ONTARIO COURTS FAVOUR SUBSTANCE OVER PROCEDURE WHEN ORDERING DEFENCE MEDICALS

By

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It happens in almost every personal injury lawsuit. At some point after discovery, the plaintiff's lawyer contacts his or her defence counterpart to set a date for trial. Typically, the parties agree to a mutually acceptable date, that date is communicated to the court and the matter moves forward. While such a scenario may seem benign, some lawyers would argue that the defendant, by simply agreeing to a trial date, has just given up its important right to a defence medical.

In this regard, it is well known that a party who sets an action down for trial is prohibited by Rule 48.04 of the Ontario *Rules of Civil Procedure* from any further discovery. Less known is that this prohibition also extends to *any* party who consents to an action being placed on a trial list.

The application of this rule to defence medicals stems from the fact that courts consider defence medicals to be a *form* of discovery. The importance of this is in the fact that plaintiff medicals are obviously not considered a form of discovery as, unlike defence medicals, they are not an examination of an "opposing" party. Accordingly, while the rule can operate to prohibit defence medicals, a plaintiff remains at liberty to deliver new medical reports well after agreeing to the trial date. It is this potential for unfairness that has caught the attention of the courts in a number of recent cases dealing with this issue.

In *Aljoe v. Co-Operators General Insurance Company* [2005] O.J. No. 4044, the plaintiff refused the defendant's request for a defence medical on the basis that the matter had been to a pre-trial conference under the Case Management Rules and, as with Rule 48, no further discovery was permitted. Justice Herman J. Wilton-Siegel, hearing the matter, agreed that the proposed defence medical was a form of discovery but ordered the plaintiff to attend in any event on the basis that the Rules "are not to be interpreted to provide a strategic advantage to one of the parties".

This same issue came before the court in *Ortiz v. Sharma* [2007] O.J. No. 2984. In that case, the parties agreed to a trial date more than two years into the future. During this period of time, but still well before trial, the defendant requested an initial defence medical. The plaintiff refused on the basis that the defendant had agreed to the trial date and was therefore precluded from any further form of discovery. In deciding the issue, Justice Silja S. Seppi noted that the "purpose of defence medical examinations is to put the parties on a basis of equality as nearly as it is possible in terms of collecting evidence of the injuries". Justice Seppi went on to note that "an assessment over 2 years before the trial would not be as helpful to the trier of fact as is an up-to-date assessment".

The principal of fairness emerged again as an important consideration in *Kernohan v. York* [2009] O.J. No. 886. In that case, a plaintiff again refused a request for a defence medical examination on the basis that the defendant had agreed to a trial date. Citing the decisions in *Aljoe* and *Ortiz*, Justice Cary Boswell stated that the request for the defence medical "must be determined principally on the basis of trial fairness". To decide otherwise, "would be to place form above substance".

The most recent case to consider this issue is the decision in *Rohit v. Nuri* [2010] O.J. No. 638. In this case, Master Donald Short clearly signalled the importance of advancing a plaintiff's case to trial must be balanced with the desire "to keep the playing field as level as possible". Referring to the recent amendments to the Rules, Master Short emphasized the importance of balance and proportionality and concluded that defence counsel who co-operate in setting a trial date "ought not to be strictly held to have 'consented to the action being placed on a trial list' in the sense contemplated by the rule.

The clear trend emerging from these cases is that the court's decision to order defence medicals will be based primarily on the principal of trial fairness, even if a defendant has agreed to a trial date. The notion that a defendant's right to a defence medical can be thwarted under such circumstances based on a technical interpretation of the Rules has essentially been rejected. In doing so, the courts have created balance between a plaintiff's right to a trial within a reasonable period of time and a defendant's right to a level playing field with respect to the medical evidence at the trial.

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