

# **Meeting the needs of the 21<sup>st</sup> Century Client**

David MacDonald, Thomson Rogers

**Canadian Society of Medical Evaluators**  
***Auto Insurance Reform – How Will it Affect You?***

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## ***Overview:***

- Part 1 – Clients and Their Needs
- Part 2 – Dangers of Not Meeting Their Needs
- Part 3 – Recent Developments in the Law
  - “necessary and reasonable”
  - “any occupation”
  - Addressing Causation
  
  - Further cases or those listed available on request

## The Client

- *The patient*
- *The insurer*
- *The lawyer*
- *The arbitrator or judge*
- *The Legislator, The Association, The College?*
- *The Treating Practitioner*

## Clients' Needs Under Bill 198

- ***For Patients*** – Duty not to cause suspension of treatment without significant grounds – SABS is remedial and is to be construed in favour of the victim

## Clients' Needs Under Bill 198

- *For Insurers* – Reduce Assessment Expense

## Clients' Needs Under Bill 198

- *For Lawyers* – Work on Both Sides of the Fence
  - Accept and discuss contributory effect of pre and post morbid factors using *Athey* analysis

## Clients' Needs Under Bill 198

- ***For Judges and Arbitrators*** – *Quo Warranto* – “by what authority”, root conclusions in findings, because, because, because...

## Clients' Needs Under Bill 198

- ***For Legislators*** – The Pen and Solutions
  - It's a heavy pen – use it wisely
  - Colorado

## **Clients' Needs Under Bill 198**

- *For Associations and Colleges* – Best Practices, Keep within professional qualifications and duties
- Public disclosure of censure

## **Clients' Needs Under Bill 198**

- *For Peers and Treating Practitioners :*
- Facilitate don't Frustrate
- Respect Specialist opinions
- Give credence to length of time treated by practitioner making recommendations.

## Dangers of Not Meeting the Clients' Needs

- Regarding Patients:
  - Iatrogenic problems
  - Loss of professional credence
  - Delay = denial
  - Duty of Care
  - Societal costs
    - Productivity
    - OHIP
    - Family breakdown

## Dangers of Not Meeting the Clients' Needs

- Regarding Insurers:
- In First party matters, role is "*partner in rehabilitation*"
  - Biased opinions increase exposure
  - Opinions provided without all necessary information carry little weight
  - Assessment expense is not sustainable
  - Opinions upon issues outside qualifications invalid and devalue qualified opinions
  - Danger of Adversarial / Advocacy Tone in first party and third party roles

## Dangers of Not Meeting the Clients' Needs

- Regarding Lawyers:
  - “defence bias” v. “sympathetic”
  - Delay of report
  - Unrecorded communications
  - Multiple drafts
  - Advocacy
  - Conclusions without foundations
  - Reliance on assumptions
  - Professional qualifications
  - Knowledge of Disciplinary proceedings may affect credibility

## Dangers of Not Meeting the Clients' Needs

- Regarding Arbitrators and Judges:
  - Duty to Court
  - Bias
  - Credibility
  - Previous inconsistent statements
  - Advocacy
  - Assumptions
  - Preempting judicial determination of issue
  - Hypotheticals
  - Elements of practice

## Dangers of Not Meeting the Clients' Needs

- Regarding Legislators, Associations, Colleges:
  - Adversarial comment v. consultation
  - Loss of relevance
  - When regulations, guidelines, best practices are not followed
  - Duty of Care to patient, “truly independent”
  - Respect Specialist recommendations
  - Consider Colorado reaction

## Dangers of Not Meeting the Clients' Needs

- Regarding Treating Practitioners:
  - Adversarialism in Medicine
  - Iatrogenic effects and *Athey*
  - Advocacy position causes disjunction in therapy
  - Loss of treatment provider - insurer partnership prevents mitigation



## Recent Law on Point

*Cases available on request.*

*email: [dmacdonald@thomsonrogers.com](mailto:dmacdonald@thomsonrogers.com)*

*416-868-3155*

- Presentation posted on our website:  
[www.thomsonrogers.com](http://www.thomsonrogers.com)

## Reports: Bye Bye Boilerplate

- *L.F. and State Farm, F.S.C. 2002*

*“Dr. Z is a physiatrist. He provided a 16 page DAC report ... 10 pages of the report lists 206 documents he says he reviewed before seeing L.F. 3 pages deal with L.F.’s post-accident history (which curiously contains no mention [of subject treatment provider]). There is a page of L.F.’s current complaints and a page for physical examination (noting L.F. was “very cooperative” ...range of motion reduced 10-40%.*

*“Dr. Z’s opinion, however, is given in one paragraph. ... did not believe “any further physical intervention...is going to change the chronic discomfort” [despite subject and facility report of 60% improvement].*

*“I found the DAC assessments of little assistance...”*

## ***“Necessary and Reasonable”***

- *L.F. and State Farm*

“A fundamental purpose of the DAC system is to allow a quick independent opinion as to the merits of a proposed treatment plan...It can seldom be reasonable to give a blanket refusal for all future benefits.”

## ***“Necessary and Reasonable”***

- *L.F. and State Farm*

... “Nor is it reasonable to tell an applicant, who has been attending treatment for more than half a year ... only at the end of the treatment that it was unreasonable.”.

## ***“Necessary and Reasonable”***

- *L.F. and State Farm*

“... reasonableness and necessity should reflect, if applicable, that an applicant has, in effect, been denied ... a timely independent medical opinion.”

## ***“Necessary and Reasonable”***

- *L.F. and State Farm*

“... a significant factor must be whether the treatment was reasonable from the perspective of what the applicant knew or ought to have known during the course of the treatment.”

## The *“any occupation”* Test

*False*

Insofar as the onus is on the patient to prove complete inability to work, the assumption that the DAC must begin from is that the patient is not disabled until proven otherwise by clinical evidence.

## The *“any occupation”* Test

*False*

In Clinical testing, maximum effort must be consistently exerted in order for test results to be both valid and reliable. If it is not, the applicant does not discharge her onus and can't be found to be disabled.

## The *“any occupation”* Test

*False*

An applicant has to prove there is no job that they can do.

## The *“any occupation”* Test

*True*

An applicant can meet his or her onus of identifying suitable employment by opting for a DAC assessment.

## The *“any occupation”* Test

*True*

The ability to engage in a reasonably suitable job, considered as a whole, including reasonable hours, consistent attendance and productivity is the essence of the test.

## The *“any occupation”* Test

*True*

By opting for a DAC the applicant satisfies her obligation to try to identify suitable employment

For employment to be suitable it must be commensurate in nature, status, remuneration, hours and consistency with the preaccident employment.

## The *“any occupation”* Test

*True*

Considerations of employability in a suitable occupation include *whether one demonstrates the speed, accuracy, consistency and productivity sufficient to be employable in the suitable occupation.*

## The *“any occupation”* Test

*True*

If as a result of the assessment one fails to show the speed, accuracy, consistency and productivity sufficient to be employable in one of the identified suitable occupations, one has met the necessary onus to be deemed to have met the any occupation test.

## The *“any occupation”* Test

*False*

Unconscious symptom exaggeration will invalidate clinical functional testing results.

## The *“any occupation”* Test

*False*

When a disability assessor determines submaximal effort has been provided as a result of unconscious symptom exaggeration, one should conclude that the applicant has not met the onus of persuasively demonstrating the complete inability to engage in suitably selected employment.



## The *“any occupation”* Test

### *True*

“Applicants do not prove a medical condition to a medical examiner. Medical practitioners are not adjudicators but may give opinion evidence”.

“If a medical expert is unable to provide an opinion within one’s area of expertise, ... one should say so and why rather than render judgment based on a presumed medical onus of proof.”

## Addressing Causation

- *Fundamental Principle of Tort Law:*

*“Restore the victim to position she would have enjoyed had defendant not harmed her”.*

## The Thin Skull Rule

- One who causes harm is held responsible for the victim's uncommon or unforeseeable reactions to the injury.
- Example: John causes a minor scrape to Tom's arm. Tom, a hemophiliac, suffers disabling blood loss.
- *John is liable for the full extent of Tom's injuries even though the harm to another person would have been minor.*

## Victim's Onus - Causation

### Athey

Victim must prove that "more likely than not defendant caused or contributed to injury."

- "Not necessary for victim to show defendant's conduct was *sole\_cause*".

## Victim's Onus - Causation

- Victim must show defendant “*materially contributed*” to her injury

## Victim's Onus - Causation

*Athey v. Leonati*: Supreme Court of Canada

- “*Since most events are the result of a complex set of causes, there will frequently be [noncompensable] contributing causes*”.

## Multiple Causes of Impairments

### Athey

- *“As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury”.*

## Multiple Causes of Impairments

### *Athey:*

*“Apportionment [of responsibility] between [compensable] and [noncompensable] causes is contrary to the principles of tort law, because the defendant would escape full liability even though he caused or contributed to the victim’s entire injuries.”*

*“The victim would not be adequately compensated, since the victim would not be placed in the position he or she would have been in absent the defendant’s negligence”.*

## **Medical and Rehabilitation Benefits for the Thin Skull victim**

### *The Bill 59 S.A.B.S:*

*“Accident” “...incident in which the use or operation of an automobile **directly** causes an impairment”.*

## **Medical and Rehabilitation Benefits for the Thin Skull victim**

- *Stargratt and Zurich* F.S.C.O. 2002
  - Where accident is *“a significant factor”* in worsening or hastening premonitory condition, the accident is held responsible for *“directly causing”* an impairment.

## Exacerbation of Premorbid Condition

### ■ Hearn and Allianz F.S.C.O.

“This Commission has repeatedly held that the Accident need not be the only cause of the subsequent injuries, but rather, *must significantly or materially contribute to the ... impairment.*”

Thank you.

- Questions.
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