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The Taping of Defence Medical Examinations

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by Teri MacDonald

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The principles governing the video or audio taping of defence medical examinations have remained fairly consistent since the Ontario Court of Appeal's decision in *Bellamy v. Johnson* (1992), 8 O.R. (3d) 591. A plaintiff must first demonstrate actual bias or a *bona fide* concern about the reliability of the examining doctor before the taping of a defence medical examination will be permitted.

These principles were recently revisited by the Court of Appeal in *Adams v. Cook,* 2010 CarswellOnt 2408. While the Court reaffirmed the *Bellamy* principles, it signalled that changes to those principle might be required given that "legitimate concerns" had been raised about the present role of experts in the civil litigation process.

In *Adams,* the plaintiff was injured in an automobile accident and was subsequently diagnosed by her family physician with a cervical whiplash. Following this diagnosis, counsel for the defendant requested that the plaintiff be examined by a specialist in physical medicine and rehabilitation. The plaintiff consented to this request on the condition that the medical examination be audio recorded. Counsel for the defendant opposed the proposed condition and brought a motion to compel the plaintiff to attend an examination free of any conditions.

At the hearing of the motion before Justice John Brockenshire, the plaintiff opposed the defendant's motion and argued that there was a systemic bias amongst health care professionals who undertook defence medical examinations and filed an affidavit to illustrate examples of abuse by medical experts. Upon review of the materials, Brockenshire J. agreed that the materials evidenced serious systemic problems and this was sufficient to meet the *Bellamy* principles.

Brockenshire J. ordered the taping of the plaintiff's medical examination **without** any specific evidence that there was a history of abuse or bias with the individual physician chosen to conduct the defence medical examination.

Justice Brockenshire's decision was appealed to the Divisional Court specifically on the ground that there was no evidence showing abuse or bias by the physician retained by the defence and, as such, the legal test established by the Court of Appeal in *Bellamy* had been misconstrued.

The Divisional Court upheld the decision of Justice Brockenshire. The Court 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."

In reaching its decision, the Divisional Court considered the general adversarial nature of defence medical examinations and differentiated them from the typical physician/patient relationship. It was

specifically noted that a defence medical does not operate within the bounds of the traditional 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.

The decision was appealed to the Ontario Court of Appeal. The Honourable Justice Armstrong delivered the majority 3-2 decision, allowing the appeal and ordering the medical examination to proceed without being audio recorded.

Justice Armstrong held that *Bellamy* had been misinterpreted by each of the lower courts. Essentially, there must be evidence of actual bias or bona fide concern about the reliability of the expert before a defence medical examination will be ordered to be taped. The lower courts extended *Bellamy* beyond its limits and had mistakenly accepted that the medical examiner was tainted with systemic bias, when there was not a "scintilla of evidence that he [was] a hired gun".

Although the Court of Appeal declined to extend the circumstances in which defence medical examinations can be taped, the majority's decision suggests that a departure from the principles in *Bellamy* may be forthcoming. In that regard, Justice Armstrong acknowledged that the "litigation landscape has changed in the 18 years since *Bellamy* was decided" and that "legitimate concerns" have been expressed about the role of experts in the civil litigation process. His Honour stated that *Adams* was not the proper case to broaden or set new parameters for the recording of defence medical examinations. Rather, this task would be best left for the Civil Rules Committe. Whether the Civil Rules Committee will take up the challenge is yet to be seen. ■