

Battling Over Medical Exam Rights

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By Michael Thomas and Bernie Buettner.

There will always be tension between a defendant's desire for access to all the details of a plaintiff's personal life and medical history and the plaintiff's desire for privacy - and difficulties will arise in balancing these interests.

Right to medical exams

All jurisdictions recognize that a defendant has a right to compel a plaintiff to attend an independent medical examination. But this right is not unrestricted.

In B.C., people injured in motor vehicle accidents generally commence two actions, one for first-party benefits against their insurer and one for tort damages against the negligent driver. If the plaintiff is required to undergo an independent medical examination by the plaintiff's insurer, the defendant in the tort action may be precluded from obtaining any further examinations, despite the fact that the tort action is independent from the first-party benefits action and the defendants are different (see, for example, *Robertson v. Gristis*, [2006] B.C.J. No. 1873).

The rationale for the rule stems from the recognition that B.C. has compulsory automobile insurance provided by a Crown corporation.

Chonn v. DCFS Canada

In *Chonn v. DCFS Canada Corp.*, [2009] B.C.J. No.2138, a person sued an allegedly negligent driver for injuries sustained in a motor vehicle accident. The defendant driver wanted to obtain documents and reports of independent medical examination that had been conducted on the plaintiff in previous personal injury actions. These documents were relevant, but they were not producible as they were subject to the implied undertaking rule as set out by the Supreme Court of Canada in *Jurman v. Doucette*, [2008] S.C.J. No. 8.

In *Chonn*, the chambers judge stated that the proper procedure was for the plaintiff to advise the defendant of the existence of the documents, and whether they were in his possession, but not to produce them. An application would then have to be made to the court to obtain an order authorizing the production of the documents.

Although both parties in *Chonn* consented to the production of the documents, such consent may not be forthcoming in future cases, especially cases involving the disclosure of independent medical examinations.

In *McQueen v. Echeolong General Insurance*, [2009] O.J. No. 3965, a motor vehicle insurer was assessed \$25,000 in aggravated damages for terminating first-party benefits without obtaining a medical opinion supporting the termination. With increasing pressure on first-party insurance

companies to obtain independent medical examinations, there will likely be an increasing number of these examinations being conducted by first-party insurers.

Plaintiffs will have to provide notice of the existence of the independent medical examinations to defendants in tort actions, but the examinations are not producible without court order as they are subject to the implied undertakings of confidentiality. It will be interesting to see where the competing interests of the plaintiff and defendant will balance.

Plaintiffs may oppose a defendant's request for independent medical examinations on the basis that they have already attended an exam in the first-party action and will consent to the disclosure of that examination in the tort action. Alternatively, plaintiffs may refuse to consent to the production of examinations conducted by their insurers on the basis that the defendant is trying to obtain a second exam, for which he or she is not entitled and the implied undertakings should therefore be honoured by the court.

The current unsettled state of the law will undoubtedly result in a certain amount of strategic gamesmanship, but it is too early to tell where things will stand once the music stops.

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