Successful motion confirms defendant's right to prepare insurer examiners for trial

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In the context of insurer examinations under the *Statutory Accident Benefits Schedule* ("Schedule"), the Superior Court has found that for the purpose of trial preparation, a Plaintiff's consent is not required for Defendant's counsel to meet with the examiners.

In *Lacroix v Federation Insurance Company of Canada, 2014 ONSC 6002*, the Plaintiff brought an action against the Defendant for income replacement benefits (IRB).

The Plaintiff was involved in a car accident in November 2004. The Defendant then proceeded with insurer medical examinations pursuant to s.42 of the Schedule (as it was then). The examiners concluded that the Plaintiff could eventually return to work with accommodations and/or retraining. Consequently, the Defendant discontinued IRB in April 2007, taking the position that the Plaintiff did not meet the "complete inability" disability criteria with respect to alternate employment. The Plaintiff disputed this and claimed to meet the disability test.

Prior to trial starting on October 14, 2014, Plaintiff's counsel had corresponded with the s.42 examiners cautioning the examiners against communicating with Defendant's counsel prior to the trial (as they did not have the Plaintiff's consent to discuss her healthcare information).

Subsequently, at the start of the trial, the Defendant brought a motion for:

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

2. 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 Defendant;

The Defendant argued that the Plaintiff has a reduced expectation of privacy by participating in the litigation process. Further, as is its right to prepare for trial, the Defendant wished to refresh the memory of the examiner witnesses as many years had passed since their examinations. The Defendant also asserted that by obtaining these reports pursuant

to s.42 of the Schedule, these reports belonged to the Defendant. The Defendant also recognized the distinction between s.42 of the Schedule and s.105 of the *Courts of Justice Act*, acknowledging that leave of the Court would be required should any testimony go beyond the examiner's initial reports.

The Plaintiff took the position that the s.42 reports did not belong to the Defendant insurer, as a copy must be provided to the Plaintiff. The Plaintiff alleged that the Defendant's intention behind meeting with the examiners was to explore information obtained after the initial report. The Plaintiff argued that there was no statutory right for ongoing communication with these examiners; potential unfairness would ensue if one party had access to more medical information than the other, without the other's presence.

The Honourable Justice Marc R. Labrosse noted that although s.105 of the *Courts of Justice Act* would also permit a "defence medical" if the insured person elected to start a court action, s.42 of the Schedule may be the insurer's only opportunity to obtain a report from an examiner of its choice. If the Plaintiff had commenced a FSCO arbitration instead, the insurer would be limited to the s.42 reports. There is no suggestion that the examiner must be neutral. Justice Labrosse went on to note that s.42 of the Schedule neither limits nor authorizes communications between the insurer and examiner. The appropriateness of those communications is determined on a case-by-case basis. Justice Labrosse noted that the Plaintiff consented to the release of her medical information in her Application for Accident Benefits (OCF-1), so there was no concern that the examiner would disclose confidential information to the Defendant.

Justice Labrosse concluded that no further consent is required from the Plaintiff for the Defendant's counsel to meet with the examiners, revisit the report and relevant health information, and prepare the examiner for cross-examination. It would otherwise be prejudicial to the Defendant to prevent them from doing so. In effect, this is considered a part of the normal trial preparation process.

This is a truly unusual issue as the OCF-1 should be a full answer to the concern. Had the approach taken by the Plaintiff been successful, the insurer Defendant would have been deprived of the ability to prepare their witnesses, which at the end of the day, would not benefit the court process.

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