NHL Lawsuit: If the Defendants in Your Lawsuit Secretly Agree to Work Together Against You, How Many Medical Assessments Can They Force You to Attend?

The Issue

The recent decision of **Moore v. Bertuzzi, 2012 ONSC 3497 (CanLII)** is another installment in the ongoing personal injury lawsuit of former NHL hockey player, Steve Moore, against NHL hockey player Todd Bertuzzi and the Vancouver Canucks. The defendants reached an agreement some time ago to work together to defend the claim (and agree to a split of liability, regardless of the Trial result).

Why This Matters

- Usually, if there are two or more defendants in a personal injury lawsuit, they are each allowed to force you to attend their own medical assessment

- Although this leads to the plaintiff attending various medical assessments, each defendant is allowed to implement their own defence strategy

- But what happens if the defendants secretly agree work together against your lawsuit, by agreeing on how liability will be determined regardless of the Trial result? And the defendants are supposed to disclose this agreement, but do not?

- In this situation, can the defendants still conduct their own, separate, medical assessments – leading to the possibility of "stacking" their defence medicals in secret pursuit of one global defence strategy?

One of the factors which the courts will often take into consideration in deciding motions etc. during litigation is the position taken by each of the parties.

If there are more than one defendant and each defendant has adverse interests, than the court will usually allow each defendant to exercise its rights independently from the other. In a personal injury action, each defendant will often be allowed to conduct its own defence medical assessments of the plaintiff if each defendant has an adverse position regarding damages, causation and/or liability and is separately represented. For example, if there were two motor vehicle accidents, the defendant from each accident would be entitled to have the plaintiff attend a defence medical assessment.

It should be noted however, that the mere presence of a cross-claim does not necessarily mean that each defendant will be entitled to conduct separate defence medical assessment from the same specialty. The entire state of the record and not merely the pleadings need to be reviewed to determine if there is an adversity of interest.

An agreement between defendants which eliminates any adversity of interests is therefore critical to the court's decision making process and must be disclosed as soon as it is entered into.

Defence counsel in the case below were fortunate that both neuropsychological assessments were not disposed of by the court. Part of the court's leniency in allowing the two defendants to rely upon one assessment was the court's belief that defence counsel's decision not to disclose the agreement was made in good faith but with a mistaken view of their obligations at law. In light of this decision and the Court of Appeal's harsh words in Aecon (see below), future counsel may not be so fortunate.

The Details

The recent case of ***Moore v. Bertuzzi*, 2012 ONSC 3497 (CanLII)** is another installment in the ongoing personal injury lawsuit of former NHL hockey player, Steve Moore, against NHL hockey player Todd Bertuzzi and the Vancouver Canucks.

Master Dash of the Superior Court of Justice of Ontario considered the case where he had previously ordered that the plaintiff undergo two separate neuropsychological assessments by each of the two defendants in that case.

During that motion, the Master was under the impression that the two defendants, Todd Bertuzzi and Orca Bay (Vancouver Canucks), were adverse in interest based on the existence of

cross-claims being advanced by each defendant. The Master assumed, based upon the pleadings, that each defendant blamed the other one for causing the altercation which led to the plaintiff's injuries.

A few weeks after the motion, it was discovered that the defendants had in fact signed an agreement, 6 months prior to the motion, to apportion their respective liability and to dismiss their respective cross-claims.

Upon discovering this agreement, the plaintiff moved to set aside the Master's order and to deny the defendants the benefit of the assessments. The plaintiff's grounds were that the defendants had breached their duty to disclose the agreement to the plaintiff and to the court and also that the defendants had breached the Master's order as to how the neuropsychological assessments were to be conducted.

The court reviewed the caselaw from the Ontario Court of Appeal in ***Aecon Buildings v. Brampton,* 2010 ONCA 898**, and agreed with that court's finding that "disclosure of such agreements is necessary immediately after they are signed…the obligation of immediate disclosure is clear and unequivocal. It is not optional. Any failure of compliance amounts to abuse of process and must result in consequences of the most serious nature for the defaulting party."

Master Dash held that if the defendants' agreement had been known to the court when it heard the defendant's motion for two defence medical assessments, the result of the motion would definitely have been different. The Master held that two expert assessments of the same specialty would be ordered at the same time on behalf of different defendants only if the defendants were adverse in interest. In this case, although the defendants were united in their interest to minimize the plaintiff's injuries, the court had mistakenly assumed that they were adverse in their positions regarding liability.

The court therefore decided that the proper result was to vary the previous order to permit only a single neuropsychological assessment. The court declined the plaintiff's request to deny the defendants any neuropsychological assessment since to do so would "tear the guts out of their defence" and also since the court found that decision not disclose was made honestly and in good faith, but with a mistaken view by the defendants of their obligations at law. The court allowed the defendants to decide which of their two reports to rely upon at trial.

For more information on medical assessments in lawsuits and your rights, see our various other blogs:

- **Forced by Insurer to Undergo a Medical Assessment in Your Car Accident Lawsuit**
- **Injured in a Car Accident > Medical Assessments > What are the Limits?**
- **Multiple Medical Assessments in Your Car Accident Lawsuit > How Many is Too Much?**
- **Ontario Accident Benefits (SABS) – The Role of Doctors and Their Medical Assessments**
- **Being Examined by an Insurance Doctor > Videotaping the Assessment**
- **Videotaping the Medical Expert Who Is Examining You (on Behalf of the Opposing Insurance Company) – Part 2**
- **Videotaping Medical Experts (Examining You on Behalf of the Opposing Insurance Company) – Part 3**