

## Videotaping Medical Examinations – The Whys and Wherefores

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The issue of videotaping a medical examination often arises where the physical or mental state of a party in a legal proceeding is in question. And not surprisingly, the issue is often relevant in personal injury or disability cases where one of the injuries suffered by the injured party is a cognitive or neurological impairment.

### Doctor-Patient Relationship

Although a doctor-patient relationship is generally based on fiduciary principles of trust, confidence and confidentiality, a medical examination conducted for the purpose of refuting a plaintiff's allegations is not quite the same. Often, the injured party feels violated, and is skeptical about the impartiality of the doctor who is conducting the examination.

### Injured Party's Position

"Bias" is an oft-cited reason by the plaintiff to push for the recording of a medical examination; however, other reasons include cognitive difficulties such as memory loss or difficulties concentrating, understanding or recollecting the questions, or the involvement of a child under disability. The subjectivity involved in a psychological assessment is what creates anxiety for most, if not all plaintiffs.

### Doctor's Position

While the issue may seem uncontroversial, generally many doctors are uncomfortable with having their examinations recorded for fear that the presence of a recording device will alter the credibility and sincerity of the examination because the examinee may act for the camera. Alternatively, videotaping can call into question the doctor's methodology, observations and diagnosis because an unsophisticated jury may wrongly interpret certain statements or actions made by the examinee to suggest a disability, when in reality the examinee is not clinically disabled.

### Ontario Rules of Civil Procedure

The Courts have often faced the issue of whether it is appropriate to record a medical examination. While the Ontario Rules do not specifically limit or prescribe the right to record a medical examination, the Rules grant the Court the jurisdiction to determine if another person can be present at the examination. Case law, such as *Simon v. Paslawski*, has defined the scope of Rule 33.05 to include videotapes and audio recordings, since any one who watches or listens to the tape afterwards is effectively present at the examination.

### *Bellamy v. Johnson Case*

To this day, the leading authority on recording medical examinations is the 1992 Ontario Court of Appeal decision of *Bellamy v. Johnson*. The Court of Appeal outlined a three-part test to determine whether it is appropriate to allow for a recording. The first of the following considerations predominates:

1. The opposing party's ability to learn the case it has to meet by obtaining an effective medical evaluation.
2. Fairness and effectiveness of trial.
3. Likelihood of achieving a reasonable pre-trial settlement.

The decision in *Bellamy* stands for the proposition that a plaintiff is not automatically entitled to

determine how a medical examination is to be conducted. However, if a doctor refuses to allow the recording, on a motion the court may exercise its inherent jurisdiction, and establish the terms and conditions surrounding the medical examination, which can include permitting the plaintiff to record the examination. This depends on the circumstances of each case, and the burden of proof rests with the person requesting the recording.

## Recent Decision – *Dempsey v. Wax*

A number of cases post-*Bellamy* were decided either for or against recording medical examinations. The only consistency amongst these decisions was the application of the *Bellamy* principles.

*Dempsey v. Wax* is the most recent Ontario decision on this issue, which seems to have made it more acceptable to record medical examinations. In applying *Bellamy*, Justice Quigley held, “the recording should enhance, rather than detract, an examiner’s ability to confidently express his/her observations, conclusions, diagnosis and prognosis.” He further stated, “a full and reliable record of statements... would facilitate the fact-finding process...providing context and avoiding potential ambiguity....” Besides mere preference, Justice Quigley found that the defendant presented no evidence to suggest that recording the neuropsychological assessment would affect the integrity of the examination. Interestingly, the Court awarded costs against the defendant, which could be signaling to counsel the Court’s overall position on the issue.

## Procedure When a Defence Medical Is Recorded

According to *Willits v. Johnston*, to ensure the accuracy of videotaping, the following conditions should apply:

1. Camera should be set up in an unobtrusive manner.
2. Videotape shall not be edited.
3. Videographer should not be present in the examination room.
4. Tape should be of sufficient time capacity to eliminate interruptions.
5. Tape is to display the time in seconds on a continuous basis.

## Final Thoughts

It is best to determine in advance whether the doctor will object to a recording. If at a standstill, one solution would be to suggest having the plaintiff’s medical legal examination recorded as well.

Further, in applying the *Bellamy* case, it is insufficient for a party to cite the doctor’s *preference* or *bias* as the reason to either contest or endorse the recording of a defence medical.

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