Upton, Adrian Richard Mainwaring, Neurologist

J.T. v A.R.M.U., 2017 CanLII 31113 (ON HPARB), <http://canlii.ca/t/h3x8q

I. DECISION

1. It is the decision of the Health Professions Appeal and Review Board to return the decision to the Inquiries, Complaints and Reports Committee of the College of Physicians and Surgeons of Ontario, and to require it to undertake further investigation and to thereafter render a new decision.

2. This decision arises from a request made to the Health Professions Appeal and Review Board (the Board) by J.T. (the Applicant) to review a decision of the Inquiries, Complaints and Reports Committee (the Committee) of the College of Physicians and Surgeons of Ontario (the College). The decision concerned a complaint regarding the conduct and actions of A.R.M.U., MD (the Respondent). The Committee investigated the complaint and decided to take no further action.

II. BACKGROUND

3. The Applicant was involved in a motor vehicle accident (MVA) on April 27, 2010. The Applicant brought a civil action against the driver of the other vehicle involved (the Defendant).

4. In October 2014, the Respondent, a neurologist, was retained by the lawyers for the Defendant's insurance company to provide an independent medical opinion (IME) regarding the Applicant.

5. The Respondent conducted a paper review of the records provided by the insurer. He prepared two reports, the first dated April 22, 2015, (the Report) and a brief follow up report dated August 24, 2015.

6. It is the circumstances surrounding the preparation of, and the content of the reports that gave rise to the Applicant's complaint.

The Complaint and the Response

7. The Applicant wrote to the College on October 8, 2015. He complained that the Respondent:

> 1) failed to comply with section 1ii) of the College's policy on Third Party Reports (#2-12), when he failed to obtain the Applicant's consent to conduct the IME and issue two reports.
>
> 2) failed to comply with section 2i) of the College's policy on Third Party Reports (#2-12), when he failed to ensure that his report was comprehensive, contained accurate information, and was written in an objective manner.
>
> 3) failed to comply with section 2ii) of the College's policy on Third Party Reports (#2-12), when he failed to provide his report and opinion in a clear manner, including an outline for the basis of the opinion, and the information which he relied on in forming it.

> 4) failed to comply with section 2iii) of the CPSO's Third Party Policy when he provided an opinion which required access to information he did not have.

8. In a subsequent letter to the College dated October 28, 2015, the Applicant added a further complaint issue, that the Respondent:

> 5) committed an act of professional misconduct contrary to section 18 of Ontario Regulation 856/93, when he certified the "Acknowledgement of Expert's Duty" that he would provide opinion evidence that is fair, objective and non-partisan when he knew or ought to have known that his two reports dated April 22, 2015, and August 24, 2015, are neither fair nor objective.

24. The essence of the Applicant's complaint was that the Respondent violated College policy in that his reports lacked comprehensiveness, objectivity, clarity of reasoning and accuracy. The Board observes that in supporting his position in his letter of complaint, the Applicant clearly identifies the source of, and cites specific passages from many of the same documents used by the Respondent in the preparation of his reports. For example, in challenging one aspect of the Report's accuracy, the Applicant wrote:

> ... in his April 22, 2015 report [the Respondent] inaccurately states that *"The Grove Memorial Hospital notes do not indicate any head injury or concussion";* and in his August 24, 2015 report [the Respondent] inaccurately states: *"Previous documents showed no evidence of concussion."*
>
> When in fact, as [the Respondent] knows or ought to know, the Groves Memorial Community Hospital *"Emergency/Outpatient Record"* clearly identifies a *"Discharge Diagnosis"* of:
>
> *"(1) whiplash injury*
> *(2) mild concussion*
> *(3) Tinnitus ? "2 °to air bag"*

25. As demonstrated by the example above, the Board is of the view that the new information provided by the Applicant's Facilitator provides a degree of support for the Applicant's concerns regarding the accuracy of some aspects of the Respondent's report. Further, the Board notes that the new information bears directly on the disputed issue of the Applicant's diagnosis of concussion, and is hence of high relevance to the complaint concern.

Tanner and Allstate

Decision Date: **1998-05-20 Arbitration, FSCO 3385 https://www5.fsco.gov.on.ca/AD/3385**

Dr. Weber also reviews the medical documentation forwarded for his review. He describes a SPECT scan from 1993 which was reported as abnormal "and some of the findings could be residual from trauma." He reviews briefly three neuropsychological reports which found brain injury caused by the accident. He reviews, in detail, a neuropsychological assessment by Dr. Frank Kenny in 1993, of which he was highly critical. Dr. Weber's comments with respect to this report are almost four single-spaced pages in length. Dr. Kenny's report was not filed for this motion. Dr. Weber is also critical of the report of Dr. **Adrian Upton**, a fellow neurologist, whose initial report and two updates were filed by Allstate.

In his report, Dr. **Upton** does *not* discuss the severe headaches Mr. Tanner lists as his number one complaint since the accident. Dr. **Upton** simply records this as Mr. Tanner's main complaint, then never mentions it again. It would appear that Dr. **Upton** does not accept that Mr. Tanner experiences severe headaches, at all, let alone as a result of the accident. I find this implausible.

L.C. and Pafco

Decision Date: **2002-05-30 Arbitration, Final Decision, appeal rendered, FSCO 1770**. https://www5.fsco.gov.on.ca/AD/1770

Dr. **Upton** was aware that Dr. Zamora had diagnosed chronic pain syndrome and major depression but observed that, in his opinion, "a possible diagnosis of conscious amplification should have been considered." Dr. **Upton** was also aware that Dr. Zamora had recommended a series of neurological assessments but he did not arrange to have these carried out. Rather, he stated: "I do not have any documentation of any head injury or unconsciousness. Dr. Howell states that Mr. C did not strike any part of the car in the accident of August 18, 1993." Under the heading further treatment, Dr. **Upton** concluded:

> In my opinion, the 'diagnosis' of 'fibromyalgia' cannot be proven or disproven. In my opinion the degree of amplification masks any real symptoms or problems. In my opinion continued acceptance of his account of his complaints will encourage his continued behaviour and amplification.
>
> I was unable to detect any residual neurological effects of his accident of August 18, 1993. I was unable to identify any organic problems that require treatment.
>
> In my opinion he should be encouraged to normalise his life and he should return to his music studies. In my opinion there is no physical impediment for recovery. [See note 36 below.]

* * * * * * * * * *

Note 36: Exhibit 8, Medicals, Tab 13.

* * * * * * * * * *

Pafco's decision to terminate Mr. C's section 13 benefits on January 23, 1996 appears to have been primarily based on the result of Dr. **Upton**'s assessment in December 1995. Mr. C was not assessed again on Pafco's behalf until September 1999.

[]

***Chronic pain syndrome and depression**:*

In my view, the preponderance of the medical evidence supports a finding that Mr. C developed and continues to suffer from a chronic pain syndrome and depression as a result of the motor vehicle accident of August 18, 1993. This was the diagnosis given by Dr. Schaman in June 1994 (repeated in July 1998), by Dr. Howell in October 1994 and by Dr. Zamora in May 1995. It is also a diagnosis which is consistent with Dr. Adler's notes, Dr. Smythe's reports in 1999-2001 and Dr. Chong's report in May 2001. In my view, this diagnosis can even be reconciled with Dr. Ross's opinion, as explained below. It cannot, however, be reconciled with Dr. **Upton**'s opinion which I, therefore, reject as being contrary to the preponderance of the medical evidence.

***Fibromyalgia**:*

In my view, the preponderance of the medical evidence does not support a finding that Mr. C developed fibromyalgia as a result of the motor vehicle accident of August 18, 1993. Dr. Mewa refused to make a definitive

diagnosis of fibromyalgia as did Dr. **Upton**. Dr. Smythe stated that the criteria for fibromyalgia were not met. I acknowledge Dr. Schaman's opinion that these criteria had "probably" been met but, on weighing the available medical opinion, I find that a diagnosis of fibromyalgia has not been established in this case.

Closed head injury:

Since the neurological assessments recommended by Dr. Zamora were never carried out, his concern about a possible closed head injury is not resolved by the evidence before me. Dr. **Upton**'s opinion on this point is of little value because it is based on the assumptions that Mr. C did not strike his head in the accident or experience any unconsciousness at the scene. The hospital records (which Dr. **Upton** did not receive) do not support these assumptions. Had Dr. Adler received a copy of Dr. Zamora's report, she may have ordered the neurological assessments he recommended. However, for reasons not disclosed by the evidence, it appears that she did not receive Dr. Zamora's report. As a result, Dr. Zamora's concern about a closed head injury remained just that, a concern. This does not establish, on the balance of probabilities, that Mr. C suffered a closed head injury in the accident.

Shadd and Liberty Mutual

Decision Date: **2001-11-28 Arbitration, Final Decision, appeal rendered, FSCO 3093**. https://www5.fsco.gov.on.ca/AD/3093

The report of Dr. **Adrian Upton**, a neurologist who examined Mrs. Shadd for Liberty in June 1997, contrasts with these four opinions. Dr. **Upton** stated that Mrs. Shadd= s problems are exaggerated emotional responses to her physical injuries.

Dr. **Upton** interviewed Mrs. Shadd and reviewed other health experts = reports, but he did not conduct extensive cognitive testing. Consequently, I give his opinion little weight. [See note 14 below.]

* * * * * * * * * * *

Note 14: Mrs. Shadd objected to the introduction of Dr. **Upton** = s report, arguing it violates the A deemed undertaking @ rule. Mrs. Shadd agrees that Dr. **Upton** = s report is relevant to the issues here, but she argues that it was prepared for defence to her tort claim, and should not be admitted in this proceeding without leave of the Court.

Liberty argues that it did not receive notice of Mrs. Shadd = s objection to Dr. **Upton** = s report until immediately before the hearing. The company submitted it would require an adjournment if Dr. **Upton** = s report was not admitted in order to prepare its case.

I find that Mrs. Shadd did not give Liberty notice of her objection to Dr. **Upton**= s report until the time of the hearing, and therefore cannot rely on the A deemed undertaking @ rule as a basis to object to the introduction of Dr. **Upton** = s report. I admit Dr. **Upton** = s report into evidence.