

More On ICBC Injury Claims And Independent Medical Exams

January 14th, 2009

One of the most frequently litigated issues in ICBC claims is the nature and number of 'independent' medical examiners ("IME") that Defendants are entitled to have Plaintiffs examined by.

Reasons for judgement were released today by the BC Supreme Court ordering a Plaintiff to be examined by a psychiatrist of the Defendant's choosing. In this case the Defendant's need for a psychiatric IME of the Plaintiff was not seriously challenged, what was challenged was the timing.

Rule 40-A of the Supreme Court Rules deals with the admissibility of expert opinion evidence in Supreme Court trials. Rule 40A(5) requires such expert evidence to be exchanged with the other party 60 days before it is tendered in evidence.

In today's case the requested examination would take place less than 60 days from trial. The Plaintiff argued that if the medical exam went ahead he would be prejudiced because the Plaintiff would have insufficient time to hire his own expert to respond to the opinion that was being sought. This, the Plaintiff argued, would likely lead to an adjournment which would be prejudicial to the Plaintiff.

Master Tokarek of the BC Supreme Court ordered that the medical exam proceed despite the Plaintiff's objection. In doing so he stated that "the timing of the application, without more, is largely irrelevant". The key reasons are set out in paragraphs 23-27 which I set out below:

[23] *The comment about the balancing of prejudice is of some significance in the context of submissions made in the case at bar with respect to when defence counsel could or would be able to seek an IME. Plaintiff's counsel submitted that whenever the plaintiff would be unable to obtain expert evidence to rebut or deal with any defence IME report, an order should not be made. Counsel indicated that his dilemma would be the same even if this application was brought in December because he would need approximately one year to get an appointment with his own expert. The logic of that seems to be that unless defence counsel applied for the psychiatric IME a year or more in advance of the trial date, the application should be denied because plaintiff's counsel would be in exactly the same position of not being able to get his expert to deal with it and prejudiced because of an adjournment. I utterly reject that logic*

[24] *I believe the more appropriate approach is to balance the prejudice of a potential adjournment against the prejudice to the defendant in not obtaining relevant evidence. Here the requested IME is not with respect to an inconsequential or insignificant issue. The defendant seeks to reasonably establish that the plaintiff's complaints are wholly or largely unconnected to the MVA.*

[25] *The balance of the authorities are similarly either distinguishable or unhelpful. Master Barber, in the **Bubra** decision said:*

... the defendant has had full opportunity to have this matter brought forward at an earlier date so that these matters could be dealt with in a reasonable way. For their own reasons, they have not done so.

I do not find that to be the situation here.

[26] *The last authority, the **Barron** case, is another decision of Master Patterson. At paragraph 21 he said:*

... it seems to me that it is the obligation of the defence to not sit and wait until the last minute and then scramble to bring an application like this on.

*With all due respect, the timing of the application without more, is largely irrelevant. All of the authorities relied on by the plaintiff came to the conclusion, in some fashion unknown to me, certainly not discernable from the reasons, that the timing would lead to an adjournment and that an adjournment would prejudice the plaintiff. Apart from the **Mackichan** decision, there is nothing to suggest that any consideration was given to balancing the prejudice to the plaintiff against that of the defendant.*

[27] *In this case, I have no evidence to conclude that there would be an adjournment or that if that was so, it would amount to a prejudice that outweighs the prejudice to the defendant in not being able to obtain material evidence going to the heart of the plaintiff's claim. Consequently I grant the application and order that an IME take place as requested.*