Dr. Arthur Ameis - Physical Medicine and Rehabilitation

Kusnierz v. The Economical Mutual Insurance Company, 2010 ONSC 5749 (CanLII), <https://canlii.ca/t/2d0kp

The admissibility of Dr. Ameis' evidence

[114] Dr. Ameis was initially retained by Jack Fireman, counsel for the plaintiff, to assist him in preparing a SABS claim. Dr. Ameis almost immediately moved from the status of an independent expert to something close to a treating physician. His first letter to Mr. Fireman of October 21, 2002 states: "In this case, the patient and I agreed that a physician patient relationship could exist, insofar as there were some elements of information that I felt important to impart to him about the [page144] nature of his condition, his prognosis and management." Dr. Ameis sent a copy of this letter to Mr. Kusnierz's family doctor. He later assisted Mr. Kusnierz in finding a new family doctor when his old family doctor retired.

[115] Dr. Ameis' report of October 28, 2004 concerning a visit on October 25, 2004 was perfunctory in part because, as a result of a recent plastic surgical procedure, Mr. Kusnierz's stump was infected and Dr. Ameis wanted him to get to a hospital. He has, however, not seen Mr. Kusnierz since.

[116] Dr. Ameis was candid and clear, and I admire his commitment to his patient. In the same report, he notes in his concluding comments that "I continue to advocate for Mr. Kusnierz to be deemed 'catastrophically impaired', as I genuinely believe that he meets the requirements of Catastrophic Impairment in terms of his severe long-term impairments of ambulatory function, chronic ill health and pain, as well as exceptional associated financial needs." Indeed, Dr. Ameis continues to be a passionate advocate for Mr. Kusnierz.

[117] But I was left in a quandary about the admissibility of Dr. Ameis' evidence as a result of recent concerns about the undue weight that trial judges sometimes give to experts who are not independent within the meaning of the amendments to rules 53.03 and 4.1.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194: see the recommendations of the Civil Justice Reform Project (2007) [See Note 25 below] related to the problem of "expert bias". [See Note 26 below] It is important that trial judges take seriously the "gate keeping" function: see the Honourable Stephen T. Goudge, Commissioner, Inquiry into Paediatric Forensic Pathology in Ontario: Report, Vol. 3 (Toronto: Ontario Ministry of Attorney General, 2008), Chapter 18 (the "Goudge Inquiry"). While the new wording does not apply to this case, the underlying policy of due caution does.

[118] It would be reasonable in these circumstances, to consider the evidence of Dr. Ameis as one would the evidence of a treating physician like a family doctor. Such a witness does not seem to fall squarely within either ru1e 4.1.01 or rule 53.03, but is someone who has and exercises expertise routinely, and ought to be able to give relevant evidence about his or her patient. I will take into account that Dr. Ameis has been a passionate [page145] advocate for Mr. Kusnierz and has formed a therapeutic alliance with him. I must, therefore, take his evidence with the proverbial grain of salt that goes to its weight.

Dr. Ameis' evidence

[128] Dr. Ameis repeated a number of times, both in his testimony and in his reports, his belief that any person who has suffered an amputation above the ankle, so that he or she is unable to stand without prosthesis, should be considered to be catastrophically impaired. In his letter of June 7, 2004 to Mr. Fireman, Dr. Ameis expressed the opinion that "[t]he additional and biomechanical burdens and associated losses of functions for a man with only one leg would be better ranked . . . at a score of 60%".

[129] Dr. Ameis took what I would call a "result-selective" or "results oriented" approach to the assessment of Mr. Kusnierz under the Guides. His stated belief is that the severity of the impairment and the financial need of the patient should both drive the determination of catastrophic impairment. In his testimony, he called these "two parallel arguments for his being considered catastrophic". I find that there is no support in the Guides for financial need as an available argument to justify an impairment assessment.

[130] His strategy was to look for ways to interpret the Guides that are "logical and plausible" to find Mr. Kusnierz to be catastrophically impaired. In his letter to Mr. Fireman of June 16, 2004, he wrote: "I will remind you that the primary consideration in developing an estimated impairment score is that the approach and final score must be logical and plausible within the context of the medical condition in question proportionate to the losses of function actually sustained." Over the years, he has discussed with counsel various approaches to the Guides in assessing Mr. Kusnierz.

[131] Section 2.2 of the Guides refers to the requirement for "plausibility". In cross-examination, Dr. Ameis said that he was "trying to throw, throw more things into the mix". Elsewhere, he said he was looking for "opportunities". Dr. Ameis took the position that, on the part of the provincial DAC Committee, "there was essentially a tacit permission to go ahead and do what you needed to do if you thought the patient should be catastrophic". He also admitted in cross-examination, however, that "the approach that you've taken in this case is an approach that has not been commonly seen previous to this case".

[166] Dr. Ameis has not, however, been consistent in his rating of Mr. Kusnierz's skin problem. Dr. Ameis concluded in his report of June 7, 2004 that Mr. Kusnierz's circumstances place him in the Class 3 level of impairment (25 per cent-54 per cent WPI) described in the Guides, at p. 284, as follows: "signs and symptoms of the skin disorder are present or intermittently present; and (2) there is limitation in the performance of many of the activities of daily living; and (3) intermittent to constant treatment may be required" (emphasis in original).

[167] In his later report of October 28, 2004, he amended his view of his estimate of skin impairment to increase it to Class 4, with a rating of 55 per cent to 84 per cent WPI, described in the Guides, at p. 286, as follows: "signs and symptoms of skin disorder are constantly present; and (2) there is limitation in the performance of many of the activities of daily living, which may include intermittent confinement at home or other domicile; and (3) intermittent to constant treatment may be required" (emphasis in original).

[168] At trial, Dr. Ameis testified that he had again changed his opinion on the class of impairment for the skin disorder and instead now believes that Class 2, with a 10-24 per cent WPI, is more appropriate for Mr. Kusnierz. According to the Guides, this requires "signs and symptoms of skin disorder are present or intermittently present; and (2) there is limitation in the performance of some of the activities of daily living; and (3) intermittent to constant treatment may be required" (emphasis in original). He testified that where Mr. Kusnierz is placed within Class 2 depends on the severity of his psychological problems. [page156]

[174] Considering the differences in the descriptions in Table 2 between a class 1 and a class 2 impairment, the evidence is clear that Mr. Kusnierz suffers from a class 2 impairment, which has a range of between 10 and 24 per cent WPI. I therefore accept Dr. Ameis' trial evidence that class 2 is appropriate.

[175] But I do not accept Dr. Ameis' evidence on the proper location of the impairment on the range within the class. Chapter 13, which deals with skin, pays some attention to scarring and disfigurement as psychological factors to be accounted for. In the case of an amputation, I agree with Dr. Lacerte that the disfigurement is subsumed in the primary impairment, as is the scar. Rather than using psychological factors to bump the score to 24 per cent, in my view it would be more reasonable to take Dr. Ameis' usual approach in the absence of more compelling evidence and go to the mid-point of the range at 17 per cent WPI for skin. That must be rounded to the nearest 0 or 5 per cent under s. 13.2, which takes it to 15 per cent WPI. I am somewhat supported in this determination by s. 13.5, which provides that "[i]f other chapters were also used to estimate the impairment from the patient's skin disorder, the skin disorder evaluation would exclude consideration of the components evaluated with those chapters" (emphasis in original).

[176] Finally, I do not agree with Dr. Ameis' approach that would combine percents from gait derangement and skin, simply because it is the problems with skin, and particularly neuromas, that led Dr. Ameis to abandon the amputation table and go to the gait derangement table. It would be inappropriate to count skin twice in assessing WPI. Section 13.5 also has some application here.

Dean Fournie v. Coachman Insurance Company, 2010 ONFSCDRS 19 (CanLII), <https://canlii.ca/t/jq7vc

I have two concerns with MDAC's assessment of Mr. Fournie. Firstly, there was no evidence presented at the hearing to indicate that the MDAC assessors had consulted on the final opinion, had seen the executive summary or, in fact, agreed with the final opinion. The executive summary and final report did not indicate that the individual assessors had signed off on it. Dr. Ameis, who is the controlling mind behind MDAC, stated that before completing the executive summary he did not consult with the psychiatrist or occupational therapist who assessed Mr. Fournie for MDAC. He gave evidence that he had consulted with Dr. MacCallum, but could not remember where or when and would not be able to provide proof of a consensus meeting with him. He gave evidence on cross-examination that he did not consult with the psychiatrist or occupational therapist when determining Mr. Fournie's final WPI percentage. Demetrios Kostadopoulos, the occupational therapist who gave evidence for Coachman, stated that he did not know if his assessment was provided to subsequent assessors. Furthermore, he was not provided with other assessors' reports, nor did he have any recollection of MDAC's executive summary being provided to him.

Secondly, Dr. Ameis' evidence on assigning a WPI of 26% to Mr. Fournie also causes me concern. Dr. MacCallum, in his report, clearly states that he leaves the determination of the final WPI to the consensus process. Dr. MacCallum does not give his opinion on Mr. Fournie's final WPI and Dr. Ameis provided no evidence that he ever got an opinion from Dr. MacCallum on Mr. Fournie's final

WPI. Dr. Ameis stated that he did consult with Dr. MacCallum, but cannot remember when. For an issue as important as the determination of an individual's impairments and that individual's access to future benefits, one would think MDAC would have taken more care in keeping records of its assessments. I find that Dr. MacCallum did not give a final opinion on Mr. Fournie's WPI. Instead, I find that the final WPI percentage score is Dr. Ameis' opinion.

Economical Mutual Insurance Company v. Maria Augello, 2009 ONFSCDRS 157 (CanLII), <https://canlii.ca/t/jq7rs

By way of context, it is no secret that there is a profound disagreement between many medical experts in the field of disability assessment as to the exact role that the AMA Guides play in determining catastrophic impairments under the *Schedule.* The prime dissident group rallying against the interpretation taken by the courts and arbitrators to date (the *Desbiens* approach) is centred around the position taken by Dr. Brigham, a prominent American advisor on disability issues.

Dr. Ameis, whose article on *Impairment Evaluation* is cited by Economical clearly falls into the Brigham camp. Indeed, Dr. Brigham is listed as a co-author of the article.

One of Dr. Brigham's claims to fame is that he participated in the development of the original guidelines, and claims to have a special insight into what was intended by the committee which draughted the original guidelines. Dr. Ameis and Dr. Brigham have posited that the intention or original meaning of the provision was that no numeric rating could be given to psychological disorders, with the result that such disorders could not directly be added to the numerical physical rating to push the whole person impairment over the necessary threshold for catastrophic impairment...

...Spiegel J. in *Desbiens v. Mordini* provided the pioneering analysis of the interaction of the AMA Guides with the balance of the *Schedule* to which it is incorporated by reference. It is this interpretation which Dr. Brigham, Dr. Ameis, and their acolytes now challenge.

***Maria Augello v. Economical Mutual Insurance Company**, 2007 ONFSCDRS 240 (CanLII), <https://canlii.ca/t/jq7c0

The reference to the AMA Guides Newsletter is not persuasive. The article is co-authored by Dr. Arthur Ameis, whose approach was rejected in *Desbiens* and some of the FSCO cases. The fact that he has written an article criticizing the decisions is not surprising and does not raise a substantial basis for doubting the correctness of the decisions.

Teresa Ritorto v. Allstate Insurance Company of Canada, 2006 ONFSCDRS 38 (CanLII), <https://canlii.ca/t/jq74f

In mid-November 2003, a Designated Assessment Centre reviewed Dr. Simone's proposal to continue Mrs. Ritorto's therapy. Dr. Ameis relied on the recommended time periods for treatment in the *Guideline* protocols for his opinion that the plan expense was not reasonable or necessary. In his

testimony, he agreed with the underlying theory that no further healing or pain control results from treating soft tissue injuries of this nature beyond six weeks.

Dr. Ameis did not examine Mrs. Ritorto and therefore did not have the opportunity to assess her pre-existing condition or the possibility that her symptoms might fall outside usual norms that would take her out of the *Guideline's* treatment protocols. The undisputed evidence is that Mrs. Ritorto's poor posture aggravated her accident-related symptoms, and Dr. Ameis' failure to address her poor posture is my reason not to rely on his opinion about Gateway's treatment.

David McMichael v. Belair Insurance Company Inc., 2005 ONFSCDRS 24 (CanLII), <https://canlii.ca/t/jq6tn

Note 4: The only expert opinion filed by Belair that questioned this conclusion was the May 6, 2002 report of Dr. L. Freedman who, while acknowledging some measurable cognitive and emotional difficulties, strongly questioned whether Mr. McMichael had suffered anything more than a benign Grade I concussion. In this expert's opinion, that level of trauma does not lead to ongoing neuro-cognitive or emotional/behavioural sequelae. This opinion was not referred to in argument and, while it is strongly worded, is outside of the broad consensus of opinions offered by others who have actually met with David McMichael. I have not disregarded it but prefer the consensus opinion that differs with it. I also note that Dr. Ameis questioned the extent of Mr. McMichael's brain injury as well, however Dr. Ameis is a physiatrist with no particular expertise in this area. I also note (see note 17 below) that his opinion in this regard is supported in large part by an error in his reading of one other DAC report.

Note 14: Dr. Ameis, informed by Dr. Reznek's views, also supported Belair's theory of the case. However, his view is based on a misreading of a report of Dr. Rosenblat, and a too easy acceptance of Dr. Reznek's suppositions. See Note 17 below.

Desbiens v. Mordini, 2004 CanLII 41166 (ON SC), <https://canlii.ca/t/1j79w

Cross-examination of Dr. Ameis On Prior Negative Judicial Comments

[265] In cross examination, plaintiffs' counsel sought to impeach Dr. Ameis' credibility by referring to a number of cases before this court and the Financial Services Commission of Ontario (FSCO) in which negative comments had been made by the judge or arbitrator concerning Dr. Ameis lack of objectivity and impartiality in his role as an expert.

[266] Defendants' counsel objected to this line of questioning on the grounds that the credibility of Dr. Ameis should be determined based on the testimony and demeanor of Dr. Ameis in the case before the court and that the comments made by a judicial officer in another case concerning the nature and quality of Dr. Ameis' evidence is totally irrelevant.

[274] I do not wish to be understood to say that this line of questioning is impermissible under any circumstances. If a satisfactory evidentiary basis is laid it may become relevant. Plaintiffs' counsel submitted that an adequate evidentiary foundation has been established. He noted that Dr. Ameis, in his examination in chief during the qualification process, stated that he testified in court before. On cross-examination Dr. Ameis agreed that he may have testified in court on hundreds of occasion prior to this trial and had given expert evidence in arbitrations on perhaps 50 or 60 occasions. He agreed on cross-examination that an expert medical witness who is not testifying with respect to his or her own patient ought not to act as an advocate and should be as objective or impartial as possible. When asked whether he had testified as an expert on previous occasions he had done so objectively and impartially

and not as an advocate, his answer quite fairly was “I’ve tried”. In my opinion this is not a sufficient evidentiary basis to support the introduction of the line of cross-examination sought by the plaintiffs.

L.F. v. State Farm Mutual Automobile Insurance Company, 2002 ONFSCDRS 129 (CanLII), <https://canlii.ca/t/jq67h

Regarding this Applicant, Dr. Ameis stated that L.F. "did not persuasively demonstrate the complete inability to engage in suitably selected employment." He was of the view that "[m]aximum effort must be consistently exerted in order for test results to be both valid and reliable" and that "[w]hen a patient chooses to provide less than consistently full effort in a test, the results pertaining to the quantification of either impairment or residual capacity are invalidated and deemed unreliable."

Applicants do not "prove" a medical condition to a medical examiner, be it AIDs, cancer, strain or sprain. Medical examinations are not judicial proceedings. Medical practitioners are not adjudicators. Medical practitioners may be qualified as experts. Experts can give opinion evidence. If a medical expert is unable to provide an opinion within one's area of expertise, based on the history provided, the examination and testing conducted and the present level of scientific knowledge, one should say so and why, rather than render judgment based on a presumed medical onus of proof.

Dr. Ameis speaks of a patient "choosing" to "provide less than consistently full effort in a test."

I take it that Dr. Ameis is speaking of L.F. It is noteworthy that Dr. Ameis has never examined or even met L.F. He appears to rely on the disability DAC assessment. Dr. Salmon, however, who saw L.F. first hand and, as a psychologist, one might think would have greater expertise in this area, was of the view, as were other experts, that L.F. had a medically recognized Pain Disorder, which is distinct from intentionally producing or feigning pain, and by extension, disability.

Nick Kotey v. State Farm Mutual Automobile Insurance Company, 1999 ONFSCDRS 192 (CanLII), <https://canlii.ca/t/jq5hz

Summons to Produce Financial Records of a Medical Practitioner:

Mr. Kotey’s counsel served a summons on Dr. Arthur Ameis the morning he was scheduled to testify on behalf of the Insurer, requiring him to bring his financial records relating to his medical practice. Counsel argued that he intended to demonstrate that Dr. Ameis was biased against insureds. He argued that production of Dr. Ameis’ financial records was required in order to establish that a substantial portion of Dr. Ameis’ income is derived from medico-legal opinions requested by insurance companies. I ruled that counsel would be permitted to cross examine Dr. Ameis with respect to these matters, but that he was not entitled to production of Dr. Ameis’ financial records. I quashed the summons for the following reasons. The primary issue in this proceeding is Mr. Kotey’s entitlement to weekly benefits. He has been examined by many medical practitioners, at the request of his own doctors and at the request of State Farm. These proceedings would become unduly prolonged if every medical practitioner were required to produce detailed financial information of the kind requested here. These allegations of general bias, as

opposed to a specific bias against Mr. Kotey, are remote from the entitlement issues before me. I concluded that the probative value of the documents did not justify the requested production.

Amy Levey v. Traders General Insurance Company, 1998 ONICDRG 96 (CanLII), <https://canlii.ca/t/jq59t

The question of neck spasm and indeed Ms. Levey's pre-accident condition in general was taken up by Dr. Arthur Ameis in a report he wrote for Traders dated February 20, 1997. Dr. Ameis had some of the same materials that I had before me. For instance, he writes that the summary of the April 1995 report by Dr. Killian indicates habitual pre-morbid positioning and posturing. Having examined the report and the summary, I can find only a reference to "habitual positioning/posturing" but no reference to its being pre-morbid. He also states a strong position on the possible development of torticollis: "One can be certain that if the claimant was to develop torticollis acutely from the accident…it would have developed very rapidly…and definitely presenting at the time of the first medical visit." Regarding that first medical visit, Dr. Ameis finds it of interest that "a 9-day latency occurs prior to the first post-trauma family doctor visit" (his emphasis — he does not refer to the fact that the emergency department suggested Ms. Levey follow up in seven days with her family doctor, nor that the accident happened on a Saturday evening and that Ms. Levey saw Dr. Liang on Monday, April 18 (1994). He refers to the mild nature of the accident, noting that the damage was $175 (the insurance appraisal sets out parts of $175, but it also shows that straightening of the automobile's unibody structure required six hours of labour, and the total estimate before taxes comes to over $1,100) and that important secondary gains can be derived from such an "unexpected opportunity" to displace personal distress through misattribution onto the accident. He writes that, to Dr. Punthakee in March 1996, Ms. Levey was "exhibiting *behaviours* suggesting a spasmodic torticollis which apparently is related in time to the accident" (again, his emphasis). Turning to the issue of the neck spasm, Dr. Ameis closely examines the October 11, 1994, report by Dr. Mascarenhas, in which Dr. Mascarenhas found left upper trapezius muscle spasm but a full range of cervical motion. Noting that spasm blocks range of motion, Dr. Ameisconcludes that Dr. Mascarenhas was likely observing voluntary tensing of muscles, also known as protective guarding. I can find no reference in Dr. Ameis's report to Dr. Paulseth's report of February 12, 1996, in which he found that Ms. Levey's left sternomastoid was firm and mildly hypertrophied; as noted above, Dr. Paulseth testified that guarding would tend to atrophy the muscle and that hypertrophy is gradual. Dr. Ameisconcluded that the underlying pre-existing psychological and physical problems were pre-eminent in the perpetuation of symptoms beyond the soft tissue healing period of 12 weeks...

...I have found that Ms. Levey suffered a qualitative change in her condition after the accident. Although Dr. Ameis insists that the torticollis should have manifested itself by April 18, 1994, both Dr. Paulseth and Dr. Oczkowski provided evidence that onset can be delayed after trauma. I find that Dr. Ameis's report, in

its constant suspicion of Ms. Levey, to be less than helpful. Furthermore, Dr. Paulseth and Dr. Oczkowski are both experts in the area of spasmodic torticollis. Accordingly, I prefer their evidence and find that the onset of spasmodic torticollis may be delayed after trauma. In this case, Dr. Cruise suspected the condition less than a year after the trauma. I find that the diagnosis occurred within a reasonable period after the accident to suggest a link between the accident and the condition.

Ghenet Worku v. Co-operators General Insurance Company, 1996 ONICDRG 149 (CanLII), <https://canlii.ca/t/jq4lh

With the exception of Dr. Arthur Ameis, a physiatrist consulted by the Insurer in 1995, the various specialists who assessed Ms. Worku at the request of her family doctor, the W.C.B, and the Insurer, generally expressed the view that *both* the car accident and the assault, in close succession, contributed to Ms. Worku's ongoing complaints of back pain, headache, excessive fatigue, and cognitive difficulties. Dr. Veidlinger, Dr. Hajek, Dr. Lipowski, Dr. Macartney-Filgate, Dr. Bacal, Dr. Sadavoy However the specialists differed in their opinions concerning the *extent* to which each of these events contributed to her current problems.
Dr. Ameis, concluded that the car accident did not contribute in any significant way to Ms. Worku's state of disability and work absence. In his opinion, the assault, consequent post-traumatic stress disorder including phobia, and then Ms. Worku's withdrawal from the business, created a circumstance in which a very lengthy delay in return to work was inevitable. He was not convinced that Ms. Worku suffered any important degree of physical impairment or disability and did not find convincing evidence of myofascial pain syndrome. However, I approach Dr. Ameis' view with caution. I find that he relied upon several assumptions concerning Ms. Worku's motivation and life circumstances which were not borne out by the evidence.

William J. Whyte v. Metropolitan Insurance, 1996 ONICDRG 67 (CanLII), <https://canlii.ca/t/jq4vk

In August 1993 Mr. Whyte was examined on behalf of the Insurer by Dr. Arthur Ameis. It is difficult to reconcile the different parts of Dr. Ameisreport of November 2, 1993. In one paragraph he states that there is a degree of magnification of pain experience and perhaps some degree of exaggeration, but later he acknowledges that the patient demonstrated no guile nor did he feign illness. He concluded that Mr. Whytes complaints were psycho-emotional and that it was appropriate that he enter a pain clinic, but later suggests that he was fit to return to work. His conclusion regarding Mr. Whytes capacity for full-time work is carefully worded and avoids any reference to his psychological health, and suggests only that he

shows no incapacity based upon his fitness level and general health. On the whole, Dr. Ameis report was of little assistance to me in my deliberations...
...Mr. Whytes weekly benefits were terminated by the Insurer in November 1993 after the receipt of Dr. Ameis report.

John Gouliaeff v. Commercial Union Assurance Company of Canada, 1995 ONICDRG 98 (CanLII), <https://canlii.ca/t/jq4pd

Dr. Ameis reported a number of inconsistencies between the Applicant's complaints and his objective examination. He felt that the Applicant's complaints were best explained by "behavioural" and "motivational" issues, a "passive/aggressive" personality, or "conversion disorder". I place little weight on Dr. Ameis' psychiatric diagnoses, which fall outside his expertise as a physiatrist.

Shiva Ahmadi-Nadoushan v. Allstate Insurance Company of Canada, 1995 ONICDRG 55 (CanLII), <https://canlii.ca/t/jq4k6

In terminating benefits on December 5, 1993, the Insurer relied on the January 17, 1994 report of Dr. Ameis (examination of November 29, 1993, Exhibit 3, Tab 38). Dr. Ameis found that the Applicant showed no objective signs in the neck or back. He felt that she displayed inappropriate pain behaviours. He did not think she was anxious or depressed. He did not accept that she has fibromyalgia.

In his testimony at the hearing, Dr. Ameis made some observations about the Applicant's movements after she left his office. These comments were not included in his report, but were passed on to the Insurer in a separate letter, which was not copied to the Applicant. In addition, Dr.Ameis' report includes several unfavourable comments about the Applicant's character. I find that Dr. Ameis was not acting as an impartial medical expert in this case, and this has affected the weight I have given his evidence.