

PRESIDENT'S MESSAGE

2006 has been a year of great challenge, growth and opportunity for CSME as we have focused on principles of inclusion, professional education, development of guidelines and liaison with our colleagues in Québec and other national organizations with shared interests.

The response to our invitation for professionals of all disciplines that are involved or interested in independent examinations to join CSME has been a wonderful success. The eager, active participation of Associate Members that include adjusters, case managers and chiropractors, facility staff, GPs and insurers, kinesiologists and lawyers, neuropsychologists, nurses and occupational therapists, and physiotherapists, psychologists, rehabilitation specialists and therapists, establishes CSME as an organization that is truly representative of stakeholders. It ensures our ability to bring the broadest perspective and range of clinical, administrative and legal experience to endeavours in all aspects of the independent examination process and practice. Associate Members' representatives make tremendous contributions to our Board in all the arenas CSME is involved in. For me, these aspects of CSME's success are particularly gratifying in my work on your behalf.

CSME mounted an active campaign of educational activities this year. Two conferences based on needs assessments of Associate Members were well attended and much appreciated, as were those with broader aims. CSME also worked with the Occupational and Environmental Medicine Association of Canada (OEMAC) to mount a weekend workshop on IMEs for Business. All our members have been given a DVD and program presentation package of the workshop proceedings. Work with Canadian occupational physicians who are primarily involved in seeking IMEs was useful to our mutual understanding of workplace issues and needs related to disability management and accommodation issues that effect return to function and work after illness and injury. Networking related to this workshop is a beginning to CSME forging ongoing national relationships with occupational clinicians whose interests and talents fit naturally with our own.

CSME is also committed to the development and implementation of a series of IME workshops in centres throughout Ontario and in Eastern and Western Canada in 2007. CSME previously announced its formal relationship with la Société des médecins experts du Québec (SMEQ) and we are continuing to work with our colleagues in La Belle Province toward facilitating a greater level of interaction amongst our members and our organizations to provide leadership in areas such as national standards and guidelines in our field.

There are numerous developments with potentially far-reaching implications. CSME worked to provide CRA with information on the issue of GST on IME services. The recent policy in this area will affect most of our members. CSME has formally addressed increasing requests to record IMEs, a practice with significant potential to undermine not only the examination process and findings, but also one that could ultimately introduce systemic bias if it is not dealt with properly. Here I am pleased to report that CSME is in the forefront in addressing this issue in a professional manner. We are polling all stakeholders on their views and concerns on all sides of this issue and analyzing their responses in order to provide leadership in the development of an objective position on whatever circumstances might warrant intrusion on the traditionally accepted and time-honoured clinical examination process.

Finally, CSME members are well represented and engaged in the FSCO initiative to develop a new PAF Guideline that is nearing completion. We have many members on both the PAF Advisory Committee and the Technical Working Group. The process, progress and outcome of our experiences in this important endeavour will be featured in the afternoon sessions of our conference on November 24th when the first six months of our experiences with the new regulations will be addressed in the morning presentations. This promises to be a very informative, lively educational event that deals with the most important topical issues of current interest. I strongly encourage you to attend.

*Michael Ross
President*



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UPCOMING EVENTS INTERIM POSITION REGARDING ELECTRONIC RECORDING OF IMES

UNIVERSITY OF MONTREAL PROGRAM ON IME EXPERTISE ARTICLE FROM MICHEL LACERTE FEDERAL PIPEDA RULING

ANNUAL GENERAL MEETING HIGHLIGHTS

CSME had a very good year in terms of growth. By-law changes were made to accommodate associate members joining the organization.

CSME has numerous members on the Pre-approved Framework Guidelines Project Advisory Committee (PAC) and the Technical Working Committee (IWC)

CSME has forged an active professional alliance with the Société des médecins experts du Québec (SMEQ). The following affiliation agreements were made:

- Members of each organization will automatically become affiliate members of the other at no additional charge
- Members of each organization will be eligible for the members' rates at the other's educational events
- Members of each organization will have access to each other's newsletters and bulletins and will be invited to contribute material to them
- Each website will have a link to the other organization's website.
- For the purpose of outreach a Joint Committee will be created to develop and disseminate national medicolegal guidelines in both official languages and the sharing of information and speakers.

The Board is entertaining ways of providing better services to members across the province and country: A by-law was passed to provide for the status of Emeritus Member, to be conferred on members in good standing who provide proof of retirement acceptable to the Membership Committee. They shall pay 50% of dues to maintain their member status within CSME

SPECIAL WORKSHOP

CSME was pleased to develop and present a weekend workshop for the annual national conference of the Occupational and Environmental Medical Association of Canada (OEMAC) held in June.

The Saturday morning workshop entitled **IMEs for Business and the Business of IMEs: How to Utilize and Provide IMEs to Enhance Productivity**, aimed to help clinicians who order or offer IMEs for/ to business to appreciate the most important factors in working with insurers and employers to improve claims management; to enhance RTW outcomes with reference to causation and current models; to navigate the problems presented by the ever-rising growth of psychiatric claims; and to understand the roles of education and provider selection in assisting them to achieve or offer the best level of return on investment for IMEs.

GST/HST POLICY STATEMENT

CRA issued a September 21, 2006 policy: *The Application of the GST/HST to the Supply of an Independent Medical Examination ("IME") and Other Independent Assessments.*

All CSME members were sent a copy of this in early October, and the **policy is posted on the CSME site**. This policy has potential implications that are very important for most CSME members.

The CSME Board recommends that members review this document with their professional advisors to determine what course of action is most useful and appropriate to their practices.

ASSOCIATE MEMBERS

CSME created an Associate Member category in the past year. The Associate Members are well represented on the Board of Directors by Mr. Rick Shaheen, a Lawyer, Ms Karen Rucas, an Occupational Therapist, and Ms Lee Tasker, a Rehabilitation Consultant. As a group, we are working to promote the best interests of our Associate Members in keeping with the goals of CSME.

We now have over 125 Associate Members from a wide range of disciplines: psychology, physiotherapy, neuropsychology, occupational therapy, case management, chiropractic, physicians, nurses, business, and law clerks.

A survey was sent to the Associate Members and we had an excellent response. As a discipline, physicians and psychologists had the largest response, followed by occupational therapy. The majority of our members work in Ontario within the following systems: motor vehicle accidents, WSIB and with other public and private disability plans, such as CPP and supplemental insurance. The vast majority joined CSME to learn more about topics that are relevant to our professions, but networking with others was also an important objective. The greatest area of interest was in the preparation of medicolegal reports, providing expert testimony, and chronic pain.

In light of this response, the past two conferences have been planned with the needs of Associate Members (as well as General Members) in mind. In March, CSME held a conference entitled **Torts, Reports and Courts: Be Prepared to Defend Your Expert Opinion**, and another was held in May, entitled, **"Advanced Concepts In Life Care Planning"**.

The Associate Members look forward to continued participation in CSME.

Lee Tasker
Vice President, Associate Members

CONFERENCES

**FULL-DAY CONFERENCE
FRIDAY, NOVEMBER 24, 2006
AT THE ONTARIO BAR ASSOCIATION, TORONTO
DRIVING TOWARD A HEALTHY FUTURE FOR
ONTARIO ACCIDENT VICTIMS
MORNING ARE WE THERE YET?
SIX MONTHS DOWN THE
NEW REGULATIONS ROAD
AFTERNOON PAFWAYS TO HEALTH:
BUILDING ON THE EVIDENCE TO DELIVER
IMPROVED HEALTH SERVICES**

**VANCOUVER AND HALIFAX:
ONE-DAY EVENTS PLANNED
LOOK OUT FOR FURTHER INFO**

**SMEQ ANNUAL MEETING
DECEMBER 1, 2006**

VISIT WWW.CSME.ORG FOR UPDATES

CONTACT US!

- If you have a change in your contact information
- If you know anyone who would like to attend CSME conferences or receive information about membership
- If you have information that you would like to share in a future newsletter
- If you would like to volunteer with CSME
- If you have been asked to address the issue of conducting an IME that is to be recorded, or to conduct such an IME

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INTERIM STATEMENT ON THE USE OF ELECTRONIC RECORDING OF IMES

CSME members have noted a significant, increasing trend in requests for recordings of IMEs and looked to CSME for guidance and leadership in this contentious area.

The Board voted unanimously in support of the following interim statement (also posted on the CSME website):

It is CSME's position that the use of electronic recording is generally undesirable and unnecessary and creates a significant potential to invalidate the evaluation process.

CSME has undertaken to consult with interested parties to ascertain those circumstances that may pose reasonable exceptions to this general position.

IMES IN BRITISH COLUMBIA FACE NUMEROUS CHALLENGES

The independent medical examination has been a frequent source of complaints to the College of Physicians and Surgeons of British Columbia. The motive may be to discredit the examiner and therefore the examination. In order to improve communication and reduce the number of complaints, the College offers the following suggestions:

1. Explain the purpose of the examination. Make it plain what your role is in the examination.
2. Explain how this examination differs from an ordinary doctor/patient interaction. Explain that its purpose is to determine the health status and functional status at the time of the examination. It is not for discussion of treatment. Confirm that treatment advice will not be given.
3. Explain the scope of the examination and describe the areas and systems that will be examined and why they will be examined.
4. Remember the patient may be suspicious of the reason for the examination. Usually the patient has never seen you before, so the usual physician/patient mutual trust has not been established, indeed the patient may feel that you are in an adversarial position.
5. Explain that the report must go to the third party or authority ordering the examination, and that the patient can ask for a copy of the report from the third party, who may or may not provide it.
6. Be careful to be particularly courteous to these patients in words and actions.
7. It is wise for you to insist on the presence of a chaperone during the entire examination for both males and females.
8. Observe the normal decorum of providing privacy while the patient undresses and dresses. Provide an adequate gown or drape.
9. If the patient attempts to set limits upon the examination, e.g., as to past history or the extent of the physical examination, explain why this is unacceptable and why the information or examination is needed. If the patient continues to refuse to cooperate, note the fact and terminate the examination.
10. If the patient does not speak English, and if you do not speak the patient's language fluently, it would be wise to have an independent interpreter present. This is particularly important in Immigration examinations. The presence and name of the interpreter should be documented.
11. Be seen to note findings.
12. Record the time that the interview and examination commences and concludes.
13. Avoid commenting on others' management of the patient's problem.
14. Be prompt in completing and submitting your report.

Source: The College of Physicians and Surgeons of British Columbia

UNIVERSITÉ DE MONTRÉAL OFFERS FIRST NORTH AMERICAN FRENCH/ENGLISH INSURANCE MEDICINE AND MEDICO-LEGAL EXPERTISE PROGRAM

In 1999, the Université de Montréal launched the first program in insurance medicine and medico-legal expertise in North America. This web-based program, available initially in French only, provides formal and comprehensive training for health and insurance professionals practising or interested in medico-legal assessment and insurance medicine. The successful French-based program also offers master's- and PhD-level training in medico-legal assessment and insurance medicine.

In January 2007, The Université de Montréal will launch an English program and offer a two-year, four-semester, 12-credit microprogram as well as a three-year, six-semester, 30-credit diploma program. The optional third year, which leads to the diploma program, requires more lectures and a term paper. Each semester will consist of 15 web-based lectures, with each lecture lasting two hours and requiring one hour of homework a week.

The program's faculty members are highly respected and accomplished Canadian and American lawyers, justices, physicians, academics

and insurance experts. CSME, SMEQ and the Medical Legal Society of Toronto are closely involved with curriculum development. Given the 2005 amendments to the Ontario Unfair or Deceptive Acts or Practices regulations, this program provides health care practitioners an exceptional and timely opportunity to become formally qualified in medico-legal assessment and insurance medicine.

Deadline to register for the January 2007 program is December 1, 2006. For details, visit <http://www.mae.umontreal.ca> or contact:

Mrs. Catherine Verschelden, Program Coordinator
catherine.verschelden@umontreal.ca
tel. 1-877-343-7606

Dr. François Sestier, Program Director
francois.sestier@umontreal.ca
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Dr. Michel Lacerte, Associate Program Director
mlacerte@uwo.ca
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RESOURCES

Société des médecins experts du Québec <http://www.smeq.org/>
 Medical-Legal Society of Toronto www.mlst.ca
 Journal of Insurance Medicine www.aaimedicine.org/JIM.htm
 Canadian Occupational and Environmental Medicine <http://www.oemac.org/>
 Insurance Bureau of Canada <http://www.ibc.ca/>
 Financial Services Commission of Ontario <http://www.fscso.gov.on.ca/>
 Canadian Institute for the Relief of Pain and Disability <http://www.cirpd.org>
 University of Montreal Faculty of Medicine <http://www.mae.umontreal.ca/>
 Insurance Bureau of British Columbia www.icbc.com

SIMPLE OPINIONS VS. CONSIDERED OPINIONS

BY MICHEL LACERTE AND
ADAM RAWLINGS

The poor expert claims, the good expert explains and the excellent expert argues.

According to David Eryou of Eryou Barristers, “The present state of expert evidence in civil litigation is regarded as an intellectual embarrassment.”¹

The quality of most expert opinions is mediocre to poor—and some, as Eryou says, are simply embarrassing. The greatest difficulty with resolving the problem, however, lies in the apathy of the participants: lawyers, experts, and triers of fact. The apathy is in some ways understandable, as the Rules of Civil Procedure do not require that expert opinions be anything more than sweeping assertions and unsupported claims. How can a trier of fact be expected to do his or her job on the basis of simple opinions?

When most people hear the term “opinion”, they think of a **simple opinion**. Everyone has these opinions, on basically every subject. And even if an individual does not have an opinion already prepared, most, when pressed, would have no difficulty creating an opinion almost instantly, on any subject. Most of the time, of course, this opinion is not well-reasoned and is based more upon intuition or emotion. Examples of this might include opinions on sporting events or the relative merits of various foods. Simple opinions are often subjective, biased or erroneous, features which may not impede a debate in a bar over a referee’s call, but can seriously undermine the reliability, validity and credibility of an expert’s claims in court.

In court, the experience and knowledge of the expert within his domain confer on his or her opinion the status of evidence. Unfortunately, very often experts will provide only simple opinions, which are

neither reliable nor valid; and these are, even more unfortunately, often accepted by the referral party and trier of fact. An opinion should not be accepted just because it comes from an “eminent” professional: even on issues within the expert’s domain of expertise, a simple opinion is not good enough. A trier of fact cannot be expected to reach a sound legal judgement if he or she is not provided with the arguments and reasoning by which the expert reached the opinion. That is, the trier of fact cannot do his or her job unless provided with a **considered opinion**.

Explicit consideration of facts and presentation of argument is what makes an opinion a considered opinion. As all participants in litigation know, it is nearly always the case that a trier of fact will be presented with contrary, or even contradictory, opinions by experts on plaintiff and defence sides. When faced with diverging opinions, the trier of fact should give weight to the opinion that best fits the facts and provides the best argument towards its conclusion. If the argument is not given or is not satisfactory, then both the judge and the opposite party should, through cross-examination, force the expert to provide the underlying argument and facts.

It should be noted that, as EE Savellos and RF Galvin write, a simple opinion would not be good enough if it were written by a judge:

... the word *opinion* should not be understood to connote something like the ‘purely subjective and arbitrary feelings’ of the judges ... legal opinions are arguments designed to demonstrate that one legal result is entailed by the law itself (and perhaps the facts of the case). So legal opinions are not purely conjectural matters; they are paradigm cases of *reasoning within the law* ...²

Expert opinions should be held to at least the same standards as legal opinions, if not higher.

Regrettably, the rules of the Ontario Civil Code are of no help when it comes to expert opinions. Even though the Supreme Court of Canada in the decision of *R vs. JJ* has rendered an opinion similar to the famous Daubert decision of the United States Supreme Court, the rules governing litigation in Ontario have not been changed. As Eryou says:

... the use of Daubert in Ontario is blocked by a procedural anachronism. Specifically the Rules of Practice do not compel experts to spell out their reasoning and methodology in their expert reports. Reports are often deliberately ambiguous. In Ontario there is no right to discover an expert on his report prior to trial. The result is that all too often it is not until the expert has been qualified to give evidence, and in fact gives evidence, that the basis for his evidence becomes apparent. By that time his evidence has been admitted and any attack on his evidence is all too often regarded as going to weight, not admissibility.³

It is probable that lawyers on both defence and plaintiff sides are satisfied with this situation, as they can then defend their cases on the basis of rhetorical flair and dramatic ability. Moreover, it may be that triers of fact, who are trained as lawyers, also have no serious objections to the situation, because they feel more comfortable assigning weight to expert testimony on the basis of eminence of the expert rather than substance of the scientific argument (for which they are ill-prepared).

It is also not to the **expert’s** benefit to provide ambiguous and poorly-supported simple opinions instead of considered opinions. The expert must keep in mind that the information he gives could be used against him during cross-examination. Only insofar as the opinion is supported with sound premises and good reasoning will the expert be able to support and defend the opinion, and his or her reputation, against attack. Furthermore, the expert must consider the ethical issues involved. If the expert is willing to use his or her reputation alone to justify the opinion, rather than facts and argument, then the expert has failed in his or her obligation for due diligence. More seriously, if the expert is willing to say whatever the referral source is asking him or her to say, then this so-called “expert” is no more than a willing accomplice in an attempt to deceive and distort the process of justice.

As a final word, T. Edward Damer writes that: **“The only opinion (belief, claim, thesis, position) that deserves acceptance is one that can be defended by a good argument”⁴**

Without support of the facts and of good reasoning, an expert opinion is no better than an off-the-cuff simple opinion on a hockey game. A considered opinion is what a referral source should expect from the expert, what a trier of fact needs to make a sound legal judgement, and what experts themselves would be both sensible and ethical to always provide. Subjects such as Logic, Critical Thinking and Presentation of Arguments are necessary skills for the provision and examination of considered opinions. CSME is committed to assisting in the professional development of these skills by offering workshops in the spring.

¹ Eryou, DW. “Why Isn’t Daubert Being Used in Ontario Civil Cases?”. *Practical Strategies for Advocates IX. The Advocates Society (Ontario): February 4-5, 2000.*

² Savellos EE, Galvin RF: *Reasoning and the law: The elements Wadsworth 2001:154.*

³ *Supra*, n. 1.

⁴ Damer TE. *Attacking faulty reasoning*. Wadsworth, Inc. 1995:5.

THE LAST WORD FEDERAL PIPEDA RULING

PIPEDA Case Summary #320: Refusal to undergo an independent medical examination results in termination of insurance benefits (Principles 4.2, 4.3; subsection 5(3))

Complaint

Two individuals alleged that an insurance company terminated their benefits because they refused to provide their personal information by attending an independent medical examination (IME).

Summary of Investigation

The complainants were insured by the company under a provincial standard automobile insurance policy. Following automobile accidents (which occurred a number of years prior to the complaints being filed), the complainants initiated claims under a section of the policy that pays for, among other things, the insured's reasonable and necessary medical, funeral and other expenses related to bodily injury incurred in connection with an automobile accident. The insurance company had been making payments to the complainants since their claims were initiated.

The complainants requested that the company provide compensation for expenses beyond the four-year statutory limit. The company has, from time to time, and on a without prejudice basis, paid insured individuals for costs associated with accident injuries beyond the four-year limit if it is reasonably foreseeable that the costs will be incurred in connection with the accident. Following the complainants' requests, the insurance company advised them that it would require an IME.

One of the complainants requested an explanation for the IME and indicated his preference to have his condition evaluated by his own physicians. The insurance company responded by indicating that it was the insurer's right to request a medical examination.

All automobile policies in this particular province are based on the mandatory form of policy that must be approved by the provincial Superintendent of Insurance. Under section 226(1) of the *Insurance Act*, "no insurer shall use a form of application, policy, endorsement or renewal or continuation certificate in respect of automobile insurance other than a form approved by the Superintendent."

The standard automobile policy of insurance for the province includes the following Section B provisions:

Section B – Accident Benefits

The Insurer agrees to pay to or with respect to each insured person as defined in this section who sustains bodily injury or death by an accident arising out of the use of operation of an automobile:

Subsection 1 – Medical, Rehabilitation and Funeral Expenses

(1) All reasonable expenses incurred within four years from the date of the accident as a result of such injury for necessary medical, surgical, dental, chiropractic, hospital, professional nursing and ambulance service and for any other service within the meaning of entitled services in the Hospital Services Act or the Medical Services Payment Act and for such other services and supplies which are, in the opinion of the physician of the insured's person's choice and that of the Insurer's medical

advisor, essential for the treatment, occupational retraining or rehabilitation of said person, to the limit of \$50,000 per person.

The insurance policy contained a provision indicating that it had the right to examine the person of the insured person when and as often as it reasonably requires while the claim is pending. In support of its right to ask for an IME, the company stated that each complainant was a party to a policy of insurance that places defined obligations on both the insured and the insurer. According to the company, the policy was a legal contract freely entered into by the complainants and the terms of which had been approved by the Superintendent of Insurance. In the contracts of insurance, the complainants agreed to submit to a medical examination by the insurer. Each complainant consented to such a collection of their personal information and its corresponding use by the company in connection with investigating and processing their claims.

Findings: Issued December 5, 2005

Application: subsection 5(3) states that an organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances; Principle 4.2 requires that the purposes for which personal information is collected be identified by the organization at or before the time the information is collected; and Principle 4.3 stipulates that the knowledge and consent of the individual are required for the collection, use, or disclosure of personal information except where inappropriate.

In making her determinations, the Assistant Privacy Commissioner deliberated as follows:

- In keeping with the requirements of Principle 4.2, the automobile insurance policy in question clearly specifies that the insurer has the right to request a medical examination by a physician of the insurer's choice for the purpose of investigating and processing the insured person's claim. The policy also states that both the physician of the insured person's choice and the insurer's medical advisor must concur with the expenses being claimed.
- In the Assistant Commissioner's opinion, a reasonable person would likely consider it appropriate for an insurance company to request a medical examination in order to ensure the validity of a claim, and to collect information from the examination and use it to assess the claim. Such a purpose would therefore meet the expectations of subsection 5(3). As all automobile insurance policy language is standard in the province, all insurance companies have this requirement.
- By being a party to the motor vehicle insurance policy and by submitting a claim under the policy, each of the complainants consented to the terms of the policy, one of which is that the insurer has the right to "examine the person of the insured person." She therefore found that the insurance company did not contravene the consent provisions set out in Principle 4.3 of Schedule 1.

The Assistant Commissioner concluded that the complaints were not well-founded.

The Canadian Society of Medical Evaluators (CSME) exists to serve Canadian healthcare professionals who perform medical and medicolegal evaluations as a professional service to employers, workplace safety and insurance or workers compensation boards or CSST, lawyers and the insurance industry, using evidence-based medicine, best clinical practices and practise guidelines. Member clinicians have the opportunity to contribute to the development, advancement and publication of ethical standards and guidelines for medical evaluators; to advise and offer expert consultation to the medical and other professions, organizations, and government agencies on all matters concerning independent medical evaluations in Canada; and to assist those hoping to locate available clinicians with suitable expertise.