

# Lawyers say expert bias still significant problem

BY ALEX ROBINSON

Law Times

Personal injury lawyers say a recent arbitrator's decision is a strong rebuke of expert bias that highlights the problem of professionally paid experts in insurance dispute cases.

In *Sopher v. Primmum Insurance*, an arbitrator for the Financial Services Commission of Ontario ruled in favour of an insurance claimant and discarded testimony of two experts retained by the insurance company, finding one of them had actively promoted the insurer's case.

Personal injury lawyers say the decision and others like it show that expert bias is still a significant problem in these kinds of cases in Ontario.

"The problem is that you only learn these things when cases go to trial or cases go to a hearing, and because so few cases go to trial or go to hearing, who knows how many untold stories there are of experts engaging in improper conduct," says Josh Nisker, a partner with Beacon Law LLP, who represented the applicant in the matter.

"Because unless you get them on the stand and cross-examine them, you just won't know."

The case concerned whether a 2012 motorcycle accident had left the applicant, Gary Sopher, catastrophically impaired. The dispute turned on whether a pre-existing injury accounted for a large portion of Sopher's post-accident disability. While the insurer conceded that Sopher is seriously disabled, one of its experts argued that a pre-existing

injury amounted for 38 per cent of his disability.

The arbitrator, David Snider, however, rejected this and found there were problems with the insurer's experts' assessments.

One expert's testimony on this point "dissolved entirely under cross-examination," Snider found.

The other expert, Dr. Kerry Lawson, had trained his daughter, who was a university student in an unrelated field, to be his psychometrist. She had engaged in conversation with Sopher's daughter during the tests she conducted.

Snider said this "calls into question any and all results" that Lawson's daughter obtained for the case.

The arbitrator found that Lawson had used a single brief test result to decide Sopher was not giving valid answers.

"Rather than assigning any validity to a number of larger, more sophisticated tests which were apparently administered and which did not show any significant scoring invalidity, Dr. Lawson chose instead to jump to the conclusion that he should completely invalidate many findings of significant impairment(s) to Mr. Sopher's functioning," Snider wrote in the decision.

Consequently, Lawson assigned zeros to certain test results, which resulted in a very low impairment rating, Snider found.

"I find all of the above to be very disturbing and conclude that Dr. Lawson was not conducting himself properly as an expert assessor of Mr. Sopher but was, instead, actively promoting the insurer's case and chose to



Josh Nisker says expert bias is a huge problem in insurance dispute cases.

Photo: Robin Kuniski

take the first shortcut he could see to conclude that Mr. Sopher was not catastrophically impaired," Snider said.

Wendy Moore Mandel, a partner with Thomson Rogers LLP who was not involved in the case, says a cap of \$2,000 plus HST for assessments in Statutory Accident Benefits cases has put pressure on experts to review less background documentation or use others to perform parts of the assessment to save costs.

This means experts hired by insurers often look for a quick way of meeting the insurer's goal of the denial of a benefit, she says.

"What it does is it leaves experts open to greater cross-examination, because they're doing a less fulsome job than they would otherwise do if the costs of the assessment were not

capped at the \$2,000 plus HST," she says.

Mandel says the cap pushes parties to retain experts who have done this type of work before. But the problem with that is that they will likely be dealing with experts who routinely look at one side or another and come with a certain bias, she says.

The matter is one of the last cases making their way through FSCO, as a new tribunal body — the Licence Appeal Tribunal — started hearing accident benefit disputes last year.

Plaintiff lawyers have expressed concerns over how the new tribunal has functioned so far, saying its procedures are being followed so strictly that it may be impacting the fairness of hearings.

Nisker says the finding in

Sopher's matter may have been different had it been heard at the LAT, where the length of cross-examination might be severely curtailed.

Nestor Kostyniuk, the lawyer representing Primmum, says his client has not decided yet whether to appeal the FSCO decision.

He says the decision only focused on the physical injury, but the insurer says part of the current overall package is what Sopher had before the motorcycle accident.

"There were problems before [and] there are clearly more problems since," he says.

"Therefore, when you split out the additional from the motorcycle accident, it should not have been found to be catastrophic."

Lawson could not be reached for comment. **LT**