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Defence medical exams under B.C.'s new rules

By Giles Deshon

There are many limitations on how and when defendants in litigation can obtain a court-ordered medical examination.

In personal injury cases, there are three methods of obtaining an assessment of claimants: claimants agree to attend an assessment; a contract of insurance requires claimants to attend; or a court orders attendance pursuant to the Supreme Court Civil Rules – the Rules.

If claimants' physical or psychological status is in issue in a dispute, they have an important strategic advantage. They can be assessed and examined by as many health practitioners, functional evaluators or vocational assessors as they, or their lawyers, can afford. They can do so without informing a person from whom they claim – or plan to claim – damages, subject to their obligation to answer questions at an examination for discovery.

They can choose to obtain reports from as many of the people they have seen as they wish; they can also choose not to deliver copies of those reports by claiming privilege over them. The only way defendants can find out about such assessments and examinations is to ask at an examination for discovery for a list of all health practitioners, functional evaluators or vocational assessors seen in relation to an accident. Even then, claimants probably do not have to disclose details about purely forensic examinations.

Nevertheless, B.C. courts weigh this advantage against claimants bearing the onus of proof. The rule which allows defendants in a lawsuit to seek an examination is read in that light, so the selection, timing and order of experts retained by defending parties in such a dispute are important tactical considerations.

Court-ordered attendance

The Supreme Court of B.C. has been operating under a new set of rules since July 1, 2010. The new rule on physical examination contains no substantive change to the old rule. Many elements of the Rules are similar to other jurisdictions.

Where the physical or mental condition of a person is in issue in an action, the Court may order that the person submit to examination by a medical practitioner or other qualified person. The Court may also order more than one examination. A person who is making an examination may ask any relevant question concerning the medical condition or history of the person being examined.

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Under the new rules, an examiner may ask any relevant medical questions.

The Rules are designed to secure a just determination of every proceeding on the merits. Case law has added that the Rules are also designed to encourage full disclosure and that the rule about examinations should be given a fair and liberal interpretation to meet those objectives.

In B.C., the principle of proportionality has been introduced into the new Rules. So far as is practicable, proceedings are to be conducted in ways that are proportionate to the amount involved in the proceeding, the importance of the issues in dispute and the complexity of the proceeding.

The new Rules provide an argument against a long-held element of the jurisprudence in this area, which is that a second examination is not justified simply because the magnitude of the loss is greater than previously known. The new argument is that the principle of proportionality would support more examinations precisely because the loss is larger than previously thought. In addition, the complexity of the medical issues in the case is now explicitly relevant to the conduct of the proceedings.

Case law

In the 1990 decision *Wildeman v. Webster*, the plaintiff was diagnosed with chronic pain and mental depression. In this exceptional case, the plaintiff was ordered to attend a multi-disciplinary medical examination by a family doctor, a psychologist, an orthopedic surgeon and a neurologist. The Court of Appeal upheld the decision to order a multi-disciplinary examination in exceptional cases or where necessary to ensure reasonable equality between the parties in their preparation of a case for trial.

In 1996 the Court of Appeal decided *Guglielmucchi v Makowichuk*. In that case the plaintiff had been examined at the defendant's request by an orthopedic surgeon and a rheumatologist. The plaintiff had been diagnosed with fibromyalgia, but had not been referred to a psychiatrist. The Court of Appeal found that, in the circumstances, the proposed examination would put the parties on an equal footing, and that a defendant should not be limited to medical examinations of a plaintiff only by a type of specialist to which the plaintiff's attending physicians had already referred the plaintiff.

In the 1997 decision *Vorasarn v Manning*, the Court of Appeal found that a court may take into consideration a prior examination under the Insurance Corporation of B.C.'s no-fault regulations in exercising its general discretion under the Rules.

The Supreme Court has refused examinations, otherwise required for reasonable equality, for reasons such as: where an insurer previously obtained a report, whether or not it strayed beyond the strict limits of considering first-party entitlements; where the application is made too close to trial and may jeopardize the trial date to the prejudice of the plaintiff; where the application is made too close to the deadline for delivery of expert reports and the plaintiff will not have sufficient time to respond; and where a previous report, from another defence expert, strays into the area to be considered by the new expert and a firm opinion is expressed, regardless of the expertise of the first doctor and regardless of the admissibility of the opinion expressed.

Where an insurer has previously obtained a report, some masters and judges will only order a second examination by a doctor in the same field in certain circumstances, including where there has been some development or significant change in the claimant's condition or complaints; where a question could not have been dealt with on a first examination; and where there is some other exceptional reason for a second examination.

An argument against these restrictions is that the right conferred on an insurer by the contract of insurance and the privilege conferred on a litigant by the Rules stand independently of each other, and that neither impairs the other.

An application made too close to trial is always subject to an argument that an adjournment is likely and that would prejudice the plaintiff. Although the application being made close to the deadline for the delivery of expert reports is established in the jurisprudence, it appears to give little weight to claimants' inherent advantages of being able to obtain as many reports as they wish. Where a previous report strays outside a doctor's expertise, it is hard to see how logically that evidence has any effect on a subsequent application, as the evidence is almost certainly inadmissible, or of little weight, as being outside the expertise of the doctor.

When a personal injury claim is litigated, defence medical examinations are often considered essential to any defence. Reports generated can be useful even if the end result is that expert evidence is not helpful to decide the issues. Cases where an insurer has already obtained a medical report can be difficult for lawyers to handle, as they have rarely had any input in the choice of doctor and do not know whether the doctor will be an effective witness at trial.

Plaintiff counsel often takes the position that their client will not attend more than one examination without a court order. It may be worthwhile to consider these arguments when faced with a decision about whether to apply for an order for another examination under the Rules. **IW**

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