

## ICBC Injury Claims, Medical Exams And Access To Information

March 17th, 2009

When advancing an ICBC Injury Claim ICBC can typically arrange an 'independent medical exam' to assess your injuries. This is usually done either through the power given to ICBC under the Insurance (Vehicle) Regulation or pursuant to Rule 30 of the Supreme Court Rules.

When ICBC sends you to a doctor for an 'independent' examination the physician usually takes notes and often authors a report summarizing his/her opinion of collision related injuries. Normally ICBC Injury Claims Lawyers negotiate the terms of these examinations to permit their client to have access to the medical examiners notes.

What if these terms are not discussed prior to the exam, are you entitled to have access to the notes that ICBC's doctor generates as a result of the visit or can ICBC claim litigation privilege over these notes?

Reasons for judgement were released today (McLeod v. Doorn) dealing with this issue. In today's case ICBC arranged to have the Plaintiff examined by a physician. The Plaintiff did not negotiate what access she would have to the physicians records when she agreed to this assessment. After the exam the Plaintiff sought access to the doctor's clinical records and ICBC refused to provide these on the basis that the notes were protected by litigation privilege.

The Plaintiff brought an application in Court to be granted access to these records and in granting the application Master Caldwell summarized and applied the law as follows:

[4] *I have considered counsel's submissions extensively; however, I am consistently drawn back to paras. 12 and 13 of the reasons of Finch J.A. (as he then was) in Stainer v. Plaza, [2001] B.C.J. No. 4:*

*In my respectful opinion this condition is too broadly expressed. Some reports prepared by or for a doctor performing an independent medical examination may not be protected by a solicitor's brief privilege. Ever since **Milburn v. Phillips** (1963), 44 W.W.R. 637 (B.C.S.C.) our courts have recognized that statements made by a plaintiff to a doctor conducting an independent medical examination under compulsion of court order may be ordered to be communicated to the plaintiff's solicitor. And, insofar as the examining doctor makes observations or findings on physical examination, he becomes to that extent a potential witness as to matters of fact. That there can be no property in a witness of fact is well settled: **Harmony Shipping Co. S.A. v. Davis**, [1979] 3 All ER (C.A.).*

*It therefore appears to me to be within the proper exercise of the discretion afforded under Rule 30 to impose, as a condition of ordering an independent medical examination, delivery up to a plaintiff of the examining doctor's notes that record any history given to him by the plaintiff on the examination, and any notes that record the doctor's observations or findings on physical examination. It would not usually, however, be fair to go further, and to require the defendant or third party to disclose any documents prepared by the doctor which contain his confidential opinions or advice to the lawyer who requested the examination, whether for the purposes of trial preparation, cross-examination at trial, or otherwise.*

[5] *Defence counsel points out that there was no order made under Rule 30 and, therefore, this reasoning does not apply; however, because the plaintiff agreed to go without an order, she is stuck. I fail to see how that can be correct. Rule 1(5) states that the object of the Rules is to "secure the just, speedy and inexpensive determination of every proceeding on its merits". Requiring a court order in the circumstances of this case hardly fits with such intention.*

[6] *I am of the view that the notes that record any history given to Dr. Piper and Mr. Kerr by the plaintiff at the examinations and any notes of those two professionals which record their observations or finding on physical examination, including raw test data, are to be produced to plaintiff's counsel in the manner outlined in para. 4 of the proposed order.*