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Defence Medical Assessments from Rear-End Car Accident: How Many Do You Have to Attend?

The Issue: One question many car accident victims have when they start a lawsuit is how many medical examinations they will have to submit to during the course of their lawsuit. The Rules of Civil Procedure allow for one medical assessment, with the defendant(s) having then to seek the plaintiff's consent or a Court order for any further assessments. In reality, the Court will generally allow the defendant to match a plaintiff in terms of expert medical reports.

When can the defendant's insurance company force you to undergo further defence medical examinations, when you've already been examined by their chosen psychiatrist and physiatrist?

Why This Matters

The balance between what is 'fair' for the defence - an ability to respond to the plaintiff's claim - versus the intrusiveness of forcing the plaintiff to submit to defence medicals arising from their car accident, is important to plaintiffs whose lives have been affected by a car accident.

The Result Here

In the recent motion on ***Ramrup v. Lazzara, 2014 ONSC 130 (CanLII)***, the defendant sought an order on the eve of Trial to have the plaintiff attend 2 more defence medicals in order to respond to new plaintiff medical reports. The issue was that the plaintiff had seen two different experts (a psychiatrist and a physiatrist) three times each. The defendant had a defence medical with a psychiatrist, as well as one by a physiatrist, and sought further examinations with each to respond to the additional reports by the plaintiff experts.

Judge Mitrow sets out the test starting a paragraph 49:

> [46] The principle that the purpose of a second or subsequent defence medical examination is not to go "one for one" or "tit for tat" with the number of plaintiff expert reports has been acknowledged in other cases including: Jeffrey v. Baker, [2010] O.J. No.

4415 (S.C.J.) at para. 4; Suchan v. Casella, [2006] O.J. No. 2467 (Master) at para. 7; and Mason v. MacMarmon Foundation, 2011 ONSC 5823 (CanLII), 2011 ONSC 5823 (S.C.J.) at para. 43. In Galea v. Firkser, 2013 ONSC 1666 (CanLII), 2013 ONSC 1666 (S.C.J.), in reviewing the authorities, McDermid J. concluded that the cases suggest it is "not simply a numbers game." Although it is trite that a plaintiff may obtain as many reports as he or she wishes, the issue of trial fairness concerns a defendant having an adequate opportunity of meeting the plaintiff's case (para. 14).

[47] In the present case, the parties provided numerous authorities as to the nature of the evidence and the criteria necessary to justify an additional defence medical examination. In Fehr v. Prior, [2006] O.J. No. 5244 (S.C.J.), R.D. Reilly J. found that the "theme" running through the jurisprudence is whether a further defence medical is necessary as a matter of fairness in order to "level the playing field" (para. 7). The test to be applied in determining whether to order a further defence medical is "necessity, fairness and prejudice": Jeffrey v. Baker, supra, at para. 12. A further defence medical will be permitted only where necessary to enable a defendant to fairly investigate and call reasonable responding evidence at trial. It is not available merely to corroborate the opinion of previous physicians: Marcoccia (Litigation guardian of) v. Gill, [2006] O.J. No. 4972 (S.C.J.) at para. 28.

[48] A need for a second defence medical may be justified where there is an unexpected change in the plaintiff's complaints, symptoms or circumstances. A further defence medical will not be permitted where the recent disclosure is more a continuation of what was known rather than an unexpected change in complaints, symptoms or circumstances: Fromm v. Rajani, [2009] O.J. No. 3671 (S.C.J.) at paras. 13, 16.

[49] As to the nature of the evidence required, I accept the following statement made by Master J. Haberman in Bougouneau v. Sevigny, [2013] O.J. No. 1961 (S.C.J.) at para. 55.

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> > The evidence on these motions is critical, and the results will vary from case to case depending on the nature and quality of the evidence filed ... At the very least, the evidence must explain why the particular examination is required (see Bergel v. Hyundai Auto Canada (2003), 28

> C.P.C. (5th) 372). This means setting out the nature of the specialty of the proposed physician; indicating the type of evidence they can provide and explaining why it is necessary in the context of the injuries and symptoms complained of and the evidence already tendered by the plaintiff. In other words, what evidence will the plaintiff be calling at trial that must be addressed by this particular defence expert?
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> ...

[50] The case of Bonello v. Taylor, 2010 ONSC 5723 (CanLII), 2010 ONSC 5723 (S.C.J.), although recent, is cited in a number of cases. In Bonello, D.M. Brown J. summarizes the principles in determining whether to order a second or further defence medical at para. 16 as follows (footnotes omitted):

> 16 ...
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> (i) The party seeking the order for a further examination must demonstrate that the assessment is warranted and legitimate, and not made with a view to delaying trial, causing prejudice to the other party, or simply corroborating an existing medical opinion;
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> (ii) A request may be legitimate where there is evidence that (i) the party's condition has changed or deteriorated since the date of a previous examination, (ii) a more current assessment of the plaintiff's condition is required for trial, (iii) the plaintiff served specialist reports from new assessors after the defendants had conducted their medical assessments, or (iv) some of the party's injuries fall outside the expertise of the first examining health practitioner;
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> (iii) Some cases take the view that the need for a "matching report" - i.e. a report from a defence expert witness in the same specialty as a plaintiff's expert - is not, in and of itself, a sufficient reason to order a further defence medical. In the circumstances of the present case I need not wade deeply into that question. That said, I would venture that trial fairness should operate as the guiding principle in this area, so if the plaintiff has decided that expert evidence from one specialty based on an examination of the plaintiff is relevant to the adjudication of her claim at trial, courts should be loathe to deny the defence a fair opportunity to

respond with expert evidence from the same specialty based on an assessment of the plaintiff. Ordering further examinations may be just where they are necessary to enable the defendant fairly to investigate and call reasonable responding evidence at trial;

(iv) Where the request is for the examination of the plaintiff by a person who is not a health practitioner, such as a rehabilitation expert, the defendant must demonstrate that the proposed examination is necessary as a diagnostic aid to the health practitioner who is conducting the defence medical examination;

(v) A request for a second examination must be supported by sufficient evidence to persuade a court of the need for the further examination. What constitutes sufficient evidence will vary from case to case. Some cases have suggested that need must be established by filing medical evidence, such as an affidavit from the first examining physician recommending a further examination by a health practitioner competent in another specialty. In other instances an affidavit from a lawyer or law clerk attaching medical reports has been utilized by the court. But, at the end of the day, determining whether the nature of the evidence filed is sufficient remains essentially an exercise of judicial discretion;

(vi) While fairness, or "creating a level playing field", may constitute a legitimate reason for ordering a second examination, someone with knowledge of the evidence in the case must provide evidence of unfairness for the court to consider; and,

(vii) A court should consider whether the request for a further examination would impose an undue burden on the plaintiff in light of the number of examinations already conducted of her by the defence.

The Court reviewed the circumstances and found that despite the plaintiff's multiple reports, that there was not a 'change in circumstances' in the plaintiff's condition that warranted further defence medical assessments. Further, the Court noted that the defence did not appropriately present sufficient evidence, from their own proposed experts, as to why the further defence medical reports were necessary.

The defendant's motion was dismissed, with costs to the plaintiff.

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