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Civil Rules Committee
Court of Appeal for Ontario
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September 5, 2017

To the attention of the Civil Rules Committee,

I am writing on behalf of Ontario's auto insurance claimants whose personal injury cases are heard in Ontario's courts. FAIR is a grassroots not-for-profit organization of MVA (Motor Vehicle Accident) victims who have been injured in motor vehicle collisions and their supporters.

Ontario's car accident victims continue to have their right to justice undermined by the failure of our courts to provide clarity in respect to Rule 4.1.01 (1) and the use of medical experts in personal injury cases. We are aware of an earlier submission by a member of the public on this issue and we would build on that foundation. *(1)*

There should be alarm at the state of Ontario's civil justice system when Justice Frederick Myers in Mandel v Fakhim *(2)* wrote ***"While jury trials in civil cases seem to exist in Ontario solely to keep damages awards low in the interest of insurance companies, rather than to facilitate injured parties being judged by their peers, the fact is that the jury system is still the law of the land."*** It isn't speculation to assume that juries are influenced by the expert testimony that they hear in their capacity or that the Form 53.03 that experts must sign to attest to their competence and impartiality isn't working.

Justice MacLeod-Beliveau in Daggitt v Campbell *(3)* stated ***"The recent changes to the Rules to require experts to undertake to the court to be fair, objective, and non-partisan has done little if anything to curb the use of certain favoured biased "hired guns" by the parties. The consequences of an expert signing the undertaking and failing to honour their obligation in their expert report or evidence is simply the rebuke of the court. This does nothing to prevent that same expert from being further retained and repeating the process over again in other trials as long as trial counsel are willing to retain them."***

Why aren't the lawyers, who knowingly participate in bringing in the flawed expert opinions and evidence into Ontario's courts, held to account for undermining the administration of justice?

Why are Ontario's medical experts, who have been the subject of repeated adverse judicial commentary *(4)* due to partisanship or shoddy assessment reports and testimony, being given a free pass? Shouldn't the experts who don't comply with the rules of the court be permanently barred from participating in the justice system? Where are the consequences for the expert who misleads the courts?

It's become obvious that the medical evidence used in our courts is of such poor quality that justice is routinely being subverted to favour the party that can best afford to manipulate the evidence. Recent exposure in the media underscores how profitable it has become for Ontario's experts to ignore the court's rules when there are no consequences for having done so. *(5)*

The Civil Rules Committee should not ignore the over 58,000 auto insurance related cases on the court docket in 2016. *(6)* The number of cases is evidence that insurers are using our courts as a tool to increase profits with the use of partisan experts that they hope the judges will not spot in time to head off the negative impact on a case before the court. Insurers are counting on the judges in Ontario to underperform as gatekeepers for experts, and if it doesn't work one day, it will the next, because the expert comes in clean each and every time without a mechanism to block those who disrespect the court.

It appears clear to Justice MacLeod-Beliveau in Kushnir v Macari *(7)* that justice is being undermined when she states ***"If the parties cannot rely on the reports being actually written by the author of the report, it attacks the very foundation and purpose of the expert report in the first place, and frankly wreaks havoc with the litigation process. If reports cannot be relied upon, unnecessary litigation is promoted."*** Acceptance of the insurer expert by our courts means the entire claims system is being undermined before plaintiffs even get to court and medical file manipulation is now the 'norm' for insurers and their 'hired gun' assessors who act with impunity.

Through Justice Paul B. Kane in Bruff-Murphy v Gunawardena *(8)* the public gets a indication of the frustration of the court with the poor quality of the experts who testify when he stated that ***"I will not qualify witnesses as experts in the future whose reports present an approach similar to that of Dr. Bail"***. By then, the damage was already done in front of a jury.

The gatekeeping role becomes ever murkier when considering the Bruff-Murphy case because there it is evident that a judge's failure to disqualify an expert prior to trial can have serious implications, not just for a particular plaintiff but also to public confidence in the system. It isn't enough that the plaintiff gets a new trial after finding on appeal *(9)* that ***"a focus on the inability to measure the precise prejudice caused by the testimony misses the point entirely, which is that there has been a miscarriage of justice in this case. This court has a responsibility to protect the integrity of the justice system. This is not a "no harm, no foul" situation. No doubt, another trial will be costly and time consuming, but it is necessary because the defence proffered the evidence of a wholly unsuitable expert witness."*** In this instance the trial judge's failure directly affected the outcome and it calls into question whether justice has been thwarted in the many other cases in which this expert has also testified.

An already ambiguous situation is made even more confusing when in the more recent Sharma v Stewart case *(10)* the victim is penalized financially for having ***"unnecessarily lengthened the trial time"*** by pointing out that other Ontario justices have made adverse comments about an expert during cross-examination in that case. Does the court not trust the words of Ontario's judges who have taken the time to express their concern about a particular expert in their decisions?

It is unclear as to when is the proper time to qualify an expert when a disreputable expert cannot be cross-examined on prior adverse comments during the course of a trial when indeed, bias or incompetence may not be apparent until that expert is testifying as has happened in the most recent case. The point is that Ontario judges in these instances appear to be unsure of their role as gatekeeper for the experts they allow to testify. Ontario judges must be ever vigilant to watch for and prevent these experts from besmirching the reputation of the courts. The 'expert' is carried along by the insurers insatiable drive to bolster their profits while bogging down the courts with their cases involving questionable evidence when justice delayed is a profit-maker for them. If judges don't heed their counterpart's warnings about particular experts in order to disqualify them, there truly is no means to prevent 'experts' from the perpetual wash, rinse, repeat that leads to flawed testimony in other cases.

It cannot be that there is no remedy when the existence of Rule 41.0.1(1) itself is the result of the Justice Goudge Inquiry into the Charles Smith case. The failings of the court system as stated by Justice Goudge are clear in respect to bias and it's clear in Rule 4.1.01(1) that partisan evidence should not be tolerated. Challenging the 'experts' matters and now that the system is awash with wrongfully denied car accident claims, what prior judges have said and the history of the expert also matters. It is impossible to establish bias without history.

The susceptibility and danger of the courts in accepting the expert without question as being qualified and non-partisan is no different in the personal injury context than in the criminal system. While the Smith case involved alleged criminal acts, the many thousands of personal injury plaintiffs that go through the court's doors every year have equally obnoxious results when the outcome of these cases that hinge on the experts testimony and reports adversely affects the quality of life for very seriously injured car accident victims. Judges shouldn't underestimate the value to insurers looking to save claim dollars because insurers are not missing out while judges who do see the abuse are powerless. 4.1.01(1) is silent on consequences for the expert who falls below the standard or is dishonest in their intent and that must be remedied.

We are aware that each case is heard on its own merits but if the evidence proffered by a particular expert is meritless, useless or of such poor quality, or even forged, what safeguard is in place to protect plaintiffs who risk everything to rely on the court for justice? Are we to believe that a Justice who comments on the quality of the medico-legal expert's testimony is doing so in decisions without the expectation that other judges will read and consider what they have said? Are we to look forward to appeals bottlenecking our courts as trial fairness is irreparably compromised while the experts are emboldened by the lack of action by the courts?

Action must be taken to prevent the subversion of justice through experts manipulating and profiting from our court inaction while undermining justice. One need look no further than the Platnick v Bent decision *(11)* to see how far insurer experts will go to preserve their income garnered through their role as experts in our courts.

Ontario's insurers will spend hundreds of millions of dollars every year hiring their experts who are more than willing use the inaction of our courts to bolster their income is articulated in David Marshall's Fair Benefits, Fairly Delivered report *(12)* prepared for the Minister of Finance in 2017. Mr. Marshall points out the cost of legal representation for accident victims is excessive because of the medical evidence and comments ***"What is perhaps even worse is that the usefulness of the medical opinions is questionable. In his final report, Justice Cunningham puts it this way: "Today's insurer examination (IE) reports appear to have little credibility with claimants and only service to trigger disputes. … IE assessors are not accountable to FSCO, have no standard assessment protocols, report formats or timelines and are not insulated from outside influence."*** These are the same medical reports and evidence placed in front of judges and juries in tort cases. They are the fuel of the auto insurers' denial system that has led to so many accident victims ending up in court and then being downloaded onto our public support systems. Ultimately the car accident victim must live with the injustice and inability to properly care for themselves financially and medically while the medical 'expert' simply moves on to the next case, the next trial and more profit.

The insurers and their legal representatives are obviously unafraid of any consequences when they parade the partisan 'expert' in front of the court. The experts themselves have no fear since they are self-regulated at their Colleges and are rarely sanctioned in any meaningful way when they harm innocent accident victims. It's clear to victims that it is only they who are expected to be truthful in their duty to the court while the behavior of the insurer 'hired gun' medical expert is given the free pass to cause harm over and over again.

What will you do to restore confidence in our justice system when the proliferation of "hired gun" experts tainting cases continues to worsen despite the Form 53.03 promise to be impartial? Will the Committee help judges improve their gatekeeping of experts by setting out the appropriate time to allow lawyers to challenge medico-legal experts with prior judicial warnings of bias and unacceptable testimony?

Shouldn't the Committee correct the belief that seeking to adduce prior judicial rebukes for bias is a waste of the court's time and establish that this is something that deserves punishment in the form of costs and make an effort to block the future testimony of the unacceptable expert? Not doing so has made the Ontario Civil Justice system a place where juries are misled and an unsafe place for vulnerable litigants while it has become a reliable and very profitable adventure for insurers and their medical experts.

What will the Civil Rules Committee do to ensure that justice exists in our courts and that a price will be paid by those who flaunt the rules such as 4.1.01(1)? I look forward to your response.

Sincerely,
Rhona DesRoches
FAIR, Board Chair

(1) Letter from a member of the public
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. http://www.fairassociation.ca/wp-content/uploads/2017/01/Submission-from-concerned-citizen-to-Ontario-Civil-Justice-Rules-Committee-regarding-prior-adverse-judicial-commments.pdf

(2) Mandel v Fakhim, 2016 ONSC 6538 (CanLII), http://canlii.ca/t/gv6pd
[9] While jury trials in civil cases seem to exist in Ontario solely to keep damages awards low in the interest of insurance companies, rather than to facilitate injured parties being judged by their peers, the fact is that the jury system is still the law of the land. This jury has spoken and did so loud and clear. If I find that the plaintiff has proven that he met the threshold, I would not only be making findings of law, but I necessarily would have to disagree with the findings of fact that are implicit in the jury's decision. Yet I told the jury an obnoxious number of times in my charge that they, and only they, were the judges of the facts of the case. I told them that their community had called upon them to take 12 days out of their lives so that they could make findings that only they can make in an act of central importance to our democratic traditions. How can I legitimately now consider whether I find facts that the jury rejected?

[10] What does it say about what I told the jury and about the legitimacy of the jury's role, if the judge may not only ignore their findings, but may make binding pronouncements that fly in the face of the jury's findings? Facts cannot exist and not exist at the same time. The plaintiff's injuries exist or they do not; they were caused by the motor vehicle collision or they were not. I am being invited to find that facts were proven at trial when the jury has already found that those facts were not proven. I cannot do that without undermining the role of the jury as the exclusive finders of fact. I cannot do that without making portions of the standard civil charge to the jury untrue. If a judge can find facts that are inconsistent with the jury's findings and that have legal effect, what justification is there to summon people away from their lives to compel them to attend court? I am already being paid to do the same job anyway.

(3) Daggitt v Campbell, 2016 ONSC 2742 (CanLII), <http://canlii.ca/t/gpqm3
[27] When an expert and that expert's report is notably partisan, acts as judge and jury, advocates for the insurer rather than being impartial, is not credible, and fails to honour the undertaking to the court to be fair, objective, and non-partisan, it directly affects a party's right to a fair trial.

[30] The recent changes to the *Rules* to require experts to undertake to the court to be fair, objective, and non-partisan has done little if anything to curb the use of certain favoured biased "hired guns" by the parties. The consequences of an expert signing the undertaking and failing to honour their obligation in their expert report or evidence is simply the rebuke of the court. This does nothing to prevent that same expert from being further retained and repeating the process over again in other trials as long as trial counsel are willing to retain them.

(4) http://www.fairassociation.ca/ime-providers-adverse-comments/

(5) http://nationalpost.com/news/hired-gun-in-a-lab-coat-how-medical-experts-help-car-insurers-fight-accident-claims

(6) Statistics Canada Number of Motor Vehicle related cases (2015 – 2016) 58,232 CANSIM Table 259-0013 http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2590013&tabMode=dataTable&p1=-1&p2=9&srchLan=-1

(7) Kushnir v Macari, 2017 ONSC 307 (CanLII), <http://canlii.ca/t/gx9g6
[30] The case goes on to highlight that ghost written reports are becoming a problem at para 13. Incredibly, an expert admitted at trial that much of her report was actually written by someone else. Another expert improperly expressed an opinion on credibility. Master MacLeod stated that, "Suffice to say that there is merit to the argument that greater rigour and predictability concerning the role and use of experts might save time at trial and promote settlements".

[31] The issue of who actually wrote the report is of particular concern to the litigation bar as many cases are resolved prior to trial on the basis of the expert reports received which form the basis of counsel's assessment of the case and subsequent offers to settle. The parties pay substantial fees to experts for their reports and they have a right to expect those reports to be written by the author of the report. If the parties cannot rely on the reports being actually written by the author of the report, it attacks the very foundation and purpose of the expert report in the first place, and frankly wreaks havoc with the litigation process. If reports cannot be relied upon, unnecessary litigation is promoted.

[32] The parties, counsel and the court rely on the expertise of the stated author and the opinion stated in an expert's report. Many cases resolve after the delivery and exchange of expert reports, without the test of the opinion in court through examination-in-chief and cross-examination. If the parties cannot rely on the fact that the report is the sole work of its author, then the benefit and cost of expert reports is dubious.

[33] There are now examples of cases that have gone to trial where ghost writing has occurred and the expert has testified that part of their report was in fact written by someone else, which fact was never previously disclosed. See Lavecchia v. McGinn at paras. 12-13 referring to El-Khodr v. Lackie; and Children's Aid Society of London and Middlesex v. B. (C.D.) [2013] ONSC 2858 (S.C.J.) at para 40.

[34] The real danger is what about the cases that were settled based on the expert's opinion as stated in the report without ever going to trial? The parties, counsel or the court at a pre-trial would never know if it was solely written by the author of the report or not. Sadly, because of a few rogue experts who have admitted to using ghost writing when they were cross-examined at trial or in a voir dire as to their expert qualifications, the issue has become serious enough that the litigation bar is now requiring that it be put into conditions of these assessments. While many examinations proceed on consent as in Rule 33.08, the terms of the consent are often supported by previous court ordered conditions for these examinations that the bar has adopted into their consents.

(8) Bruff-Murphy v Gunawardena, 2016 ONSC 7 (CanLII), <http://canlii.ca/t/gmr5x see para 53 - 125
[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.

(9) Bruff-Murphy v. Gunawardena, 2017 ONCA 502 (CanLII), <http://canlii.ca/t/h4c7f
[6] In addition, the trial judge's concerns about the expert's testimony were substantially correct; the witness crossed the boundary of acceptable conduct and descended into the fray as a partisan advocate. In these circumstances, the trial judge was required to fulfill his ongoing gatekeeper function and exclude in whole or in part the expert's unacceptable testimony. Instead, the trial judge did nothing, resulting in trial fairness being irreparably compromised.

[68] The point is that the trial judge was not powerless and should have taken action. The dangers of admitting expert evidence suggest a need for a trial judge to exercise prudence in excluding the testimony of an expert who lacks impartiality before those dangers manifest.

[72] It is impossible to gauge with any certainty the impact of Dr. Bail's testimony. The fact that he was one of only two witnesses to testify for the defence suggests that his testimony may well have been an important factor in the jury's analysis of the case. In any event, a focus on the inability to measure the precise prejudice caused by the testimony misses the point entirely, which is that there has been a miscarriage of justice in this case. This court has a responsibility to protect the integrity of the justice system. This is not a "no harm, no foul" situation. No doubt, another trial will be costly and time consuming, but it is necessary because the defence proffered the evidence of a wholly unsuitable expert witness.

(10) Sharma v Stewart, 2017 ONSC 4333 (CanLII), <http://canlii.ca/t/h50xw
[31] Second, there was the fact that Plaintiff's counsel sought to cross-examine Dr. Rezneck on findings made about his reports in previous cases. I ruled that cross-examining an expert about judicial findings in previous cases where that expert had testified was not within the scope of proper cross-examination. The argument on this ruling, and the consideration of the cases that counsel for the Plaintiff filed consumed a couple of hours of court time. Raising this issue unnecessarily lengthened the trial time, and it should also be considered in a minor way in assessing the costs.

(11) Platnick v Bent, 2016 ONSC 7340 (CanLII), <http://canlii.ca/t/gvx6g
[68] The independence of experts is an issue of considerable importance to the administration of justice generally and to the administration of the Dispute Resolution System implemented as part of Ontario's no-fault accident benefits scheme in particular. Lessening the prevalence of the partisan "hired gun" expert and moving closer to the ideal of the non-partisan "amicus curiae" expert is a matter is of great importance to the administration of justice in Ontario and thus a matter of considerable public importance.

(12) Fair Benefits, Fairly Delivered report http://www.fin.gov.on.ca/en/autoinsurance/fair-benefits.pdf see pages 34-37
Based on 2013 expenses, in the no-fault accident benefits system, out of about $1.9 billion in benefit payments by insurance companies, about $440 million, more than one dollar out of every four is not received by the accident victim in benefits; that is, $340 million is going to pay for competing medical opinions because insurers and claimants – or their lawyers – disagree on what is appropriate medical care, and another $100 million is going to lawyers' contingency fees. And this is in a no-fault system which is intended to eliminate disputes over fault.

In the tort or bodily injury part of the system the diversion of costs is proportionally higher. Out of about $1.5 billion in benefit settlement payments made by insurance companies, $430 million or almost one dollar out of every three is not going to accident victims; that is, $373 million dollars is going to pay lawyers contingency fees to fight with insurance companies and a further $57 million is going to pay for more medical and other experts to support accident victims claims against the insurance companies.

When you add in the costs incurred by the insurance companies to manage and defend claims in the dispute resolution and the tort systems, a further cost of almost $500 million is added to the overall costs which contribute to higher premiums but do not reach the accident victim.

Overall, out of total claim costs of about $4 billion in benefits, about $1.4 billion or some 35 per cent of the benefits costs are not going to accident victims. In my opinion, this is undermining the ntegrity of the system.

Commenting on his review of the dispute resolution system, Justice Cunningham said "The whole notion of getting benefits to deserving claimants quickly and inexpensively had been lost."[14]

Medical exams and assessments

A major element of delay and extra cost is caused by the inability of parties to agree on an appropriate diagnosis and treatment of the injury.

In the no-fault system, despite the fact that the majority of injuries are relatively routine and common, a major element of delay and extra cost is caused by the inability of parties to agree on an appropriate diagnosis and treatment of the injury. As a result, many thousands of expensive medical examinations are ordered by insurers and claimants in an effort to resolve this matter. Claimants frequently have to attend more than one insurer examination. The average total cost of examinations for each of the 30,000 to 35,000 claimants is approximately $9,000 for the life of the claim.[15] The aggregate cost of these insurer medical exams is huge. In the no-fault accident benefits system, the table in Appendix III shows that they grew from $248 million in 2004 to $847 million in 2010; then in response to a cap on the cost per medical opinion and other changes, they came down to $282 million in 2012 and has grown again to $347 million in 2013. The equivalent average annual cost of medical opinions in the whole of the Ontario Workplace Safety and Insurance Board system was just $30 million in treating 170,000 injured workers.[16]

These medical opinion expenses in the Ontario auto system which in 2013 amounted to over 20 per cent of money spent on actual medical treatment costs do not go to medical care for the individual. What is perhaps even worse is that the usefulness of the medical opinions is questionable. In his final report, Justice Cunningham puts it this way:
"Today's insurer examination (IE) reports appear to have little credibility with claimants and only service to trigger disputes. … IE assessors are not accountable to FSCO, have no standard assessment protocols, report formats or timelines and are not insulated from outside influence."