Bail's reports and testimony are crucial to an understanding of the circumstances surrounding the stoppage of benefits by Zurich, and have ramifications for all aspects of Ms. Gabremichael's claim, I will deal with them at this point.

Dr. Bail's examination

Dr. Bail, a psychiatrist, saw Ms. Gabremichael for about one hour on August 14, 1997, for an insurer's examination. Dr. Bail concluded in his reports and testified at the hearing that Ms. Gabremichael does not suffer from a psychiatric disorder caused by the motor vehicle accident. Rather, he opined that she has some sort of personality disorder. His conclusion is that Ms. Gabremichael's reported symptoms really amount to malingering, motivated by gain.

Dr. Bail testified at the hearing that he discounted most of Ms. Gabremichael's problems, because of perceived inconsistencies in the materials provided to him as well as her presentation during the interview. His reports consist of a listing of Ms. Gabremichael's supposed inconsistencies and contradictions.

Dr. Bail testified that he gave Ms. Gabremichael no opportunity to explain or correct any of these supposed inconsistencies. He added that he did not confront people with inconsistencies because they would cause bodily harm or destroy his office.

The contradictions that Dr. Bail referred to included Ms. Gabremichael's expressed interest in returning for a visit to Ethiopia. This was portrayed as being inconsistent with her story of her departure as a refugee. Dr. Bail made no allowance for any change in political climate in Ethiopia since Ms. Gabremichael's precipitate departure that might have made such a visit possible.

Dr. Bail also assumed from a cursory examination of an OHIP claim summary that Ms. Gabremichael wrongly asserted that prior to the accident she enjoyed good health. A more detailed examination of the record would have shown claims for dental surgery, among others, that did not support Dr. Bail's conclusion that Ms. Gabremichael's health was poor prior to the accident, and that she was misleading the Insurer.

Dr. Bail testified that in evaluating a patient he acts as judge and jury. Unfortunately, from my reading of his reports, and from listening to his testimony, it is obvious that he has appropriated to himself another role, and has become an advocate for the Insurer, rather than an impartial expert witness.

In *Harrison and Wellington Insurance Company* (FSCO A96-000785, July 23, 1998), Arbitrator Makepeace dealt with the testimony of a partisan medical examiner. She stated: "I reject Dr. Costa's report in all other respects because he appears to have focussed mainly on identifying discrepancies in the Applicant's claim." Likewise, Dr. Bail's partisan approach and his focus on inconsistencies are troubling and seriously weaken the credibility and weight of his testimony.

I find that Dr. Bail's opinion on the nature of Ms. Gabremichael's psychiatric disabilities is not convincing and should be disregarded. I accept Dr. Link's characterization of Ms. Gabremichael's condition as chronic depression complicated by Post-Traumatic Stress Disorder, Chronic Pain Syndrome, and relationship stress.

.....

[Gordon v. Greig](#), 2007 CanLII 1333 (ON S.C.) — 2007-01-23

[43] I do not accept the evidence of Dr. Bail, a psychiatrist called by the defence. He suggested that Mr. Gordon might be a person with attention deficit hyperactivity disorder, that he could work, and that he was not impaired from doing daily activities. This appears to fly in the face of many other medical reports and opinions.

[44] In cross-examination, Dr. Bail accepted that he would defer to others such as neurologists and neuropsychologists. It appears to me that the others were more qualified than Dr. Bail to make opinions about the abilities of the Plaintiff to work and live alone. He ended up agreeing that he would defer to the opinions of Dr. Scher, Dr. Berry, Dr. Ouchterlony and Dr. van Reekum. They supported the opinions that this man could not live on his own independently.

[45] Dr. Bail appears to have attempted to cloud the proceedings with suggestions that some of Mr. Gordon's deficits could be attributed to attention deficit disorder and oppositional defiance disorder when there was not a foundation for such comments. He took these terms and opined that poor school marks and one suspension for smoking on school property is indicative of the possibility of the existence of these disorders. I might say that throughout Mr. Gordon's schooling there was no diagnosis of attention deficit disorder or oppositional defiance disorder. Dr. Bail had reported that ADHD

never goes away, but in cross-examination he was faced with a medical journal report that as persons grow into their adult stage of life, 50% do not have any a continuation of the disorder and the other 50% have varying degrees of it. Dr. Bail then watered down his opinion by saying that he should have said that ADHD virtually never goes away.

[46] Dr. Bail suggested that Mr. Gordon might have been faking symptoms such as an altered gait, no taste, no sense of smell, and no sense of temperature. But he deferred to neurologists and neuropsychologists in making such findings. Dr. Bail had reported that Mr. Gordon had normal short-term memory meaning that he did not find any deficits, but then said that he did not mean that the Plaintiff did not have any memory impairment.

[47] The answers being given by Dr. Bail left the impression that he was gathering up terms, such as ADHD and oppositional defiance disorder, to create an impression that this Plaintiff had problems prior to the accident and that his inabilities should not be attributed to the accident. Dr. Bail went further to suggest that Mr. Gordon was malingering. When he was challenged on cross-examination, he did not have a foundation for such an opinion.

[48] Dr. Bail had a report from Dr. Sweeney, a neuropsychologist, describing Mr. Gordon's short-term memory deficits, and he did not agree with those opinions. Dr. Bail acknowledged that Dr. Sweeney had concerns that Mr. Gordon was a suicide risk, but then Dr. Bail obfuscated over whether Dr. Sweeney as a psychologist understood the matter. Dr. Bail had referred to the Plaintiff as a psychopath after a 1-hour interview. Dr. van Reekum did not have such an opinion. He was qualified to give expert opinion evidence in the field of neuropsychiatric assessments, but Dr. Bail attempted to suggest that Dr. van Reekum works in a geriatric facility and not with adolescents. These answers appear to me to be given by an expert who has become an advocate for the party calling him as a witness. That is not the role of an expert witness who is allowed to provide expert opinion evidence...

Rocca and AXA <https://www5.fscso.gov.on.ca/AD>

Decision Date: **1999-03-10**, Adjudicator: **Joachim, M. Kaye**, Regulation: **776/93**,
Decision: **Arbitration, Final Decision, appeal rendered, FSCO 2906**

I also give little weight to the psychiatric reports of Dr. Monte Bail, who was more concerned with attributing Mr. Rocca's ongoing symptoms to renewed narcotics abuse, than with addressing the disabling effects of Mr. Rocca's symptoms. I find his oral and written testimony contradictory with respect to disability.