OTLA Ontario Trial Lawyers Association

OTLA Submission to the College of Physicians and Surgeons of Ontario

Third Party Medical 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 reformulation and incorporation of the two policies Third Party Reports and Medical Experts: Reports and Testimony into one draft policy to be called Third Party Medical Reports (the "Policy") and one advice document to its members to be called Advice to the Profession: Third Party Medical Reports (the "Advice Document").

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

This consultation is extremely important to our members, our clients and society at large. At its heart, this policy seeks 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 proposed Policy.

Equally, OTLA applauds the CPSO's recognition of the importance of medical experts and their testimony. 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. 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

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

2. The expert offering expert evidence gained his or her special knowledge by a course of study or previous habit which secures his habitual familiarity with the matter in hand.[2]

The draft Policy emphasizes that physician authors of third-party reports "must" do so in an "objective" manner. OTLA commends the CPSO for using such strong language in the Policy.

OTLA also commends the CPSO for their clear and strong direction to members that they ***must***:

- be fair, objective and non-partisan;
- restrict their opinions to their scope of practice;
- not make any unrelated or unnecessary comments;
- ensure the statements and opinions are not influenced by prejudice or bias;
- not change statements or opinions regardless of who retained you or paid for services; and
- not be "hired guns"

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 the reformulated Policy 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 from the Requesting Party

OTLA commends the CPSO for its recognition of the importance of understanding and clarifying instructions from the requesting party. Equally important, 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. OTLA recommends that such a reminder be placed in the preamble of the Advice Document.

In the recent Licence Appeal Tribunal decision of *A.K. 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.[3] 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.

[2] *Kelliher v. Smith*, [1931] S.C.R. 672 at page 684.
[3] *A.K. vs. Allstate Insurance*, *2020 ONLAT 17-008646/AABS* (File No. 17-008646/AABS) at para. 57.

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 that a finding by a court or tribunal that an expert cannot be relied upon may affect the professional reputation of that physician.

Scope of Expertise

OTLA agrees with the direction that a physician should only opine in areas within his or her scope of expertise. However, lacking in the draft Policy is a caution to members with respect to opining on the credibility of an individual being evaluated either as part of a medical legal report or during an IME. 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[4] 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.[5] By commenting on the credibility of the examinee, the expert assumes the role of advocate, which will undermine his or her credibility with the trier of fact. In *Bruff-Murphy v. Gunawardena*, the Trial Judge held that the Psychiatric expert was not to testify about credibility. On appeal the Ontario Court of Appeal went one step further, and required a new trial of the entire matter as the Psychiatrist was "intent on advocating for the defence and unwilling to properly fulfill his duties to the court" and therefore his evidence lacked independence and he should not have been permitted to testify.[6]

OTLA recommends that the draft Policy and Advice Document be augmented to specifically caution members against making any interpretations or making any comments which are not pertinent to the expert's assessment or report, including credibility.

Ghostwriting

One area that neither the Policy or Advice Document addresses 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

[4] 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.
[5] 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.
[6] *Bruff-Murphy v. Gunawardena*, *2017 ONCA 502 (CanLII) at para. 42.*

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*[7] 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.*[8], 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 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[9] and court decisions[10] 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*:[11]

> 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

[7] *Lavecchia v. McGinn* ,2016 ONSC 2193 (CanLII) at para. 13.
[8] *Children's Aid Society of London and Middlesex v. B.*(CD), 2013 ONSC 2858 (CanLII).
[9] 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/.
[10] 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).
[11] *Kushnir v. Macari*, 2017 ONSC 307 (CanLII) at para. 31.

> 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 ***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 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 Policy should add a proviso 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. The Policy does not address this major problem.

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, the Policy 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 the Policy 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 Policy instruct physicians that they must permit observers[12] when requested by an examinee to ensure their comfort during the assessment.

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, which has been incorporated into the draft Policy that, "[P]hysicians **must** ensure… any arrangements with respect to observers or recording are mutually agreeable to the parties involved" [see para. 34(a)]. However, OTLA is concerned that the proposed Policy is not strong enough regarding how audio or video recordings are to be utilized and

[12] Except an examination under Rule 33.05 of the *Rules of Civil Procedure*, which states that observers shall not be present.

the specific method by which consent to records is being obtained. The Policy requires 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 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 Policy, the physician should postpone the assessment until the matter can be resolved. In this manner, both the physician and examinee will be protected.

Clinically Significant Findings

The combining of the two policies has effectively dealt with OTLA's prior concerns regarding a clinically significant finding. OTLA commends the CPSO's advice that in situations where a physician discovers a clinically significant finding that puts the subject at risk of serious harm or requires urgent medical intervention, they **must**: disclose the finding to the subject ***and*** communicate the finding to the subjects primary health-care ***provider***.

Conclusion

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