



MEMORANDUM

DATE: JUNE 18, 2018

TO: NYRC ASSESSORS

FROM: DR. ROCCO GUERRIERO, PRESIDENT

CC: NYRC REPORTS & QA STAFF

SUBJECT: MEDICAL LEGAL REPORT WRITING – MAINTAINING CREDIBILITY

At NYRC, we strive to be the very best with our services, assessors and medical legal reports. In order to ensure that we achieve this and that you, our valued experts, continue to produce objective, defensible and admissible medical legal reports in British Columbia we would like to provide some reminders and recommendations for your consideration when preparing your reports.

We want to emphasize that you are ultimately responsible for your report and at no time will anyone at NYRC alter or submit a final report that you have not approved. Our quality assurance process at NYRC is in place to help you to make sure that grammar, spelling and punctuation is correct and that all questions posed by the referral source are addressed appropriately. Further, NYRC may offer comments and suggestions to you, where appropriate, to ensure that all reports and opinions are fair, neutral and unbiased.

Below are some key points we would like to highlight for your consideration:

1. EDUCATING THE READER

Your role is to assist the court by providing objective opinions on the case at hand. The Judge and/or Jury will rely on your insights in order to make their ultimate decision(s).

As such, your reasoning for coming to an opinion in your report should include:

- a. Differential Diagnoses where applicable
 - b. What evidence in the exam and or records led to the differential diagnosis?
 - c. A discussion of the reasons why you eliminated other diagnoses when coming to your final opinion.
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Provide an introduction for your report to guide the reader. A proper introduction will allow the reader to understand the purpose and nature of the IME and the expert's approach to their examination.

We suggest that the start of each report, include the following paragraphs under the heading "**INTRODUCTION**":

"Mr. or Ms. Jane/John Doe, a xx-year-old male/female (occupation), was seen for the purposes of a medicolegal assessment and report at the request of Mr. /Ms. Fred/Alice Smith, of XYZ Law firm, on month, day, year, to address issues related to (an) incident(s) that occurred on month(s), day(s), year(s).

The examinee was assessed at NYRC (location) for (time in minutes or hours). The following individuals were present for the evaluation: "Mr. or Ms. Jane/John Doe, a professional interpreter (if required), examiner's name, and an intake assistant (to assist with note-taking and to chaperone the examination portion of the assessment – if appropriate).

I explained to her/him the purpose and nature of the assessment and each step of the examination with feedback. It was explained to her/him that the examination may reproduce some of her/his pain symptoms but would not do her/him any harm and she/he could stop the examination at any time. She/he was allowed to pace herself/himself during the examination and was given sufficient time to rest, if needed.

In addition, I explained to the examinee that no typical doctor-patient relationship was planned, and that I did not intend to treat him/her, nor did I intend to be his/her physician. I believe the examinee understood the purpose and nature of the examination and provided his/her consent both verbal and written to continue.

If any additional information subsequently becomes available, the opinions in this report may change."

2. UNDERSTAND YOUR DUTY TO THE COURT AS AN EXPERT WITNESS

Experts are retained to assist the trier of fact (generally Judges and Jury) in formulating their opinions on particular cases. It is not the role of experts to advocate for one side or the other and every attempt should be made to avoid advocacy.

Your report **must** state your Duty to the court outright under Rule 11-2 of the Supreme Court Civil Rules of BC. Under the heading of **Duty to Court** in your report we recommend the following:

I, Dr. X, do hereby certify that I have read the provisions set out in Duty of Expert Witness, Rule 11-2 of the Supreme Court Civil Rules, and I am aware of my duty to assist the court, and not be an advocate for any party. I have made every effort to ensure that my report

conforms with that duty and will, if called upon, give oral or written testimony in conformity with that duty. I confirm that I am the sole author of this report and of the opinions rendered herein. I certify that I have no Conflict of Interest in this matter.

3. QUALIFICATIONS

We recommend that you do not make reference to the number of assessments that you have performed over the course of your career. Opposing counsel may utilize the number to portray you as being a “*medicolegal hack*”.

We recommend that you include, if appropriate, that “*you provide both plaintiff and defense opinions and that you maintain a balanced practice between clinical and independent opinion services.*”

On a point of clarification – if you have certification from an American Board the correct term is **Diplomate** of the American Board of XYZ. Some of you are using the term **Diplomat** which refers only to someone who has a political appointment.

4. FACTS AND ASSUMPTIONS

Recently, the courts have taken a critical position on the **Facts and Assumptions** section in expert reports. There have been a number of cases in which expert reports have been deemed to be inadmissible or unpersuasive because the reports failed to specifically set out the facts and assumptions on which the experts’ opinions were based.

Mr. Justice Lowry, in *Crouch v. BC Women’s Hospital*, 2001 BCSC 995 stated that:

“I consider it preferable that a statement of expert evidence (most often referred to as an expert’s report) begin with a clear statement, or perhaps reference to an annexed letter of request, sufficiently specifying the nature of the opinion sought so as to make it immediately evident why the opinion is required and what it is that must be proven with this kind of evidence. The facts upon which the opinion is based - and only those facts - should then be set out in as complete and concise a statement as the circumstances will allow. The opinion, including the reasoning applied, should be expressed in the simplest terms bearing in mind that the challenge an expert witness faces is to make the evidence easily understood.”

In support of addressing a portion of this, we recommend that there be a very clear introductory paragraph as outlined above.

Mr. Justice Lowry provided further clarification in the case of *Rowe v. Bobell Express Ltd.*, 2003 BCSC 472 where he said as follows:

“Rule 40A of the Rules of Court permits the opinion of an expert witness to be proven by tendering a statement of the opinion without the necessity of the witness being called. The statement must, however, contain the facts and assumptions on which the

opinion is based. As I have said before, it is my view that the statement should set out all of the facts necessary to the opinion, but only those facts.

The facts, known or assumed, should be immediately apparent. The reader should not have to cull them out of pages recording what was said in the course of interviews or observed during examinations or revealed by tests administered.

There is no simple recommendation for this section of an Examiner's report as each case is different. Notwithstanding this, we would recommend that you try to be as comprehensive as possible on what facts and assumptions you are basing your diagnosis, opinions and recommendations."

The difference between a **fact** and an **assumption** may not be obvious. A **fact** is something that has occurred or is actually the case. The usual test for a statement of **fact** is verifiability; that is, whether it can be proven. An **assumption**, on the other hand, is a belief without proof.

5. USE APPROPRIATE LANGUAGE

Use neutral language in your report.

Again, you are not advocating for either side. Refer to the individual being assessed as either the examinee and not the claimant or plaintiff to reduce an adversarial implication.

Do not comment on the credibility of the examinee unless you are commenting on inconsistencies in the records, exam, etc., and this in turn brings into question the credibility of the injuries being reported.

Do not put examinees' comments in quotes in your report as that may be perceived as conveying skepticism about their statements.

It is ok to use Waddell's Signs or other tests for non-organic findings in your examination. Non-organic signs may affect the validity of your examination findings, but just leave it at that. Be sure that these non-organic signs and any inconsistencies are just documented or being used to reinforce your findings and not to comment on the examinee's overall credibility. That is for the Trier of Fact to determine.

Do not comment on liability of the incident. The expert's role is not to determine who was at fault of the incident that resulted in the injuries sustained. Rather, focus only on whether the incident caused the injuries in question.

6. TESTS UTILIZED IN YOUR PHYSICAL EXAMINATION

Under the heading **Physical Examination**, use the correct terminology when naming tests for certain conditions. These include:

It is **FAIR** test for piriformis syndrome. This stands for Flexion, Adduction and Internal Rotation of the femur. This Orthopaedic test has the best validity and stresses the piriformis muscle the most.

It is **Hawkins-Kennedy (not Hawkins)** test for shoulder joint impingement. The test is named after orthopaedic pioneers Drs. Jack Kennedy and Richard Hawkins in London, Ontario. In the UK it is referred to as Hawkins test.

Hornblower's not hornblower's

Trendelenburg - It is Trendelenburg Sign for weakness or paralysis of the abductor muscles of the hip. Trendelenburg Test is to determine the competency of the valves in the superficial and deep veins of the legs in patients with varicose veins.

Signs are reported as being either present or absent. Tests are reported as being either positive or negative. Therefore, if assessing hip abductor muscle weakness, one would report an absence of weakness as *"Trendelenburg sign on the (left/right/bilaterally) was absent."*

7. ADDRESSING CAUSATION

Balance of Probabilities:

- a. Ask yourself "Did the trauma in question more probably than not (51% or greater) cause the injury(s) in question".
- b. 100% CERTAINTY is not required in Medical Legal Reports. Balance of probabilities is what the courts are looking for.

Clearly state your opinion on causation:

Avoid terms like:

"May have", "could have", or "consistent with" when referring to causation.

Use terms like:

"But for", "very likely", or "based on the balance of probabilities".

Example: "The injuries very likely arose as a result of the traumatic event in question" or "But for that event, the resultant injuries would not have occurred".

When determining causation ask yourself:

- a. Is the suspected injury biologically plausible?
 - b. Is there a logical and reasonable temporal relationship between the incident and the injuries sustained?
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- c. Are there any other alternative explanations that could have resulted in the injuries?
- d. Is my opinion based on clinical experience and up to date scientific literature?
- e. Would the injuries sustained have resulted if the incident, had not occurred?
- f. Did the incident exacerbate or aggravate a pre-existing injury?

Note the difference between the terms “exacerbation” and “aggravation”.

Exacerbation – this is a temporary worsening in a condition that fully resolves. Therefore, an injury is not permanent.

Aggravation – Is a permanent worsening of a condition. Therefore, it is compensable. Even an aggravation of a pre-existing condition is “*Causative*” as it “*materially contributed*” to it. “Material contribution” is an important consideration in Canada – See ‘*Athey v. Leonati*’ (1996).

8. ADDRESSING QUESTIONS ON DISABILITY

Employment considerations:

Be sure to understand the examinee’s essential tasks of their employment or job duties in full. Some jobs may be more physically or mentally demanding than their titles reflect. Ask the examinee their job title and then a job description, in layman’s terms. This information should be obtained primarily in the interview portion of the examination as the examinee should verify their main job duties. This information may also be obtained from accepted resource documents like the National Occupational Classification (NOC) or the Dictionary of Occupational Titles (DOT). The DOT is the best resource to determine how physically or mentally demanding their job is, for example “Light” vs. “Heavy”.

9. ADDRESSING FUTURE IMPLICATIONS OF INJURIES

Probability of Future Events vs. Possibility of Future Events:

In addressing damages, future events should be considered in terms of possibilities, not probabilities. If there is a 25% risk for future surgery, state this outright. Do not state that surgery is unlikely.

Why?

It is the duty of the court to assess all possible future implications that the incident will have on the examinee’s current and future self in order to make an accurate determination on compensation. Thus, it is very important to list out future implications that may arise even when they seem unlikely.

Note: Future care needs is not based on “Medical Necessity”, but rather, “Medical Justification”.

10. QUESTIONS AND ANSWERS

Oftentimes the Letter of Instruction will contain a list of questions that the referring party wants answered. It is best to dictate these questions in your report together with your answers to each question. Answers should be succinct and clear to avoid ambiguity so that the referring party does not have to scour your report looking for answers.

Please answer the questions that the clients are listing in the Letter of Instruction. If you don't, then you are not meeting their expectations and may miss the purpose and nature of the examination. We will come back to you or our clients will come back and ask for answers to questions. To eliminate this back and forth, please be sure to answer all the questions!

11. ASK FOR MORE INFORMATION

If further medical records or imaging are needed to assist you in forming your opinion, request it! It is better to ask for more information than to base your opinion off partial or incomplete information. It is the duty of the referring party to provide you with all necessary information and clarification to assist you in forming an objective and impartial opinion.

Post-IME Telephone Conferences (TCs) with the referring party

Telephone conferences are **not** a chance for the retaining party to influence your opinion! Rather, it is an opportunity for you to raise concerns with incomplete records or the need for further testing, and to clarify questions in the Letter of Instruction, along with other things. These **TCs** are also necessary (from the client's perspective), as they want a verbal opinion. Based on your verbal opinion, they will decide if they want a written report or not. Do not regard these **TCs** as a nuisance. They are part of the medicolegal process and clients have a right to know what evidence they are going to be relying upon in advance.

12. PREPARING REBUTTAL REPORTS

There is nothing to be gained by making disparaging comments concerning opposing expert opinions or being overly argumentative. There will always be differences of professional opinion, but being overly aggressive with disparaging comments about your professional colleagues will only result in complaints to your professional licensing or regulatory bodies.

13. REPORT TEMPLATES

It is acceptable to use a templated report format to assist with ensuring that all issues are addressed. However, we ask that every effort be made to ensure that each report is

customized to the examinee and specific to the opinion that is being requested. We have noticed that some reports appear to be the same from one examinee to another, in particular: diagnosis, prognosis and recommendations. Opposing counsel will look for trends or patterns in your reports to determine whether your opinions are unique to the examinee or not. Not being careful in this regard can lead to misuse of examinee names and a perception of bias. We don't want parties to say, "I knew what the doctor was going to say, before I even read the report".

14. READABLE REPORTS

Reports should be easy to read. There are a number of things you can do to ensure this, including using appropriate subheadings and avoiding lengthy paragraphs. A reader is often looking for a specific piece of information, and breaking up the text with subheads and paragraphs facilitates quick scanning of the report. Please avoid paragraphs that fill an entire page.

CONCLUSION

We clearly state here that **your opinion is yours alone** and NYRC makes no effort to unduly influence your opinion. We are here to assist you and ensure quality in your expert report. We are also attaching to this memorandum an article entitled "**Medicolegal Reports Made Easy – New Rules**" which you may find of assistance.

We hope the recommendations provided are helpful. If we can be of further assistance, please do not hesitate to contact us. I can be reached at drguerriero@nyrc.ca if you have any comments or concerns. Thank you.
