Medical Exams And ICBC Tort And No-Fault Claims

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As many of you know ICBC is a Provincial auto insurer which enjoys certain statutory monopoly privileges in British Columbia. Since ICBC insures almost every BC motorist when a crash happens there is a good chance ICBC represents both drivers. When the faultless driver is injured and sues typically once adjuster is assigned to deal with his/her claim for 'no-fault' benefits under their own policy of insurance and that same adjuster is assigned to defend the tort claim (the claim for damages including pain and suffering) made against the offending driver.

This potential conflict of interest can create various problems. One of which often comes up is the right of the 'defendant' (who is insured by ICBC) to obtain an independent medical exam in defence of the tort claim in circumstances where the ICBC adjuster already sent the Plaintiff to an independent medical exam in the process of reviewing the Plaintiff's application for no-fault benefits.

Reasons for judgement were released today dealing with exactly such a problem.

Here the Plaintiff was allegedly injured in a 2005 motor vehicle collision. He applied to ICBC for no-fault benefits under his own policy of insurance and also sued the other motorist in tort. The other motorist was also insured with ICBC. One adjuster was assigned to handle both claims.

That ICBC adjuster sent the plaintiff to be assessed with an orthopaedic surgeon. That surgeon wrote a report . The defence lawyer in the ICBC tort claim then applied to court for an order to send the Plaintiff to a different physician claiming that the first report was set up to review the Plaintiff's claim for no-fault benefits and that the defendant was entitled to a report from a doctor of his own choosing to level the playing field.

Here, the court dismissed the Defendant's application finding that when ICBC sent the Plaintiff to the first orthopaedic surgeon it may have been to assess the claim for no-fault benefits but the ICBC adjuster asked the doctor to comment on things that went beyond the scope of such an application. The court concluded that the Defendant can ask the same doctor to comment on the Plaintiff's condition if necessary but they were not entitled to a new doctor's opinion in the circumstances.

The Court's key analysis is found at paragraphs 13-15 which I reproduce below:

[13] It appears in the instant case that Ms. Dyrland was handling both the Part 7 and the tort claims arising out of the alleged accident. Although she deposes that her intention was that the assessment by Dr. Bishop was for the purposes of the Part 7 claim only, her instructions to him suggest a wider scope. In the case of ***Longva v. Phan****, [2007] B.C.J. No. 1035, 2007 BCSC 690, Master Bolton considered instructions identical to those set out at paragraph 7 of these reasons. He noted that, however specific or equivocal the adjuster's requests might have been, a request for a "history" of the accident, recommendations concerning future treatments and surgery and, in particular, a request for comment on a contributory negligence (seat belt) issue, must be considered as solely referable to the plaintiff's tort claim and not merely concerned with issues relating to a claim for disability benefits. Thus, while the adjuster may have expressed her intention to limit the assessment to the Part 7 claim, the nature of her instructions suggests that she expected a report which would address not only the plaintiff's current needs for treatment and rehabilitation but, as well, his prospects for recovery and other issues unrelated to the disability claim. I have reached the same conclusion. The assessment prepared by Dr. Bishop on December 22, 2005 was a "first" examination. Having reached that conclusion, I must now consider whether the circumstances justify a "second" examination.*

[14] A party seeking to have a second examination preformed by a practitioner practicing in the same speciality or discipline as a practitioner who has already examined a person faces an uphill battle: ***Hothi v Grewal****, [1993] 45 B.C.L.R. (3d) 394 (SC);* ***Hamada v. Semple****, [1983] B.C.J. No. 1307 (SC). Successful applicants are those who are able to demonstrate that something has happened since the first examination which*

could not have been foreseen or which could not, for some other reasons, have been addressed by the first examiner. It also seems to me that material filed in support of the application should indicate why a further examination by the doctor who performed the original assessment is not appropriate.

[15] In the circumstances of this case, there appears to be no good reason why Dr. Bishop could not be asked to comment on the relevance of the disk herniation noted in January 2006, and, if necessary, perform a further examination of the plaintiff.

The concern many Plaintiff's ICBC injury claims lawyers have in cases where one ICBC adjuster is assigned to both the Plaintiff's and Defenant's claims is that of 'report stacking'. That is there is a concern amongst some ICBC injury lawyers that ICBC may use their position as insurer for both parties to get more 'independent' reports than a Defendant may otherwise be entitled to. In deciding whether to consent to an application by a defendant insured with ICBC to a further examination it is important to review the factors discussed in this useful judgement.