

VIDEOTAPING DEFENCE MEDICALS

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Videotaping defence medicals is the latest tactic being utilized by the plaintiff's bar. Often the request is made as a condition precedent to their client's participation in the medical assessment. Usually it is prefaced as being necessary in order to accommodate their client's alleged language deficits or impaired mental capacity.

A defendant's right to have a plaintiff examined by a medical practitioner is grounded in the *Courts of Justice Act* and the *Rules of Civil Procedure*. The former provides in s. 105 that "[w]here the physical or mental condition of a party to a proceeding is in question, the court, on a 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 mentions any right of the plaintiff to record the examination nor do the provisions allow for the presence of a third party medical practitioner as is allowed in some jurisdictions in Canada.

Nonetheless, the Court of Appeal decision in *Bellamy v. Johnson*¹, which is the leading authority on this issue, held that Courts have the authority to order recordings of medical assessments as part of their "inherent jurisdiction of the court to control the discovery process."

The *Bellamy* decision dealt with a situation where the plaintiff had requested a recording of his neurological examination based on the allegation that the practitioner selected by the defence was biased. At the motions court Master Browne, as he was then, found that the plaintiff had an onus to satisfy the Court that the principles involved in the matter warranted a change from the normal course of medical examinations. Based on the evidence, Master Browne found that "the demonstrated defence orientation of Dr. Peerless and the demonstrated lack of accuracy in his reports satisfy the onus upon the plaintiffs." Accordingly he ruled that the plaintiff should be allowed to record the examination.

The Master's order was set aside by a judge and the subsequent appeal to the Divisional Court was dismissed.

On a further appeal, the matter reached the Court of Appeal who dismissed the appeal and held that the plaintiff did not have the right to record the examination. Although

¹(1992), 90 D.L.R. (4th) 564

Justice Doherty authored the minority reasons in *Bellamy* it would appear that his reasons have received the largesse of the judicial consideration. He noted that in “deciding whether to permit the tape-recording of conversations which occur during a ‘defence medical’, 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;
- (3) the fairness and effectiveness of the trial.”

Justice Doherty held that the first consideration predominated the others as without an effective medical evaluation, the defendant cannot know their case and their chances of a fair and effective trial would suffer. A Court should consider the second and third considerations only if it is decided that the first consideration would not be impinged.

The decision on allowing the recording must be considered in a factual context and the moving party bears the onus of demonstrating a “bona fide concern as to the reliability of the doctor’s or plaintiff’s account of any statements made during the examination, and if the moving party proposes a method and terms of recording the examination which would provide both parties with a full and accurate record of those statements in a timely fashion, then an order permitting the recording would be appropriate”.

Ultimately, the Court was of the opinion that the plaintiff failed to establish the necessary criteria. While the Court was of the opinion that the recording device would not impair the doctor’s ability to conduct an effective defence medical, there was no evidence of lack of accuracy in previous assessments. Nor were there any procedural safeguards advanced by the plaintiff to ensure that the accuracy or preservation of the tapes. Without those safeguards, merely permitting the plaintiff to record the examination would not promote the likelihood of a pre-trial settlement or enhance the fairness or effectiveness of the trial.

Although the plaintiff was unsuccessful in *Bellamy*, the Court’s analysis provided a blueprint for the argument that, in the appropriate circumstances, plaintiffs should be entitled to record their defence examinations.

The issue came before the Superior Court again in *Willits v. Johnston*². This time the plaintiffs advanced the argument that the audio-video recording of the psychiatric examination was necessary due to language barriers which, absent a recording, would prevent the proper instruction of their counsel as “to the outcome of the medical examination.”

² [2003] O.J. No. 1442

Each side presented competing medical evidence. Dr. Marguiles, for the defence, filed an affidavit stating that the “video-audio recording of [the] examination would threaten the integrity of the examination and, thus, affect his ability to properly conduct a complete psychiatric examination.”

The plaintiffs relied upon the affidavit of Dr. George Glumac who disagreed with the position taken by Dr. Marguiles, and stated that “videotaping is completely unobtrusive”. He was of the opinion that the majority of psychiatrists would not object to recording an examination as, in his opinion, it would not “interfere with or compromise the assessment.”

Essentially the decision in *Willits* came down to a battle of expert evidence. The cross-examination of Dr. Marguiles yielded information which the Court seized upon to hold that his opinion, regarding the impact on recording equipment on the effectiveness of the assessment, was mere preference. Accordingly, the Court was satisfied that “a video-recording [would] not adversely impact or impair Dr. Marguiles' ability to conduct the medical examination.”

In its reasons, the Court found that video-recording psychiatric examinations would in fact enhance their “efficacy and usefulness” given the highly subjective of the assessment which involves the “evaluation and interpretation of the emotional demeanour, speech characteristics, varying voice tones, volumes and loudness, eye contact and facial expressions in addition to questions, answers and dialogue.” The Court felt that many of these factors would be “very difficult for the plaintiffs to dispute without objective evidence.....[and] it is clear that the plaintiffs would be placed at a significant disadvantage to support an alternate version of the events occurring at a defence medical in the event of any dispute or for purposes of cross-examination at trial.”

The Court ruled that the plaintiff would be permitted to record the examination subject to the following criteria it laid out 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; and
5. The tape is to record and display the passage of time in seconds on a continuous basis and the frame time codes sequentially.

A motion for leave to appeal the *Willits* decision was dismissed by Justice Belch of the Divisional Court.

Justice Quigley's reasons in *Willits* are clearly one sided. The Court recognizes that it would be difficult for a plaintiff to dispute the findings of a defence medical without objective evidence. On that basis a plaintiff could be put to a disadvantage at trial.

What the Court does not speak to is the fact that defendants in personal injury actions are always left in this position concerning the medical evidence of the plaintiff. Defendants are not afforded any opportunity to have recordings of plaintiff examinations and accordingly, the exact arguments supporting the usefulness of the recordings to the plaintiffs, can be made in favour of the defendants as well.

If anything, given the limited opportunities the defence has to obtain medical evidence, greater deference should be given to the assessments defendants are permitted to obtain pursuant to Rule 33 and section 105 of the *Courts of Justice Act*. If plaintiffs are permitted to record these assessments, it is clear that it will allow them to gain a tactical advantage over defendants in terms of the effectiveness of the medical evidence.

The Alberta Court of Queen's Bench has also addressed this issue. In *Crone v. Blue Cross Life Insurance Co. of Canada*³ the plaintiff was asked to subject to two independent medical examinations. The plaintiff did not object to the assessments however she requested that she be allowed to video-record the examinations.

After reviewing the relevant authorities, the Court found that it was "eminently reasonable that defence medical examiners, indeed all medical professionals, should be left to conduct their medical examinations as they see fit unless there is a compelling reason for the court to interfere or the rules permit it, as for example the rule allowing the presence of a medical nominee chosen by the plaintiff." The Court also commented on the policy consideration that if "courts begin to place constraints on how particular plaintiffs are examined, the predictable effect is that the number of doctors willing to perform defence medical examinations will decline, raising both the price and length of time to complete the discovery process in personal injury actions."

Recognizing that "the purpose of defence medical examinations is to put the parties on a basis of equality as nearly as is possible in terms of collecting evidence of the injuries of the parties....it seems incongruous, again without compelling reason, to order that the plaintiff may videotape the defence medical examination, which will, of course, be ruthlessly scrutinized by the plaintiff's experts while at the same time there will be no equivalent tape provided to the defence of the plaintiff's doctor's examinations. This has an air of unfairness to it which does not exist in the absence of any recordings, in which case the parties are on equal footing in terms of having an equal opportunity to attack one another's reports and medical examiners in cross-examination."

³ [2001] A.J. No. 1234

The Court in *Crone* denied the plaintiff's request based on the significant policy reasons detailed above. Absent clear and compelling reasons, it was the opinion of the Court that the discretion to order recordings should be exercised in reticent manner.

Courts in other jurisdictions, such as British Columbia⁴, Alberta⁵ and Nova Scotia⁶ have routinely denied these types of motions. In *Mahoney v. Mahoney*, a decision of the BC Supreme Court, Master Chamberlist echoed similar concerns to those addressed in *Crone* regarding a level playing field for all parties involved in the litigation. The Master could find no compelling reason to distinguish the matter from the hundreds of other personal injury cases proceeding through the Courts. Any issues regarding objectivity could be dealt with on cross-examination.

Master Donaldson in *Whittingham v. Trim*, also a decision of the BC Supreme Court, found that the plaintiff had failed to demonstrate any unusual circumstances that would justify the recording. Her alleged problems with attention and concentration were not sufficient to meet the test. Master Barber, also of the BC Supreme Court, stated the same in *McGrath v. Chiang* concerning the plaintiff's memory problems which were felt to affect many members of the public at large and therefore not sufficiently unusual so as to warrant a recording of the defence medical.

Justice Edwards of the Nova Scotia Supreme Court denied a plaintiff's request to record a defence medical in *Wilneff v. Maritime Life Assurance*. He felt that absent reasons for the unorthodox request it should be denied.

Despite the general trend elsewhere in other Provinces, Courts in Ontario have remained open to the idea and have been following the reasoning of the *Bellamy* decision and the outcome of the *Willits* decision.

Master Dash, in an unreported decision dated May 26, 2005 in *Otote v. Shenouda*, found that it was in the interests of justice to permit the plaintiff to record the defence medical examination. The specific facts of that matter indicated that the plaintiff had demonstrated evidence of "severe ongoing" memory problems which the Court felt would put the plaintiff in a handicapped position at trial when it came to testing the evidence of the defence doctors.

Master Dash also found that the video record would act as a "full, reliable and unbiased account" of the examination and thus enhance the possibility of settlement and facilitate any eventual trial of the action. Conversely, there was no evidence that the recording "would interfere with the integrity of the examination" and that the recording was being

⁴ *Mahoney v. Mahoney* [1997] B.C.J. No. 1448; *Whittingham v. Trim* [2005] B.C.J. No. 2900; *McGrath v. Chiang* [2006] B.C.J. No. 817

⁵ *Crone v. Blue Cross Life Insurance Co. of Canada supra*; *Butt v. Loch* [1996] A.J. No. 1082; and *Trang v. Alberta (Edmonton Remand Centre)* [2004] A.J. No. 645

⁶ *Wilneff v. Maritime Life Assurance Co.* [2003] N.S.J. No. 427

challenged based on mere preference. Accordingly, the “defendant’s ability to learn the case he [had] to meet by an effective defence medical examination [would] not be compromised.”

A similar result was reached by Master Sproat in *Gutierrez (Litigation Guardian of) v. Jaffer*⁷. In that matter, the plaintiff sought permission to record a defence medical in order to properly instruct counsel as to the examination. It was submitted by the plaintiff that same would not be possible without a recording due to neurological impairments sustained in a near drowning.

The defence opposed the motion on the basis that the recording would impact examination in a negative way. To support their position they relied upon the evidence of Dr. Snow, who had indicated that he would decline to conduct the examination if a recording was ordered. Dr. Cancelliere, for the plaintiff, opined that there “would be minimal, if any, impact on the efficacy of the examination.”

Master Sproat, in her decision, stated that she was “persuaded by the approach of Quigley J. in the *Willits* decision that a recording [would] not adversely impact or impair an expert’s ability to conduct a medical examination.” Master Sproat accepted that the plaintiff would be unable to recount to counsel what occurred during the assessment and therefore it would be “virtually impossible” for counsel to rebut the evidence of the defence doctor.

Recognizing the disadvantage to the plaintiff if the recording was not permitted, Master Sproat ordered that the recording was to be allowed in accordance with the terms outlined in the *Willits* decision.

It is clear from the case law reviewed above that Courts in Ontario, while paying lip service to the type of deference courts should be shown to the opinion of medical doctors, are willing to disregard, as mere preference, evidence presented by defence doctors that recording equipment will have a negative effect on the conduct on the defence assessment.

However, more recently in Ontario there have been several decisions where defendants have been able to reverse this trend.

*Sousa v. Akulu*⁸ is a case being defended by our office where plaintiff’s counsel was only prepared to consent to a psychiatric defence medical if it was videotaped. In an attempt to accommodate the plaintiff’s request, several doctors were contacted all of whom refused to permit recording equipment during the assessment.

⁷ [2006] O.J. No. 650

⁸ [2006] O.J. No. 3061

In light of the fact that no doctor could be found to accommodate the plaintiff's request, a motion was brought to compel the plaintiff to attend the assessment without recording equipment.

It was clear that, based on *Bellamy* and *Willits*, the plaintiff's onus to provide a substantially and compelling reason why the recording was necessary was a key issue. In addition, it would be necessary to convince the Court that it was more than mere preference that was leading defence doctors to refuse to allow recording equipment.

With respect to the latter, numerous doctors were contacted on this issue. Dr. Reznek, Dr. Marguiles, Dr. Goldstein and Dr. Hershberg all refused to conduct a videotaped assessment. In addition, as a general proposition, Health Impact, Canadian Trauma Consultants, WestPark and MDAC all refused to allow recording equipment to be present during their assessments. The four doctors provided written reasons for their refusals. The fact that multiple doctors were prepared to put their position in writing distinguished this case from its predecessors. It also permitted argument regarding a defendant's right to select a physician of choice.

In her decision, Master Brott referenced the *Crone* decision and noted that in "order to maximize fairness, and attempt to keep the parties on an equal basis at a pre-trial and trial, the parties should as much as possible be granted equivalent tactical and strategic advantages. In the same way as a plaintiff has a right to select its physician of choice throughout the litigation, the rules provide that the defendant has a prima facie right to select its physician of choice to conduct the defence medical(s). While the Court has discretion to order another physician, or terms and conditions of a defence medical, the plaintiff has the burden of providing valid and legitimate reasons why another physician or terms are necessary."

Master Brott also noted that it was the plaintiff's "onus to show compelling reasons why a court should permit recording during a defence medical." That reason(s) must be balanced with the doctor's opinion as to the proper conduct of an effective medical evaluation.

The plaintiff based her request for recording on her English language difficulties and her alleged cognitive difficulties resultant from her head injury. The Master found this evidence to be weak and instead was persuaded by the evidence of the psychiatrists that the effectiveness of their examination would be detrimentally impacted by the presence of recording equipment.

Master Brott stated that the evidence before the Court did "not outweigh the prejudice the defendants would suffer if they were forced to conduct a defence medical examination with a physician not of their choice. The purpose of the defence medical examination is to balance the parties' rights to attack one another's reports. The plaintiff was examined by her physician and reports were written without video-tapes and without the

involvement of the defendants or their counsel in regards to choice of physician. As the plaintiffs have failed to satisfy the onus by demonstrating no compelling reason for a video-taped psychiatric defence medical, there is no reason for this court to exercise its discretion to set terms and conditions for the defence medical examination.”

Master Brott was also of the opinion that the second and third factors, outlined by Justice Doherty in the *Bellamy* decision, weighed in favour of the defendants as the plaintiff would have the tactical advantage of scrutinizing the defence medical whereas the defendants would not have the same advantage.

Accordingly, the plaintiff was ordered to attend the psychiatric examination without recording equipment and which was to be conducted by a psychiatrist of the defendants' choice.

An appeal of this decision has been recently abandoned.

The *Sousa* decision is helpful in that it addresses some of the issues that Courts in Ontario had yet to deal with on this type of motion. Specifically, it commented on the balancing act that must occur in order to keep both plaintiff and defendants on an equal playing field. Instead of focusing on the advantages that a plaintiff gains when they record a defence medical, the Court addressed the inherent disadvantages to the defendants.

Regarding the burden of evidence, Master Brott ruled that the onus rests with the plaintiff to provide a substantial and compelling reason why the recording is necessary. In addition, where it is clear that permitting the recording will deny the defendants their right to select a physician, the plaintiffs again have the burden “providing valid and legitimate reasons why another physician or terms are necessary.”

Despite the fact that the decision was only recently released it has already received judicial consideration.

Justice Pitt made several references to the reasons of Master Brott in his decision in *Byczko v. Hamilton*⁹ that again involved a request to record a psychiatric examination. Justice Pitt analyzed the three factors outlined by Justice Doherty, while taking into account Master Brott’s reasoning, and held that the plaintiff was not entitled to record the assessment.

Justice Pitt relied upon policy considerations, concerning the impact of routinely ordering recordings, such as reluctance in the medical profession, delays, discovery difficulties and additional costs. He was also not satisfied that the plaintiff’s memory impairments, by itself, was sufficient to grant the relief sought.

⁹ [2006] O.J. No. 3911

The *Byczko* decision is currently under appeal with a leave hearing scheduled for December 5, 2006.

The most recent judicial consideration of this issue was Justice Sproat's decision in *McNorton v. Schuett*¹⁰. He noted in his decision that, while the plaintiff requested a recording of the defence medicals, he himself underwent seven assessments with non-treating medical experts and none of those examinations were taped.

Justice Sproat quoted from the *Crone* decision and included an excerpt from an unpublished decision of Madam Justice Milanetti who, echoing the Court in *Crone*, found that "a videotape of the defence medical, available for trial purposes, would present an unfair advantage to the plaintiff." Justice Sproat was also concerned with the recordings impact on a potential jury who might wonder "why it was only the defence experts who were subjected to video scrutiny."

In reviewing the three criteria outlined in the *Bellamy* decision, Justice Sproat found that, while the recording of the medical evaluation would not significantly diminish its effectiveness, there would be some prejudice to it. In regards to the second criteria, he was of the opinion that creating an uneven playing field was not conducive to a reasonable settlement. On the final criteria, the Court held that the fairness and effectiveness of the trial would be compromised if only one side was permitted to record medical assessments.

Justice Sproat's ruling has also been appealed.

The decisions noted above make it clear that there are a multitude of considerations at play when dealing with requests for recordings of defence medicals. Justice Doherty's three criteria represent the current test in the case law however the Court of Appeal was dealing with the narrow issue of bias in that case. Given the number of matters proceeding to Court on this issue and the number of appeals, hopefully the matter will again come to the attention of the Court of Appeal at which time they could set out more defined criteria as to situations which would properly entitle a plaintiff, or perhaps a defendant, to record a medical assessment.

¹⁰ Ontario Court File No. CV-05-4510