

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



FAIR Association of Victims for Accident Insurance Reform

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Submission to the Proposed Revised Rules of Practice and Procedure for the
Licence Appeal Tribunal

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FAIR (Fair Association of Victims for Accident Insurance Reform) is a grassroots not-for-profit organization of MVA (Motor Vehicle Accident) victims who have been injured in motor vehicle collisions and who have struggled with the current auto insurance system in Ontario. We support auto accident victims through advocacy and education.

As auto accident victims and their supporters FAIR is most concerned about access to resources for recovery and benefits. Tens of thousands of claims are turned down every year in Ontario and many of the denials are based on poor quality medical information through both insurer medical assessment reports and expert testimony. These reports and testimony will now go through the LAT system.

A recent [decision](#) in Ontario's Superior court is the latest example of the poor quality of the expert evidence used in our courts by Ontario's insurers who hire medico-legal experts to deny the legitimate claims of injured auto accident victims.

The quality of the medical evidence used in our courts and tribunals is a direct result of CPSO regulatory inaction and secret medical 'cautions'. MVA victims routinely have their recoveries cut off based on poor quality and biased medical reports and testimony. Regulatory inaction to protect MVA victims isn't exclusive to CPSO, we can [see it as well in Health Professions Appeal and Review \(HPARB\) decisions](#) that protect the names of physicians on otherwise public decisions thus compounding the harm through a lack of transparency.

The CBC show [DOCTORS WITHOUT BOUNDARIES](#) on 1/22/16 regarding the regulatory oversight at the College of Physician and Surgeons of Ontario (CPSO) highlights that this is not the self-regulated organization that can ensure that the Public's safety comes first. SLASTO should not operate under the impression that 'in good standing' with a regulatory College means that the assessor record is unblemished or that their evidence should be accepted at face value.

According to [HCAI data](#) insurers have consistently spent more on medical assessments than they do on treatment. There's a reason for this and it has nothing to do with returning their customers to wellness; it has to do with 'shopping' for medical opinions until the insurer gets what they want, an excuse to turn down the claim. The [biased medical opinions](#) that have poisoned our insurance system, our courts, and are causing such hardship for legitimate claimants, are only possible through CPSO inaction and the protection they afford their members while ignoring the interests of injured Ontario MVA victims.

We have no doubt that the new Tribunal hearings system will benefit Ontario's insurers who are still doing nothing about their excessive claims turn down rate because our Government and now the LAT isn't asking that the insurers be accountable for their shoddy claims handling practices. The government's inaction on the insurance file, other than to cut insurer costs, has led to the unprecedented volume of [cases in our civil court system](#) and at the [FSCO DRS](#) unit. The new LAT system will be faster but will the system continue to punish victims through acceptance of shoddy medical reports?

10.2 What is the LAT going to do when the new rules under 10.2 for expert witnesses aren't followed? Given the serious nature of some the expert witness issues, why is there no enforcement language to hold insurers or their paid medical expert witnesses accountable? There are clear expectations and a form but what happens if the experts don't comply? Where is the Special Award to the victim who has suffered harm through a lack of funding for treatments and incurred significant legal costs because their insurer's expert is lacking in skill or qualifications or is biased? Where is the accountability?

10.4 The extension from 5 days to 10 days under section 10.4 to challenge the evidence might be an inadequate timeframe for those who self-represent and who are facing significant physical or cognitive challenges. What happens when the MVA victim alleges that there is a clear trail of bias by an expert witness? Will Ontario's insurers who depend on their deceptive and dishonest expert medical reports be held accountable at the LAT?

The LAT and SLASTO are in a unique position to put some integrity back into our administrative tribunals when it comes to medico-legal experts by adopting a zero tolerance stance when it comes to expert evidence. By developing a roster of experts who are both qualified and who are supplied with a standard of practice there is an opportunity to clean up a dysfunctional system. FAIR did [advance the idea](#) of a [Colorado model of a roster of experts](#) who were 'qualified' by a board to assess MVA victims. We would be pleased to discuss this further.

Thank you for the opportunity to provide input.

Rhona DesRoches
FAIR, Board Chair

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

M.L. v G.D., 2015 CanLII 46 (ON HPARB), <<http://canlii.ca/t/gft8q>>

<http://www.cbc.ca/fifth/>

<http://www.fairassociation.ca/wp-content/uploads/2015/02/HADB-standard-report-2014h1-final.pdf>

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

<http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2590013&pattern=259-0011..259-0016&tabMode=dataTable&srchLan=-1&p1=-1&p2=31>

<http://www.fairassociation.ca/wp-content/uploads/2015/11/Mediation-Arbitration-cases-at-FSCO-Sept-2015.pdf>

<https://www.sos.state.co.us/CCR/GenerateRulePdf.do?ruleVersionId=6439&fileName=3%20CCR%20702-5> pgs 62-69

<http://www.fin.gov.on.ca/en/autoinsurance/submissions/2013/FAIR%20response%20to%20the%20Ontario%20Dispute%20Resolution%20System%20Review%20Interim%20Re....pdf>

<http://www.fin.gov.on.ca/en/autoinsurance/drs-final-report.pdf> pg 32

18. Experts should be required to certify their duty to the tribunal and to provide fair, objective and non-partisan evidence. Arbitrators should ignore evidence that is not fair, objective or non-partisan and, in such instances, the expert should not receive compensation for appearing as a witness.

<http://www.sse.gov.on.ca/lat/english/Documents/Rules%20of%20Practice/Proposed%20LATRules%20English%2017December2015.htm>

10.2 EXPERT WITNESSES (IDENTIFICATION AND DISCLOSURE)

A party who intends to rely on or refer to the evidence of an expert witness shall provide every other party with the following information in writing:

- (a) The name of the expert witness;
- (b) A signed statement from the expert, in the Tribunal’s required form, acknowledging his or her duty to:
 - (i) provide opinion evidence that is fair, objective, and non-partisan;
 - (ii) provide opinion evidence that is related to matters within his/her area of expertise;
 - (iii) provide such additional assistance as the Tribunal may reasonably require to determine a matter in issue.
- (c) The qualifications of that expert witness, referring specifically to the education, training and experience relied upon to qualify the expert;
- (d) A report that sets out the expert’s conclusions and the basis for those conclusions on the issues to which the expert will provide evidence to the Tribunal;
- (e) Where the written report exceeds 12 pages, excluding photographs, a summary stating the facts and issues that are admitted and those that are in dispute, and the expert’s findings and conclusions; and
- (f) Where that party intends to rely on or refer to the written report or the witness statement at the hearing, a copy of that report or witness statement signed by the expert witness.

Commentary

This provision is based on the current LAT Rule 6.5. Subsection (c) refers only to a “report” rather than a “witness statement or written report” on an expert’s conclusions.

A more substantive change is the addition of subsection (b). Subsection (b) is adopted from the current rules of Health Professionals Appeal and Review Board /Health Services Appeal and Review Board. The new subsection is designed to respond to Recommendation #18 set out in the Hon. Douglas Cunningham’s *Ontario Automobile Insurance Dispute Resolution System Review Final Report (“Cunningham Report”)*.

10.4 EXPERT WITNESSES—CHALLENGES TO QUALIFICATIONS, REPORTS

A party intending to challenge an expert’s qualifications, report or witness statement shall give notice, with reasons, for the challenge to the other parties as soon as possible and no later than 10 days before the hearing and must file a copy with the Tribunal

Commentary

The wording to the current LAT Rule 6.8 provides that LAT requires notice about a challenge to an expert five days in advance. Under the revised rules, it is being proposed that 10 days’ notice will be required.