

## Intervener Status by the National ME/FM Action Network in *Lowe v. Guarantee Insurance*

Judgment Explained by

Hugh Scher

Barrister and Solicitor for the National ME/FM Action Network

**[Ed. Note** *If you were sent to a third party to have your health condition assessed and the assessor came to a conclusion that you didn't like, could you sue the assessor? Someone involved in a car accident in Ontario decided to try. Before the trial started, the assessors asked the judge to dismiss the case against them arguing that they could not be sued. The trial judge agreed with the assessors, and the accident victim appealed the decision. The National ME/FM Action Network was very concerned about the unfairness that could result if assessors were immune from law suits, so asked to participate at the appeal. Mr. Hugh Scher, a noted disability lawyer in Toronto and a friend of the Action Network, represented our organization.*

*As the following report shows, the Court of Appeal ruled that the assessors were not automatically off the hook. The case was sent back to the trial judge to hear the evidence against the assessors.*

*It is not at all clear at this stage how broad the impact of this decision will be. For one thing, this case dealt only with a particular kind of assessment under Ontario's motor vehicle accident scheme. For another, the court put restrictions on what can be argued in a lawsuit against assessors. For now, though, we know that assessors can be sued, which is a very important legal breakthrough. And we are hoping to participate in an upcoming case (*Worthman v. AssessMed*) which will push the issue another step forward.]*

On July 15, 2005, the Ontario Court of Appeal released its reasons for decision in the above matter. The ruling of the Appeal Court reverses the order of Justice Lane which denied the individual plaintiffs the right to pursue a claim as against a DAC (Designated Assessment Centre) assessor for reason of bias, breach of neutrality, negligence and incompetence. The Appeal Court reversed the decision of Justice Lane finding that individuals could pursue claims of bias, breach of the duty of neutrality, and bad faith in the conduct of an assessment and in the preparation of the assessment report. The court found that mere negligence or incompetence was not sufficient to justify an action as against a DAC assessor.

The Court of Appeal found that DACs have a materially different mandate from the categories of individuals considered by the motion judge, which included expert witnesses and court-appointed assessors.

Assessing the nature of the duty owed by DAC assessors to individuals, the court noted that it is reasonably foreseeable that a biased or careless DAC assessment could cause harm to the person being assessed in terms of delayed treatment and denied benefits. Although the relationship between DAC assessors and the persons they assess does not fall squarely within one of the previously recognized categories of proximate relationships, the court held that it is at least arguable that the SABS (Statutory Accident Benefit Schedule) legislative framework creates a relationship of sufficient proximity such that the relationship should be viewed as similar to claims which have been allowed to proceed based on being analogous to negligent misrepresentation. In finding a duty of care owed by DAC assessors to insurers and insureds, the court found that “the legislatively created decision-making function distinguishes DACs from expert witnesses, court-appointed assessors, and the types of assessors considered by the motions judge “and creates a close and direct relationship to the persons they assess”. Viewed in this way, the court concludes that it is not plain and obvious that the potential role of DAC assessors as expert witnesses should be viewed as the primary defining element of that relationship. The court further notes that legislative directives relating to conflict of interest, professional experience, neutrality and competence serve to form the nature of the duty owed by DAC assessors.

While the court concludes that the legislatively created decision-making role performed by DACs creates a sufficiently proximate relationship to create both duties of competence and neutrality, the court goes on to determine that because the decision-making role is carried out in the context of a dispute resolution process, policy considerations justify not recognizing a duty of competence. As such, mere carelessness is not sufficient to expose a DAC to legal action given their role as a decision-maker in the dispute resolution context which is best enhanced by affording immunity for simple negligence. Further justifications for this decision include that it would unnecessarily complicate the process and that such errors and omissions, where they occur, are likely to be addressed in the context of the dispute resolution process itself where relief for any damages caused due to a careless assessment will likely be addressed.

With respect to the breach of the duty to be neutral and free of bias, the court found that the same policy considerations do not apply and that DAC assessors could be subject to legal action in these circumstances.

While the motions’ judge concluded that the doctrine of witness immunity served to protect DACs from legal action, the Court of Appeal found that to the extent that DACs have a duty of care to the appellants arising from their statutory role as decision makers, that may be viewed as a free-standing basis for liability, separate and apart from their role as witnesses. In the circumstances, pending determination of the scope of their duty, the court found that it is not plain and obvious that DACs should be relieved of liability by virtue only of the fact that they may be called upon to testify in court.

In this case, the court was persuaded that bad faith on the part of DAC assessors by virtue of their bias and breach of neutrality could serve to cause damages to individual insureds in circumstances where the DAC produces a report which because of its bias serves to deprive an insured of income replacement or other such benefits under the statutory accident benefit schedule. The court was persuaded that because of their role as statutorily appointed experts that DACs owe a duty of care to insured which can be the subject of legal action in circumstances where the DAC acts in bad faith to deprive the insured of their just entitlement to benefits.

It remains to be seen how this duty of care will be interpreted by the courts with respect to this or any other future actions against DAC assessors. In particular it remains to be seen what limitations, if any, the courts will place upon this duty of care in future matters. Further, it remains to be seen how the courts will interpret this duty of care with respect to other assessors such as third party medical assessors conducting assessments on behalf of insurance companies, particularly where there is no legislative mandate for such assessments and where such assessments are typically viewed as part and parcel of the litigation process.

As you are aware, the case of *Worthman v. AssessMed* which is presently before the Divisional court seeks to address this very issue. In *Worthman* the court will examine whether a third party assessor in the context of an insurance dispute may be the subject of legal action in circumstances of a breach of a duty of competence, neutrality and bad faith. In *Worthman*, the motions' court judge found that sufficient evidence existed such that a breach of a duty could be found and from which the IME report could be found to be not protected by privilege. As such, the motions' court dismissed the motion for summary judgment and it is that decision which is now the subject of appeal.

The *Worthman* case provides a good opportunity for the court to address the nature of the duty owed by third party insurers and assessors in the conduct of medical assessments and if the duty is found to exist, the nature and scope of that duty owed to third party insureds in the context of a disputed claim where the insurer's assessment serves as the basis for denial of benefits to an insured because of alleged incompetence, bias and bad faith demonstrated by the assessor both in the conduct of the assessment and in the preparation and production of the assessment report.

*[Hugh R. Scher, 210-69 Bloor Street East, Toronto, ON M4W 1A9. Tel. (416) 515-9686, Fax: (416) 961-2534, E-mail: [hugh@sdlaw.ca](mailto:hugh@sdlaw.ca) – Web: [www.interlog.com/~scherde](http://www.interlog.com/~scherde)]*