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VIDEOTAPING DEFENCE MEDICAL EXAMINATIONS

AN OVERVIEW OF THE CASE LAW

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I. INTRODUCTION

In a personal injury action, the defence medical examination ("DME") is the most potent tool that a defendant has to test and respond to a plaintiff's allegations. Plaintiff counsel have increasingly been requesting, and receiving, court orders that DMEs be videotaped. This has naturally caused concern among defence counsel.

The plaintiff's argument is that recording DMEs will encourage a defence medical assessor, who is commonly seen as a "hired gun", to conduct an objective examination. Furthermore, recording is appropriate because a plaintiff may not recall what transpired during the examination and, as a result, may not be able to properly report to his or her counsel.

On the other hand, defence counsel point to the prejudice that may arise from a jury seeing that the defence expert's examination was recorded to ensure integrity while the plaintiff's expert was not subject to the same condition. Another concern is that many medical experts refuse to undertake examinations that are recorded. This limits the pool of medical experts that defence counsel have access to. Finally, some defence counsel are of the view that these recordings are simply a tactical tool used by plaintiff counsel to bolster the plaintiff's credibility.[1]

Cases on this contentious issue are accumulating on both sides. This paper will review the current law governing defence medical examinations. An examination of the case law on this issue will demonstrate that, although routine recording of DMEs is not yet the practice or the law in Ontario, it would appear that things may be heading in that direction.

II. REQUIREMENTS & ONUS FOR RECORDING DMES

A. REQUIREMENTS FOR RECORDING A DME

Courts are prepared to allow the recording of a DME in specific situations. As set out in case law and reiterated in the recent OBA Submission on Audio or Video Recording of a Defence Medical[2], orders for recording DMEs have been restricted to cases where: 1) the cognitively impaired plaintiff is unable to communicate with counsel on what has transpired during the examination or, 2) where bias on the part of the examiner has been established. Courts have also ordered a recording where the plaintiff can prove that a language barrier or cultural inhibitions would undermine the examination.[3]

[1] Jennifer McPhee, "Personal Injury Bar Divided on Videotaping" Law Times, Oct. 9, 2007 < http://www.lawtimesnews.com/200710093174/Headline-News/Personal-injury-bar-divided-on-videotaping>
[2] Carole J. Brown, OBA Submission on Audio or Video Recording of a Defence Medical (Ontario Bar Association: Toronto, July 26, 2010) [*OBA Submission*].
[3] *Willits v. Johnston*, [2003] O.J. No. 1442 [*Willits*].

Orders based on bias of the examiner are extremely rare and are only made where there is compelling evidence showing that the expert has known bias. These experts are precluded from giving evidence in any event under the *Rules of Civil Procedure*[4] (the "*Rules*"). Therefore, the real issue is whether DMEs should be recorded where the plaintiff has compromised cognitive abilities.

B. ONUS OF PROOF

Unlike various jurisdictions in the United States, where an individual has the right to have the DME recorded, Ontario has adopted a restrictive approach that places the onus on the party requesting the recording to establish that it is necessary.[5] Furthermore, the moving party should propose a method and terms of recording the examination that would provide both parties with a full and accurate record of the statements in a timely fashion.[6]

The Ontario Court of Appeal has recently affirmed that allowing the recording of a DME will depend on the facts of each case.[7]

III. OVERVIEW OF CASE LAW

A. THE TEST – *BELLAMY v. JOHNSON*

A defendant's right to require a plaintiff to undergo a medical examination is based on the *Courts of Justice Act*[8] (the "*Act*") and the *Rules*. The former provides in s.105(2) that, "[w]here 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." The latter provides the procedural basis for a motion pursuant to s.105, and grants the court authority to dispose of any disputes relating to the scope of the examination.

Neither the *Act* nor the *Rules* mention any right of the plaintiff to record the DME. Nevertheless, the Ontario Court of Appeal in *Bellamy v. Johnson*[9] held that courts have inherent jurisdiction to set the terms and conditions of DMEs as justice may require.

In *Bellamy*, the plaintiff sought to make a tape recording of a DME on the basis that the defence medical examiner was biased. Master Brown allowed the plaintiff to record the

[4] *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194.
[5] Carole J. Brown, OBA Submission on Audio or Video Recording of a Defence Medical (Ontario Bar Association: Toronto, July 26, 2010) at 2.
[6] *Bellamy v. Johnson*, [1992] 8 O.R. (3d) 591 at para. 21 [*Bellamy*].
[7] *Adams v. Cook*, [2010] 100 O.R. (3d) 1 (ON C.A.) at para. 23 [*Adams*].
[8] *Courts of Justice Act*, R.S.O. 1990, Chapter c.43.
[9] *Supra* note 5.

examination. Master Brown's order was set aside by a judge and the subsequent appeal to the Division Court was dismissed.

The matter eventually reached the Court of Appeal, which held that the plaintiff did not make out a case for the tape recording of the conversations with the doctor. The court held that permitting the plaintiff to tape record statements made during the examination would not necessarily result in a more complete record of what was said. Merely permitting the plaintiff to take a tape recorder into the medical examination would not promote the likelihood of reasonable pre-trial settlements, or enhance the fairness or effectiveness of the trial. The court held that it was not enough for the plaintiff to allege that the medical examiner demonstrated defence orientation or a lack of accuracy in his reports.

The Court of Appeal stated that the test for a court-ordered recording of a DME was that the party needed to "demonstrate a *bona fide* concern" as to the reliability of the examiner's or the plaintiff's account of any statements made during the examination. Justice Doherty, writing for the minority, stated that before granting an order to record a DME, the court must consider the potential impact of that recording on:

1. the opposing party's ability to learn the case it has to meet by obtaining an effective medical evaluation;
2. the likelihood of achieving a reasonable pre-trial settlement; and
3. the fairness and effectiveness of the trial.[10]

Justice Doherty held that the first consideration predominated the others and a court should consider the second and third considerations only if it is decided that the first consideration would not be impinged. Justice Doherty's reasons have become the authority on the issue of recording DMEs.

B. WHERE RECORDING THE DME WAS NOT ALLOWED

The *Bellamy* decision was recently reconsidered by a five-judge panel of the Ontario Court of Appeal in *Adams v. Cook*. While the court in *Adams* reaffirmed the *Bellamy* principles, it recognized that the litigation landscape has changed in the 18 years since *Bellamy* was decided, and that changes to those principles might be required. The Court of Appeal further stated that:

> ...[s]ome contend that the routine recording of defence medicals and the transparency it produces would improve the discovery process. Given the electronic world in which we now live, it is perhaps at least questionable whether the presence of a small recording device is likely to have any adverse affect on a medical specialist's examination.[11]

[10] *Ibid.*.

[11] *Supra* note 6 at para. 28.

In *Adams*, the plaintiff consented to a DME on the condition that it be audio recorded. The defendant opposed the condition and brought a motion to compel the plaintiff to attend the examination without any conditions. At the motion, Justice Brockenshire agreed with the plaintiff that there was a systemic bias amongst health care professionals who undertake DMEs. Justice Brockenshire found that this systemic problem was sufficient to meet the *Bellamy* principles and ordered that the examination be recorded.

The Divisional Court upheld Justice Brockenshire's decision and stated that the principles articulated in *Bellamy* "should not be interpreted to require a specific factual foundation of potential abuse or concern directly attacking the credibility of the doctor chosen by the defence."[12] In its reasons, the court noted that a defence medical does not operate within the bounds of the tradition physician/patient relationship bound by confidentiality and trust. Rather, the examining physician is retained by the examinee's adversary and is not subject to the usual confidentiality requirements.

At the Ontario Court of Appeal, Justice Armstrong delivered the majority 3-2 decision allowing the appeal. Justice Armstrong found that *Bellamy* had been misinterpreted by the lower courts. Essentially, there must be evidence of actual bias or *bona fide* concern about the reliability of the expert before a DME will be ordered to be recorded. The lower courts extended *Bellamy* beyond its limits in finding that the medical examiner was tainted with systemic bias. Justice Armstrong stated that *Adams* was not the proper case to broaden or set new parameters for the recording of DMEs. Rather, this job should be left to the Civil Rules Committee.

Shortly after *Adams* was decided, the court dealt with another motion by a plaintiff to have his DME videotaped. In *Bakalenikov v. Semkiw*[13], Master Short did not allow the DME to be video recorded but allowed it to be audio recorded. Master Short commented on the Osborn Report and the new rules relating to duties of experts. Specifically, the new expert obligations made explicit that the expert's duty is to the court, rather than to any party. Master Short reviewed both *Bellamy* and *Adams*, and noted that the new rules differ significant from those in place when the judge at first instance addressed *Adams*.

In reaching his decision to order that the DME be audio recorded, Master Short acknowledged that the proposed expert had, on at least three occasions, his opinions disregarded by the court due to bias. Master Short also stated the following in relation to recording DMEs:

> I believe the national trend is clearly towards allowing such recordings as a quality control "check" on the process. I can see much benefit to the parties and the court. The court and ultimately the public have a right to be confident in the independence and competence of experts reporting on matters before the court.

[12] *Supra* note 6 at para. 11.
[13] *Bakalenikov v. Semkiw*, [2010] ONSC 4928.

Three cases were rendered in 2009 on this issue. The first was *Worrall v. Walter*[14], in which Justice Tausendfreund refused to allow videotaping of a defence psychiatric examination. The plaintiff raised concerns both about the defence doctor's potential defence bias (which was rejected) as well as the plaintiff's alleged problems with memory and concentration. Justice Tausendfreund was concerned that a jury may wonder why only the defence experts were subject to video scrutiny. However, he also found that "relief to have a defence medical examination videotaped remains available."[15]

In that particular case, the only evidence before the court was a single outpatient clinical note of a doctor who reported that the plaintiff said that he had difficulty with memory and concentration since the accident. Justice Tausendfreund concluded that this evidence was "neither substantial nor compelling", and was not enough to grant the plaintiff's request.

The two other cases decided in 2009 on this issue are *Safi v. Steele*[16]and *Jilla v. Ribeiro*[17]. In the former case, Master Beaudoin rejected the plaintiff's argument that any defence psychiatric examination should be recorded because they are highly subjective in nature. Master Beaudoin considered *Bellamy* and *Willits*, and found that the plaintiff had not met the onus of establishing the need for a recording.

Similarly, in *Jilla*, Master Dash found that the plaintiff did not show compelling reasons why the examination should be recorded. Master Dash also emphasized the potential for interference if the examination is recorded. In his concluding remarks, Master Dash stated that the case of *Byczko v. Hamilton*[18] cannot be reconciled with the *Willits/Otote/Gutierrez* and *Sousa/Worrall* lines of cases, which are discussed below.

In the 2006 case of *Byczko v. Hamilton*, Justice Pitt refused to allow the DME to be recorded despite the fact that the plaintiff had demonstrated a potential for *bona fide* concern as to the plaintiff's account of any statements made during the examination. Justice Pitt was concerned that requests for taping "may not find favour generally in the medical profession" and the difficulties arising therefrom.[19] He stated at paragraph 19:

> While it is clear that court practice is to be determined by justice considerations rather than concerns for the sentiment of any profession or group, it is useful to bear in mind that there may well be widespread reluctance to engage in this practice among members of the medical profession; that sentiment, if it were widespread, could result in delay, other discovery difficulties, and additional costs in bringing cases to trial. That consideration would support, at least at this time, a restrictive use of such orders to cases that clearly meet the criteria set out by the Court of Appeal.[20]

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[14] *Worrall v. Walter*, [2009] O.J. No. 119 (Ont. S.C.J.) [*Worrall*].
[15] *Ibid* at para. 17.
[16] *Safi v. Steele*, [2009] CarswellOnt 1875.
[17] *Jilla v. Ribeiro*, [2009] 75 C.P.C. (6th) 107.
[18] *Byczko v. Hamilton*, [2006] 152 A.C.W.S. (3d) 51 [*Byczko*].
[19] *Ibid* at para. 18.
[20] *Ibid* at para. 19.

Justice Pitt concluded that the plaintiff failed to show that her memory problem, by itself, was an appropriate reason for granting her request.

In *Sousa v. Akulu*[21], the plaintiff alleged that her poor English and cognitive defects from a head injury necessitated a recorded DME. Master Brott felt that the evidence before her on the plaintiff's problems does not outweigh the prejudice the defendants would suffer if they were forced to conduct a DME with a physician not of their choice. In that case, the defendants had consulted four psychiatrists and all refused to conduct a video recorded examination. Their evidence was that the presence of the videotape and operator would seriously affect the performance and behaviour of both the doctor and the patient and interfere with the doctor's ability to reach a meaningful conclusion.

Master Brott found that the interests of all of the parties and the physician must be balanced in these cases. Master Brott was concerned about maximizing fairness and held that the plaintiff would have a tactical advantage over the defendant if the plaintiff had a recording of the DME but the defendant did not have a recording of the plaintiff's medical examinations.

The reasoning in *Sousa* was followed by Master Hawkins in *Gill v. Royal & Sun Alliance Insurance Co*.[22] Master Hawkins comments on the "subtle message" a jury might receive that the plaintiff's experts are to be trusted without being videotaped while the defendant's expert is not to be trusted. Master Hawkins also rejected the plaintiff's request to record the DME in *Flory v. Black*[23] for the same reason.

C. WHERE RECORDING THE DME WAS ALLOWED

As stated previously, courts have allowed DMEs to be recorded in certain circumstances.

Moroz v. Jenkins[24] is the most recent case in which the court allowed a defence psychiatric examination to be recorded. The plaintiff was a 31-year-old man who developed serious cognitive difficulties as a result of a motor vehicle accident. Justice Wood found that the plaintiff has met the *Bellamy* test and allowed the examination to be videotaped. To address the fairness factor set out in *Bellamy*, Justice Wood ordered that, absent a recorded plaintiff's psychiatric examination, the recording of the defence examination may not be introduced in court or used in cross examination.

In the 2007 case of *Dempsey v. Wax*[25], the plaintiff's general level of intelligence was impaired as a result of a motor vehicle accident. The defendants brought a motion requiring the plaintiff to undergo a DME without it being videotaped. Justice Quigley found that the plaintiff has met the three considerations set out by Justice Doherty in *Bellamy*. Specifically, Justice Quigley was of the view that a video recording would:

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[21] *Sousa v. Akulu*, [2006] O.J. No. 3061 (Ont. Master).
[22] *Gill v. Royal & Sun Alliance Insurance Co*., 2006 CarswellOnt 9637.
[23] *Flory v. Black*, [2006] 154 A.C.W.S. (3d) 801.
[24] *Moroz v. Jenkins*, [2010] ONSC 4789.
[25] *Dempsey v. Wax*, [2007] O.J. No. 2084.

1. enhance, rather than detract, an examiner's ability to confidently express his/her observations, conclusions, diagnosis and prognosis;

2. enhance settlement prospects at a pretrial by reducing the potential for any ambiguity arising from the examination; and

3. facilitate the fact finding process (for trial or pretrial) by providing context and avoiding potential ambiguity and grist for dispute.

In the 2006 case of *Gutierrez Jr. (Litigation Guardian of) v. Jaffer*[26], the plaintiff requested that the DME be video or audio recorded because the plaintiff's memory has been adversely affected by the near drowning. The defendant opposed the recording on the basis that the recording can impact the testing, and that the defence expert would decline to conduct the examination if recording is ordered. Master Sproat relied on *Willits* to find that a recording will not adversely impact an expert's ability to conduct a medical examination.

In the 2005 case of *Otote v. Shenouda*[27], Master Dash applied the three-part test set out in *Bellany* in holding that the DME should be audiotaped. Master Dash found that no good reasons have been given to deny the recording. In particular:

1. There is no evidence that the tape recording would interfere with the integrity of the examination. The recording is challenged only because it is the "preference" of the doctors.

2. There is no evidence that the audio recording would impair the doctors' ability to conduct the examination.

3. The plaintiff has offered to supply a second concurrent tape recording, or a second copy of the single recording, to the defendant to eliminate any concern of alteration.

4. The defendant's ability to learn the case he has to meet by an effective defence medical examination will not be compromised.

The defendant's doctors refused to have the examination recorded and the defendant did not proffer alternate doctors. The order was conditional on the defendant's doctors excepting the term; if the doctors refuse, there was no obligation on the plaintiff to attend.

In *Willits v. Johnston*[28], the plaintiffs argued that the psychiatric examination should be recorded due to language barriers which, absent a recording, would prevent the proper

[26] *Gutierrez Jr. (Litigation Guardian of) v. Jaffer*, [2006] O.J. No. 650.
[27] *Otote v. Shenouda*, [2005] O.J. No. 6298.
[28] *Supra* at note 3.

instruction of their counsel as to the outcome of the medical examination. It is important to note that the plaintiffs agreed to have their own assessments videotaped.

Essentially, the decision in *Willits* came down to a battle of the experts. The defence expert claimed that videotaping would hinder his ability to conduct examinations. The plaintiff's expert stated that videotaping is completely unobtrusive and was of the opinion that the majority of psychiatrists would not object to a recording. The cross-examination of the defence expert yielded information, which Justice Quigley seized upon, to the effect that the refusal to permit video recording was based on personal preference. Justice Quigley found that videotaping the examination would not adversely impact or impair the expert's ability to conduct the medical examination.

Justice Quigley ruled that the plaintiff would be permitted to record the examination subject to the following criteria to ensure the accuracy of the recording:

1. The camera is to be set up in an unobtrusive manner before the commencement of the examination by a professional videographer.

2. There will be no editing of the video-recording.

3. The operator will not be present in the examination room.

4. The tape is to be of sufficient time capacity to eliminate any necessity to interrupt the examination.

5. The tape is to record and display the passage of time in seconds on a continuous basis and the frame time codes sequentially.

IV. CONCLUSION

Despite the above decisions allowing the videotaping of DMEs, the law and practice in Ontario is that recordings are only permitted in very limited circumstances. However, the recent case of *Adams v. Cook* suggests that a departure from this approach is forthcoming.

In *Adams,* Justice Armstrong left it to the Civil Rules Committee to set new parameters for the recording of defence medical examinations. Justice Armstrong set out seven questions for consideration by the Civil Rules Committee, most of which addressed the need to "level the playing field" and avoid "unfair tactical advantage" by the plaintiff in cases where recording is ordered. It is unclear whether the Civil Rules Committee will take up this challenge.

The recording of DMEs is generating debate not only among the legal community but also in the medical and insurance community. The Canadian Society of Medical

Evaluators ("CSME") has put out a Statement of Electronic Recording of Independent Medial Examinations, which states:

> It is CSME's position that the use of electronic recording is generally undesirable and unnecessary and creates a significant potential to invalidate the evaluation process.[29]

For insurance companies, the main concern is not whether claimants should have access to videotaping for medical exams, but the potential for higher costs and longer delays. Undoubtedly, routine recordings will give rise to increased costs, delayed proceeds, and fewer practitioners being prepared to cooperate in the legal system. The increased costs are mostly a result of the time spent by a lawyer to review the recording. Fortunately, orders allowing a DME to be recorded are the exception rather than the rule. However, it is unclear whether this will remain the practice for long.

[29] *Surpra* note 2.

CASE LAW

Adams v. Cook, [2010] 100 O.R. (3d) 1

Bakalenikov v. Semkiw, [2010] ONSC 4928

Bellamy v. Johnson, [1992] 8 O.R. (3d) 591

Byczko v. Hamilton, [2006] 152 A.C.W.S. (3d) 51

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Moroz v. Jenkins, [2010] ONSC 4789

Otote v. Shenouda, [2005] O.J. No. 6298

Safi v. Steele, [2009] CarswellOnt 1875

Sousa v. Akulu, [2006] O.J. No. 3061

Willits v. Johnston, [2003] O.J. No. 1442

Worrall v. Walter, [2009] O.J. No. 119