CITATION: Lacroix v. Federation Insurance Company of Canada, 2014 ONSC 6002
COURT FILE NO.: 08-CV-41913
DATE: 2014/10/17

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jacinthe Lacroix, Plaintiff

AND

Federation Insurance Company of Canada and The Economical Insurance Group, Defendants

BEFORE: Justice Marc R. Labrosse

COUNSEL: Joseph Y. Obagi and Elizabeth Quigley, Counsel for the Plaintiff

Nicholaus de Koning, Counsel for the Defendants

HEARD: October 14, 2014 (Ottawa)

ENDORSEMENT

[1] This motion was brought at the start of the trial of this matter by the Defendants for an order seeking, amongst other things, the following relief:

a. an Order confirming that counsel for the Defendants is entitled to discuss the subject matter of this action with certain medical witnesses in advance of those witnesses being called for Trial; and,

b. an Order directing counsel for the Plaintiff to communicate in writing with the witnesses [sic] that they may discuss the subject matter of this action, including health information of the Plaintiff, with counsel for the Defendants;

[2] At the hearing of the motion, the relief pursued by the Defendants was limited to an Order confirming that the Plaintiff's consent is not required in order for certain medical examiners who prepared reports pursuant to s. 42 (as it then was) of the *Statutory Accident Benefits Schedule* (now *O. Reg. 34/10*) (the "SABS") to meet with the Defendants' counsel prior to trial. Specifically, the Defendants are seeking to meet with Dr. Lentini, Dr. Suddaby, Dr. Herbert and Dr. Ayotte for trial preparation purposes.

Position of the Parties

[3] The Defendants advance the position that in participating in the litigation process, the Plaintiff automatically has a reduced expectation of privacy and that Defendants' counsel is entitled to meet with the various examiners who have prepared reports in these proceedings and

that they may discuss the subject matter of this action, including health information of the Plaintiff.

[4] During the motion, the Defendants limited the relief sought to trial preparation with four examiners who authored insurer examination assessment reports under s. 42 of the SABS. The insurance examinations were completed many years ago and counsel seeks to refresh the memory of the expert witnesses and prepare them for the rigors of cross-examination. The Defendants limited their arguments to their right to trial preparation. The Defendants agree that these examiners are limited to the findings in their reports. However, in wanting to prepare their witnesses for cross-examination, the Defendants did not limit themselves to discussing only the health information provided under s. 42 of the SABS.

[5] While the Defendant recognizes that s. 42 of the SABS operates differently than s. 105 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the report prepared under s. 42, although provided to the Plaintiff, is a report that belongs to the insurer. The Defendants state that the *Rules of Civil Procedure* already prevent an examiner from going beyond the scope of the initial report without leave of the Court.

[6] The Plaintiff advances a different view of the process under s. 42 of the SABS. Such report is limited in scope and purpose and a copy of the report must be delivered to the insured person. As parties are entitled to submit information to the examiner, it should not be viewed as a report which belongs to the insurer.

[7] The Plaintiff relies on the fact that after the litigation was commenced, the Defendants never requested any defence medical examinations pursuant to s. 105 of the *Courts of Justice Act*. The Plaintiff assumes that the Defendants' desire to meet with the examiners is to obtain further findings from them based on information obtained after the date of their reports.

[8] The Plaintiff relies on the fact that there is no statutory right for ongoing communication with these examiners. There is potential unfairness if an insurer was permitted to communicate with these examiners without the Plaintiff knowing the substance of the communications. After the completion of the report and until the medical examiner provides evidence at trial, the Plaintiff and the Defendants should have the same information from the medical examiner and thus no further communications should be permitted in the absence of the Plaintiff.

Analysis

[9] The analysis of s. 42 in these circumstances has been complicated by the historical legislative changes to the SABS. There were five different amendments to the SABS during the period that the s. 42 examinations, which are the subject of this motion, were completed. Counsel for the Plaintiff provided a very useful summary of the various statutory changes and how they impacted the s. 42 examination process. To summarize the relevant process, the parties agree that following applies to these s. 42 examinations:

a. The insurer had a right to request for the insured person to be examined as often as is reasonably necessary;

b. Both the insurer and the insured person had a right to provide all reasonably available information and documents that are relevant or necessary for the review of the insured person's medical condition;

c. The medical examiner shall complete the examination, prepare a report of their findings and provide a copy of the report to the insurer;

d. The insurer must provide a copy of the report and the insurer's determination with respect to the specified benefit to the insured person; and,

e. The insurer may not stop payment of the specified benefit unless the report of the examination and its determination has been provided to the insured person.

Otherwise, for the purposes of this motion, the Court need not concern itself with the changes to the SABS during the relevant period of these s. 42 examinations.

[10] Section 42 of the SABS sets out the process which relates to *insurer examination assessment reports*. This is the common term for the medical examination performed by a health practitioner selected by the insurer as referred to in the Plaintiff's motion materials. These reports are not intended to provide the neutrality of the former Designated Assessment Centre ("DAC") assessments. To the contrary, in many proceedings under the SABS, it is the only chance for the insurer to obtain a medical examination of the insured person from its examiner of choice. This is because an arbitrator at the Financial Services Commission of Ontario does not have the authority to authorize a defence medical examination pursuant to s. 105 of the *Courts of Justice Act*. This supports a finding that while the Plaintiff has a right to participate in the process and receive a copy of the report, the insurer examination is a report prepared for the insurer. It is not prepared jointly for the insurer and the insured person.

[11] Section 42 of the SABS does not limit the communications between the examiner and the insurer nor does it authorize it. The appropriateness of such communications may vary in the circumstances. The information provided to the examiner by both parties pursuant to s. 42 of the SABS is available to both the insurer and the Plaintiff. The Plaintiff has consented to its release as part of the Application for Accident Benefits. There is therefore no concern that the examiner will disclose confidential information to the Defendants' counsel.

[12] In the course of preparing for litigation, I am of the view that no further consent is required from the Plaintiff for the Defendants' counsel to meet with the examiners, revisit the report and relevant health information and prepare the examiner for cross-examination. This is part of the normal trial preparation that is done with an expert witness who may give evidence in a proceeding. In addition, while the examiner is limited to the findings in the report, there may be circumstances where preparation for cross-examination will require that health information obtained after the report was prepared will be communicated to the examiner. Otherwise, the examiner may be unprepared to deal with questions on cross-examination and the proceedings may be delayed.

[13] It is impossible to circumscribe the nature of trial preparation communications between the examiner and counsel for the Defendants. These communications may vary depending on

the circumstances. As this matter is now before the Courts, Rule 53.03 of the *Rules of Civil Procedure* will apply to the medical examiner's expert evidence. If the Defendants seek to have the medical examiner testify with respect to an issue which is beyond the scope of the original report, a supplementary report or leave of the Court is required. Otherwise, the evidence is not admissible.

[14] I do not agree with the concerns raised by the Plaintiff as to the potential for unauthorized information to be exchanged during a trial preparation meeting for the following reasons:

a. The information provided to the examiner under s. 42 of the SABS is known to all parties and its release has been consented to by the Plaintiff. It is not same as for a treating physician who may have additional information which is subject to doctor-patient confidentiality;

b. The examiner will be limited to their findings in the original report. If additional information is communicated to the examiner which leads to new findings by the examiner or a change to the original findings, there may be a requirement for an addendum to the original report or a supplementary report pursuant to Rule 53.03. In these proceedings, leave of the Court would be required for these examiners to comment on matters which go beyond the scope of their reports;

c. The examiner may be examined on trial preparation steps. The documents reviewed, the persons consulted and the information considered will be subject to examination; and,

d. Where the examiner has considered information that is objected to by the Plaintiff or where the examiner has had improper communications with the insurer or its counsel, the trial judge can deal with this through findings of credibility or rulings as to the admissibility of some or all of the examiner's evidence.

[15] The purpose of s. 42 of the SABS is to allow the insurer to have its examiner of choice examine the insured person and prepare a report. The examiner is likely to be called as a witness by the insurer and it is proper for counsel for the insurer to be able to meet with its witness, refresh their memory and prepare them for the rigors of cross-examination. The examiner may also assist counsel in its review of reply reports. This is normal trial preparation work between a counsel and its expert witness. It would be prejudicial to the Defendants to prevent them from doing so.

[16] When considering the authorities relied upon by the Plaintiff, they do not deal with situations where the examiner with whom a meeting is sought is the examiner chosen by the insurer under s. 42 of the SABS. In *Burgess (Litigation Guardian of) v. Wu,* [2003] 68 O.R. (3d) 710 (Ont. Sup. Ct.), the health professional in that matter was a former treating physician who was now being retained by the defence. In that case, there was risk that the health professional may communicate information protected by doctor-patient confidentiality. In *Russet v. Bujold,* [2003] 43 C.P.C. (5th) 171 (Ont. Sup. Ct.), the Defendant in the tort action was attempting to

interview the physician who assessed the Plaintiff through a DAC Assessment. Again, there was risk that information obtained through a different process be used in the tort action.

[17] In the present case, the s. 42 reports were prepared for this insurer. There is no suggestion in s. 42 of the SABS that the examiner must be neutral or cannot communicate with the insurer's counsel prior to trial. The Plaintiff should not be able to prevent such a trial preparation meeting.

[18] On a procedural level, leave is granted to abridge the time for service and filing of the motion material of both parties, if required.

Conclusion

[19] In the context of these s. 42 insurer examinations, I find that the consent of the Plaintiff is not required for the Defendants' counsel to meet with Dr. Lentini, Dr. Suddaby, Dr. Herbert and Dr. Ayotte for the purpose of trial preparation. I am not prepared to specify or limit the scope of the trial preparation meeting and what can and cannot be discussed between the examiner and the Defendants' counsel. This will be evaluated on a case by case basis and may be explored in evidence by either party at trial.

Justice Marc R. Labrosse

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ENDORSEMENT

Labrosse J.

Released: October 17, 2014