# End use of ghostwriters in medical reports: lawyers

**BY MARG. BRUINEMAN**
For Law Times

Lawyers who act for plaintiffs in personal injury cases are calling for the end of the use of ghostwriters in the creation of expert medical reports.

And although the issue hasn't often been directly addressed in Ontario courts, there is indication that the judiciary has found problems with the approach.

"It's critical that the expert write their own report," says Stephen Birman, a personal injury lawyer and partner with Thomson Rogers in Toronto.

"I think it's kind of obvious that you would expect the medical expert is going to prepare their own report in its entirety and the rules pretty much say that explicitly — that the examining health practitioner shall prepare the report."

Expert evidence is mandatory in personal injury cases to prove injury and damages on both sides, says Birman. And it is necessary for them to be objective and transparent.

In the statutory accident benefits regime, there is a $2,000 cap on what insurance companies can pay for assessments. Some, such as neuropsychological assessments, can be comprehensive and involve collecting and reviewing a great deal of information.

"I can see how it might have developed whereby some of these assessors outsourced part of the report-writing function," says Birman.

"When an expert gets a request to write an expert report, it doesn't just come with a letter; sometimes, it comes with a box of documents."

That could involve having someone other than the expert reviewing and summarizing the documents. But if that does occur, there has to be transparency that the person who is doing the document review is someone other than the person who is conducting the medical assessment, and they have to be prepared to be cross-examined on it, he says.

There are concerns that the involvement of third parties — or ghostwriters — in the creation of these expert reports can completely change and alter their tone.

In weighing in on the issue last year, Justice Helen MacLeod-Beliveau of the Superior Court of Justice noted in ***Kushnir v. Macari*** that litigation counsel deal with these kinds of conditions involving examinations regularly, but that they're rarely litigated.

Among the concerns that she identified was that expert reports form the basis of counsels' assessment of the case and factor into their offers to settle. So, often, those reports are not tested in court.

She concluded that "the expert report must be that of the expert and not a report written partly by administrative staff or other individuals employed by the agency through which the doctor provides expert services."

Insurance defence lawyer Jennifer Hunter, a partner with Lerners LLP in Toronto, says the third-party companies handling the expert retainer on the lawyer's behalf become the middle man in the process. They retain the expert for the lawyer, handle the scheduling [and] the flow of medical records and deliver the report.

Plaintiff lawyers concerned that the flow of information impinges on their client's privacy will request a condition that the expert medical report be written by the expert, she says.

She sees potential for the judge's comments in ***Kushnir v. Macari*** to be applied to the use of experts beyond the medical field, such as engineers, because her ruling says the fact that the report is not written by the expert affects the reliability of the opinion.

Stephen Birman says it's very important medical experts write their own reports to be used in personal injury cases.

"***Kushnir*** could be interpreted very narrowly and I would argue that it should be, but it could be argued or counsel could argue it more broadly," says Hunter.

She suggests the best approach for lawyers is to find out if others were involved in any expert report, talk with the expert directly and have them disclose any third-party involvement in the report.

In her own practice, Hunter says, she tries to avoid using companies that offer the services of medical experts so that she can maintain direct contact with the expert throughout to "understand their approach and how they're going to conduct the independent medical examination, who's going to be involved [and] how the report is going to be prepared. Those things are important."

Toronto personal injury lawyer Charles Gluckstein says he is concerned that the involvement of third-party providers may steer the reports to a particular bias.

He says the court's observation in ***Kushnir*** that few of these experts are tested because of the trend toward negotiation and avoiding trial is particularly noteworthy.

The truth of the reports, their credibility and how they are assembled is not subject to the kind of scrutiny that's available had the case gone to trial, Gluckstein says.

"I thought that that was a particularly important decision, so now the plaintiff bar can use this as a weapon to ensure that defence assessments, whether it's done in the context of a tort claim or an accident benefit claim, have to be held to task, and these experts should not be able to get away with the ghostwriting and collaboration that goes on so that they can skew the outcome to a favourable result to the insurance company that's either defending the tort claim or the accident benefit claim," he says.

Robert Deutschmann, principal of Deutschmann Law PC in Waterloo, Ont., says third-party involvement in the creation of these reports has "become a bit of an industry" and that, despite the judge's comments in ***Kushnir,*** it persists.

A service provider is sometimes hired to find the necessary experts and co-ordinate everything required to create the report. That role could include providing backup to review the medical information and create a summary for the expert when the file they're working with is large.

Deutschmann says this is where the problem occurs, because the summary that's created is based on someone else's opinion of what's relevant.

"Ideally, it should be one doctor, one person, the same person reviewing all the medical information, preparing the summary and doing the assessment and coming to a conclusion," he says. "But it's become, for some people, a lucrative industry, preparing medical reports."

That process could also include final editing.

He points to a problem identified in an FSCO [Financial Services Commission of Ontario] hearing in April. In ***Harb and Allstate,*** the insurer's medical expert testified that the final report that was submitted by a service provider hired to co-ordinate the report process was not what he had dictated. The issue was discovered just before the hearing was to begin.

The insurer told the hearing that the only possible explanation was that the third-party service provider, which polishes the doctor's formatted reports and then submits them to the insurer for dissemination, somehow changed vital sections of the report.

In adjourning the hearing, adjudicator Charles Matheson determined the report was false and negatively impacted the applicant, possibly affecting the benefits to which the applicant may have been entitled.

Deutschmann says the practice is unacceptable because of the risk of it interfering with the one chance an individual suffering from permanent chronic pain has of receiving compensation.

"If you have one opportunity for compensation, then you should have the best medical evidence available on both sides to be fair to that individual. And, in my view, the best medical evidence is where the doctor reviews everything and provides their opinion," he says.

"If that medical expert is the one testifying, they should be testifying on the totality of the work they did, not to the work of other people and then presenting it as if it were their opinion alone." **LT**

Reprinted with permission. © 2018 Thomson Reuters Canada Ltd.