There is a long-standing expectation in both criminal and civil law that an expert's duty is not to interested parties but to the court. Expert testimony and evidence is expected to be both truthful and to be proffered by someone possessed of sufficient skill, training and knowledge as to be qualified to give opinion evidence on a matter that is relevant to the issues before the court. This underlying expectation has been made explicit in the 2010 changes to Ontario's Rules of Civil Procedure.

I will argue that these changes, together with pre-existing safeguards, are inadequate given that the provision of expert evidence has become a growth industry. The competition in this industry is intense and incentives to be less than truthful often overtake professional obligations and standards. It is not enough to expect someone with vested interests to be truthful about their willingness to be truthful. In addition to these changes, then, the courts must listen to what prior triers of fact have to say about the quality of experts that have made submissions to them. My suggestion to Ontario's Civil Justice Rules Committee is this: *Counsel ought always seek to adduce all prior adverse judicial comments which call into question the qualifications, credibility and/or reliability of opposing (medico-legal) expert witnesses. Further, in the interests of facilitating thorough judicial gate-keeping of expert evidence, triers of fact ought not merely allow, but encourage, counsel to bring all prior warnings about prospective experts in the form of adverse judicial comments to the court's attention.*

Preamble – Lessons from the Goudge Inquiry

In the Executive Summary to the *Inquiry into Paediatric Forensic Pathology in Ontario*, Justice Stephen Goudge detailed the "horrific" consequences for individuals who were wrongfully convicted on the basis of Dr. Charles Smith's "woefully inadequate" expert opinion. Justice Goudge warned that wrongful convictions based on inept expert medico-legal opinion evidence such as that proffered by Dr. Smith will inevitably "come at a huge cost to the public's faith in the justice system." Rogue experts "can do much damage without effective oversight by those who must provide it and constant vigilance on the part of participants in the justice system who can protect it from flawed expert evidence" (P.20 Executive Summary, Goudge Inquiry).

Whether in the criminal justice system or in in the civil justice and personal injury context, decisions based on faulty expert opinion evidence carry the same costs, both in terms of harm to individuals and in terms of harm to the public's faith in our institutions of justice.

A key lesson from the *Goudge Inquiry* is that a failure to thoroughly check - and to challenge when appropriate - the qualifications, credibility and reliability of medico-legal experts before their opinion evidence is proffered and subsequently weighed by a trier of fact, can come with extraordinarily dire consequences. Doing so is vital if we are to protect the criminal justice system from rogue experts the likes of Dr. Charles Smith. Doing so is equally vital, I believe, if we are to protect litigants in Ontario's civil justice system from wrongful decisions based on unchecked, unchallenged, unqualified or highly partisan ("hired-gun") medico-legal expert opinion evidence.

Justice Goudge set two tasks for himself. The first was to find out what went "so badly wrong." The second was to seek remedies. One thread running through the Inquiry was the (mis-)handling of prior adverse judicial comments which ought to have served as red flags: "The story of missed warning signs began with Dr. Smith's participation in Amber's case. In 1991, Justice Patrick Dunn of the Ontario Court (Provincial Division) acquitted S.M. of the charge of manslaughter after a lengthy trial in Timmins, Ontario. Dr. Smith was the key witness. Justice Dunn identified 16 areas of concern (lack of objectivity, lack of skill/competency, etc.) with the work of Dr. Smith" (P.23).

During the Inquiry, key participants were asked if things might have gone differently in subsequent cases involving Dr. Smith had they been made aware of the many warnings contained within Justice Dunn's adverse judicial commentary regarding Dr. Smith's lack of competency and his partisanship. All answered in the affirmative.

Perhaps the greatest lesson Dr. Charles Smith taught us is that the requisite expertise, candour, and integrity we expect from expert

witnesses can't be taken for granted. Justice Goudge writes that "judges must bear the heavy burden of being the ultimate gatekeeper in protecting the system from unreliable expert evidence." This gate-keeping function relies on "vigorous testing" of expert evidence by skilled and informed counsel. Red flags thrown up by previous triers of fact must be brought to the court's attention if the judge is to fulfil the role of gatekeeper.

Commentary On Expert Opinion Evidence – The Promise

There is consensus on the necessity of expert opinions being qualified and impartial; decisions tainted by unqualified experts or "hired gun" undermine trust in the system.

> At trial the expert must be and appear to be independent of the party or counsel who retained the services of the expert and must demonstrate objectivity and impartiality in the analysis and opinions that she or he is allowed to give. Because the opinions stated by an expert are predicated upon expertise that the court does not possess, the court must be confident in relying upon the expert to provide a thorough, balanced and technically sound analysis. Independence and impartiality; the court expects nothing more and it will accept nothing less. [...] To the extent that the court must receive and rely upon the expert opinions of others and to the extent that those opinions are tainted, the administration of justice is imperilled. *Frazer v. Haukioja*, 2008 CanLII 42207 (ONSC)

Ontario's Rules of Civil Procedure hold out the promise to litigants and to the public that expert opinion evidence will be both qualified and impartial. Several rule changes made in 2010, including the Form 53 Undertaking to the Court, were intended to help make that promise reality. Justice Milante addresses concerns raised by Justice Coulter Osborne in the Civil Justice Reform Project regarding the proliferation of "hired gun" experts, and lays out the objective of Form 53.

> This new duty [Form 53] is aimed at overcoming what had become a battle of experts and the 'hired gun' or 'opinion for sale' approach to evidence... It is the court's duty, as gatekeeper, to limit opinions to those which are necessary for the just, most expeditious, and least expensive determination of an issue on the merits. Looking back, the role of the expert may have been lost in our adversarial process. Thinking forward, for the litigator, the implications of the amendments are clear: choose a credible expert, bring the duty under rule 4.1.01 to their attention, aim for a well-balanced clean report, and be fair. (*Expert Witnesses – Looking Back/Thinking Forward, Apr. 2011*.)

Master D.E. Short has raised important questions regarding the 2010 amendments in general and Form 53 in particular: can we reasonably expect long-time rogue experts to take their Form 53 promises any more seriously than they do their duty to be impartial?

> [76] The Court expects and relies upon frank and unbiased opinions from its Experts. This is a major sea change which requires practical improvements to past opaque processes. How are long time plaintiffs' and defendants' experts to be "trusted" to change their stripes? At the initial stages skilled, licenced professionals clearly must be taken at their word that on principal they take their Form 53 Undertaking to Court seriously. They are clearly promising to bring a new, transparent and objective mind set to the drafting of their reports and to their subsequent testimony. *Bakalenikov v. Semkiw* 2010 ONSC 4928 (CanLII)

That the problem Master Short lays out is both serious and systemic is not lost on medical practitioners in the business of selling medico-legal reports and expert testimony. Many if not most vendors of expert evidence (in the form of IMEs) and testimony are members of the Canadian Society of Medical Evaluators. In 2011, its newsletter carried this astounding warning from its president: "We have all to realize that times are changing - amateurism, bias and fraud in the domain of IMEs will be tolerated less and less in the future. For those of you doing IMEs for years, it is time to notice this approaching shift: the cost of litigation, cost of automobile insurance and lack of quality control of IMEs, leading to public scandals, might soon lead the parties requesting IMEs to be more critical when the appraising medico-legal credentials of an expert before hiring his/her services."

Much has been said and written about the expectation of competence and neutrality in the provision of expert evidence. Much has also been said and written about the "industry" of competing experts giving rise to "hired guns" and "opinions for hire," clearly suggesting expectations are not being met. Very little comment can be found, however, regarding assisting triers of fact in their gate-keeping function by allowing (much less requiring) counsel to adduce prior adverse judicial comments which speak to an expert's lack of impartiality or qualifications.

Discourse on Prior Adverse Judicial Commentary in Ontario's Civil Justice Context

Within Ontario's civil justice system there is little explicit judicial commentary on the question of when if ever to allow prior adverse judicial comments to be adduced as a means to help triers of fact test the qualifications, credibility and reliability of expert witnesses. What little judicial discourse there is, is often contradictory.

The first position can be found in *R. v. Karaibrahimovic*. In this case, the expert's evidence was questioned because it had been rejected in a number of earlier cases. This was found to be insufficient cause to reject the expert's evidence in this case.

> In this case the Crown, at trial, cross-examined the accused's expert witness on the basis that the expert's testimony was rejected in four other cases. Furthermore Crown counsel specifically cross-examined the expert by putting to him the conclusions of other trial judges apparently critical of his evidence. [44] Based on the inclusion of this cross-examination *inter alia* the Court allowed the appeal and ordered a new trial. In doing so the Court specifically stated, ***"there is no legitimate use to which the trier of fact in this case could have put the evidence arising out of [the expert's] cross-examination about four other cases in which it was asserted that his opinion was rejected."***

It seems to me that counsel's counting cases in this way is folly. It is wrong-headed and mistakes what properly constitutes prior negative judicial commentary and its role in judicial gate-keeping. For purposes of my suggestion to the Rules Committee, prior adverse judicial comments which ought to be adduced by counsel to assist judicial gate-keeping of experts, are explicit statements that speak directly to an expert's lack of qualifications and/or prior partisanship. (Such as the reference to the expert as a "classic example of a hired-gun expert," or a judicial observation that "under cross-examination the expert conceded to to a lack of training and competency.") Adducing these judicial warnings (red flags) would be congruent with the notion put forward at the Goudge Inquiry that had Justice Dunn's adverse judicial comments regarding Dr. Smith's ineptitude and partisanship been brought to the attention of subsequent triers of fact, things would have gone much differently.

A second position is articulated by Justice H. Spiegel in *Desbiens v. Mordini* 2004, ON SC. In this case, Justice Spiegel decided not to permit cross-examination of Dr. Ameis regarding prior judicial rebukes.

> [268] While both counsel acknowledged that they knew of cases in which this line of questioning did take place they were unable to provide me with any decision in which the issue was the subject of judicial analysis. However, while the matter was under reserve I came across two cases that, in my view, lead to the conclusion that this line of cross examination is not permissible.
>
> [274] ***I do not wish to be understood to say that this line of questioning is impermissible under any circumstances***. If a satisfactory evidentiary basis is laid it may become relevant. Plaintiffs' counsel submitted that an adequate evidentiary foundation has been established. He noted that Dr. Ameis, in his examination in chief during the qualification process, stated that he testified in court before. On cross-examination Dr. Ameis agreed that he may have testified in court on hundreds of occasions prior to this trial and had given expert evidence in arbitration on perhaps 50 or 60 occasions. He agreed on cross-examination that an expert medical witness who is not testifying with respect to his or her own patient ought not to act as an advocate and should be as objective or impartial as possible. When asked whether he had testified as an expert on previous occasions he had done so objectively and impartially and not as an advocate, his answer quite fairly was "I've tried." In my opinion this is not a sufficient evidentiary basis to support the introduction of the line of cross-examination sought by the plaintiffs.

Though Justice Spiegel was careful to point out that there may be occasions when cross-examination of experts regarding prior negative judicial comment may be allowed, the nature of those circumstance weren't articulated in his decision.

In *Bakalenikov v. Semkiw,* Master Short doesn't discuss the pros and cons of allowing prior adverse comment. Rather, Master Short simply looks to the warnings found in earlier judicial comments (as if the need to do so is self-evident) and on the basis of those adverse comments, ruled that the injured litigant was entitled to have a proposed medico-legal expert assessment (IME) electronically recorded:

> In this case I am obliged to consider a proposed expert who has on at least 3 occasions had his opinions disregarded by the Court for bias and advocacy for the Defence. He has been criticized by a judge of this Court for delivering his evidence as "an advocate for the party calling him as a witness. .....On the facts before me in this motion I find that this expert's objectivity

> needs to be demonstrated." ***The Court now implicitly holds out to jurors that experts testifying are the Court's experts, independent of the plaintiff or of the defendant.*** At least at the outset of this new system, the Court's positive duty encompasses the power to allow a non-intrusive form of audit of the experts paid by the those ultimately liable to fund the payment of any liability determined at the trial.

Finally, a very recent BC Supreme Court decision criticizing an expert for destroying digitally recorded observations made during an independent medical assessment appears to amplify Master Short's position, suggesting a fourth position that mandates the production of his comments in any further procedings involving the expert in question. In *Birkich v. Canatio* Justice Betton wrote the following regarding future reports authored by this expert:

> [10] Given the evidence that I do have on this *voir dire*, specifically from Dr. Apel, that this is a verbatim transcription (with only the editing that I have described) of what was on the now destroyed digital recording, I am not inclined to grant the defence application to not allow the report. Whether, and to what extent, the examination of Dr. Apel will affect my ultimate conclusion about the weight of her opinions is yet to be determined, but I do not want there to be any illusion that this in any way endorses the practice that Dr. Apel undertook in this case or, from her evidence, what has gone on for some 20 years. It is wrong, it is not in compliance with the Rules, it is not to be endorsed, and this decision should not in any way be seen as endorsing that.
>
> [11] I am going to direct as part of my order here that, at the plaintiff's expense, a transcript of my decision on this *voir dire* be prepared and a copy of it be provided to Dr. Apel. ***To the extent issues of this nature might arise in the future, in respect of Dr. Apel at least, this decision may be brought to the attention of a court dealing with issues on those occasions such that it would be considered in any decision that might be made about future reports***. If there is, not that I think that there should be, but if there is any misapprehension or confusion among the bar about the nature of instruction letters and what experts should be informed of, I would hope that this decision might, in some measure, resolve that because it is simply unacceptable. It is an easy process in this digital age for that information to be retained, it is abundantly clear from the Rules what the intention is, and to be faced with these sort of issues, in my view, is something that simply should not be occurring.

Laying these cases out on a continuum, we find the following positions from the Bench with respect to prior adverse judicial comments aimed toward medico-legal experts: (1) no, never relevant; (2) sometimes, under certain circumstances; (3) yes, the need is self-evident; and (4) yes, with an instruction to do so.

Repercussions for Ontario's Personal Injury

The problem of expert bias identified in Justice Osborne's 2007 Civil Justice Reform Project Report continues to plague the Ontario auto insurance litigation/adjudication landscape. The hope was that the subsequent amendments and Form 53 would introduce a level of accountability that might finally deter "hired gun" experts entrenched in the system. Over 60,000 Ontarians are hurt in auto accidents each year; many seriously and some catastrophically. They are captive subjects of medico-legal assessments: if they refuse to submit to a scheduled IME or IE medico-legal assessor, their policy benefits including treatment benefits are severed. These IME/IE expert reports are adduced as evidence and their authors are often called to testify as expert witnesses. Prior findings of incompetence or lack of qualification of these experts is seldom raised. *Rather, litigants are made subject to assessment by a pool of hired guns who carry as much sway in the personal injury context as did Dr. Smith in the forensic pathology context, and with equally grave results.*

For example, for nearly a decade, automobile accident victims with brain injuries were sent for their (neuro)psychological assessments, assessments on which their rehabilitation and income replacement benefits depended, to a psychologist not authorized by his licencing College to proffer opinion evidence in brain injury cases (see Appendix, Example #1 - Dr. H. Shah). After tainting far too may cases with unchallenged, unqualified expert opinion evidence, this psychologist was finally made to retire from the profession of psychology (in the same way Dr. Charles Smith retired from medicine) rather than face a College discipline hearing.

By the time Dr. Shah had been forced out of practice, he had performed almost 1,0000 medico-legal assessments, all of the "neuropsychological variety" for which he was not qualified. To this day, his brain injured litigants have been kept in the dark and haven't been informed by FSCO that their cases were tainted in this way. This collective (non)response from institutional players in Ontario's civil justice/personal injury system stands in stark contrast to the collective response regarding Dr. Charles Smith's victims. Much of this

abuse of injured litigants could have been headed off had prior adverse comments been been brought to the attention of triers of fact by counsel.

Pain and and pain disorder resulting from auto accident injury has become a substantial area of medico-legal expertise. Here, too, we find expert opinion evidence being proffered by those with little or no training in the area (see Appendix Example #2 - Dr. P. Martan). In one case, we find an expert who, after authoring and submitting a report concluding the applicant was malingering, admitted under cross-examination to "a lack of training and competency in the area of chronic pain." This same doctor went on to conduct more assessments involving pain, his credentials unchallenged.

This confusion regarding competency/qualifications is replicated in the cases of a general practitioner passing as an orthopaedic surgeon. FSCO triers of fact failed to notice that a general practitioner repeatedly mislead arbitrators into giving his opinion evidence the weight of an orthopaedic surgeon/specialist (see Appendix Example #3 - Dr. P. Grant). This is despite the fact that in two cases cases he was strongly rebuked for his exaggerated and misleading presentation of his credentials. Had lawyers adduced these adverse negative comments aimed toward this "specialist/surgeon," the damage to seriously injured litigants might have been mitigated.

Competence and qualifications aren't always the issue when expert opinion is found lacking. Sometimes the expert may be highly qualified, but possesses a "pre-existing bias" which gives him the appearance of a "hired gun" (see Appendix, Example #4). Surely subsequent triers of fact exercising their gate-keeping of experts duty ought to take into account a prior judicial warning about an expert's flagrant willingness to act as a "classic hired gun" in a previous case?

Questions of qualification and bias are amplified when medico-legal expert evidence in the form of IMEs have been "farmed out" and "doctored." In at least one assessment firm, signature stamps provided by the doctors it hires were collected and used to "sign" highly altered versions of the original report. (Appendix Example #5)

In the December 18, 2015 issue of *Lawyers Weekly*, Patrick Brown chronicles the rise of medico-legal report brokerages and the "third-party manipulation and alteration of expert reports." Here experts' reports are filtered through "quality control" departments. Brown cites *Burwash v. Williams, 2014 ONSC* in which Justice Smith writes:

> It is important to know whether the expert produced by the Defendants and/or the report filed is independent, or whether a third party has altered or amended the opinion proffered or the report filed in any substantial way.... If there is reason to believe that the expert's report or opinion has been influenced by unknown third parties and is therefore not entirely the expert's opinion, the fundamental rationale for accepting expert opinion evidence is no longer present and hence the report is not only not helpful to the court but may become misleading. This is an issue that is directly related to trial fairness.

Brown points out that these sorts of examples of altered medico-legal evidence/reports "only rise to the surface when there is a trial or arbitration and production forced on the third party." If this is true shouldn't cases like this one and like *Macdonald v Sun Life* (Appendix, Example #5) be treated as the canary in the coal mine? Little if anything is known about who exactly it is doing the "editing" of these medical assessment reports, nor about what "quality" criteria is being applied when altering the reports of the original authors/experts. We do know that this "quality control" function of expert evidence brokerages has resulted in reports so drastically altered that the original authors of the reports can no longer recognize the "expert findings" in them as being their own. (See Appendix, Example #5, FSCO meeting minutes.)

Finally, there is the problem of verification of medico-legal evidence in light of the practice of destroying supporting materials. This was the issue in *Birkich v Canatio* (see p. 4 above). In *Thevaranjan and Personal Insurance* the expert in question also destroyed supporting material and, with the audacity that comes with the certainty of immunity, affirms that it is his "policy" to do so:

> Dr. Zabieliauskas responded that he dictated the report from the notes and subsequently destroyed the notes. Dr. Zabieliauskas hastened to add that he developed this policy to avoid being cross-examined about his notes by a "lawyer of your ilk" (referring to the Applicant's counsel) and to avoid being asked to interpret every "squiggle" and "jotting." Rather than be faced with that,

> Dr. Zabieliauskas stated, his practice is to destroy the notes. Dr. Zabieliauskas agreed that the accuracy of his report cannot be verified by any contemporaneous background notes.

Despite the gap in verifiability created by the destruction of notes, (or perhaps because of it), Dr. Zabieliauskas' evidence was that between 2000 and 2006, the time of the hearing, he conducted on average four to six assessments per week at an average cost of $1,000 to $2,000 per report.

Summary

Ontario's civil litigation landscape provides an abundance of examples of how the promise of qualified and impartial expert evidence is being thwarted. The reliability of expert evidence is being undermined by practitioners who are un- or under-qualified; by qualified vendors selling biased reports; by the farming out and use of signature stamp by assessment firms; the doctoring of medico-legal reports by brokerages; and the destruction of evidence that would verify expert findings. To this list, one suspects, can be added any number of fraudulent options for experts willing to provide opinions at the right price.

There are a number of ways to mitigate these abuses. They might include, for example, tightening regulations and codes of ethics of the various professional colleges; making transparent professional censures and cautions; rewriting claims handling procedures; introducing new codes that would restrict "quality control," requiring the doctor engaged be the one to write the report; eliminating third-party assessment brokers; etc. The list can go on and on.

While not suggesting these options should not be explored, that exploration should come only after the one more expedient and effective step is taken; i.e. that we heed the warning implicit in Justice Goudge's inquiry and attend to prior adverse judicial comment which calls into question the qualifications, credibility, or reliability of medico-legal expert evidence. What is preventing the courts from hearing these comments and from responding to the red flags being thrown up by previous triers of fact? Are there procedural obstacles? How can Ontario judges be encouraged to act on the example provided by B.C. Supreme Court Justice Betton (see earlier, p. 4), and ensure that an expert's misdeeds in one case follow him or her to the next case, as a warning both to the expert to act with integrity and to the next trier of fact to be alert to possible wrong doing.

In the arsenal of weapons available in the battle to reclaim the integrity of our civil justice system this option, if only by virtue of its simplicity, surely this one is the more expedient.

APPENDIX

EXAMPLE #1 Dr. Shah - Cases illustrating a history of unqualified medico-legal evidence in brain injury cases.

Rumak and Personal Insurance - Special Award [+] Arbitration, 2004-10-07

> Note 5: In the Catastrophic DAC report, which found Mr. Rumak had suffered a catastrophic impairment as a result of the car accident, Dr. H. Becker noted that *"Dr. Shah is not registered by his college to undertake such neuropsychological assessments."*

Richman v. Ontario (Health Professions Appeal and Review Board) - (ON SCDC)— 2005-01-27

> [2] The applicant, Dr. Jack Richman, seeks judicial review of the decisions of the Health Professions Appeal and Review Board (hereafter "Board"), dated June 17, 2002, that he attend in person before the Complaints Committee of the College of Physicians and Surgeons to be cautioned respecting the use of unqualified practitioners in conducting Independent Medical Examinations (IME) and about his obligations, as medical director of AssessMed, to ensure that qualified practitioners conduct IMEs for AssessMed. Several grounds were put forward in the judicial review material, but, before us, the argument revolved around the applicant not being provided with natural justice and procedural fairness alleging that:
>
> 1) the Board, and before that the Complaints Committee, had not given adequate or any notice to Dr. Richman that the gravamen of the complaint was that *he ought to have known that Dr. Hemendra Shah, a psychologist, was not "qualified" to perform neuropsychological assessments, it being Dr. Richman's duty and obligation as the medical director for AssessMed to so ascertain before assigning such assessments to Dr. Shah,* and
>
> 2) the record showed that before the Complaints Committee that Dr. Richman had no notice with regard to certain allegations and, therefore, he had no opportunity to respond.
>
> [3] The issues enumerated above were not raised before the Board and thus the Board did not consider them. Therefore, there is no legitimate ground for judicial review on that basis of the Board's decision of June 17, 2002.
>
> [4 In the factum of the respondent, at paragraph [54], it is stated: "The issue, to the extent it is a legitimate ground of review, which is denied, is raised de novo on judicial review."
>
> [5] The applicant submits that the Board's decision was patently unreasonable because the Committee had no evidentiary basis to find that Dr. Shah was "unqualified" and was thus attempting, directly or indirectly to regulate AssessMed. We are of the view that the Board's conclusions were not patently unreasonable because:
>
> 1) The Committee had an evidentiary basis to make the findings it did regarding Dr. Shah, and
>
> 2) The Committee had an evidentiary basis to make its findings regarding Dr. Richman's responsibilities as the Medical Director of AssessMed. (See the Reasons of the Board, pp. 8-10)
>
> [6] The Board concluded its reasons this way.
>
> The Board appreciates that Dr. Richman knows full well what an IME [Independent Medical Examination] entails. It is both his business and his profession. What needs to be included in his discussion with the College is his obligation to ensure that qualified professionals conduct IMEs for AssessMed so that the public can have trust and confidence in a statutory system that has been set up to provide them protection.

Assessmed Inc. v. Canadian Broadcasting Corp., 2004 CanLII 28479 (ON SC)

> [323] Dr. Shah's health problems, his difficulties with the College of Psychologists and the program 'Prove It If You Can' all impacted his work and business. Prior to July of 1997, AssessMed kept no computer records of the number of assessments performed by Dr. Shah. From July to December of 1997, when computer records are available, Dr. Shah performed 94 assessments at AssessMed.
>
> [324] In 1998, he did 204 assessments. In 1999, his assessments dropped to 87. Following 1999, he performed the following number of assessments:
>
> 2000 - 132 assessments
>
> 2001 - 121 assessments
>
> 2002 - 96 assessments

EXAMPLE #2 Dr. P. Martin - Lack of training and competency.

Thevaranjan and Personal Insurance [+] Arbitration, 2006

> Dr. Peter Marton also testified on behalf of the Personal. He testified that he attained his PhD in clinical psychology in 1977 in New York State. He is a registered member of the Ontario College of Psychologists and of the Ontario and American Psychological Associations. He has conducted a practice in clinical psychology since 1977, specializing in the treatment of both adults and children. **Dr. Marton conceded he does not have expertise in treating and assessing chronic pain.** He testified that in his practice he performs assessments at the request of several assessment facilities predominantly for insurers and employers. He does a minimum of two insurer examinations per week for AssessMed. Overall, Dr. Marton performs five to six insurer and employer assessments for four assessment facilities weekly, earning about 40% of his income from this practice.
>
> On August 20, 2004, he assessed the Applicant to determine whether she was substantially disabled psychologically by the accident from returning to her pre-accident employment and housekeeping activities. He prepared a report dated August 20, 2004 and a brief report dated March 2, 2006. On cross-examination, Dr. Marton stated that he had neither a job demands analysis nor the Applicant's pre-accident clinical notes, records, consultation notes or test results from the Applicant's medical practitioners before him when he prepared his August 20, 2004 report. Dr. Marton admitted he only asked the Applicant general questions about her pre-accident job and therefore had little knowledge of the Applicant's pre-accident occupation when he prepared his report. When the Applicant's counsel presented a description of the Applicant's job demands to Dr. Marton, he disagreed that data input would require a considerable level of concentration, and went on to try to diminish the demands of the Applicant's job by holding up as a standard the concentration required of an air traffic controller.
>
> Dr. Marton's failure to properly consider the Applicant's pre-accident job has caused me to discount this area of his evidence.
>
> Dr. Marton testified in chief that he received Dr. Zabieliauskas' August 12, 2004 report before he did his assessment. However, the Applicant's counsel presented a letter to Dr. Marton dated September 16, 2004 attaching Dr. Zabieliauskas' report. In response to this evidence, Dr. Marton attempted to explain how he could have indicated in his August 20, 2004 report that he had reviewed Dr. Zabieliauskas' report B a report he actually had received after September 16, 2004. I find Dr. Marton's testimony in this area made no sense, which I find affected his credibility as a witness. I further conclude the value of his report is further discounted by the fact that he did not have Dr. Zabieliauskas' report and other key medical and employment documentation when he prepared his report.
>
> Dr. Marton retained a psychometrist to administer six psychometric tests to the Applicant: the Malingering Probability Scale, the Wahler Physical Symptoms Inventory, the Sensations Scale, the Multidimensional Pain Inventory, the Personality Assessment Screener and the Clinician Hamilton Depression Rating Scale. Dr. Marton conceded on questioning that he did not know the psychometrist, did not ask her for a curriculum vitae and was not familiar with her qualifications. The Applicant's counsel questioned Dr. Marton about the test results. I found many of Dr. Marton's attempts to explain the results confusing.
>
> For instance, looking at the results in the Malingering Probability Scale, according to the report, the Applicant displayed a low probability for malingering. Dr. Marton testified he only agreed with this finding in part, without offering a satisfactory explanation for this comment. He also conceded that the psychometrist had used incorrect numerical measures to arrive at the result. Dr. Marton did not explain to my satisfaction what effect the incorrect numerical measures would have on the assessment of the Applicant's performance. Dr. Marton also made the surprising remark that although the test purports to test for malingering, it really does not. Again, Dr. Marton did not explain this statement satisfactorily. Throughout his evidence on the testing results, Dr. Marton also gave evidence that undermined the value of the other tests administered to the Applicant without providing comprehensible explanations for these opinions. I find this supported the Applicant's credibility.
>
> On the whole, I find Dr. Marton's reports and his oral evidence of little or no value in determining whether the Applicant sustained a psychological impairment that substantially prevents her from resuming her pre-accident employment and housekeeping tasks. I find he was not forthright in presenting some of his evidence and displayed a lack of expertise in understanding the psychometric tests that were administered. I also find that he was not balanced and objective in his assessment of the Applicant. **Dr. Marton also conceded that he had not acquired the expertise and training in the assessment of the psychological aspects of chronic pain problems.**

EXAMPLE #3 Dr. P. Grant - History of misleading triers of fact regarding qualifications

Mrs. S and (Lloyd's) Non-Marine Underwriters - FSCO Arbitration, 2004-08-03

> Lloyd's retained Dr. Paul H. Grant, a general practitioner, to assess the Applicant. In a number of documents, including Explanations of Benefits Payable by Insurance Company, correspondence, and Lloyd's counsel's written submissions, Dr.

Grant's reports are referred to as orthopaedic assessments. On Dr. Grant's reports, under his signature is "Orthopaedics & Sports Medicine" and he entitles supplementary reports as "Orthopaedic Addendum." The Applicant's counsel submitted, and I accept, that this is misleading since Dr. Grant is not an orthopaedic surgeon. Dr. D.J. Ogilvie-Harris, an orthopaedic surgeon, confirms this in his July 19, 2002 report. I therefore regard Dr. Grant as a general practitioner and do not accept Dr. Grant's opinions as orthopaedic opinions.

Zeris and Aviva Canada - FSCO Arbitration, 2004-05-17

Dr. P. Grant, an o***rthopaedic surgeon***, assessed Ms. Zeris in October 2001 and then again in May 2002. Dr. Grant concluded that Ms. Zeris was not physically unable to perform her pre-accident employment duties. On the basis of Dr. Grant's opinions, Aviva terminated income replacement benefits effective May 30, 2002.

Grape and Liberty Mutual – 2 - Arbitration, 2001-07-20

Dr. Grant concluded that Mr. Graper was not disabled from an ***orthopaedic point of view.***

Oppedisano and Zurich Insurance - Arbitration, 1999-07-06

Although Dr. Grant has a resume which describes him as a specialist in sports and orthopaedic medicine, Mr. Oppedisano's counsel challenged Dr. Grant's credentials at the hearing. As a consequence, Zurich's counsel telephoned Dr. Grant during a recess. Dr. Grant confirmed that he is not an orthopaedic specialist and has no specialist certification. A certificate of status of registration from the College of Physicians and Surgeons lists Dr. Grant as having no specialty qualifications. In the context of individual medical assessment, this can be misleading. Dr. Grant would have self described himself more properly as a general practitioner with an interest and experience in sports medicine.

EXAMPLE #4 Dr. Clark –Qualified but a "hired gun."

Guerrero v. Fukuda, **2008 CanLII 49158 (ON SC)**

[5] Pain, and its degree of severity, are subjective and can exist without any objective finding. Calling an expert to say that no objective finding equals no pain is on longer acceptable. That same expert will often treat the pain that exists even though it is without objective findings.
[24] I reject Dr. Clark's evidence outright. He was a physiatrist called by the defence. ***His evidence was a classic example of a highly qualified doctor with a pre-existing bias, appearing as a hired gun*** to discredit Ms. Montero.

EXAMPLE #5 – warnings about "doctored" medico-legal evidence

Macdonald v. Sun Life Assurance Company of Canada**, 2006 CanLII 41669 (ON SC) — 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. I made my ruling based on the evidence before me at the time. The case proceeded and the jury ultimately delivered a verdict awarding the plaintiff damages and that verdict has not been appealed. However, in view of the serious allegations that had been made against Riverfront I felt that Riverfront should be given an opportunity to respond before I delivered the full reasons for my ruling. Subsequent to the conclusion at the trial, counsel for Riverfront appeared before me and called evidence and made submissions.

[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.

FSCO - Counsel Forum Minutes of Meeting - March 25, 2011

"Doctored" Reports:

Senior Arbitrator Nastasi reported that a recent unit meeting arbitrators reported two separate hearings in which in the middle of testimony by a doctor or assessor, it became clear that the report issued / produced by the Clinic or assessor was not the same report created by the doctor / assessor on the witness stand. Liz put the issue out to the group to assess whether this has been a recent issue or new trend that counsel have also experienced.

Counsel Response: In the past IR adjusters would contract out to individual assessors and defence counsel could potentially request certain doctors that they liked to work with BUT today - to save money almost 100% of the assessment work is farmed out to Brokers leaving very little choice about who will do the assessment.

Stan P. - 100% of ALL assessments are "doctored" - in that the actual doctors and assessors are not able to do MOST of the report for $2000. The result is that the clinic administrators are the ones setting up most of the report and then doctors actually write a small portion of the actual report.

Eric G - the $2000 cap is "unworkable" - most of the work is done by the broker because of the limited amount of money available to pay for the report.

Suggestion - FSCO needs to look at this in a more systemic way

Query - what is FSCO's or an arbitrators' responsibility when this issue comes up during a hearing ? - When an arbitrator does encounter this during a hearing then they need to report on it and this will have an effect in the future on whether that company or assessor receives any further business.

EXAMPLE #6 Dr. Zabieliauskas

Thevaranjan and Personal Insurance

Decision Date: 2006-08-24, Decision: Arbitration, Final Decision, FSCO 3438.

> Dr. Zabieliauskas has practised as a physician since 1982 and began specializing in physical medicine in 1989, during which year he took an appointment as a lecturer at the University of Toronto. He is a member of the medical staff at various hospitals and at a rehabilitation facility in Toronto. Dr. Zabieliauskas has experience as a Designated Assessment Centre ("DAC") assessor, and as an assessor with the Workers' Safety and Insurance Board, the Toronto Transit Commission, Air Canada and a nursing home.
>
> On cross-examination, the Applicant's counsel questioned Dr. Zabieliauskas about his professional background and medical practice and attempted to elicit evidence of Dr. Zabieliauskas' bias in favour of insurers in preparing assessments. The Applicant's counsel established that AssessMed principally performed DAC assessments as well as medical evaluations for insurers and employers. The Applicant's counsel questioned Dr. Zabieliauskas about his income from AssessMed. Dr. Zabieliauskas' evidence was that for the last six years he conducted on average four to six assessments per week at an average cost of $1,000 to $2,000 per report. Dr. Zabieliauskas testified that AssessMed pays any expenses associated with the assessments and that he earned approximately $300,000 in 2004 from preparing assessments for AssessMed.
>
> Dr. Zabieliauskas prepared a report dated August 12, 2004 and a brief follow-up report dated February 16, 2006 The latter report primarily commented on Mr. Balaban's August 8, 2005 FCE report. Dr. Zabieliauskas interviewed the Applicant on August 12, 2004 and concluded that the Applicant did not suffer from any objective physical impairments as a result of the accident. On cross-examination, he testified that if a person complains of pain, but displays no clinical or objective signs of pain, then he would conclude that the person is able to return to her pre-accident employment and household tasks. That is, according to Dr. Zabieliauskas, if there are no muscle spasms, limitations of movement, or any objective x-ray findings in the person's medical picture, then the person can return to their pre-accident activities.
>
> The Applicant's counsel questioned the reliability, accuracy and completeness of the findings in Dr. Zabieliauskas' report. A registered nurse conducted the testing of the Applicant's functional abilities. The nurse conducted numerous tests and recorded measurements for cardiovascular fitness, the Applicant's abilities and her performance times for various physical tasks and movements such as the ability to stoop, to lift, to push a cart, to reach, to grasp, to turn, and to walk. The Applicant's counsel questioned Dr. Zabieliauskas about the nurse's training to observe and assess a person's bio-mechanical limitations in performing the assigned functions.
>
> Dr. Zabieliauskas answered, "I don't know. She's an R.N., Sir."
>
> Regarding the background material to and preparation of his reports, Dr. Zabieliauskas stated that he did not have the family doctor's clinical notes and records when he prepared his more comprehensive August 12, 2004 report. Dr. Zabieliauskas testified he read Mr. Balaban's report, but did not recall whether Mr. Balaban commented on the Applicant's bio-mechanical limitations. The Applicant's counsel pointed out that Dr. Zabieliauskas did not produce his written background notes with his reports and questioned the reason for this. Dr. Zabieliauskas responded that he dictated the report from the notes and subsequently destroyed the notes. Dr. Zabieliauskas hastened to add that he developed this policy to avoid being cross-examined about his notes by a "lawyer of your ilk" (referring to the Applicant's counsel) and to avoid being asked to interpret every "squiggle" and "jotting." Rather than be faced with that, Dr. Zabieliauskas stated, his practice is to destroy the notes. Dr. Zabieliauskas agreed that the accuracy of his report cannot be verified by any contemporaneous background notes.
>
> The Applicant's counsel also questioned the accuracy of the testing data outcomes recorded by the nurse and the divergence illustrated between some of the nurse's observations during intake and testing, and her and Dr. Zabieliauskas' written conclusions.

The Applicant cross-examined Dr. Zabieliauskas on various aspects of the findings in the August 12, 2004 report. The report stated that the Applicant was inconsistent on 38% of the tests performed which would mean a consistency rate of 62%. Dr. Zabieliauskas concluded that in 9 of the 24 tests administered, the Applicant's performance exceeded standard consistency rates. The Applicant's counsel questioned Dr. Zabieliauskas' oral evidence that the person's performance must meet the standard of being consistent in about 75% to 80% of the tests, or conversely, have an inconsistency rate of no higher than 20 to 25%. On questioning, Dr. Zabieliauskas conceded that the consistency/inconsistency standard is mentioned nowhere in his report or its appendix. He went on to say, without being specific, that the standard is contained somewhere "in the literature."

The Applicant's counsel also challenged the 38% inconsistency rate recorded by the nurse and relied upon by Dr. Zabieliauskas. AssessMed uses certain measures purported to be standardized for functional testing. The tests use universal characteristics of work ("Methods-Time Measurement") such as grip, turn, move, walk and stoop, etc. The tests then compare the performance of the person being tested to an Industrial Standard, or the time it takes the average worker with average skill and judgement to perform a task over an 8 hour day, with appropriate rest periods and without undue fatigue or stress. The tests also purport to contain a measure ("Coefficient of Variance") that discriminates between average and poor effort and measures the variation in the times it takes a person to do the same task several times. If there is too much variation in the times, the person's performance will be found to be too inconsistent. The Applicant's counsel reviewed the scores on some tasks and, using the AssessMed assessment tools, pointed out that AssessMed had miscalculated the Applicant's rate of inconsistency. That is, rather than a 38% inconsistency rate, it ought to have been calculated at 12.5% (a score well below the 20 to 25% rates to which Dr. Zabieliauskas referred) with only 3 of the 24 test scores reflecting inconsistency, rather than 9 out of 24, as stated in the report. The Applicant's counsel pointed out that Dr. Zabieliauskas erred by using a 10% Coefficient of Variance rather than 15% and this error resulted in the incorrect 38% inconsistency rate.

I found Dr. Zabieliauskas was unable, to my satisfaction, to refute the Applicant's interpretation of the Applicant's performance data and to coherently explain the basis of the AssessMed scores. When responding to the Applicant's counsel's questions about the 10% rate versus the 15% rate, Dr. Zabieliauskas asserted that the Applicant's counsel was "looking at numbers that are not that important." I find this response unacceptable since AssessMed's assessment of the Applicant's abilities was based on these very scores.

I also found troublesome AssessMed's treatment of the signs of pain displayed by the Applicant during the assessment. The nurse recorded that during testing and intake, the Applicant frequently squirmed in her chair and frequently changed her position in her chair.

Dr. Zabieliauskas acknowledged that those behaviours could be legitimate expressions of pain and that the nurse failed to repeat those observations in the narrative portion of her report. Nor does Dr. Zabieliauskas' report mention those behaviours, because according to his evidence, he made no such observation during his assessment. Counsel for the Applicant pointed out that Dr. Zabieliauskas noted in his report that the Applicant "showed no overt signs of discomfort" while also stating that she held her neck during the assessment. Dr. Zabieliauskas conceded that the neck holding behaviour could also be a genuine and objective sign of pain and discomfort. He conceded on questioning that access to his background notes might have been of assistance in clarifying this area of evidence.

I note throughout each day of the hearing, whether she was testifying or not, the Applicant regularly squirmed and changed positions in her seat, stood up for periods of time, grimaced and rubbed her right shoulder and neck.

Overall, I found Dr. Zabieliauskas' evidence of little value in determining the Applicant's entitlement to accident benefits. He did not appear to be balanced and objective in his assessment of the Applicant. I also find he displayed a lack of understanding of the assessment tools used by the nurse to arrive at her conclusions, and upon which he relied to find the Applicant capable of returning to her pre-accident activities. He had no knowledge of whether the nurse who conducted the testing had the appropriate training to conduct an assessment. I found Dr. Zabieliauskas, on many occasions throughout his testimony, to be uncooperative, sarcastic and flippant, which in my view further devalued his evidence.