

As stated previously by the Ontario Court of Appeal in *R v Abbey*, this gatekeeping function will involve examining the potential probative value of the expert evidence by looking at the reliability of the evidence.³ The Court of Appeal stated, “Reliability concerns reach not only the subject matter of the evidence, but also the methodology used by the proposed expert in arriving at his or her opinion, the expert’s expertise and the extent to which the expert is shown to be impartial and objective.”⁴ The Court of Appeal also noted that “There are many civil cases in which an expert’s evidence has been excluded or given no weight because of that expert’s bias.”⁵

The Supreme Court set out the current legal framework for expert opinion evidence in *WBLI*, adopted with minor adjustments from the test in *Abbey*. The inquiry is divided into two steps:

1. The “proponent of the evidence must establish the threshold requirements of admissibility” using the four *Mohan* factors: relevance, necessity, absence of an exclusionary rule and a properly qualified expert. When evidence does not meet these threshold requirements, it must be excluded.
2. If the threshold requirements are met, the decisionmaker must balance “the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks.”⁶

When a piece of expert evidence fails this reliability examination, it should be excluded from the record.

The IME report in question does not meet the threshold requirement of being put forth by a properly qualified expert. Dr. Monte Bail is an unreliable and biased expert, and the Tribunal should exercise its gatekeeping function to exclude his report from the record on appeal. My reasons are set out below.

II. Dr. Bail is an Untrustworthy, Biased Expert

i. Court and tribunal findings that Dr. Bail provides misleading and biased evidence

Dr. Bail has been discredited in various Ontario Superior Court of Justice and Financial Services Commission of Ontario arbitration decisions, since at least 2007, and as recently as 2016.

³ 2009 ONCA 624, 97 OR (3d) 330 (CanLII) at para 87.

⁴ *Ibid* at para 87.

⁵ *Ibid* at fn 8, citing Guy Pratte, Nadia Effendi & Jennifer Brusse, “Experts in Civil Litigation: A Retrospective on Their Role and Independence with a View to Possible Reforms” in The Hon Todd L Archibald & The Hon Randall Scott Echlin, *Annual Review of Civil Litigation, 2008* (Toronto: Thomson Carswell, 2008) 169 at pp 182-88. See also David Paciocco, “Taking a ‘Gouge’ out of Bluster and Blarney: an ‘Evidence-Based Approach’ to Expert Testimony” (2009) 12 Can Crim LR 135 at 150-153.

⁶ *WBLI*, *supra* note 1 at para 22-24.

***Bruff-Murphy v Gunawardena*, 2016 ONSC 7 (CanLII)**

In *Bruff-Murphy*, Justice Kane held, on the basis of Dr. Bail's report, examination-in-chief, and cross-examination, that Dr. Bail was not a credible witness.⁷

He found, in part, that:

- Dr. Bail's report resembled "work legal defence counsel might do in identifying potential discrepancies between the plaintiff's transcript from discovery and her medical records";⁸
- Dr. Bail's credibility was "impaired in several ways by his other conduct, reporting and testimony in this case"⁹; and
- Dr. Bail was "making up evidence as he testified to support his conclusions adverse to the plaintiff."¹⁰

He further stated that:

The vast majority of [Dr. Bail's] 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."¹¹

As a result, Dr. Bail did not meet his obligation to be fair, objective and non-partisan.¹²

Finally, Justice Kane stated that the Court "will not qualify witnesses as experts in the future whose reports present an approach similar to that of Dr. Bail in this case."¹³

***Daggitt v Campbell*, 2016 ONSC 2742**

In *Daggitt*, Justice MacLeod-Beliveau dismissed a motion requesting an IME of the plaintiff by Dr. Monte Bail because there was insufficient evidence to warrant an order.¹⁴

⁷ *Bruff-Murphy v Gunawardena*, 2016 ONSC 7 at para 121-122.

⁸ *Ibid* at para 74.

⁹ *Ibid* at para 84.

¹⁰ *Ibid* at para 108.

¹¹ *Ibid* at para 122.

¹² *Ibid* at para 122.

¹³ *Ibid* at para 125.

¹⁴ *Daggitt v Campbell*, 2016 ONSC 2742 at para 2.

In *obiter*, she reviewed findings on Dr. Bail's lack of credibility as an expert witness and noted that recent changes to procedural rules had "done little if anything to curb the use of certain favoured biased 'hired guns' by the parties."¹⁵

She emphasized that:

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 party's right to a fair trial.¹⁶

Justice MacLeod-Beliveau found that although "it would be uncommon to find an expert biased and impartial," a number of cases showed that Dr. Bail's activities warranted such a finding.¹⁷

Nguyen v Economical Mutual Insurance Company et al, 2015 ONSC 2646

In *Nguyen*, the defendant insurance company had relied on an examination and evidence of Dr. Bail.

The Court noted that the Arbitrator "concluded Dr. Bail did not fairly assess the plaintiff and did not assign great weight to his opinion."¹⁸

Sohi v ING Insurance Co of Canada, [2004] OFSCD No 106

In *Sohi*, the Financial Services Commission was required to assess Dr. Bail's evidence on behalf of ING Insurance.

The arbitrator found Dr. Bail to be a "notably partisan witness" whose "partisan approach and [...] focus on inconsistencies are troubling and seriously weaken the credibility and weight of his testimony."¹⁹

As a result, the Commission decided that it would give little weight to Dr. Bail's evidence.²⁰

¹⁵ *Ibid* at para 30.

¹⁶ *Ibid* at para 27.

¹⁷ *Ibid* at para 31. Cases, at para 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 paras. 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."

¹⁸ *Nguyen v Economical Mutual Insurance Company et al*, 2015 ONSC 2646 at para 4.

¹⁹ *Sohi v ING Insurance Co of Canada*, [2004] OFSCD No 106 at paras 33-42.

²⁰ *Ibid* at para 41.

Gordon v Greig, 2007 CanLII 1333 (ON SC)

In *Gordon*, Justice Glass concluded that:

- Dr. Bail’s evidence was unreliable;
- Dr. Bail obfuscated upon questioning;
- Dr. Bail attempted to “cloud the proceedings”; and
- Dr. Bail had become an advocate for the party calling him as witness.²¹

The Court elaborated, in part:

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.²²

Dr. Bail’s answers upon cross-examination “appear[ed] . . . to be given by an expert who has become an advocate for the party calling him as a witness. This is not the role of an expert witness who is allowed to provide expert opinion evidence.”²³

Conclusion

Dr. Bail has been unable to understand his role as an expert witness and not an advocate. His expert opinion evidence is therefore unreliable and should be excluded.

ii. Dr. Bail has made public statements indicating bias and a failure to understand the role of an expert

Dr. Bail has made statements in the media that indicate a biased attitude towards people who are claiming disability benefits. Dr. Bail has also made statements that suggest he does not understand his role as an independent objective expert.

I attach a copy of an article that appeared in *Benefits Canada* (April 1998). In the *Benefits Canada* article, Dr. Bail is cited as follows:

“You take a man who gets a concussion playing amateur soccer on the weekend,” says Toronto psychiatrist Dr. Monte Bail, a specialist in medicolegal evaluations. “He has a headache, he takes it easy for a couple of weeks and then he’s back to playing soccer. But if he gets a medically identical concussion at work or in an auto accident where there’s compensation, he’s off on disability.”

²¹ *Gordon v Greig*, 2007 CanLII (ONSC) at para 45.

²² *Ibid* at para 47.

²³ *Ibid* at para 48.

Also, in an interview posted on the Riverfront Medical Evaluations website, titled “A Conversation with a Psychiatrist,” Dr. Bail stated the following:

“Insurance benefits are sometimes looked at as a kind of ‘pension’, or early retirement, to which the individual feels entitled because of various reasons (or sometimes for no reason). Other people are stuck in low-paying, boring jobs, and see an LTD claim, or MVA as a way out. [...]

For many people, there are significant psychosocial benefits to being disabled. For example, there are some women who are expected to hold down a low-paying, repetitive factory job and then come home and do all the housework, cooking, shopping, child care, etc. for their family (and sometimes for an extended family that lives under the same roof). They may receive little support or recognition for these efforts. Then an accident comes along. [...] For such individuals, there is significant psychosocial gain to be derived from being ‘disabled’.”²⁴

In *Sohi v ING Insurance Co of Canada*, the Ontario Financial Services Commission explained that the interview in which Dr. Bail focused on opportunistic claims and psychosocial benefits was, while not conclusive of bias, “disquieting” when taken in conjunction with his misleading testimony.²⁵

And, in the same interview, Dr. Bail said, “When a claims handler challenges my findings, I reassess the situation. If the claims handler provides no new information on the case, I reassess and then discuss with the handler my reasoning.” This statement suggests that he is willing to reconsider his medical opinion based solely on the opinion of a claims handler. This is clearly inappropriate for an independent expert.

iii. Dr. Bail’s opinions indicate a bias toward identifying malingering

In numerous cases, including a number before the WSIAT, Dr. Monte Bail has provided opinion evidence to courts and tribunals. His opinion is often the same, namely that the worker or claimant in question is malingering and has no psychiatric condition.²⁶ His opinion is often rejected because it is out of keeping with the opinion of other health professionals.

²⁴ “One-stop assessment shopping”, Benefits Canada (April 1998), online (cached): [URL]

²⁵ *Sohi*, *supra* note 6 at para 37.

²⁶ See e.g. *BB v Canada (Minister of Human Resources and Skills Development)*, 2011 LNCPEN 78, in which the Canada Pension Appeals Board rejected Dr. Bail’s evidence which was contrary to other opinions in the case. Dr. Bail said, “It is my opinion that Ms [BB] has been exhibiting malingering behaviour over time since the accident. I suspect she will continue to do so as long as this claim remains outstanding.” He said that she had not suffered any significant and serious psychiatric impairment. The Board allowed the appeal, noting that the majority of the medical evidence proved severe disabilities. In Decision No 1108/11, the Vice-Chair noted Dr. Bail’s opinion that the worker was “misrepresenting” his symptoms and had no DSM-IV diagnosis, but rejected his opinion (para 41). In Decision No 1729/09, the Panel preferred the evidence of the worker’s treating physicians over Dr. Bail’s opinion that the worker was malingering and had no psychological diagnosis (para 49).

We also have become aware that the WSIB has retained Dr. Bail as an independent expert in at least a few cases. We were able to obtain anonymized copies of reports Dr. Bail produced in two other cases in 2011 and 2013. They are attached. You will see his assessments of those workers are strikingly similar to the report on Ms. [REDACTED]. Each worker has no psychiatric diagnosis. Dr. Bail expects that each worker will continue to malingering “as long as the claim is outstanding.”

III. Remedy Requested

Ms. [REDACTED] requests that Dr. Bail’s report dated [REDACTED] be removed from the record before the WSIAT, or in the alternative, that the report be considered only as factual evidence about the WSIB’s adjudication, and not relied upon as expert evidence.

Please do not hesitate to contact me with any questions about this preliminary motion.

Yours truly,

[REDACTED]
Caseworker
Advocates for Injured Workers

cc: [REDACTED] [REDACTED]

[REDACTED] Authorities