# ***Battle of the Forms:***

## An overview regarding authorizations to conduct independent medical examinations

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## Disclaimer

The contents of this paper are not legal advice. The writer's statements do not necessarily represent the position of any client or other entity.

## Introduction

Medical or other expert assessments of claimants are routine, in both the tort and AB context. This paper provides a brief overview of the framework within which such assessments take place, including the issue of whether an authorization/consent for the assessment – prepared by either the claimant or the assessor – is required or appropriate.

## Health assessments in tort claims – the principle of discovery

The *Courts of Justice Act* provides that, where the physical or mental condition of a party to a proceeding is in question, "the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners"[1]. Moreover, the legislation stipulates that "the party examined shall answer the questions of the examining health practitioner relevant to the examination and the answers given are admissible in evidence"[2] [emphasis added].

Rule 33 of the *Rules of Civil Procedure* deals with examinations under section 105 of the *Courts of Justice Act*. The contents of Rule 33 apply not only to examinations ordered by the court, but ones conducted on the written consent of the parties, "except to the extent that they are waived by the consent"[3].

Where a plaintiff fails to comply with section 105 of the *Courts of Justice Act* – for example, he/she fails to "answer the questions of the examining health practitioner relevant to the

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1 R.S.O. 1990, c. C.43, s. 105(2)
2 *Ibid*., s. 105(5)
3 *Rules of Civil Procedure*, R.R.O. 1990 Reg. 194, Rule 33.08

examination" – the defendant may seek to have the action dismissed[4]. The principle is the same as where any litigant fails to comply with their discovery obligations.

In *Bellamy v. Johnson*[5], the Court of Appeal emphasized that a "defence medical" is part of the discovery process. Brooke J.A. stated that "… the quality of the examination contemplated by the rules … is … dependent on the skill and integrity of the doctor in conducting the examination in a manner that will best facilitate discovery in the adversarial process"[6] [emphasis added]. He also stated that a plaintiff "has no right to determine how the examination is to be conducted"[7].

Doherty J.A. emphasized that, in this context, the assessor "is not operating within the bounds of the traditional doctor-patient relationship"[8].

A majority of a five judge panel of the Court of Appeal recently re-visited *Bellamy* and declined to support the routine recording of defence medical assessments[9].

Consent forms regarding "defence medicals" in tort cases – the current state of the law

In two decisions in separate cases, Justice Valin addressed the issue of defence medical experts requiring plaintiffs to sign consent forms.

In *Chapell v. Marshall Estate*[10], the defence physiatrist, a Dr. Rado, required the plaintiff to sign an authorization prior to conducting an assessment[11]. The plaintiff refused to do so. Justice Valin cited *Bellamy*, above, with respect to the fact that a defence medical assessor is not operating within the bounds of the traditional doctor-patient relationship. For example, contrary to the normal duty of confidentiality, "the examining health practitioner's very purpose is to report his/her findings to the examinee's adversary"[12]. Justice Valin concluded that, since section 105 of the *Courts of Justice Act* contained no requirement that a plaintiff sign any form of authorization, consent, or other agreement, the plaintiff in the case at bar was entitled to refuse[13].

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4 *Rules of Civil Procedure*, R.R.O. 1990 Reg. 194, Rule 33.07
5 55 O.A.C. 62 (C.A.)
6 *Ibid*., para. 8; see also paras. 9, 16
7 *Ibid*.
8 *Ibid*., para. 27
9 *Adams v. Cook*, [2010] O.J. No. 1622 (C.A.) at para. 31
10 2001 CarswellOnt 2731 (S.C.J.)
11 *Ibid*., para. 4
12 *Ibid*., para. 22
13 *Ibid*., paras. 21, 23

The same issue came before Justice Valin in *Tanguay v. Brouse*[14]. He reiterated his conclusion in *Chapell*, above, holding that section 105 of the *Courts of Justice Act* and Rule 33 constitute "a complete code and procedure" with respect to defence medical assessments[15]: if plaintiffs were required to sign (or, by the same token, entitled to present) authorizations or other forms of agreement prior to completion of an assessment, this would have been included in the "code". Justice Valin clarified that this applied equally to assessments "agreed to by counsel on consent"[16].

Based on the foregoing, where a defence medical assessment is conducted in a tort case either pursuant to court order or on the written consent of counsel:

- the plaintiff is required to answer questions relevant to the examination, or else face potential dismissal of his/her action;

- a plaintiff is entitled to refuse to sign any form presented by the assessor (and vice versa).

**Health assessments in AB claims – the principle of contract**

Insurance benefits, unlike tort damages, are a matter of contractual entitlement.

The current Statutory Accident Benefits Schedule ("SABS") provides that, for purposes of assisting an insurer to determine if an insured person is entitled to a benefit for which an application is made, an insurer may require the insured person to be examined "by one or more persons chosen by the insurer who are regulated health professionals or who have expertise in vocational rehabilitation"[17].

The SABS also provides that, where the attendance of an insured person is required for such an examination, he/she "shall attend the examination and submit to all reasonable physical, psychological, mental and functional examinations requested by the person or persons conducting the examination"[18] [emphasis added]. It would appear that "psychological" and "mental" examinations, and likely even some component of "physical" and/or "functional" examinations, would imply some questioning of the insured person.

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[14] 2002 CarswellOnt 4139 (S.C.J.)
[15] *Ibid*., para. 20
[16] *Ibid*., para. 19
[17] Ontario Regulation 34/10 under the *Insurance Act*, R.S.O. 1990, c. I.8, s. 44(1)
[18] *Ibid*., s. 44(9)2iii

Consent forms regarding "IE's" in AB cases – the current state of the law

In the recent FSCO arbitration decision of *Luther v. Economical Mutual Insurance*[19], Economical had arranged an examination of the insured with respect to IRB's. The insured, on the advice of his lawyer, refused to sign the consent forms put forward by the facility and the assessors, who therefore refused to proceed[20]. The issue was whether the insured had failed or refused to comply with the requirements under 1996 SABS with respect to attendance at examinations, and, if so, what the insurer's rights were at that point.

The arbitrator found that, as the assessment was to include a functional abilities evaluation, this would likely involve "both pain and touching" which "in the absence of consent, or other legal justification", would constitute a "battery" at common law[21]. He distinguished Justice Valin's decisions in both *Chapell and Tanguay*, above, on the ground that they involved "orders to be examined". The arbitrator reasoned that the absence of a consent from the claimant did not "invalidate such a mandatory order"[22].

Therefore, the arbitrator accepted that "it is reasonable for an examiner to ask for a generalized consent before undertaking a section 42 examination and to document that process"[23]. He observed that, under the *Health Care Consent Act*, consent can be either oral or written[24], and stated that "[a]ny written consents requested should be simple, consistent, and in accordance with the purposes of the Schedule"[25].

The insured, however, was found not to have intentionally frustrated the assessments by refusing to sign the consents. On the contrary, his refusal was held to have been "both reasonable and prudent"[26].

Based on the foregoing, where an insurer requires an examination under the SABS:

- the insured is required to "submit to all reasonable physical, psychological, mental and functional examinations requested", which would apparently include some degree of questioning;

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[19] 2012 CarswellOnt 8237
[20] *Ibid*., paras. 2-3
[21] *Ibid*., paras. 21-22
[22] *Ibid*., para. 47
[23] *Ibid*., para. 50
[24] *Ibid*., para. 62
[25] *Ibid*., para. 72
[26] *Ibid*., para. 73

- depending on the specific circumstances, an insured may validly refuse to sign a form presented by the assessor; however, the assessor cannot necessarily rely on the fact that the examination has been arranged as constituting consent by the insured for the assessor to perform the examination.

**So what is an assessor to do?**

Decisions in the tort and AB worlds appear to be at odds on the issue of whether an assessor requires, or is advised to obtain, consent from the claimant to conduct the assessment.

There may in fact be no legitimate basis for any seeming discrepancy. In *Luther*, above, the arbitrator stated that "[u]nlike section 42 [of the SABS], section 105 [of the *Courts of Justice Act*] allows for an order forcing a party to submit to an examination"[27]. Section 105(2) of the *Courts of Justice Act*, however, provides for an order that "the party undergo a physical or mental examination"; not for an order to "force" them to do so if they refuse. Thus, it seems the arbitrator's analysis may have been prefaced on an over-estimation of the relative 'coerciveness' of the tort system in terms of requiring plaintiffs to "submit to an examination".

Similarly, the arbitrator's reasoning was based on the concept of a "mandatory order" to be examined. However, as Justice Valin stated in *Tanguay*, above, the rules regarding defence medicals apply even where they are arranged on consent. Thus, Justice Valin's conclusion regarding the absence of any requirement for a consent form to conduct the assessment does not appear to have rested on the basis that the assessment was being undertaken pursuant to a "mandatory order".

It is not apparent that an insurance claimant is materially less 'obligated' to cooperate, with respect to an independent examination required by the insurer, than a plaintiff is in a tort matter.

In any event, it is respectfully submitted that the professional obligations of a regulated health practitioner in this context are not ultimately within the purview of either the *Insurance Act*, the *Courts of Justice Act*, FSCO, or the courts.

The College of Physicians and Surgeons, for example, publishes policies that set out its expectations of physicians in specific situations. One such policy is entitled "Third Party Reports: Reports by Treating Physicians and Independent Medical Examiners", which was

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[27] 2012 CarswellOnt 8237 (FSCO Arb.), para. 30

recently updated in May 2012[28]. This policy is expressed to apply to requests of physicians for a professional opinion "for a third party process such as for applications for insurance benefits … or legal proceedings". The policy states, amongst other things, under the heading "Consent":

> Physicians must obtain the patient's or examinee's consent for disclosing personal health information to the third party and for conducting a medical examination. The College strongly advises physicians to document that consent has been obtained.
>
> …
>
> Through the consent process, physicians should ensure patients and examinees understand that the examination is being conducted to prepare the report and should outline what the examination will entail.
>
> This includes an indication of what areas of the body will be examined, what functional capabilities the physician will be testing, and what types of questions the physician may have to ask.

Specifically with respect to the requirement of consent to conduct a medical examination, the policy also provides:

> Physicians can rely on a pre-signed consent form provided they are satisfied of the following: first, the form meets the criteria of a valid, informed consent; and second, the consent form applies to, and authorizes the full spectrum of acts they will conduct in order to prepare the third party report (for instance, if physicians will need to conduct a medical examination, the signed form must contain consent for an examination). <u>If physicians have any doubts about the validity of the consent provided, or if the patient or examinee has imposed limits on the consent that will prevent physicians from completing the report, they should discuss the matter with the requesting party before proceeding</u>. [Emphasis added.]

The policy also advises physicians to retain for their records, after the report has been prepared, a copy of the consent obtained from the person examined.

Even more recently, in December 2012, the College of Physicians and Surgeons of Ontario published a policy statement entitled "Medical Expert: Reports and Testimony"[29]. It similarly provides:

> Where physicians are asked to review the personal health information of a specific individual, they must ensure that proper consent has been obtained to use and disclose that information in their report and/or testimony, unless they are permitted or required by law to use and disclose that information. If physicians

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[28] Policy Statement #2-12, available at www.cpso.on.ca
[29] Policy Statement #7-12, available at www.cpso.on.ca

> are asked to conduct a medical examination on a specific individual, consent for the examination must be obtained.

An example of being "required by law" to disclose personal health information would be where a physician is under subpoena. Neither the *Insurance Act* nor the *Courts of Justice Act*, however, imposes any specific requirement on a health practitioner in this context. In fact, interestingly, the 1996 SABS had an additional provision in s. 42(11) that "if the insured person complies with subsection (10) [i.e. requirements of attendance at examination], the person or persons conducting the examination shall complete the examination, prepare a report of their findings and provide a copy of the report to the insurer". The current SABS does not appear to contain a similar provision. Therefore, it is arguable that completion of the examination and preparation of a report are no longer specifically 'compelled by statute' [although the obligation may be implicit since, pursuant to section 36(7)(a), the insurer is still required to serve a report].

In summary, the governing body for physicians in this province has clearly stated that, in conducting medical examinations for insurance or court purposes, physicians should:

- obtain and document consent to review the individual's personal health information, conduct a medical examination, and disclose the individual's information as well as the physician's conclusions to the requesting party.

**Conclusion**

Whether in the tort or AB context, claimants are required to cooperate. Taking the position "I will attend but don't touch me or ask me anything" is unlikely to ever be legitimate. In a tort matter, a plaintiff taking such a position runs the risk of having his/her action dismissed. In an AB matter, an insured person may be denied benefits to which they might otherwise have been entitled.

In both contexts, claimants do not appear to be entitled to require assessors to sign forms that in any way limit the assessment, or otherwise. Notwithstanding past decisions, it also appears that physicians, in order to comply with their professional obligations, may properly require a documented consent process prior to proceeding with any examination or disclosure of information to a third party.