A GUIDE TO EFFECTIVE LEGAL REPORT WRITING FOR HEALTH CARE PROFESSIONALS

McLEISH ORLANDO LLP
LAWYERS

9th Edition: May 2023

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ABOUT OUR FIRM

McLeish Orlando is a law firm dedicated to helping people who have been seriously injured and to helping family members who have lost a loved one. Our team represents individuals who have suffered brain injuries, spinal cord injuries, serious orthopaedic injuries, and families where a family member has been killed.

By limiting the number of clients we represent, we are able to devote whatever time and resources necessary to each client's case.

The most important resources we have are the medical and rehabilitation professionals we retain. McLeish Orlando's goal is to procure fair and objective reports from all health professionals who assess and treat our clients. We have prepared this Guide to help health professionals achieve our goal.

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A. INTRODUCTION

The most important aspects of any personal injury claim are the reports from the treating health professionals. The health care professionals who author these reports are in a much higher standing than lay witnesses. There are two reasons for this:

1. Reports of health professionals, not the evidence of lay witnesses, are the basis for settlement discussions.

2. The authors of these reports are considered experts and accordingly are permitted to give their opinion on matters within their area of expertise.

Lay witnesses are distinctly different than “experts” in the eyes of the law in that they are not permitted to give their opinions. Lay witnesses can only give evidence on what they saw, heard, smelled or felt.

Example
A lay witness, such as an ambulance attendant can say: “I saw Ms. Maclean at the collision scene and she was unconscious for 30 minutes after my arrival at the scene.”

An expert witness writing a report within her area of expertise can say: “The ambulance records indicate that Ms. Maclean was unconscious for 30 minutes after the arrival of the ambulance and the police records indicate that the collision occurred 7 minutes before the arrival of the ambulance at the scene. Based on a period of unconsciousness of 37 minutes, it is my opinion that Ms. Maclean suffered a moderate brain injury.”

How an expert expresses her opinion in a written report is of vital importance. Success in obtaining fair compensation for the losses suffered by an injured individual can turn on a word, a phrase, a sentence or a paragraph contained in a report.

B. EXPERTS’ REPORTS AND THE *RULES OF CIVIL PROCEDURE*

Information an Expert’s Report Must Contain

Rule 53.03 (2.1) of the *Rules of Civil Procedure* states what every report shall contain and that is the following:

1. The expert's name, address and area of expertise.

2. The expert's qualifications and employment and educational experiences in his or her area of expertise.

3. The instructions provided to the expert in relation to the proceeding.

4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

6. The expert's reasons for his or her opinion, including,

    i. a description of the factual assumptions on which the opinion is based,

    ii. a description of any research conducted by the expert that led him or her to form the opinion, and

    iii. a list of every document, if any, relied on by the expert in forming the opinion.

7. An Acknowledgment of Expert's Duty - (Form 53) signed by the expert, which must be attached to every report.

A copy of the Form 53 - Acknowledgment of Expert's Duty is shown at **Appendix "A"** at page 30 of this report.

Difficult Language in Rule 53

The *Rules of Civil Procedure* can appear convoluted. For example, when referencing the content of expert reports, paragraph 5 reads as follows:

> 5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

However, a close reading of this particular requirement in the *Rules of Civil Procedure* indicates that the requirement only applies **if** an expert gives a range of opinions. While an accident reconstructionist may be required to give a range of opinions (for example, a car may have been moving anywhere from 30 km/h to 50 km/h at the time of impact), the same is not required of a health professional.

A Remedy for Existing Reports Which Do Not Comply with Rule 53

Under Rule 53.03, every expert report must be accompanied by a Form 53 - Acknowledgment of Expert's Duty -- unless the court orders otherwise. This is problematic because of the wording of paragraph 2 of Form 53 which reads as follows:

> "I have been engaged by or on behalf of (name of party/parties) to provide evidence in relation to the above-noted court proceeding."

The language of paragraph 2 in Form 53 is such that certain experts may not be allowed to provide their opinions on a case.

Example
Say that a case manager feels that a neuropsychological assessment is warranted for a patient. Approval is then given by the accident benefits insurer for that assessment, and a detailed neuropsychological report is prepared.

Can the neuropsychologist be called as an expert witness at trial by either the plaintiff's lawyer or the defence lawyer?

Maybe not.

Why not?

The neuropsychologist was not engaged "by or on behalf of one of the parties to provide evidence" in relation to a court proceeding

Is there anything that can be done so that the neuropsychologist who wrote the report can be called as an expert witness?

Yes

What can be done?

Let us assume that the lawyer representing the injured person wishes to call the neuropsychologist as an expert witness. The lawyer may write directly to the neuropsychologist and request a report that complies with Rule 53 of the *Rules of Civil Procedure*.

The new report must address the issues listed in Rule 53 of the *Rules of Civil Procedure,* as outlined on pages 1 and 2 of this Guide. The neuropsychologist must also complete the Form 53 - Acknowledgment of Expert's Duty. The second report that complies with the *Rules of Civil Procedure* will contain information that is virtually identical to the first report, but the difference now is that the neuropsychologist was "engaged by or on behalf of one of the parties."

Generating a second report to comply with the *Rules of Civil Procedure* will take additional time and will require some additional cost, but it is an effective way to make use of helpful information a health professional has generated.

Is it possible to call the neuropsychologist as an expert if the neuropsychologist did not comply with Rule 53 and did not complete Form 53?

Yes, it may be possible. The courts have made some exceptions for health professionals to be called as expert witnesses if:

> The health professional has provided treatment to an injured person or;
>
> The health professional was initially retained by the accident benefits insurance company.

C. THE ROLE OF THE EXPERT WITNESS

Many health professional are often surprised when they learn about what it means to be an expert witness. An expert is not meant to advocate for the injured person. Rather, an expert witness is to assist the court by providing opinion evidence on matters that fall within their area of expertise – matters generally outside the experience of lay people.

Example:
A health professional is advocating on behalf of the patient if she writes:

> "This was a horrific tragedy of epic proportions."

Compare that to the following sentence:

> "The collision caused extensive injuries to Mr. Jones which will reduce his ability to function at work, with performing certain chores at his home, with interacting with family and friends, and with engaging in recreational and athletic pursuits."

A report that contains language like the former example is less credible since it seems as though the health professional is biased and merely helping the injured person win his or her case. The neutral language in the second example is credible – it shows that the health professional is trying to help the judge and jury decide the case fairly and responsibly.

The consequences of writing as an advocate are:

- The insurance adjuster and defence lawyer will give little or no credence to the report.
- If the opposite side does not give credence to the report, the case becomes difficult to settle.
- If the case goes to trial, the trial judge may rule that the health professional who authored the biased report is not to be called as a witness.

The ultimate consequence for the injured person is that his or her settlement ends up being less than it should be.

If the health professional keeps her language neutral and unbiased, and avoids sounding like an advocate, her report will be taken very seriously by an insurance adjuster, a defence lawyer, a judge and the jury.

D. THE LICENCE APPEAL TRIBUNAL

Ontario has two systems of recourse for individuals injured in motor vehicle collisions: the tort or civil lawsuit, and the no-fault statutory accident benefits regime. Unlike civil lawsuits which are adjudicated in the courtroom, disputes between insured individuals and their statutory accident benefits insurer are heard before the Licence Appeal Tribunal (the "LAT"). The LAT is the successor to FSCO, which was the arbitration body responsible to hearing these disputes until July 1, 2020.

The LAT's Common Rules of Practice and Procedure govern the use of experts although many of the report writing tips and instructions in this guide are useful in both contexts. Rule 10 of the Common Rules of Practice and Procedure applies to expert witnesses at LAT hearings and is modelled on Rule 53.03 of the *Rules of Civil Procedure*.

Rule 10.2 states a party who intends to rely on or refer to the evidence of an expert witness shall provide every other party with the following information in writing:

a. The name and contact information of the expert witness.
b. A signed statement from the expert, in the Tribunal's required form, acknowledging his or her duty to:

    i. Provide opinion evidence that is fair, objective, and non-partisan,
    ii. Provide opinion evidence that is related to matters within his/her area of expertise, and
    iii. Provide such additional assistance as the Tribunal may reasonably require to determine a matter in issue.

c. The qualifications of that expert witness, referring specifically to the education, training and experience relied upon to qualify the expert.
d. A signed report that sets out the instructions provided to the expert in relation to the proceeding, the expert's conclusions, and the basis for those conclusions on the issues to which the expert will provide evidence to the Tribunal.
e. A concise summary stating the facts and issues that are admitted and those that are in dispute, and the expert's findings and conclusions.

Rule 10.3 requires the party who filed the notice of appeal (usually the insured who is disputing a denial) to make the above noted disclosure at least 30 days before the hearing. The Rule also requires any other party to do so at least 20 days before the

hearing, and permits the Tribunal to make orders related to the timeline for the disclosure of expert witnesses.

Finally, Rule 10.4 requires any party who intends to challenge an expert's qualifications, report or witnesses statement to give notice in writing with reasons for the challenge to the other parties as soon as possible. This notice must be filed the Tribunal at least 10 days before the hearing.
It is commonplace that LAT hearings are conducted remotely, via video stream. They may also be heard in person in some cases, in writing or by telephone.

E. THE ONUS OF PROOF

The Balance of Probabilities

Many treating health professionals do not understand the burden of proof which rests on an injured person in an action for damages. And why would they? Health professionals do not receive training in medical school on writing medical-legal reports, or being an expert witness at a trial. As a result, many health professionals are unclear on the wording to use when stating their opinions and conclusions.

Many health professionals are reluctant to state an opinion in a report unless they are "certain" of it. This is unnecessary and may hinder the injured person's ability to be fairly compensated. In order to satisfy the onus of proof that is on the injured person, a fact does not need to be proved with "absolute certainty". A fact is proven on "a balance of probabilities." Therefore, the expert reports that support the facts of a case only need to be expressed "on a balance of probabilities."

Expressing an opinion, "on the balance of probabilities," means that there can be some doubt in the mind of the health professional about her opinion, but that is fine as long she feels that her opinion is *probably* or *likely* the correct one.

How does this translate into words in an actual report? A health professional qualified in the area of brain injury, such as a neurologist, neurosurgeon, psychiatrist or neuropsychologist, can write:

> "In my opinion, the injured person *likely* suffered a moderate brain injury as a result of the collision."
>
> Or
>
> "In my opinion, the injured person *probably* suffered a moderate brain injury as a result of the collision."

Language that could harm an injured person's case is as follows:

"In my opinion, the injured person *possibly* suffered a moderate brain injury as a result of the collision."

The reason using the word "possibly" hurts the case is that it does not satisfy the onus on the injured person of proving his case on "the balance of probabilities."

Real and Substantial Possibility of a Future Adverse Consequence

There is one exception to the general rule that an injured person must establish his or her case on a balance of probabilities. The onus of proof is on an injured person with respect to potential future adverse consequences.

Health professionals do not have crystal balls that gaze into the future. Our courts recognize that future events are difficult to predict and are different than stating an opinion on past events. With respect to future events, the health professional needs to state her opinion on the basis that, "there is a real and substantial possibility," of a future adverse consequence.

However, to state that "there is a real and substantial possibility" of a future event is not enough. The health professional must attribute a percentage to the chance of that future event occurring.

Example
Let us say that an orthopaedic surgeon writes:

"There is a real and substantial possibility that Sarah will have to have her right leg amputated above the knee within 5 years."

A life care planner working on the case writes:

"If Sarah's right leg is amputated, she will incur future care expenses of $250,000.00 as outlined in my report."

This does the injured person little good if a percentage is not attributed to that "real and substantial possibility."

Let us say the chances of amputation are 25%. The trial judge will instruct the jury that if they accept the evidence of the orthopaedic surgeon and the life care planner, the proper way of calculating the injured person's damages is:

25% of $250,000.00, or $62,500.00

If the orthopaedic surgeon stated that there was a 51% chance that Sarah's leg will be amputated, she would receive the full $250,000.00. A "balance of probabilities" is

considered a chance of 51% or more. If an opinion is stated on that basis, and the jury accepts that opinion, the injured person is entitled to receive 100% of her damages.

So if a health professional attributes a percentage to “a real and substantial possibility” of a future adverse consequence, and a jury accepts that evidence, the result will be a percentage of the monetary value. If the health professional expresses her opinion “on a balance of probabilities”, the award is inevitably much higher.

Strong Versus Weak Language

The problem with the word “probably,” and the phrase “real and substantial possibility,” is that they have little persuasive value. It is the equivalent of an emergency physician saying, “Ms. Dole apparently broke her left arm,” rather than “Ms. Dole fractured her right humerus”. Use of the word “apparently” leaves some doubt about whether the injured person actually broke her arm. The word “probably” tends to leave the same doubt in the mind of the reader or listener.

If a health professional is confident enough in her opinion, the word “probably” should be avoided. Listen to the difference in persuasive effect between, “Ms. Dole *probably* sustained a moderate brain injury” as opposed to, “Ms. Dole sustained a moderate brain injury.” If I am an insurance adjuster reading the report of a health professional, or a juror listening to the testimony of the health professional, I will be less convinced if I read or hear the word “probably” than if the word is omitted.

F. CAUSATION

The Legal Rationale

As a health professional writing a report, you cannot address the issue of causation in a meaningful way without knowing the operative legal language. The operative language is often referred to as the “but for” test. Put simply, if it can be said that “but for” a defendant’s negligence, the injured person would not have suffered his injury, the defendant’s negligence is considered the legal cause of the injury. This is true even if there are other contributing causes. The rationale for this test was set out in the Supreme Court of Canada case of *Athey v. Leonatti*. In that case, the Supreme Court of Canada states:

> Causation is established where the injured person proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury.
>
> The general, but not conclusive, test for causation is the "but for" test, which requires the injured person to show that the injury would not have occurred but for the negligence of the defendant.

> It is not now necessary, nor has it ever been, for the injured person to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. 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. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.
>
> The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm.

The Supreme Court of Canada reaffirmed the "but for test" in the case of *Resurfice Corp. v. Hanke* which reads in part as follows:

> [T]he basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The injured person bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.

This fundamental rule has never been displaced and remains the primary test for causation in negligence actions.

An Example of More Than One Cause

An injured person must prove that a traumatic event caused his or her injury. In most cases the injured person has only been involved in one collision, making the cause of the injury apparent. But sometimes there is more than one collision and potentially more than one cause of a person's disability.

Example
Let us say a person was injured in three traumatic events on February 6, February 28, and June 4, 2013.

On February 6, the injured person was backing up a tractor to hook it up to a trailer in a trucking depot and had difficulty getting the tractor attached to the trailer on the first try. In the second attempt, when the tractor met the trailer, he felt the right side of his neck snap and felt pain in his neck and he started seeing a chiropractor the next day. His neck started to improve quickly and he was cleared to return to work on March 3, 2013.

On February 28, just as the injured person is getting out of the driver's door of his car in a parking lot, a van backs into the passenger side near the rear of the injured person's car and causes a twisting type injury to the left side of the injured person's neck. As a

result, the injured person then increases his visits to the chiropractor. In addition, after the February 28 collision, the injured person has difficulty moving his neck - he cannot move it without left-sided neck pain and cannot move his neck through a full range of motion. He then starts to get pain running down his left arm to his fingers.

On June 4, the injured person is stopped on Highway 401 eastbound and another car rear ends his car. The injured person reports to his chiropractor that the June 4 incident aggravated his symptoms only for about a week. Before the accident, the injured person had surgery on May 27, 1998, to the left side of his neck to relieve a trapped C6 nerve and the surgery is helpful in removing most of the injured person's left arm pain, but it does not help the injured person's left sided neck pain and does not help increase the range of motion in the injured person's neck.

The injured person is a 57-year-old truck driver and earns $55,000.00 a year. His family doctor will not clear him to drive a truck after he loses his AZ truck driver's licence at a Ministry of Transportation mandatory medical examination. Because of his age, his disability, his limited education (grade 7) and the perception that he will be a detriment to any prospective employer, he is unable to get another job and has not worked since February 6, 2013. Add to the foregoing, the fact that the injured person had degenerative changes existing in his neck as of February 6, 2013, but no neck pain or stiffness or any other neck symptoms.

The injured person starts a lawsuit as a result of the February 28, 2013 collision only and not the other two incidents.

Needless to say, on these facts, causation is of vital importance and has enormous repercussions. The reports of health professionals will be crucial in determining damages. Assume for the purpose of the following section that you believe that the injured person would not suffer left-sided neck pain and would have been able to return to work as a truck driver within a short period of time had he not been injured in the February 28, 2013 collision.

If you use the following language, the injured person should be fully compensated for his past and future loss of wages and various other categories of damages:

> "But for the collision on February 28, 2013, the injured person would not suffer left-sided neck pain and restricted range of motion, and would not suffer an inability to work as a truck driver."

The words "but for" in the above sentence are the important ones. However, while the words "but for" are legally sufficient, they are not the most persuasive words to accurately convey the impact of the February 28, 2013 collision on the injured person. Better wording from the injured person's perspective in this case would be:

> "The February 6 incident involving the trailer caused a short term inability to work of approximately 4 weeks. The February 28, 2013 collision was the

most significant cause of the injured person's left-sided neck pain and restricted range of motion, as well as his inability to work as a truck driver. Without the involvement of the February 28, 2013 collision, it is my opinion that the injured person would have been able to return to work as a truck driver on March 3, 2013 and work until normal retirement age. The June 4th incident, may have caused an inability to work of a few days, but nothing more than this."

The Thin Skull Doctrine

What Does it Mean?

Most health professionals have heard the phrase, "the thin skull principle", but are unsure of its applicability to a particular case. The "thin skull principle," means that a defendant takes a victim as she finds him.

Example
Lisa has degenerative changes in her neck, but experienced no symptoms until she was involved in a collision. Since Lisa's neck was more fragile and vulnerable than a healthy neck, she suffered an injury far more extensive than a person with a healthy neck would have in the same circumstance.

The defendant in this case would be fully responsible for Lisa's injuries since the defendant has to take the victim as he finds her. The defendant cannot take the position that he is not responsible for the full extent of the damage he caused to Lisa because she had a neck prone to injury.

Applies to Psychological as Well as Physical Injuries

The "thin skull principle," also applies to psychological and emotional injuries. It is no defence to say that the injured person was vulnerable to depression, anxiety, and to chronic pain whereas someone else would not be. A defendant is not entitled to have the damages reduced because most people might not suffer from depression, anxiety and chronic pain in the same kind of collision.

Incorporating the Thin Skull Doctrine into a Report

How does a health professional deal with the thin skull principle in a report? Dealing with the degenerative neck example, a health professional might write the following in a report:

"X-rays show the injured person had long standing degenerative changes in her neck. I have been Lisa's family doctor for ten years and looking at my notes I see that I saw her once for a neck strain five years ago which occurred after she was body checked in a pick-up hockey game. At that time, I prescribed anti-inflammatory medication and when I saw her a month later she reported that her neck symptoms had totally dissipated.

Other than for that brief period five years ago, Lisa has been able to work and do handyman chores around her home and engage in recreational and athletic activities without any problems whatsoever with her neck. However, at the time of the collision, Lisa was 55 years old and, like most people over 35 years old, had a degenerative condition in her neck. Lisa's neck was more fragile and more vulnerable than someone who did not have degenerative changes. It would take a less severe traumatic event to injure Lisa's neck than someone without degenerative changes. As well, the damage to Lisa's neck would be greater, because of the pre-existing weakness in her neck. The collision in question caused Lisa's neck pain and restricted range of motion. Lisa would not be suffering from neck pain and stiffness but for the collision. As a direct result of the collision, Lisa now has almost constant pain and restricted range of motion in her neck.

The pain is blunted somewhat by the use of Tylenol 3, but the pain returns when the effects of the medication wear off.

The pain and restricted range of motion interfere with Lisa's ability to function. Specifically, Lisa can no longer ..."

G. THE INJURED PERSON'S PRE-ACCIDENT HEALTH HISTORY

The Consequences of Missing Something

Most injured individuals have difficulty when recalling and providing details of their pre-collision health history. What makes the situation worse is rather than saying something like: "I do not remember ever having back pain before the collision", the injured person may deny ever having back pain and say: "I never had back pain before the collision." This is a critical mistake if the injured person ever did have back pain before the collision.

When writing about an injured person's pre-collision health history in a report, a health professional has to be very cautious about using absolutes. Absolutes in this context are words like "always" and "never". There can be devastating consequences to an injured person's claim for damages if a health professional asks an injured person: "Have you ever had back pain before this collision?", and the injured person responds: "No, never," and then this information is recorded in a report. A better way of asking the question is: "Can you ever remember having back pain before this collision?" Even if the injured person says "no", that does not mean she did not previously have back pain, she just cannot remember whether she has or not.

Consider the following example as to how a health professional can be cross-examined by a defence lawyer, if the health professional has received an inaccurate pre-collision health history and has put this in her report. On the initial interview after the collision in issue, the health professional asked the injured person if she had ever had neck pain

before the collision. The injured person responds that she did not. However, unknown to the health professional (and something which the injured person had forgotten) is that the injured person strained her neck playing a sport three years ago. She saw her doctor on one occasion after the sports injury and the only treatment was a prescription of Tylenol 3. In these circumstances, the defence lawyer's cross-examination of the health professional on the contents of the report may go something like this:

Example of Cross-Examination

Q: You took a history from Ms. Dole?

A: Yes.

Q: You relied on that history in coming to your conclusions?

A: Yes.

Q: And if the history you took was inaccurate or incorrect, this can throw off your conclusions?

A: Yes.

Q: The inaccurate or incorrect history can make your conclusions wrong?

A: Yes.

Q: You asked Ms. Dole if she had ever had any neck symptoms before the collision in issue?

A: Yes.

Q: And she told you she did not?

A: Yes.

Q: Would it surprise you to know that Ms. Dole injured her neck three years ago?

A: That's not what she told me.

Q: We will get through this a lot faster if you just answer my question. Would it surprise you to know that Ms. Dole injured her neck three years ago?

A: Yes.

Q: You did not know that Ms. Dole injured her neck playing soccer three years ago?

A: No.

Q: You did not know that she saw her family doctor for this injury to her neck?

A: No.

Q: You did not know that the family doctor prescribed medication?

A: No.

Q: You would agree that you received an inaccurate history from Ms. Dole?

A: Yes.

Q: And as you said a few minutes ago, an inaccurate history can throw off your conclusions?

A: But, but...

Q: Just answer the question please. We will get through this a lot faster if you do. Would you like me to repeat my question?

A: Yes.

Q: As you agreed a few minutes ago, if you receive an inaccurate history from the injured person that can throw off your conclusions?

A: Yes.

Q: It can make them wrong?

A: Yes.

Q: It might well mean Ms. Dole is not telling the truth on certain other very important matters in this lawsuit she has started against my client?

A: Yes.

The foregoing questions and answers have been exaggerated to make a point, but the lesson is clear - an accurate pre-collision health history is extremely important.

In a real trial, a well prepared health professional would not be as compliant as the example suggests. A well prepared health professional would not agree so readily that her conclusions were incorrect. Instead, a well prepared health professional would say that it would depend on the extent of the inaccurate pre-collision health history as to whether her conclusions would be wrong. Regardless, the injured person's credibility is

now in issue and the health professional's conclusions are weakened. The more times a health professional obtains inaccurate or incomplete information about a person's pre-accident health, the more the injured person's claim for damages can be compromised.

How to Avoid the Problem

There are several ways to avoid the problem above. One way is for the injured person's lawyer to order the family doctor's clinical notes and records from as far back as they are available, review the records with the injured person, and then send the injured person a written summary of the entire pre-collision health history. The problem with this method is if the pre-collision health history is very extensive, or if the person has suffered a brain injury affecting memory, the person may not be able to remember and recite his pre-accident health history to a health professional when asked.

Another way to avoid the problem is for the lawyer to obtain the family doctor's clinical notes and records as far back as they are available and send them to the health professional for review. Still, there is a problem with this method as well. Many health professionals, especially physicians, are very busy and do not have time to review the records of the other professionals who treated the injured person before the collision in issue. It can indeed be an arduous task to review two or three inches of records containing all of an injured person's symptoms and complaints made over a period of twenty years.

Defence Medical Examinations

While the injured person's treating physicians may not have the time or inclination to meticulously review all of the pre-collision records, defence doctors definitely do. In fact, one of the major objectives of a defence doctor is to find something in the pre-collision records that the injured person has not reported to his treating health professionals. The defence doctor will then list the inaccuracies in his report on the pre-collision health history the injured person has given to his treating health professionals.

H. CONSISTENCY WITH OTHER MEDICAL RECORDS

As harmful as an inaccurate pre-collision health history can be, a situation where an injured person gives a health professional an inaccurate post-collision health history can also have devastating consequences. Take the example of a person who sees her family doctor five days after a collision and tells her doctor she was rendered unconscious for two hours. The family doctor then makes a referral to a neurologist or neuropsychologist. The family doctor may give the specialist the information about the two hours of unconsciousness or the injured person may do so when she sees the specialist. In any event, the information is repeated and is now in the family doctor's records and the records of the specialist.

At some point before the case is concluded, the police and ambulance records will be ordered. Assume the police report shows the collision occurring at 5:00 p.m. and the

ambulance dispatch report shows the ambulance arriving at 5:15 p.m. The ambulance records further indicate that the injured person was conscious and talking to the ambulance attendants upon their arrival at the scene. It turns out that the injured person suffered from amnesia for a few hours following the collision and cannot remember events until she was at the hospital. In other words, she mistakes her amnesia for a loss of consciousness.

If a health professional indicates in a report that the injured person suffered unconsciousness for two hours, a defence lawyer can ask a series of questions similar to those from the example above. The health professional's conclusions are suspect and the injured person looks as though she is trying to exaggerate the seriousness of her injury for monetary gain in the lawsuit.

The problem is avoided or minimized if the ambulance records and hospital emergency records are ordered and reviewed with the injured person. This can be done either by the injured person's lawyer or by a health professional involved in the injured person's treatment. The expense of getting the ambulance records and hospital emergency records can be justified to the no-fault insurer on the basis that it is necessary for the health professional to review the injured person's immediate post-collision condition from independent sources.

I. THE IMPORTANCE OF ACCURATE NOTE-TAKING

The Difference Between "Can't do an Activity at All" and "Trying to do an Activity"

The importance of accurate note-taking cannot be underestimated. Again, the way a health professional asks questions can be of vital importance. Another example can help illustrate this point. Imagine a health professional who asks an injured person if they can shovel snow, and the injured person responds: "No." What if, in actual fact, the injured person tried to shovel snow on the weekend for ten minutes and got so sore that she had to stop? The injured person has now given an incorrect answer to the health professional. This can have devastating consequences to the injured person if the defendant's insurance company has videotape surveillance of the injured person shovelling snow. When played in a courtroom, these ten minutes of videotape surveillance of the injured person shovelling snow would seem like a lifetime to the injured person and his lawyer. A better way for the health professional to have asked the question would be: "Have you tried to shovel snow and what were the results?"

On-going Symptoms

Another area where accurate note taking and proper questioning techniques are very important is with respect to the injured person's ongoing symptoms. Let us take an example where an injured person is involved in a collision and has suffered pain in her neck, low back and left knee. This is recorded in the ambulance records and the emergency hospital records. There is no question as to the legitimacy of the injured

person's complaints. However, let us assume that the neck injury is the most disabling because of the effect that the pain and restricted range of motion has on the injured person's activities.

There is a tendency by all of us to tell our doctor about only our most major problem. On follow-up visits with health professionals, the injured person may only tell her health professional about her neck problems and omit to tell them about the lesser pain she is having in her low back and left knee. If the injured person does not tell the health professionals about the pain in her back and left knee, no record is made in the health professional's notes. As a result, when a report is ultimately drafted, no mention will be made of the sore low back and left knee. Cross-examination of a health professional by a defence lawyer would go something like this:

Example of Cross-Examination

Q: You are trained to take accurate notes?

A: Yes.

Q: And you pride yourself on accurate and complete note taking?

A: Yes.

Q: You met with Ms. Dole on June 25 last year?

A: Yes.

Q: At that time, you asked Ms. Dole to tell you what body parts were sore?

A: Yes.

Q: And she told you her neck was sore?

A: Yes.

Q: She did not tell you her low back was sore?

A: That's correct.

Q: She did not tell you her left knee was sore?

A: That's correct.

Q: Can I assume that if Ms. Dole told you her low back and left knee were sore or were causing her any difficulty whatsoever, that you would have recorded this fact?

A: Yes.

Q: And you saw Ms. Dole again on July 2 of last year?

A. Yes.

Q. And there was no mention at that time about soreness in Ms. Dole's back and left knee?

A. That's right.

And so it will go.

How to Avoid the Problem

To avoid this problem, it is important to convey to the injured person, in no uncertain terms, that she should tell every health professional - on every visit - each and every symptom she has. This is extremely important in a brain injury case where all the imaging may have been negative and the injured person is in denial about his difficulties. Imagine the kind of settlement a teenager with a mild brain injury is going to obtain if the imaging is negative and the teenager denies having any difficulties. Compare this kind of result with one where the brain injured teenager has been told to articulate all his symptoms on every visit to all health professionals. The clinical notes and records of the health professionals will be detailed and comprehensive and will portray a far more accurate picture of the true difficulties the teenager is experiencing.

Dealing With the Defence Suggestion of Exaggeration or Malingering

A word of caution is in order here. It should be made very clear to the injured person that while she should tell all health professionals about all the symptoms she is experiencing, they should also tell them of any pain or injuries that have completely resolved. An injured person telling a health professional about symptoms that have completely gone away reduces the chances of a defence lawyer saying that an injured person is malingering or trying to exaggerate her claim for monetary gain. All the articles and texts on the subject of malingering say that malingers tell health professionals they never improve. For an injured person to say they are not improving defies medical science. Although there are some important exceptions, most injuries improve with treatment and time.

Consider this example of how an injured person can virtually eliminate the chances of a defence lawyer successfully arguing that an injured person is malingering or attempting to exaggerate her injuries for monetary gain. Assume two years have gone by since the collision and the injured person says her knee is totally symptom free. Although her low back infrequently bothers her, it does not prevent her for participating in any activity. The injured person also says her neck is still very sore and stiff and interferes with her ability to work as a truck driver. The chances are much greater that the injured person will be believed under these circumstances rather than if she says *all* body parts are still sore

and *none* of her injured body parts are improving. If there has been improvement to some body parts, the injured person's lawyer can say the following to the jury in his closing statement:

> "The defence lawyer has suggested to you that Ms. Dole is malingering and exaggerating her complaints in the hope that you will award lower damages. If Ms. Dole was trying to exaggerate her symptoms, why would she tell you that she has no symptoms whatsoever in her knee and that the symptoms she is experiencing in her back represent only a minor nuisance? Is this the evidence of a person trying to exaggerate her claim for her own personal financial gain? If Ms. Dole were being dishonest and trying to exaggerate her claim, would she not tell you that her knee and back were still very sore and disabling?"

J. CATEGORIES OF DAMAGES

In order to write an effective report it is important that a health professional know what the different categories of damages are. The main categories of damages, with a brief explanation, are as follows:

General Damages

These damages are for pain and suffering and loss of enjoyment of life.

Future Loss of Income

These damages may be awarded if the injured person:

- Returns to work but is less efficient and productive (because of pain or fatigue or some other cause);
- Is forced out of the work force for a couple of years (and when she returns she has lost the benefit of promotions and pay raises and will always be 2 years behind where she would otherwise be);
- Has to work at a lesser paying occupation;
- Can only work part time;
- Is discriminated against by prospective employers because of a combination of disability, age and limited experience in other fields; or,
- Will be forced to retire 10 or so years earlier than would otherwise be the case.

If the injured person is a child:

- He may not achieve what he would otherwise have achieved academically in the following three ways:
    - He may achieve lower grades than he otherwise would.
    - It may take him longer to complete his education than it otherwise would.
    - He may not progress as far in school as he otherwise would.

The list of possibilities is endless and because future loss of income is such an important category of damages, it is imperative that it be addressed by a health professional who is qualified to do so and in a position to do so.

There is no limit or cap on damages for future loss of income if a permanent injury has adversely impacted a person's ability to function in the work place. For example, if a 50-year-old male, with an expected post-injury work life expectancy of 15 years earns $20,000.00 per year less because of his injury; this translates into a future loss of income of $300,000.00. If, because of the injury, the person is forced to retire earlier than age 65, the future loss of income amount will be even higher. The type of injury needed to produce this amount for damages does need to be significant. Take the example of a construction worker who earns $50,000.00 per year before he suffers a bimalleolar fracture in his ankle, causing arthritis. After the collision, he can no longer work in construction. Instead, he has to work in the company's office doing scheduling at $30,000.00 per year. This is the kind of future loss of income claim that can be generated.

Loss of Handyman Capacity

These damages may be awarded if an injured person has either lost the total ability to do things such as vacuuming, lawn cutting, house painting, etc., or if they can only do these chores under circumstances of pain and discomfort both during the particular activity and for a period of time after the activity has been completed. It is unfair and unreasonable to expect an injured person to perform housekeeping and handyman chores if it is going to cause pain.

Example
Assume the injured person is married with two young children and lives in a detached home and, before the collision, had responsibilities for lawn cutting, snow shovelling and home repairs which took her an average of 10 hours per week to complete. After the collision, she either cannot do any of these things or just as importantly, can only do these chores with an unreasonable amount of pain during, and for a period of time after, she attempts the activity. It is unfair to expect the injured person to perform these chores if to do so causes an unreasonable amount of pain. It is equally unfair to put the burden of doing these chores on other family members. If the replacement cost of having someone

do these 10 hours of work is $15.00 an hour for 50 weeks per year, this amounts to an annual cost $7,500.00. A cost to an injured person of $7,500.00 dollars per year for as long as she would have done these chores can be a significant amount.

As can be seen from the foregoing example, if there has been a permanent injury resulting in an adverse effect on a person's ability to do "handyman" chores, it is very important that this be dealt with in detail in the health professional's report; to the extent that it is within the health professional's sphere of expertise to do so.

Loss of Shared Family Income

These damages apply to more serious cases such as severe injuries to a person's brain or injuries to a person's spinal cord. If a person suffers brain damage so that she goes from having a pleasant, easygoing personality to a personality involving unprovoked anger and general unpleasantness, that person's chances of entering a marriage or common law relationship are reduced. If the person is in a relationship, her chances of separation or divorce are increased. The end result is that the person may lose the benefit of sharing the income of a partner. These damages are called loss of shared family income or loss of an interdependent relationship.

Cost of Future Care

Damages for cost of future care represent the expenses an injured person will incur for items and services she would not have incurred if she had not been injured. These damages can include modifications to the injured person's home, the cost of prosthetics, attendant care, physiotherapy, psychotherapy and any number of items and services depending on the injury.

Family Law Act Claims

For family members of an injured person, the three main categories of damages that a health professional need to be aware of which are available under the *Family Law Act* are as follows:

1. Loss of guidance, care and companionship the family member would have received from the injured person, but for the injury.

2. The value of nursing, housekeeping and other services that a family member has performed or will perform in the future for an injured person.

3. A reasonable amount for loss of income a family member suffers as a result of injury to another family member.

K. THE VERBAL THRESHOLD

Before a person injured in a motor vehicle collision can be compensated for pain and suffering and loss of enjoyment of life, as well as for cost of future care, the injured person must show that the injury is serious enough to meet the “verbal threshold” as defined in both the *Insurance Act* and the Regulation under the *Insurance Act*.

What is the Verbal Threshold?

The first part of the definition is contained in the *Insurance Act* and says that the injured person must show that she has suffered:

(a) Permanent serious disfigurement; or

(b) Permanent serious impairment of an important physical, mental or psychological function.

The Regulation made pursuant to the *Insurance Act* contains the second part of the definition which defines "permanent serious impairment of an important physical, mental or psychological function". The definition is complex, and is very important that health care professionals properly address the definition in their report. The reason for this is two-fold: first, the injured person will not be compensated for pain and suffering and loss of enjoyment of life, as well as for cost of future care unless a qualified health professional says that their injury meets the criteria of the “verbal threshold” definition; and second, there is a Rule which states that if an expert witness, such as a physician, does not address a particular issue in her report, the physician is prevented from discussing the issue at trial. If a physician does not address the “verbal threshold” definition in a report, the injured person may not be properly compensated.

Definition of Serious, Important, and Permanent

The Regulation made pursuant to the *Insurance Act* which defines "permanent serious impairment of an important physical, mental or psychological function" states that the “verbal threshold” is satisfied if the following criteria are met:

1. For the impairment to be **serious** the impairment must:

For individuals who were employed

i. Substantially interfere with the person's ability to continue his regular or usual employment, despite reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue employment.

For individuals who were in school, college, university or other form of career training

ii. Substantially interfere with the person's ability to continue training for a career in a field in which the person was being trained before the incident, despite reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue his career training.

For all individuals (employed, in school or unemployed)

iii. Substantially interfere with most of the usual activities of daily living, considering the person's age.

2. For the function that is impaired to be an **important** function of the impaired person, the function must:

i. be necessary to perform the activities that are essential tasks of the person's regular or usual employment, taking into account reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue employment.

ii. be necessary to perform the activities that are essential tasks of the person's training for a career in a field in which the person was being trained before the incident, taking into account reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue career training.

iii. be necessary for the person to provide for his own care or well-being.

iv. be important to the usual activities of daily living, considering the person's age.

3. For the impairment to be **permanent**, the impairment must:

i. have been continuous since the incident and must, based on medical evidence and subject to the person reasonably participating in the recommended treatment of the impairment, be expected not to substantially improve.

ii. continue to meet the criteria in paragraph 1.

iii. be of a nature that is expected to continue without substantial improvement when sustained by persons in similar circumstances.

The Regulation that defines the “verbal threshold” also stipulates the nature of the evidence that must be adduced from a physician in order to prove “permanent serious impairment of an important physical, mental or psychological function”. Below we have reproduced the Regulation which stipulates the nature of the evidence the physician must provide. The nature of the evidence that must be provided is contained in sub-headings (a) to (g) noted below:

(a) The nature of the impairment.

(b) The permanence of the impairment.

(c) The specific function that is impaired.

(d) The importance of the specific function to the person.

(e) The impairment was directly or indirectly sustained as a result of the motor vehicle collision in question.

(f) The contents of the report are based on medical evidence in accordance with generally accepted guidelines or standards of the practice of medicine.

(g) Details of the physician’s training and experience in the assessment or treatment of the type of impairment in issue.

A huge problem arises for the injured person if a sub-heading is not addressed. If a subheading is not discussed, the threshold will not be met, meaning the injured party will not be compensated for pain and suffering and loss of enjoyment of life and for future cost of care.

L. THE IMPORTANCE OF DETAILED AND COMPREHENSIVE REPORTS

The report of the health professional defines the scope of her testimony at trial. The lawyer for the injured person cannot question the health professional beyond the scope of her report.

The Consequence of Not Including an Important Point in a Report

Based on the foregoing, if a particular topic is not discussed in the report, the lawyer for the injured person is prohibited from questioning the health professional on that topic. To take an example, if a physician writes in a report that the injured person’s ability to work as a construction worker has been compromised because of an injury, but the physician does not write reasons for the opinion, the physician may be precluded from giving these reasons at trial. Without reasons, the physician’s opinion that the injured person’s ability to work as a construction worker has been compromised will not carry weight with a judge or jury.

There is no such restriction applicable to cross-examination. For example, if a health professional does not comment in a report about an injured person's pre-collision health history, the defence lawyer is not precluded from cross-examining the health professional extensively on the person's pre-collision health history. By way of another example, if a health professional does not mention in a report anything about camping vacations the injured person has taken; the defence lawyer is at liberty to cross-examine on the subject of the camping vacations.

M. REPORT WRITING STYLE

The Unfairness of the "Optimism First - Realism Second" Style

A report may be unfair to an injured individual if the, "optimism first; realism second" style is used. What does this mean? Many health professionals will say in one of the concluding paragraphs of a report: "Ms. Dole has improved a great deal in the 3 years since the accident and is doing extremely well. However, she will still have days where she will not be able to go to work because of pain and days where she will not be able to do the heavier and more repetitive aspects of handyman and household chores because of pain. However, with pain killing medication, hopefully, she will be able to minimize her difficulties." Not only does this style put the injured person's difficulties in too optimistic a light, but it also gives more latitude for a defence lawyer to conduct a more effective cross-examination, where one of their objectives is to make the injured person's ongoing symptoms look minimal.

A much better way of reporting the foregoing would be: "It has now been 3 years since the collision and Ms. Dole has reached a plateau where no further improvement can be expected. Unfortunately, there will be days when Ms. Dole will not be able to go to work because of pain. There will be other days when she does go to work but will not be able to work as efficiently and productively as she otherwise would, because of pain. There will also be days where she will not be able to do the heavier and more repetitive aspects of handyman and household chores because of pain. Pain killing medication may blunt her symptoms temporarily, but will have no long-term beneficial effect."

We all like to take pride in our work and it is natural for all of us to want to talk or write optimistically about how our efforts have helped improve the health and overall functioning of a seriously injured individual. Be that as it may, reports of health professionals should put realism before unfounded optimism.

A Word of Caution on Activities of Daily Living

It is not helpful in a report to start a section by saying: "Ms. Dole is completely independent in all activities of daily living (ADLs)." Then immediately in the next sentence say: "However, she continues to require the use of grab bars for transfers into and out of the bathtub and requires a cane for ambulating outside her home." This writing style hinders the report for several reasons:

- Based on the principle of primacy, a reader will put more emphasis on the first sentence they read, and less emphasis on what follows.

- Effective writing is writing where the first sentence in a paragraph is a lead-in to what the reader can expect in the remainder of the paragraph. The paragraph in the example is not intended to be about the fact that the injured person is independent in all aspects of ADLs. The paragraph is intended to discuss the person's need for assistive devices like grab bars and a cane.

- Stating that a person is independent in ADLs adds nothing whatsoever to the report and in fact, gives something for the defence lawyer to cross-examine on.

Compare the foregoing with: "Ms. Dole is having difficulty with some aspects of self-care. She requires the use of grab bars for transferring into and out of the bathtub. When walking in her home she can use the walls, furniture and rails for support and does not require a cane. However, when she attempts to walk outside, she requires a cane and even then, moves very slowly and can only walk very short distances."

The goal of any health professional writing a report is to write a balanced and objective report. The style of writing used in the second example above accomplishes this goal, whereas the first does not.

What Sets Reports Apart

The quality of the report of almost every health professional is improved with the use of specific examples. Everyone remembers stories and few of us remember vague generalities. Specific examples bring life to any report, making the report more impressionable.

Example
Consider Bill, who suffered a brain injury in a motor vehicle collision and one of his difficulties is a quick temper.

What is considered a vague generality is this:

> Since the collision, Bill has developed an uncontrollable temper. One evening he lost his temper with his wife and started yelling at her.

This is better:

> Since the traumatic brain injury, Bill has developed a hair-trigger, uncontrollable temper. By way of example, on August 15, 2013, in the evening, Bill was watching television with this wife Mary in the living room of the family home. For no reason, Bill lost his temper and became very angry with Mary. He stood up and yelled at

Mary that she was stupid and lazy. He continued to berate her for several minutes. He then stormed off to the kitchen. He returned about 30 minutes later as if nothing had happened.

Example
Consider Susan who suffers from chronic pain following a motor vehicle collision.

A vague generality is this:

Susan tries to do things around her home but is hampered by pain.

This is better:

Since the collision, Susan has tried to get back to performing some of the household chores she did before she was injured. Whenever she tries to do something that requires even moderate effort she gets pain in her neck, right shoulder, and down her right arm to her wrist, to a degree that she has to stop the activity.

For example on August 21, 2013, in the evening, Susan tried to help her husband Dave make dinner. She filled a pot with water and lifted the pot from the sink to the stove. She felt pain to such a degree that she could not help further with making dinner. She took two non-prescribed Tylenol and after approximately 30 minutes the pain relented so that she could join her husband and daughter for dinner. After dinner she laid down on the couch for an hour and went to bed at 9:00 p.m.

Example
Consider Trevor who is trying to go back to work as a stone-cutter, but is unable to do so, because of the effects of a brain injury.

A vague generality:

Trevor has tried to go back to his job as a stone-cutter, but has had very limited success.

This is better:

Trevor has tried to go back to his job as a stone-cutter but has only had limited success. On Tuesday, August 23, 2013, he arrived at work at 8 a.m. He was cutting stone on a curb in Newmarket with two other men in his crew. By 9:30 a.m. he had a pounding headache and felt dizzy. At around 10:30 a.m. he vomited. Trevor's foreman told him to stop working for the day. The foreman told Trevor he wanted someone to come to the job site to pick him up, but Trevor insisted on driving himself home. When he arrived home, he went to bed for several hours.

> When he got up he called his family doctor and made an appointment to see her the following week. He took a Tylenol 3 and put cold packs on his forehead periodically for the rest of the day. He had a light supper with his wife and two children and went to bed at 8:00 p.m.

Examples that show an injured person trying to make an effort to get back to family activities, or household chores, or school, or work or social and recreational activities are the most helpful to a judge and jury in deciding the case fairly.

N. THE TIME LIMIT FOR DELIVERING REPORTS

The reports of health professionals are considered reports of expert witnesses and there are time limits for the delivery of these reports in relation to the start of a pre-trial conference. There are numerous adverse consequences that an injured person will face if the time limits are not complied with.

Rule 53 of the *Rules of Civil Procedure*

These time limits are set out in Rule 53.03 and 53.08(1)(e) of the *Rules of Civil Procedure* which read:

Experts' Reports

Rule 53.03(1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference required under Rule 50, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1)[1] O. Reg 438/08, s. 48

(2) A party who intends to call an expert witness at a trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O Reg. 438/08, s.48

> (2.2) Within 60 days after an action is set down for trial, the parties shall agree to a schedule setting out dates for the service of experts' reports in order to meet the requirements of subrules (1) and (2), unless the court orders otherwise.

Sanction for Failure to Address Issue in Report or Supplementary Report

(3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,

[1] Refer to page 1 for reference of subrule (2.1)

(a) a report served under this rule; or

(b) a supplementary report served on every other party to the action not less than 30 days before the commencement of the trial

Extension or Abridgment of Time

(4) The time provided for service of a report or supplementary report under this rule may be extended or abridged,

(a) by the judge or case management master at the pre-trial conference or at any conference under Rule 77; or

(b) by the court, on motion. O. Reg. 570/98, s. 3

Evidence Admissible Only With Leave

Rule 53.08 (1) If evidence is admissible only with leave of the trial judge under a provision listed in subrule (2), leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial.

(2) Subrule (1) applies with respect to the following provisions:

Subrule 53.03 (3) (failure to serve expert's report)

O. CONCLUSION

It takes time and effort for a health professional to write a detailed and comprehensive report which addresses all of the issues that need to be addressed. It also takes experience and expertise. A health professional, who is not accustomed to writing medical-legal reports should never be shy about calling the injured individual's lawyer to seek clarification on a particular point or inquire about a legal issue. The reports of health professionals are the heart and soul of a personal injury claim. To a large extent, these reports dictate the settlement offers that are made on behalf of the injured individual or by the insurance company. Medical-legal reports will dictate the way the examination-in-chief and cross-examination proceed at trial - not only for the author of the report who is being examined, but also for other medical witnesses and for the injured person. For these reasons, every effort should be made to ensure that reports are accurate and fair and deal with all of the relevant issues in a realistic way.

APPENDIX "A"

FORM 53 - ACKNOWLEDGMENT OF EXPERT'S DUTY
Courts of Justice Act

(General Heading)

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is *(name)*. I live at *(city)*, in the (*province/state)* of *(name of province/state)*.

2. I have been engaged by or on behalf of *(name of party/parties)* to provide evidence in relation to the above-noted court proceeding.

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:

   (a) to provide opinion evidence that is fair, objective and non-partisan;

   (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and

   (c) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date _____ _____
Signature

RCP-E 53 (November 1, 2008)

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