Dr. Monte Bail – Psychiatrist

https://doctors.cpso.on.ca/DoctorDetails/Monte---Howell-Bail/0041055-55031

Concerns

Source: Compliance and Monitoring Department

Active Date: November 12, 2018

Expiry Date:

Summary:

Caution-in-Person:

A summary of a decision of the Inquiries, Complaints and Reports Committee in which the disposition includes a "caution-in-person" is required by the College by-laws to be posted on the register, along with a note if the decision has been appealed. A “caution-in-person” disposition requires the physician to attend at the College and be verbally cautioned by a panel of the Committee. The summary will be removed from the register if the decision is overturned on appeal or review. Note that this requirement only applies to decisions arising out of a complaint dated on or after January 1, 2015 or if there was no complaint, the first appointment of investigators dated on or after January 1, 2015.

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SUMMARY DR. MONTE HOWELL BAIL (CPSO# 55031)

1. Disposition On November 12, 2018, the Inquiries, Complaints and Reports Committee (the Committee) required psychiatrist Dr. Bail to appear before a panel of the Committee to be cautioned with respect to his failure to meet professional and ethical obligations as a court-appointed expert. The Committee also requested that Dr. Bail submit a written report to the College, approximately 2-4 pages in length, with respect to impartiality, fairness, and balance in psychiatric assessments for any party.

2. Introduction The College received information raising concerns about Dr. Bail’s impartiality as an expert witness in court and regarding the fairness and balance of his independent medical evaluations

(IME). Subsequently, the Committee approved the Registrar's appointment of investigators to review Dr. Bail's practice. Dr. Bail expressed regret that he has been seen as an advocate in the courts. He maintained he never intended to act as "judge and jury" [with respect to the individuals he evaluated].

3. Committee Process A Mental Health Panel of the Committee, consisting of public and physician members, met to review the relevant records and documents related to the complaint. The Committee always has before it applicable legislation and regulations, along with policies that the College has developed, which reflect the College's professional expectations for physicians practising in Ontario. Current versions of these documents are available on the College's website at www.cpso.on.ca, under the heading "Policies & Publications."

4. Committee's Analysis The Committee reviewed several judgments from court cases in which Dr. Bail had either served as an expert witness or had been proposed as an expert. Commentary by judges in the judgments reviewed raised significant concerns about Dr. Bail's bias on behalf of the insurance companies who retained him to conduct IMEs and then testify in court. The Committee also reviewed an IME report by Dr. Bail that was notable for its advocacy of the insurance company, and neither fair nor balanced.

The Committee was troubled that Dr. Bail had abandoned the principles set out in the College's policies, Medical Expert: Reports and Testimony and Third Party Reports. These policies make very clear that when providing expert opinions, physicians must embody the principles of trustworthiness, altruism and service that guide the medical profession, and uphold the reputation of the profession by acting with the same high level of integrity and professionalism as they would when delivering health care. The cases the Committee reviewed clearly showed that Dr. Bail's testimony and expert opinions did not embody the above principles.

The level of the Committee's concern about Dr. Bail's actions was so significant that the panel considered referring this matter to the College's Discipline Committee. In his role as a sworn expert witness, Dr. Bail was not only a member of this College but also an officer of the court. As such, his duty was to the court, not to the party who retained him. Yet, this was clearly not the impression of the justices who found Dr. Bail's testimony and reports so troubling. The Committee is aware that it is unusual for the court to make the kinds of comments about expert witnesses that were made about Dr. Bail. That Dr. Bail has been the subject of such commentary and disapprobation is most concerning. His

behaviour, in testifying in so biased a manner and in providing such clearly biased IME reports, was unacceptable.

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Bruff-Murphy v. Gunawardena, 2017 ONCA 502 (CanLII), <https://canlii.ca/t/h4c7f

Hourigan J.A.:

A. INTRODUCTION

[1] The law regarding expert witnesses has evolved considerably over the last 20 years. Gone are the days when an expert served as a hired gun or advocate for the party that retained her. Today, expert witnesses are required to be independent, and their function is to provide the trier of fact with expert opinion evidence that is fair, objective and non-partisan.

[2] The role of the trial judge in relation to expert witnesses has also evolved. Appellate courts have repeatedly instructed trial judges that they serve as gatekeepers when it comes to the admissibility of expert opinion evidence. They are required to carefully scrutinize, among other things, an expert witness's training and professional experience, along with the necessity of their testimony in assisting the trier of fact, before the expert is qualified to give evidence in our courts. This gatekeeper role is especially important in cases, such as this one, where there is a jury who may inappropriately defer to the expert's opinion rather than evaluate the expert evidence on their own.

[3] In the present case, the trial judge qualified an expert to testify on behalf of the defence despite some very serious reservations about the expert's methodology and independence. It became apparent to the trial judge during the expert's testimony that he crossed the line from an objective witness to an advocate for the defence. Despite his concerns, the trial judge did nothing to exclude the opinion evidence or alert the jury about the problems with the expert's testimony.

[4] On appeal, the appellants advance several arguments to the effect that trial fairness was breached, such that a new trial is necessitated. All of these arguments focus on the impugned expert.

[5] In my view, the appeal must be allowed and a new trial ordered. I reach this conclusion because the trial judge failed to properly discharge his gatekeeper duty at the qualification stage. Had he done so, he would have concluded that the risks of permitting the expert to testify far outweighed any potential benefit from the proposed testimony.

[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.

[11] The other defence expert witness was Dr. Monte Bail, a psychiatrist. Counsel for Ms. Bruff-McArthur objected to his testifying on two grounds.

[12] First, she argued that his report was essentially an attack on Ms. Bruff-McArthur's credibility. Counsel pointed to numerous instances in the report where Dr. Bail commented on discrepancies between the information Ms. Bruff-McArthur provided in her interview with him

and what he later found in her medical records. Dr. Bail never put those alleged inconsistencies to Ms. Bruff-McArthur. Counsel sought an order that excluded the parts of Dr. Bail's report that did not meet the test in *Browne v. Dunn* (1893), 1893 CanLII 65 (FOREP), 6 R. 67 (H.L.), and an order that Dr. Bail not be permitted to testify regarding his views on her credibility.

[13] Second, Ms. Bruff-McArthur argued that Dr. Bail was biased. In support of this argument, counsel submitted that she should be permitted to cross-examine Dr. Bail on findings made in another court case and two arbitrations to the effect that he was not an independent witness. The trial judge ruled, relying on *R. v. Karaibrahimovic*, 2002 ABCA 102, 2 Alta. L.R. (4th) 213, *R. v. Ghorvei*, (1999) 1999 CanLII 19941 (ON CA), 46 O.R. (3d) 63 (C.A.) and *Desbiens v. Mordini*, 2004 CanLII 41166 (Ont. S.C.) that Dr. Bail could not be cross-examined on prior court rulings or arbitration decisions where his testimony was rejected or his objectivity as a witness had been questioned.

[14] The trial judge then put to counsel for Ms. Bruff-McArthur that there remained the issue of whether Dr. Bail had sufficient professional objectivity to provide independent evidence and he asked her if she wished to cross-examine Dr. Bail on this issue as part of a *voir dire*. Counsel declined that offer and elected instead to cross-examine Dr. Bail on the issue as part of her cross-examination in the trial proper.[1]

[15] The trial judge then proceeded to rule that Dr. Bail could not testify on certain sections of his report. The relevant sections were primarily where Dr. Bail was critical of the reliability of the conclusions reached by other doctors examining Ms. Bruff-McArthur. The trial judge also made clear that he did not want Dr. Bail testifying about Ms. Bluff-McArthur's credibility.

[16] Dr. Bail testified in chief that his methodology was not to review any of a subject's medical records before meeting with them. Consistent with this methodology, after the examination of Ms. Bruff-McArthur, which took just over an hour, Dr. Bail spent 10 to 12 hours reviewing her medical records, looking for discrepancies between what she told him in the meeting and what was in the records. These discrepancies formed the largest portion of his report.

[17] In summary, Dr. Bail testified that in his opinion: Ms. Bruff-McArthur did not develop any psychiatric disorders or limitations as a result of the accident; required no psychotherapy or psychotropic medication in relation to the accident; her pre-accident psychiatric profile was not exacerbated by the accident; and she did not require housekeeping or attendant care as a result of any psychiatric condition.

(3) The Verdict

[18] Dr. Bail was the last witness to testify at trial. After closing submissions, the trial judge gave his charge to the jury. The charge was previously subject to a pre-charge conference and it

was provided to the parties in advance of being presented to the juries. No objection was made to the charge and no special instruction regarding Dr. Bail's testimony was requested.

[19] As part of his charge, the trial judge reviewed very briefly Dr. Bail's testimony. He did not instruct the jury regarding the duty of expert witnesses. Nor did he raise any concerns with respect to the substance of Dr. Bail's testimony or his independence.

(2) During the Expert's Testimony

[49] As we know, the trial judge permitted Dr. Bail to testify and determined that Dr. Bail crossed the line of acceptable expert evidence. In order to analyze his response to this situation, it is first necessary to consider whether the trial judge's concerns regarding Dr. Bail's testimony were well founded. Assuming that they were, the next issue is what the trial judge should have done in the circumstances.

(1) Did Dr. Bail's Testimony Indicate Lack of Impartiality?

[50] I have had the opportunity to consider in detail Dr. Bail's evidence and I concur with the trial judge that it is most troubling. For present purposes, it is unnecessary to recount his testimony in full. Instead, I will focus on some of the more concerning aspects of his testimony.

[51] First, I repeat my concern regarding his methodology. It was fundamentally unfair to Ms. Bruff-McArthur not to give her an opportunity to explain the alleged inconsistencies in the information she provided. As mentioned above, there is a real concern that Dr. Bail was usurping the role of the trier of fact in determining the issue of Ms. Bruff-McArthur's credibility. Despite that concern, I am willing to acknowledge that in a case such as this, where the existence and extent of the alleged injuries are not easily determined, consideration of the plaintiff's veracity is a necessary part of an independent medical examination. However, if Dr. Bail were serious about probing this issue, he would not have adopted this methodology. He would have reviewed the inconsistencies with Ms. Bruff-McArthur.

[52] Second, and equally troubling, is that to the extent that Dr. Bail referred to the scientific testing conducted, he torqued the results so that they produced results that supported his conclusion. For example, he testified that Ms. Bruff-McArthur was administered a test where she was instructed to count backwards from 100 by 7s. He noted that she provided a few incorrect answers in her count. Dr. Bail considered this to be an inconsistency because she was able to get some of the count right but also made mistakes. For Dr. Bail, inconsistencies meant that the subject was not being truthful about her condition.

[53] Dr. Bail then testified that in cases where a subject mathematically "just doesn't have it together," he asks them to recite the months of the year in reverse order. Apparently, Ms. Bruff-McArthur did very well on this test, answering correctly and quickly. Dr. Bail testified that that this result was also an inconsistency because she did so well on that test and so poorly on

the 7s test. So, despite the fact that Dr. Bail testified that he administers the month test as a check for those who are not mathematically inclined, he calls into question her credibility for doing well on the month test and faring poorly on the 7s test.

[54] Dr. Bail went on to administer another mathematical test, requiring her to calculate how many $1.50 magazines could be purchased with $10. Ms. Bruff-McArthur did not do well on this test and Dr. Bail considered this to be an inconsistency. The other logical conclusion, that Ms. Bruff-McArthur was consistently weak in performing math exercises, seems not to have crossed his mind.

[55] In short, the tests were deliberately interpreted to fit a theory of mendacity. Unless she got every question on every test correct, she was inconsistent and, in Dr. Bail's opinion, inconsistency equated to an untruthful subject.

[56] A third concern relates to a subtle point that demonstrates Dr. Bail's fundamental misconception of his role. He questioned Ms. Bruff-McArthur regarding her physical limitations. It is, of course, perfectly appropriate for a psychiatrist conducting an independent medical examination to ask questions about a subject's physical injuries and resultant limitations. That information could provide useful context for the examination. However, Dr. Bail was quite open about the fact that he asked the questions for an entirely different purpose. He testified that he asked about physical limitations so that he could compare those answers to any future surveillance evidence he may receive. This is consistent with how Dr. Bail regarded the purpose of his review of the medical records. There is a troubling pattern that suggests that he understands his primary role to be to expose inconsistencies and not to provide a truly independent assessment of Ms. Bruff-McArthur's psychiatric condition.

[57] Fourth, when Dr. Bail was cross-examined about his emphasis on perceived inconsistencies, he denied ignoring those parts of the medial records that did not fit his diagnosis. He explained their absence from his report on the basis that "you can't put everything in your report." Later in his cross-examination, Dr. Bail stated, "I'm interested in the things that don't corroborate, not the things that do corroborate." Again, this testimony makes plain Dr. Bail's lack of awareness of the need to be impartial as an expert witness.

[58] Before turning to what the trial judge should have done in face of this testimony, I wish to correct one of his findings. The trial judge stated in his reasons on the Threshold Motion that Dr. Bail did not have any notes of his examination of Ms. Bruff-McArthur. Based on this observation, he concluded that Dr. Bail was making his testimony up as he went along to support his position.

[59] That is not accurate. Dr. Bail did have notes. Indeed, the trial judge ruled that he could refer to them as he testified. It is not a fair conclusion that Dr. Bail was making up his testimony. Having reviewed his evidence carefully, I am of the view that there is no basis to

conclude that Dr. Bail was anything but truthful in his testimony. I have concerns regarding Dr. Bail's independence and his methodology; I do not have any concerns about his veracity.

(2) What Should the Trial Judge Have Done in this Case?

[60] Under the *White Burgess* framework, and in most other leading cases on the admissibility of expert evidence, the issue of admissibility is decided at the time the evidence is proffered and the expert witness's qualification is requested by a party. To the extent that this is possible, it should be the norm: *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at para. 28.

[61] In the present case, however, the trial judge appears to have assumed that, once Dr. Bail was qualified as an expert, his gatekeeper role was at an end. The trial judge erred in law in reaching that conclusion.

[62] A trial judge in a civil jury case qualifying an expert has a difficult task. She must make a decision based on an expert report that will, in most cases, never be seen by the jury. While the report provides a roadmap of the anticipated testimony and specific limits may be placed on certain areas of testimony, the trial judge obviously cannot predict with certainty the nature or content of the expert's testimony.

[70] I would go further and state that, given the importance of a trial judge's on-going gatekeeper role, the absence of an objection or the lack of a request for a specific instruction does not impair a trial judge's ability to exercise her residual discretion to exclude evidence whose probative value is outweighed by its prejudicial effect.

[71] The respondent submits that even if this court concludes that Dr. Bail's testimony should have been excluded, there is no basis to order a new trial because he was just one of many witnesses and his testimony likely did not have a significant impact on the jury's verdict.

[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.

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Dr. M. Bail

Qualifications As Expert Witness

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

[54] The plaintiff during the trial sought to prevent Dr. Bail from testifying as an expert on the basis of bias as evidenced in his expert's report and several reported decisions which held that Dr. Bail had:

(a) Become an advocate for the party calling him as a witness which is not the role of an expert: *Morrison v. Greig*, 2007 CarswellOnt 343;[2007] O.J. No. 225 (ONSC) paras. 47-48.

(b) Appropriated the role of advocate of the insurer rather than an impartial witness. His partisan approach and focus on inconsistencies are troubling, seriously weaken his credibility and weight of his testimony which should be disregarded: *Gabremichael v. Zurich Insurance Co.*, [1999] O.F.S.C.I.D. No. 198, paras. 31-33.

(c) Presented as a notably partisan witness: *Sohi v. ING Insurance Co. of Canada*, [2004] O.F.S.C.D. No. 106, para. 38.

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

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

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

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

[74] The above quoting for 10 pages by Dr. Bail of excerpts from prior medical records and comparing that to what the plaintiff told him, resembles work legal defence counsel might do in

identifying potential discrepancies between the plaintiff's transcript from discovery and her medical records. The difference in this analogy however is the existence of a discovery transcript to evaluate the reported discrepancies.

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

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

[77] Dr. Bail in the engagement letter from counsel was retained in 2013 "to provide his opinion as to the nature of injuries suffered by the plaintiff in the MVA, her current condition and his prognosis for the future."

[78] Subsequent to its ruling, the court noted that Dr. Bail's report cites terms of engagement different than those communicated to him by legal counsel. Dr. Bail's report states he was engaged "to provide his psychiatric opinion in relation to the issue of damages." Damages are normally a focus of legal counsel, not a psychiatrist.

[79] Dr. Bail did not have the authority to re-write his terms of engagement. He testified he has conducted 5,500 IME during his career. Dr. Bail was very experienced in IME engagements.

[80] This alteration of the terms of engagement directly impacts the expert's obligation in R. 53.03 (2.1), to include in his report the instructions provided to him or her, the nature of the opinion sought and each issue in the proceeding to which the opinion relates.

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

(a) Was not forthright with him as to her accident related claims, her prior medical and psychological history;

(b) Her reported medical history since the MVA cannot be relied upon;

(c) Has serious credibility issues as to her MVA claim; and

(d) Lacks reliability, credibility and validity.

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

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

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

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

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

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

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

[122] Dr. Bail was not a credible witness. He failed to honor his obligation and written undertaking to be fair, objective and non-partisan pursuant to R. 4.1.01. He did not meet the requirements under R. 53.03. The vast majority of his report and testimony in chief is not of a psychiatric nature but was presented under the guise of expert medical testimony and the common initial presumption that a member of the medical profession will be objective and tell the truth.

[123] The vast majority of Dr. Bail's testimony to the jury amounted to nothing other than the following:

(a) The plaintiff did not tell me the truth in my interview;

(b) Here are all the instances I found in my 10 to 12 hour review of her medical records which prove that she did not tell me the truth;

(c) If I as a psychiatrist cannot believe her; how can you?

[124] The primary purpose of R. 4.1.01 is to prohibit and prevent such testimony in the guise of an expert. Dr. Bail undertook and thereby promised to not do what he did in front of this jury.

[125] I will not qualify witnesses as experts in the future whose reports present an approach similar to that of Dr. Bail in this case.

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Daggitt v Campbell, 2016 ONSC 2742 (CanLII), <https://canlii.ca/t/gpqm3

Positions of the Parties

[4] The plaintiff's position is two-fold. Firstly, the plaintiff submits that the defendant is not entitled to an independent medical examination by a psychiatrist as the plaintiff was never treated by a psychiatrist and because there is insufficient evidence of why an assessment by a psychiatrist is warranted. The plaintiff asks that the motion be dismissed. Secondly, the plaintiff submits that Dr. Monte Bail, the psychiatrist chosen by the defendants, has demonstrated such clear and definitive defense bias in many previous cases that the court should decline to make any order allowing any independent medical examination by Dr. Monte Bail in particular.

[5] The defendants' position is that they can decide what speciality of medical doctor they wish to have examine the plaintiff. The defendants submit that to properly defend the claim, they need to provide opinion evidence as to the plaintiff's depression and mental health-related injuries from a psychiatrist and that they can select any qualified psychiatrist of their choice. Dr. Monte Bail is the psychiatrist of choice selected by Mr. Todd McCarthy, trial counsel for the defendants**,** in spite of objections raised by the plaintiff as to previous findings that Dr. Bail was not credible and failed to honour his written undertaking to the court in *Rule* 4.1.01. The defendants ask that the motion be granted. A tentative date for the examination by Dr. Bail has been booked for May 30, 2016.

[26] While it is unnecessary for me to decide the second issue of the relief requested by the plaintiff—namely, whether to not allow Dr. Monte Bail to conduct a defense psychiatric examination due to his failure to adhere to the principles of fairness, objectiveness and impartiality and his defense bias—I make the following observations and comments by way of *obiter dicta*. I find the plaintiff's argument on this issue compelling. *Rule* 4.1.01 makes it clear that an expert's duty to the court prevails over any obligation owed by the expert to a party. The Supreme Court of Canada has held that an expert witness who is unable or unwilling to comply is not qualified to give expert opinion evidence and should not be permitted to do so. (See *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182).

[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.

[28] Kane J. in *Bruff-Murphy v. Gunawardena*, 2016 ONSC 7**,** held that Dr. Bail was not a credible witness and that he failed to honour his obligation and written undertaking to be fair, objective and non-partisan pursuant to *Rule* 4.1.01 (see paras. 53-125). He did not meet the requirements under *Rule* 53.03. Justice Kane found that Dr. Bail's report and testimony was 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. He further held that the purpose of *Rule* 4.1.01 is to prohibit and prevent such testimony in the guise of an expert, and that "Dr. Bail undertook and thereby promised to not do what he did in front of this jury." Importantly, Justice Kane held that, "I will not qualify witnesses as experts in the future whose reports present an approach similar to that of Dr. Bail in this case."

[29] Additional critical findings in relation to Dr. Bail can be found in *Gordon v. Greig* (2007), 46 C.C.L.T. (3d) 212 (Ont. S.C.J.), at para**s.** 43-48; *Sidhu v. State Farm Mutual Automobile Insurance Co*., 2014 CarswellOnt 18595 (F.S.C.O**.** Arb**.),** at para. 68; *Sohi v. ING Insurance Co. of Canada*, 2004 CarswellOnt 3236 (F.S.C.O. Arb.), at paras. 35-41; *Gabremichael v. Zurich Insurance Co*., 1999 CarswellOnt 4480 (F.S.C.O. Arb.), at para**.** 132; and *Rocca v. AXA Insurance (Canada),* 1999 CarswellOnt 5506 (F.S.C.O. Arb.)**,** at para**.** 66.

[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.

[31] *Rule* 33.02 provides that the court shall name the health practitioner by whom the independent medical examination is to be conducted. It could be argued that the court, in the exercise of its discretion, should therefore consider and determine in appropriate cases whether or not the proposed named health practitioner is biased in favour of a party on the balance of probabilities and therefore fails to qualify as an expert under *Rule* 4.1.01. The court's discretion would therefore include the discretion not to name a particular health practitioner if that health practicioner fails to meet the criteria set out in *Rule* 4.1.01 on the basis of bias. While it would be uncommon to find an expert biased and impartial, such an expert so found should not be allowed to have any role in the court process.

[32] Considering the highly intrusive nature of these independent medical assessments, and the serious issue of ensuring a fair trial, the plaintiff's argument to deny the right to have an expert that has been found to be biased conduct the assessment in the first place is worthy of consideration in appropriate circumstances considering the potential for a miscarriage of justice that can be caused by such an expert biased in favour of one party, particularly in front of a jury.

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

[1] The defendant seeks various orders in the face of various actions commenced by the plaintiff arising from her involvement in a motor vehicle accident on January 27, 2003. This led to a decision by Arbitrator Richards of the Financial Services Commission of Ontario August 28, 2013, which denied her claim for additional statutory automobile accident benefits. The decision

was upheld on appeal by Director's Delegate Evans with reasons released October 3, 2014. Director's Delegate Evans also awarded costs payable by the plaintiff to the insurer, Economical, in the amount of $5,000 (which Economical advises remains unpaid).

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

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

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

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

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

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

[7] This action against the defendant insurer and three of its employees, Smith, Davy and Shewchuk is commenced on December 3, 2014, Discovery plans have been exchanged, not apparently agreed upon, and is the subject of a motion by the plaintiff to proceed on June 17, 2015. The key aspects of this action are the plaintiff's allegation that the defendants, Smith, Davy and Shewchuk were the defendant's Claim Adjuster, Ontario Region Claims Team Leader and Accident Benefits Technical Advisor respectively, and that they and the plaintiff reached a settlement agreement on August 22, 2013 in the amount of $157,500 in exchange for a full and final release (see paragraphs 3, 4, 5 and 9 of the Statement of Claim).

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

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Sohi and ING Insurance

The Insurer, in taking its position, was bolstered by the opinions of Dr. Monte **Bail**, a psychiatrist who assessed Mr. Sohi as part of the West Park Attendant Care DAC.
Dr. **Bail** stated:
From a review of the extensive medical file material, and the assessment today, it seems that Mr. Sohi was suffering from a Major Depressive Disorder, Anxiety, and Alcoholism for a long time prior to the motor vehicle accident, even though he denied all of these things today...

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

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

In his testimony, Dr. **Bail** downplayed the likelihood of suicide as the result of motor vehicle accidents, stating that he had never seen a similar situation in his examination of some 4,000 motor vehicle accident cases. Dr. **Bail**'s observation, while perhaps literally correct, is at the very least, somewhat misleading.
While the specific act of self immolation following a motor vehicle accident may well be a rarity, attempts at suicide in that context are not unheard of, even in Dr. **Bail**'s practice. Nor are they unknown to accident-related jurisprudence. [See note 10 below.] [See note 11 below.]
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Note 10: See *Gabremichael and Zurich Insurance Company* (FSCO A97-002061, October 12, 1999).
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Note 11: In the case of *Cotic v. Gray* , 33 O.R. (2d) 356, the Court of Appeal dealt with a suicide taking place some 16 months after a motor vehicle accident, upholding a finding that the suicide directly resulted from the motor vehicle accident, notwithstanding the passage of time. See also *Murdoch v. British Israel World Federation (New Zealand) Inc* . et al. [1942] 61 N.Z.L.R. 600.

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

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

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

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

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

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

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Sohi and ING Insurance - Appeal

The causation issue was the main dispute at arbitration. Mr. Sohi testified, and called two psychologists who supported his claimB Dr. J. Pilowsky, his treating psychologist, and Dr. Louise Koepfler, a psychologist who assessed him as part of a Medical-Rehabilitation DAC. ING's position was supported by Dr. Monte **Bail**, a psychiatrist who assessed Mr. Sohi as part of an Attendant Care DAC. The arbitrator rejected the evidence of Dr. Bail, whom he found to be a partisan witness.

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Gabremichael and Zurich Insurance

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

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

Dr. Bail's examination

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

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

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

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

Dr. Bail also assumed from a cursory examination of an OHIP claim summary that Ms. Gabremichael wrongly asserted that prior to the accident she enjoyed good health. A

more detailed examination of the record would have shown claims for dental surgery, among others, that did not support Dr. Bail's conclusion that Ms. Gabremichael's health was poor prior to the accident, and that she was misleading the Insurer.
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Dr. Bail testified that in evaluating a patient he acts as judge and jury. Unfortunately, from my reading of his reports, and from listening to his testimony, it is obvious that he has appropriated to himself another role, and has become an advocate for the Insurer, rather than an impartial expert witness.

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

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

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

[43] I do not accept the evidence of Dr. Bail, a psychiatrist called by the defence. He suggested that Mr. Gordon might be a person with attention deficit hyperactivity disorder, that he could work, and that he was not impaired from doing daily activities. This appears to fly in the face of many other medical reports and opinions.
[44] In cross-examination, Dr. Bail accepted that he would defer to others such as neurologists and neuropsychologists. It appears to me that the others were more qualified than Dr. Bail to make opinions about the abilities of the Plaintiff to work and live alone. He ended up agreeing that he would defer to the opinions of Dr. Scher, Dr. Berry, Dr. Ouchterlony and Dr. van Reekum. They supported the opinions that this man could not live on his own independently.
[45] Dr. Bail appears to have attempted to cloud the proceedings with suggestions that some of Mr. Gordon's deficits could be attributed to attention deficit disorder and oppositional defiance disorder when there was not a foundation for such comments. He took these terms and opined that poor school marks and one suspension for smoking on school property is indicative of the possibility of the existence of these disorders. I might say that throughout Mr. Gordon's schooling there was no diagnosis of attention deficit disorder or oppositional defiance disorder. Dr. Bail had reported that ADHD never goes away, but in cross-examination he was faced with a medical journal report that as persons grow into their adult stage of life, 50% do not have any a continuation of

the disorder and the other 50% have varying degrees of it. Dr. Bail then watered down his opinion by saying that he should have said that ADHD virtually never goes away.
[46] Dr. Bail suggested that Mr. Gordon might have been faking symptoms such as an altered gait, no taste, no sense of smell, and no sense of temperature. But he deferred to neurologists and neuropsychologists in making such findings. Dr. Bail had reported that Mr. Gordon had normal short-term memory meaning that he did not find any deficits, but then said that he did not mean that the Plaintiff did not have any memory impairment.
[47] The answers being given by Dr. Bail left the impression that he was gathering up terms, such as ADHD and oppositional defiance disorder, to create an impression that this Plaintiff had problems prior to the accident and that his inabilities should not be attributed to the accident. Dr. Bail went further to suggest that Mr. Gordon was malingering. When he was challenged on cross-examination, he did not have a foundation for such an opinion.
[48] Dr. Bail had a report from Dr. Sweeney, a neuropsychologist, describing Mr. Gordon's short-term memory deficits, and he did not agree with those opinions. Dr. Bail acknowledged that Dr. Sweeney had concerns that Mr. Gordon was a suicide risk, but then Dr. Bail obfuscated over whether Dr. Sweeney as a psychologist understood the matter. Dr. Bail had referred to the Plaintiff as a psychopath after a 1-hour interview. Dr. van Reekum did not have such an opinion. He was qualified to give expert opinion evidence in the field of neuropsychiatric assessments, but Dr. Bail attempted to suggest that Dr. van Reekum works in a geriatric facility and not with adolescents. These answers appear to me to be given by an expert who has become an advocate for the party calling him as a witness. That is not the role of an expert witness who is allowed to provide expert opinion evidence...

Rocca and AXA https://www5.fsco.gov.on.ca/AD
Decision Date: **1999-03-10**, Adjudicator: **Joachim, M. Kaye**, Regulation: **776/93**,
Decision: **Arbitration, Final Decision, appeal rendered,FSCO 2906**

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

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