Defence Medical Expert Bias

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Accusations are often exchanged between the plaintiff and defence personal injury bar that medical experts used by the other side are biased. This is because a number of experts tend to gravitate to either one side or the other in conducting medical-legal work.

In Ontario, the duty of an expert is set out in Rule 4.1.01 of the *Rules of Civil Procedure*:

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

…

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

The issue of expert bias was addressed in two recent Ontario cases in which judges singled out specific medical experts for their "defence" bias.

In *Daggitt v. Campbell* (2016), a personal injury motor vehicle action, the defendant moved to compel the plaintiff to undergo an independent medical examination with psychiatrist Dr. Monte Bail. The motion was denied for various reasons, including the added time in obtaining an assessment and the fact that the plaintiff had not been examined by a psychiatrist, but rather by his own psychologist.

After dismissing the defendant's motion, Madame Justice MacLeod-Beliveau took the opportunity to comment on the plaintiff's allegation that the proposed defence psychiatric expert,

Dr. Bail, had failed to adhere to the principles of fairness, objectiveness, and impartiality and had a “defence” bias. Madame Justice MacLeod-Beliveau referenced six cases which were critical of Dr. Bail’s opinions. One of those cases found that Dr. Bail was not a credible witness and had failed to honour his undertaking to be fair, objective and non-partisan pursuant to Rule 4.1.01. She also cited the Supreme Court of Canada’s holding in *White Burgess Langille Inman v. Abbot and Haliburton Co.* (2015), that an expert witness, who is unable or unwilling to comply with their obligation to the Court, is not qualified to give expert opinion evidence and should not be permitted to do so.

Madame Justice MacLeod-Beliveau did not make a specific finding regarding Dr. Bail, as it was unnecessary because the requested medical defence was denied. Her Honour implied that he would not qualify as a fair and impartial expert. In that regard, Her Honour stated as follows:

[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, directly affects a party’s right to a fair trial.

…

[31] 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.

In another recent decision, *Mamado v. Fridson* 2016 CarswellOnt 9923, Justice Baltman took aim at defence experts, physiatrist Dr. Rajka Soric and psychiatrist Dr. Lawrie Reznek. The defendant brought a “threshold motion” alleging that the plaintiff had not established that her injuries met the criteria under section 267.5(5) of the *Insurance Act*. While Justice Baltman did not make any specific finding of bias against the defence experts, she identified serious flaws in their opinions.

With respect to Dr. Soric, Justice Baltman found that she had misread portions of the plaintiff’s pre-accident medical history, had no recollection of how much time she had spent reviewing the defence medical brief, and failed to document several of the tests she claimed to have performed in her report. Of particular note, Her Honour commented that the majority of Dr. Soric’s income came from assessments for defence lawyers and insurance companies and that the expert had never testified on behalf of a plaintiff - except on one occasion when the plaintiff also happened to be her patient.

With respect to Dr. Reznek, Justice Baltman noted that none of the plaintiff’s treating practitioners had ever referred her to a psychiatrist (although she had been seen by a psychologist). She was also critical of Dr. Reznek because half of his time and two-thirds of his annual income were devoted to medical-legal work for defendants.

From a personal injury defence perspective, albeit troubling, these cases are highly instructive. They clearly signal that defence counsel cannot ignore the need to exercise great caution when

selecting an expert and particularly the need to identify and weigh any potential risk of disqualification based on bias. These cases suggest that, before retaining an expert, defence counsel must take extra care to search reported decisions for any potentially troublesome comments about the expert and interview the expert to obtain a full history of their past retainers, and how much of their income is earned from providing defence medical-legal reports. Only armed with this critical information, can defence counsel be able to assess the risk of disqualification and properly advise their clients of that risk.