OTLA Ontario Trial Lawyers Association

OTLA Submission to the College of Physicians and Surgeons of Ontario

Medical Expert: Reports and Testimony & Third Party Reports

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The Ontario Trial Lawyers Association appreciates the opportunity to make submissions to the College of Physicians and Surgeons of Ontario (the "CPSO") on its review of the policies to the medical profession on Third Party Reports ("Third Party Reports Policy") and Medical Experts: Reports and Testimony ("Medical Expert Policy").

The Ontario Trial Lawyers Association (OTLA) was formed in 1991 by lawyers acting for plaintiffs. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while at the same time advocating aggressively for safety initiatives.

Our mandate is to fearlessly champion, through the pursuit of the highest standards of advocacy, the cause of those who have suffered injury or injustice. Our commitment to the advancement of the civil justice system is unwavering.

OTLA's members are dedicated to the representation of wrongly injured plaintiffs across the province and country. OTLA is comprised of lawyers, law clerks, articling students and law students. OTLA frequently comments on legislative matters, and has appeared on numerous occasions as an intervener before the Court of Appeal for Ontario and the Supreme Court of Canada.

OTLA's Position

Both policies being reviewed by the CPSO in this current consultation are extremely important to our members, our clients and society at large. OTLA has chosen to address both policy consultations in this one submission as there is significant overlap in both policies. At their heart, these policies seek to ensure that physicians who chose to write a report or perform an independent medical examination ("IME") do so in a manner that meets the expectations of the profession and does not do improper harm to the individual who is being assessed.

Many patients, government institutions, schools, employers and insurance companies rely upon physicians to provide third party reports. These reports provide health-related information or opinions on an individual which might otherwise be unavailable. OTLA commends the CPSO for recognizing the importance of and the unique issues with these types of reports in its Third Party Reports Policy.

Equally, OTLA applauds the CPSO's recognition of the importance of medical expert reports and testimony in its Medical Expert Policy. Medical experts provide courts and tribunals with specialized medical knowledge. Medical experts are an integral part of our civil justice system. However, as discussed below, it is important for physicians, who chose to prepare an expert report, to understand the importance of the task they are undertaking.

The Physician's Role: Impartiality and Objectivity

Physician experts are important to our justice system. They provide "a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate".[1] To be admissible, the expert's opinion must satisfy the following criteria:

[1] *R. v. Abbey*, [1982] 2 S.C.R. 24 at page 42.

1. The subject-matter of the expert's inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by the expert; and
2. The expert offering expert evidence must have gained his special knowledge by a course of study or previous habit which secures his habitual familiarity with the matter in hand.[2]

Both policies emphasize that physician authors of expert reports or third party reports "must" do so in an "objective" manner. OTLA commends the CPSO for using such strong language in both policies. However, OTLA is concerned that the Third Party Reports Policy does not also add the qualifier that any opinion expressed by a physician in a third party report where he or she is acting as an independent medical examiner should also be impartial. This is striking given the Medical Expert Policy makes clear that a report prepared by a medical expert must be not only objective, but also impartial.

A report prepared by an independent medical examiner may ultimately be utilized in the courts or tribunal and, in any event, can affect the examinee's livelihood, benefits or the treatment that the individual receives. As a result, OTLA recommends that the CPSO amend the Third Party Reports Policy to make it consistent with the Medical Expert Policy. The Third Party Reports Policy should include that any report prepared by a independent medical examiner **must be objective *and impartial***.

Glaringly lacking from the Third Party Reports Policy, is the clarity to the membership of the importance of physicians preparing reports that are fair, objective, independent and impartial, and what that practically means. Physicians should be given a clear indication of what these terms mean, especially *objectivity* and *impartiality*. The definition for these terms should include a reference to the "acid test" set out in the recently released Supreme Court of Canada (S.C.C.) case of *White Burgess Langille Inman v. Abbott & Haliburton.*[3] In *White Burgess*, the S.C.C. defined impartiality and independence of an expert and laid out the "acid test" for admissibility as follows:[4]

> Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. **The acid test is whether the expert's opinion would not change regardless of which party retained him or her** [emphasis added].

Both policies need to reinforce this principle: that the physician's report should be written in such a manner that the opinion would **not** change "regardless of which party retained him or her". Unfortunately, that is not the reality that many of our members, and the courts, are facing on a

[2] *Kelliher v. Smith*, [1931] S.C.R. 672 at page 684.
[3] *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (S.C.C.), [hereinafter referred to as "*White Burgess*"].
[4] *White Burgess* at para. 32.

daily basis. Over the last several years, there has been a proliferation of the use of "hired-gun" experts in Ontario courtrooms. The so-called hired-gun expert modifies his or her medical evidence based on whomever pays that expert's account, even if that opinion is patently false. The use of competing hired-gun expert opinions make the job of the trier-of-fact more difficult. The proliferation of an entire industry of hired-gun experts, whose primary source of income is providing reports to be used as advocacy tools and ongoing litigation cases, is not only regrettable, but has also resulted in the loss of public confidence in the effectiveness and impartiality of the courts. The question of whether hired-gun experts are acting as advocates rather than neutral and impartial witnesses has also come under media scrutiny in a series of articles in both the National Post and the Globe and Mail.[5]

The negative impact of hired-gun experts was highlighted by the Ontario Court of Appeal in *Bruff-Murphy v. Gunawardena.*[6] Ultimately, a new trial was ordered because of the damage caused to the administration of justice by allowing the testimony of a biased, hired-gun expert who was found to be wholly unsuitable to provide evidence. In that decision, the court found: [7]

> [72] It is impossible to gauge with certainty the impact of Dr. B'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.

OTLA recognizes that physicians who agree to act as medical experts or participate as independent medical examiners play an important role in our system. Without medical experts, our members could not prove that their clients were victims of medical malpractice. Without expert opinions, our members could not successfully establish the damages that are appropriate for their clients who have been injured in motor vehicle accidents ("MVAs"). However, to the extent that the CPSO becomes aware of a physician acting as a hired-gun through either a reported decision, an article or an independent complaint, the CPSO should, after a full investigation, consider utilizing its powers to sanction that physician member. OTLA's expectation is that with reformulations of both policies to emphasize the need for and importance of

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[5] See for instance, *Hired Gun in a lab Coat: How medical experts help car insurers fight accident claims* (National Post, originally published January 5, 2017 at https://nationalpost.com/news/hired-gun-in-a-lab-coat-how-medical-experts-help-car-insurers-fight-accident-claims) Also see *Licenced to bill: How doctors profit from injury assessments that benefit insurers* (Globe and Mail, originally published December 1, 2017) at https://www.theglobeandmail.com/news/investigations/doctors-insurance-independent-medical-examinations/article37141790/.

[6] *Bruff-Murphy v. Gunawardena* , 2017 ONCA 502.

[7] *Bruff-Murphy v. Gunawardena* , 2017 ONCA 502 at para. 72.

objectivity and impartiality in expert reports and IME reports, along with the CPSO taking a harder stance against the bad players in the industry, hired-guns will become a thing of the past.

Instructions & Transparency

OTLA commends the CPSO for its recognition of the importance of understanding and clarifying instructions from the requesting party. Equally important, however, is advising members of the limits with respect to instructions. While open communication between the requesting party and the medical expert or examiner is encouraged, there are limits on the extent of the involvement of the requesting party. Ultimately, the medical expert or independent medical examiner must come to his or her own opinion. The CPSO should remind its members that remaining fair, objective and impartial will ensure that the trier of fact or individual reading the report finds the expert credible.

In the recent Licence Appeal Tribunal decision of *Kielesinski v. Allstate Insurance*, the adjudicator found it "troubling" conduct that the psychiatrist, who had performed an IME of a MVA victim, changed his assessment from one which would see the accident victim receiving compensation in his draft report to one that would see no compensation being received by the time of his final report and testimony.[8] As a result of this significant discrepancy in evaluations, which only came to light because of disclosure of draft reports, the testimony of the expert was discounted at the hearing. More importantly, future testimony from this expert may also be called into question as a result of this finding. As this case highlights, the CPSO should consider reminding its members in both policies and in its Advice to the Profession document that a finding that an expert cannot be relied upon may affect the professional reputation of that physician.

Scope of Expertise

OTLA agrees with the recommendations in both policies that a physician should only opine in areas within his or her scope of expertise. However, lacking in either policy is the CPSO's caution to its physicians when opining on the credibility of an individual he or she is evaluating. OTLA members have observed a disturbing trend of medical experts and examiners opining on matters related to the examinee's credibility. These opinions step into areas reserved for the trier of fact; these reports use argument in the guise of opinion. Medical experts should not comment on the credibility of the examinee.

The Waddell Signs[9] are a good example of where this can happen. The Waddell Signs are occasionally used by expert doctors as a means to justify opining on the credibility of the patient. They should not be used for this purpose. There is medical literature to support the position that positive Waddell Signs do not signify malingering.[10] By commenting on the credibility of the

[8] *Kielesinski v. Allstate Insurance*, 2019 ONLAT 17-008646/AABS (File No. 17-008646/AABS) at para. 52.
[9] Named after G. Waddell from his article co-authored by J.A. McCulloch, E. Kummel & R.M. Venner "Nonorganic physical signs in low back pain" (1980) 5 Spine 117; The Waddell Signs can be used to detect whether or not there is a non-organic cause of a patient's pain.
[10] D. Fishbain et al., "A Structured Evidence-Based Review on the Meaning of Nonorganic 47 Physical Signs: Waddell Signs" (2003) Pain Medicine 141; D. Fishbain, R. B. Cutler, H. L. Rosomoff, & R. Steele Rosomoff, "Is There a Relationship Between Nonorganic Physical Findings (Waddell Signs) and Secondary Gain/Malingering?" (2004) 20 Clinical Journal of Pain 399.

examinee, the expert assumes the role of advocate, which will undermine his or her credibility with the trier of fact.

OTLA recommends that in reinforcing the importance of only opining on areas within his or her scope of expertise both policies should be amended to caution members against making any interpretations or making any comments not pertinent to the expert's assessment or report. The CPSO should consider adopting the language utilized by the Quebec Code of Ethics of Physicians which states in part at section 67:[11]

> A physician acting on behalf of a patient or a third party as expert or assessor, must:
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> …
>
> (2) avoid obtaining any information from that person or making any interpretations or comments not pertinent to the subject of the assessment or expert's opinion;
>
> (3) communicate to third parties only the comments, information or interpretations necessary for answering the questions raised by the requested assessment or expert's opinion…

Ghostwriting

One area neither policy seems to address is the serious problem of ghostwriting of reports.

OTLA has seen the proliferation of this practice in recent years, especially in the context of third-party IMEs. Ghostwriting involves an unidentified author preparing a key aspect of a medical report, often the qualitative testing performed on the individual being assessed and/or a summary of the patient's medical history. Ghostwriting may also involve assessment companies editing and revising expert medical reports both with and without the expert's knowledge and/or final approval. The testing, summary, analysis and edits are then incorporated into the physician's report and the physician signs off on it as his or her own work product.

Although likely not a new practice, the impropriety of ghostwriting is now coming to light within the litigation system. Examples of this practice have been cited in a number of court cases. For example, Master MacLeod in the case of *Levecchia v. McGinn*[12] referring to the decision of *El-Khodr v. Lackie*, noted that an expert at trial admitted on cross-examination that much of her report was actually written by a "quality assurance" individual at the assessment company for which she worked. The issue of ghostwriting is not only a problem in the civil litigation context, but also in other areas such as family law. In *Children's Aid Society of London and Middlesex v. B.*[13], a number of non-experts played a substantial role in the expert's assessment and final report. The expert admitted on cross examination that staff members at the center, for which he worked, had input to

[11] http://legisquebec.gouv.qc.ca/en/ShowDoc/cr/M-9,%20r.%2017/
[12] *Levecchia v. McGinn* ,2016 ONSC 2193 (CanLII) at para. 13.
[13] *Children's Aid Society of London and Middlesex v. B.*, 2013 ONSC 2858 (CanLII).

various portions of the data collection including interviewing witnesses and that a non-expert social worker drafted substantial portions of the report. He also admitted that the Executive Director heavily edited the report prior to the final version being released. Only one of the non-experts involved in drafting the report was listed within the body of the report.

IMEs are utilized to analyze an individual claimant's physical or psychological harm in all types of civil litigation. They are routinely utilized in motor vehicle accident litigation and have become an integral part of the evaluation of the current and future needs of MVA victims. Ghostwriting appears to have become a byproduct of the need for multiple IMEs in order to prove or disprove, as the case may be, the injuries that are being claimed. Many IMEs are now being handled through assessment companies, rather than directly by independent physicians. Some of assessment companies, but by no means all, do substantial work on the assessment and medical reports. This work includes reviewing and summarizing the medical records, doing testing, inserting "standardized" passages in the report, and editing the report. The parties are not advised of the identity of those who do this work, their qualifications to do the work, the work they actually do, or the work that was done by the physician including whether the physician reviewed and approved the final report before signing it.

Ultimately, the practice of ghostwriting brings the propriety and impartiality of expert reports into question as an individual reading the report would have no idea that the assessment or conclusion in the report is not that of the physician whose name appears as the sole author of the report. Recent articles[14] and court decisions[15] are raising concerns with the propriety of this practice and demanding a stop to this practice. As stated by the Court in the case of *Kushnir v. Maccari*:[16]

> 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**. [emphasis added].

OTLA recommends that the CPSO add a provision in both policies ***specifically prohibiting*** its members from submitting a medical report as his or her own when a ghostwriter is involved. OTLA recognizes that some aspects of a report, especially medical assessments or files with complex and

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[14] See *Insurance assessment firms altered, ghostwrote accident victim reports* (Globe and Mail originally published December 4, 2017). https://www.theglobeandmail.com/news/investigations/insurance-assessment-firms-altered-ghostwrote-accident-victim-reports/article37193127/.

[15] See for example the decisions of *Kushnir v. Maccari*, 2017 ONSC 307 (CanLII), *Levecchia v. McGinn* ,2016 ONSC 2193 (CanLII) at para. 13 and *Children's Aid Society of London and Middlesex v. B.*, 2013 ONSC 2858 (CanLII).

[16] *Kushnir v. Maccari*, 2017 ONSC 307 (CanLII) at para. 31.

long medical histories, may require the input of multiple parties in order to complete. To the extent that a physician relies on a summary of facts or other work prepared by someone else in his or her report, the CPSO policies should add provisos that the summary ***not*** form part of the expert or third-party report unless that summary is provided as a separate addendum signed by the individual who reviewed and summarized the medical records or did the other work with a summary of his or her qualifications. This full disclosure is necessary for transparency in the litigation process and to enable litigation parties to properly evaluate the validity and strength of a report and the merits of the overall case. It is also necessary for the integrity of the medical profession to prevent non-experts from providing and revising medical opinions.

Assessment Centers & Electronic Signatures

Many IMEs, especially in the context of MVA litigation, are now being conducted through assessment centers. An assessment center may be owned or operated by a physician, other health care providers, or other unregulated persons. Third parties, such as insurance companies, retain an assessment center to decide what IMEs should be conducted, to select and retain the appropriate physician to prepare the report from the physicians on the assessment center's roster, and to provide the third party with a report from the physician on the assessment center's letterhead. As discussed above in the Ghostwriting section, in order to expediate or assist in an IME other individuals within the assessment centers, who are not themselves physicians, will author portions of the IME that will be ultimately attributed to a physician. The role of other individuals at the assessment centers contributions to IMEs has not been readily transparent. More importantly, their true influence on the final report, and even the opinions themselves, is often unclear. Reports, signed by doctors, are for the most part silent on whether the physician drafted the entire report or whether any other individual had influence on the final opinion set out in the report. It is often not clear whether physicians have reviewed entire medical briefs or summaries prepared by other individuals at the assessment center. Neither of the CPSO policies appears to address these glaring problems.

In addition, unfortunately, some of our members have encountered scenarios where a physician's electronic signature has been utilized in attributing an IME report as the physician's sole work product even though the physician ultimately had little hand in preparing the report or reviewing the records of the patient's healthcare they allegedly assessed. OTLA is concerned that physicians' electronic signatures may be improperly used in an assessment center by attributing an IME report to a physician that he or she has not in fact authored or finalized. In a report that has the weight that these IMEs do in the litigation process, it is imperative that only the physician be permitted to add his or her signature to a report. OTLA recommends that the CPSO must clarify that physicians are solely responsible for the use of their electronic signatures and should properly guard against the potential for the misuse of electronic signatures on these reports.

Although the CPSO is not able to regulate these assessment centers, the CPSO is able to regulate its physician members. As discussed above, both policies should specifically prohibit ghostwriting of physician reports. Ghostwriting of the opinion section of the report should be barred. Any reliance on summarizes, drafted by other individuals, used in preparation for the report should clearly be noted and the author of the summaries should be disclosed in the report. If a report is

prepared jointly with other individuals or other physicians then all authors should be signing the report and clearly indicate which sections they authored.

In addition, OTLA recommends that both policies should specifically prohibit a physician's electronic signature from being utilized in a medical report unless that physician has specifically authored that report and authorized the use of his or her signature for that specific report. A physician should always safeguard his or her electronic signature, and should ultimately be held responsible for how and when that signature is utilized. Equally, to the extent that a physician elects to perform IMEs through an assessment center, he or she should also be held responsible by the CPSO should that assessment center improperly attribute a report to that physician.

Presence of Observers During IMEs.

Often a physician conducting an assessment for a medical report will have an individual from their office or the assessment center in the room during the assessment. This is often true when a male assessor is assessing a female examinee. Our members have expressed their clients' frustration at being denied that same right to have an observer or family member in the room during an assessment. An examination is typically conducted because the examinee has been involved in some sort of incident for which he or she is claiming physical or psychological harm. An examination by a physician they have never met, when they are at their most vulnerable, can increase those feelings of harm the examinee may be experiencing. OTLA recommends that the both policies be amended to permit examinee requests for family members or observers to be present when an examination be conducted. OTLA recognizes that, in many cases, physicians performing these types of review are attempting to get all necessary information to complete their reports. A physician's work should not be interfered with and, to the extent the CPSO considers making this recommendation, OTLA recommends that the CPSO also add a provision that the observer be advised that they cannot interfere or intervene in any way in the assessment being conducted by the physician. However, ultimately it is OTLA's position that the examinee should be afforded the right to have a family member or observer present for their own comfort during the assessment. The current situation is one sided – where the assessor often has someone in the room but examinees are not afforded the same courtesy.

Video/Audio Recording of IMEs

Video or audio recording of assessments by physicians in the context of a medico-legal or IME report is becoming very common. It often affords a physician the ability to examine the examinee without having to frequently stop to record his or her impressions. OTLA agrees with the wording currently utilized in the Third Party Report Policy that, "Physicians **must** ensure any arrangements with respect to observers or recording are mutually agreeable to the parties involved." However, OTLA is concerned that current policies are not strong enough regarding how audio or video recordings are to be utilized and the specific method by which consent to records is being obtained. The policies require that, prior to recording an assessment, a physician **must** obtain clear written and verbal consent from the examinee. OTLA strongly urges that the CPSO also add wording requiring that, where a consent is being sought for a recording, that the examinee be afforded an opportunity to contact their counsel prior to signing the consent. Too often our clients

are put in a situation where a Consent form ("consent") is thrust in front of them for signing. Already anxious at the thought of someone examining them, and often vulnerable due to their injuries, the examinee will just sign the consent the physician puts in front of them without reading it, and more importantly, without seeking input from their legal counsel. Given these assessments are often set weeks, if not months, in advance of the actual assessment, the CPSO should add wording to the Third Policy Report policy requiring that the physician provide any consent he or she requires to be executed to the examinee's counsel or legal representative **in advance** of the examination. The physician would then only have to verbally confirm that the consent has been received for the recording at the examination. However, should the examinee or their counsel/legal representative refuse to sign the consent, as already recommended in the Third Policy Report policy, the physician should postpone the assessment until the matter can be resolved. In this manner, both the physician and examinee will be protected.

Suspicious Findings

In both policies, the CPSO addresses the issue of a medical expert or medical examiner making a suspicious finding when physically examining an individual and/or examining an individual's medical records. Where a physician discovers an unexpected significant finding in the course of examining an individual during an IME of which the physician does not believe the examinee is aware or and/or has been treated for, the CPSO appropriately advises its members that they "**must** advise the examinee or their substitute decision maker of this fact to enable timely medical attention". However, this strong language utilized in the Third Party Reports Policy is not mimicked in the Medical Report Policy which states that the physician must only exercise his or her professional judgment in deciding whether or not to immediately advise disclosure of the suspicious finding to the individual. OTLA strongly recommends that the CPSO change the recommendation to the members in situations involving imminent risk of significant harm. Members should be advised that they must report any finding, which may require urgent medical care, to the examinee at the time the finding is made. Failure to do so may result in harm to an examinee, which may be avoided with simple disclosure.

Conclusion

OTLA thanks the CPSO for inviting us to provide input on these initiatives. OTLA supports the CPSO's initiative to ensure physicians understand the importance of Third Party Reports and Medical Experts opinions, which support patients and the wider justice system. OTLA would be pleased to discuss our position and recommendations further should the need arise.