

The Myth of the “Independent” Medical Examination

Whenever you place your mental or physical impairment at issue in a claim for compensation, the defendant insurer has a right under our rules of court to have a physician of its own choice examine you.

How Does the Examination Work?

The insurer must give you reasonable notice of the examination including the place, and name of the examiner as well as the scope of the evaluation.

The examining doctor must provide a copy of the report to you, (or your lawyer) within a reasonable time after the examination. You are required to provide copies of all medical office treatment notes, lab reports, and consultations from every doctor who has examined or treated you for your injuries.

In addition, most insurance companies will also ask you to sign a release form so the insurer can obtain other information before your examination date. Do not sign anything without consulting with your lawyer.

Why it Happens

The so-called “independent” medical examination is conducted by a medical doctor selected by the defendant (or their insurance company) for the purpose of providing a medical opinion that can be used by the defendant insurer to defend your claim.

The doctor may be subpoenaed and questioned under oath during a discovery examination. The doctor may testify and be cross-examined at trial if your claim cannot be settled. Therefore, it is extremely important to be prepared for the examination and understand the objectives of the examiner.

In theory, the examination is supposed to help “clarify” complex medical restrictions and limitations. In practice, the examination is a tool paid for by the defendant’s insurer which will be used to support their decision to deny your claim for compensation and defend your claim.

Independence is a Myth

The examination is usually referred to by insurance companies and defence lawyers as an “independent” medical examination (I.M.E.). But their independence is a myth. A better term is a **Defence Medical Examination (D.M.E.)**.

The problem is that for the most part, doctors whose practice consists primarily of conducting D.M.E.'s are not "independent" medical examiners by any reasonable definition. They are hired to provide testimony that supports the defendant insurer. D.M.E. doctors often render opinions and conclusions outside their area of medical expertise.

D.M.E. doctors may also assume the role of a claims investigator, paid for by the insurance company, to provide evidence that can be used against you.

It is important to remember that **D.M.E. doctors are not concerned with your medical well being!** They have a clearly defined agenda and strategy to help the insurance company with what appears to be an objective medical opinion contrary to that of your treating doctors.

Their job is to attack your credibility by assuming that your claim is a fraud that must be exposed. It is easier to attack *your* credibility, and the judgment of your treating doctors than it is to discover the medical restrictions and limitations that prevent you from returning to work.

They Know the Answers the Insurance Company Want

D.M.E. doctors are given all the medical information you sent to the defendant's lawyer. They take their instructions from the Defendant's lawyer. **In other words, the D.M.E. doctor already knows the defendant's "opinion" concerning your ability to work before you arrive for the evaluation.**

It seems reasonable to conclude the D.M.E. doctor may have already formed an opinion concerning your impairment, especially when the defendant's lawyer is the one that hired them.

This memo is intended to help you prepare for the Defence Medical Examination. If you are not prepared for the D.M.E. your claim may be seriously damaged. Although the following suggestions won't guarantee that your claim will be successful, it will help prevent the defendant's doctors from unduly damaging your claim.

The D.M.E. Process: How to Prepare Yourself

The doctor will probably conduct an interview before the medical examination. This is usually referred to as "taking your medical history".

The purpose of the interview is to obtain facts and comments from you which may be used after the D.M.E. to show your answers are inconsistent with the results of the medical examination. For example, if you say you can't use your hands or carry heavy objects, don't lift a large bag and drive a vehicle to the D.M.E.

Always use common sense. Remember, the insurance company may have arranged for video surveillance the day before, the day of, and the day after your D.M.E. Whatever you tell the doctor about your physical capacity should be the same as what you told the insurance company when you gave a statement or what you testified to at discovery. It should also be the same as any videotaped activity in case the insurance company has you under surveillance before the exam.

Keep in mind when you talk to the doctor to answer only the questions asked, and then be quiet. **Never volunteer or offer additional information!**

When you know the date and time of the evaluation, call your family doctor and make an appointment with him/her just after the D.M.E. Tell your doctor that the defendant's insurer has asked you to submit to a D.M.E.

Two Purposes

The appointment with your family doctor serves two purposes:

- 1) It provides evidence of your physical condition by your family doctor **on the same day** as the D.M.E. exam, and
- 2) Sometimes the D.M.E. doctor may be a little rough and cause you to swell or have pain. These physical symptoms should be documented by your family doctor as well. Tell your doctor if you have any pain, swelling, or any other physical symptoms as a result of the D.M.E. The documentation of your own doctor may be extremely important when pointing out inconsistent and unreasonable conclusions made by the D.M.E. physician.

It is extremely important that you review all of your past medical records and history of your present disability. One way in which the D.M.E. doctor may draw suspicion to your claim is to "catch" you in inconsistencies when you talk about your past medical history. A simple lapse of memory by not mentioning a particular doctor, or lab test you had in the past is sufficient for the D.M.E. doctor to conclude you are trying to hide something and your claim is fraudulent. Study your medical records before your D.M.E.

Refresh Your Memory

Make sure you prepare by being ready to provide the following information:

1. Your medical history;
2. The date you first stopped working and why;
3. How your disability has affected your activities of daily living (personal hygiene, meal preparation, dressing and undressing, preparation of meals etc.);
4. Any restrictions and limitations imposed by your treating doctors; and
5. A description of your treatment plan discussed with your physician.

Being well prepared for discussing your medical history, can you avoid the “traps” of giving an inaccurate or inconsistent medical history. Experienced D.M.E doctors will make a big deal of every omitted detail no matter how insignificant it may seem.

Bring a Friend

Never attend a Defence Medical Examination alone. On the day of the exam, do not engage in any substantial activity. Remember that the insurance company may have requested surveillance. Leave your house with someone who can help you during the exam, ask questions for you, and take notes of procedures during the exam. Always request that the person who comes with you be allowed to remain with you during the D.M.E.

Nova Scotia’s rules of court do not **require** that the doctor allow you to have someone with you during the examination. Some D.M.E. physicians will allow you to have someone with you, some will object. If they object, we can use that fact to question the objectivity of the examination.

If you are required to wear braces, wear them to the exam. If you use a cane, bring it with you, and use it. Bring a camera with you and take a picture of any swollen body part at the D.M.E. doctor’s office. For example, if the D.M.E. doctor writes in his report that “there was no swelling”, the picture will refute the statement.

Ask your friend to take notes and to observe how the D.M.E. doctor treats you during the examination. Take someone with you who is assertive and who would not have a problem asking for a break if you become tired, or need something to drink. Your friend is there to protect your personal needs during the exam, and document what took place.

The D.M.E. Bag of Tricks

D.M.E. physicians use certain exams to trick you. One such test is referred to as **Waddell’s signs**, which are used by doctors to identify psychological factors in patients claiming back problems from trauma, chronic pain and fibromyalgia.

So-called “false positives” on these indicators are often at the root of adverse decisions documented by the D.M.E. doctor. The D.M.E. examiner will perform a hands-on examination for each test, looking for you to say “it hurts” when in fact it is impossible, given nerve or sensory distribution for it to really cause pain.

In other words, the D.M.E. physician tries to “trick you” into saying it hurts when it really shouldn’t, given the injury or diagnosis you have.

WADDELL SIGNS IN A NUTSHELL

Tenderness:

The doctor will lightly touch or pinch your skin over a wide area beyond the normal distribution of the sensory nerves. If you say these light touches are sensitive and tender, the D.M.E. physician will suspect exaggeration. If you say you have pain when deeply touched over a wide area beyond the area of an injury or joint, the doctor will suspect exaggeration. Usually pain is only evident in the localized area of the injury. If you have fibromyalgia and say you have pain “everywhere”, the doctor will suspect your reactions.

Stimulation Tests:

If the doctor presses down on your head while you are standing (axial loading), and you report low back pain, the doctor will say you are exaggerating. If the doctor rotates your shoulders and pelvis at the same time while you are standing, and you complain of low back pain, the doctor will say you are exaggerating.

Distraction Tests:

On occasion when the D.M.E. doctor finds something wrong, he/she may try to distract you, performing another test of the same area without telling you why. If you have a negative reaction, or don't give a full effort, the doctor will suspect exaggeration.

For example, the doctor may ask you to raise one leg against resistance while lying down. If your opposite leg does not press down, for leverage, the doctor will suspect you are not giving full effort for the purpose of exaggeration.

Sometimes, the D.M.E. doctor will just walk away from you supposedly to write something down in your chart, then quickly ask you a question. If you “turn your head” in his direction when you told him you couldn't do that because of pain, the doctor will suspect all of your complaints.

Regional Disturbances:

If you complain of excessive weakness, such as the giving way of muscles within a particular group, the doctor will say you are exaggerating. Likewise, if you claim numbness, tingling or pain over an area outside of the distribution where the nerves from the spine lead down the leg into the toes, the doctor may suspect exaggeration.

This test is commonly used to refute fibromyalgia and chronic fatigue claims.

Overreaction:

If you cringe, grimace or otherwise show unnatural responses to sensory, motor or reflex tests (or all of the above), the doctor may suspect exaggeration.

Remember:

Remember the D.M.E. physician is not examining you to give you medical advice.

The doctor will not discuss treatment options with you. The D.M.E. doctor is not there to recommend appropriate treatment for your injuries. Often the D.M.E. physician will not give you an opportunity to explain what is really disabling you. The doctor will ask only questions requiring a “yes” or “no” answers.

It is human nature, once you are committed to an D.M.E. exam, to *want* to be believed, and to hope that the doctor examining you is acting in your best interests. Once you thoroughly understand that the D.M.E. doctor’s role is to represent the defendant’s insurance company and not you, then you can present yourself appropriately during the exam.

Types of Independent Medical Evaluations

Neuropsychological Examination

A test that is commonly used in cases involving head injuries, is the Neuropsychological exam. A Neuropsych exam uses scientifically validated tests to evaluate brain functions from simple motor performance to complex reasoning and problem solving. The results of these tests are then compared with normative standards.

While CT scans, MRI’s, EEG’s and PET scans identify structural, physical, and metabolic conditions of the brain, a neuropsychological examination is the only way to formally assess brain *function*.

Neuropsych tests examine the following:

- Attention & processing speed Intelligence
- Motor performance Language
- Sensory Acuity Calculation
- Working memory Vision analysis
- Learning & memory Problem solving
- Abstract thinking Judgment
- Mood & Temperament Executive functions

How doctors pretend to test for “malingering”

The MMPI-2 (Minnesota Multiphasic Personality Inventory) is a well-known test that is often used to identify malingering or exaggeration.

Other common tests include:

- The Beck Depression or Anxiety Scales: provide a quick assessment of symptoms related to depression or anxiety;
- The Bender Visual Motor Gestalt test: evaluates visual-perceptual and visual-motor functioning and possible signs of brain dysfunction, emotional problems, and developmental maturity;
- Dementia Rating scale: provides measurement of attention, initiation, construction, conceptualization, and memory to assess cognitive status in older adults with cortical impairment;
- Halstead Category test: measures concept learning, flexibility of thinking and openness to learning. It is considered a good measure of overall brain function.

There are other tests available to neurologists who generally select a combination of tests for each individual based on their diagnosis and history.

In order to be valid, neuropsychological examination results should be interpreted by a certified neuropsychologist, or psychologist. The neuropsychological tests are subject to interpretation, and of course, D.M.E. physicians often interpret the results in favour of the defendant insurance company.

Neuropsychological D.M.E.’s should not be used for all impairments, but because of the possible subjective nature of the interpretation, insurers can use these exams to achieve results favorable to the company.

Neuropsychological exams should not be used in cases where the diagnosis is depression or other mental and nervous disease. Some tests may be applied in a psychological D.M.E., but using a neuropsychological exam alone to determine Axis I-IV diagnosis may not be appropriate.

Functional Capacities Examinations

Although Functional Capacities Examinations should be the most common type of evaluation, they are not. For structural injuries of the hands, bones, feet, back, cardiac, chronic pain and fatigue, the FCE, administered by a qualified occupational physician produces the most objective, verifiable, and accurate results.

Functional Capacities Evaluations include physical tests to determine how much weight you can lift or carry; your ability to use hands and feet i.e. pinch strength, grip, fine manipulation; ability to climb stairs, lift overhead, crawl, bend, stoop; physical endurance, i.e. ability to work consistently and give full physical effort.

The physician will attempt to categorize your functional capacity by defining your physical ability as either:

- sedentary,
- light,
- medium or
- heavy capacity.

The FCE may result in a rating of full body disability usually expressed as a percentage. The insurance company will ask the FCE physician to give you restrictions and limitations (things you may not do at all, and activities you may only perform at a certain level or duration).

The D.M.E. physician will state whether he/she believes you made a full effort on the exam. As stated earlier these evaluations are more reasonable and produce better results for both the insurance company and for the claimant.

Psychiatric and Psychological Tests

Although some of the tests used in the battery of neuropsychological tests can be used in a psychiatric D.M.E., some tests are unique. The conclusion or outcome of these tests is to give you a rating in each of the Axis diagnosis scales, and a GAF, a global assessment of functioning rating.

GAF Ratings

GAF Ratings are expressed as a fraction. For example, 45/70 means you now have a GAF of 45 but within the last six months, it was 70.

The GAF Scale.

100-91

Superior functioning in a wide range of activities, life's problems never seem to get out of hand, is sought out by others because of his or her many positive qualities. No symptoms.

90-81

Absent or minimal symptoms (*e.g.*, mild anxiety before an exam), good functioning in all areas, interested and involved in a wide range of activities, socially effective, generally satisfied with life, no more than everyday problems or concerns (*e.g.*, an occasional argument with family members).

80-71

If symptoms are present, they are transient and expectable reactions to psychosocial

stressors (*e.g.*, difficulty concentrating after family argument); no more than slight impairment in social, occupational, or school functioning (*e.g.*, temporarily falling behind in schoolwork).

70-61

Some mild symptoms (*e.g.*, depressed mood and mild insomnia) OR some difficulty in social, occupational, or school functioning (*e.g.*, occasional truancy, or theft within the household), but generally functioning pretty well, has some meaningful interpersonal relationships.

60-51

Moderate symptoms (*e.g.*, flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational, or school functioning (*e.g.*, few friends, conflicts with peers or co-workers).

50-41

Serious symptoms (*e.g.*, suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (*e.g.*, no friends, unable to keep a job).

40-31

Some impairment in reality testing or communication (*e.g.*, speech is at times illogical, obscure, or irrelevant) OR major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood (*e.g.*, depressed person avoids friends, neglects family, and is unable to work; child frequently beats up younger children, is defiant at home, and is failing at school).

30-21

Behavior is considerably influenced by delusions or hallucinations OR serious impairment, in communication or judgment (*e.g.*, sometimes incoherent, acts grossly inappropriately, suicidal preoccupation) OR inability to function in almost all areas (*e.g.*, stays in bed all day, no job, home, or friends)

20-11

Some danger of hurting self or others (*e.g.*, suicide attempts without clear expectation of death; frequently violent; manic excitement) OR occasionally fails to maintain minimal personal hygiene (*e.g.*, smears feces) OR gross impairment in communication (*e.g.*, largely incoherent or mute).

10-1

Persistent danger of severely hurting self or others (*e.g.*, recurrent violence) OR persistent inability to maintain minimal personal hygiene OR serious suicidal act with clear expectation of death.

0

Inadequate information.

Try to find yourself on this scale. Most people live their lives normally somewhere between 61-80. We all have bad days. Below 60 is usually considered to be somewhat impairing.

Interpretation of the GAF scale is again made by the defence physician. Ratings from 41-50 may be referred to as “functional” even though the general medical community considers a rating at that level to be impairing.

The Axis diagnosis scale:

Axis I—Clinical primary diagnosis.

Axis II—Personality definition.

Axis III—Physiological-Any organic problems that may be present.

Axis IV—Social. Loss of a loved one, sexual abuse, divorce, career changes etc.

The results of a psychiatric D.M.E. are often “interpreted” by the defence insurance company and it may be necessary for you to obtain your own physician’s opinion of the results.

It’s Not Always Bad

Defence Medical Examinations are not necessarily a bad thing in every case. When correctly used, the D.M.E. should be given equal weight with the recommendations of the primary care physician. Unfortunately, this is rarely done in the litigation process.

Some Final Tips

1. Prepare for the D.M.E. in advance. Know your medical history and be consistent when telling your history to the D.M.E. physician.
2. Let your physician know you have been asked to submit to an D.M.E., and make an appointment to be examined by him/her on the same day.
3. Take someone with you to the exam who can speak for you and take accurate notes of the procedures. Take pictures of any swelling or obvious physical marks in the D.M.E. physician’s office.
4. Do not attempt to exaggerate symptoms or over react when touched or prodded.
5. Remember the fact the D.M.E. physician is neither your advocate or medical doctor. Do not ask medical questions about your treatment, and answer only the questions you are asked. Do not contribute information beyond the scope of the examination. In other words, during the D.M.E. exam, don’t discuss the problems of your life.

7. Remember you may be surveilled by an insurance investigator. Wear braces, use canes, or other therapeutic devices as instructed by your physician. Limit your activities on the day before, the day of and the day after your D.M.E. examination. Look for strangers on your street, or neighborhood.

8. Ask for a copy of the D.M.E. report. The doctor may or may not give it to you, but ask anyway.

9. Stay calm, and if the D.M.E. physician hurts you, say so. No physician likes to have a patient carried out of his office on a stretcher. If the D.M.E. physician manipulates you, or physically hurts you to the point of pain, ask for an ambulance to be called.

10. After the exam, go home, relax, and be positive. These exams often have an emotional effect of making you feel guilty, or defeated. Never allow a defence n insurance company to have that much power over you. You showed up for the exam, you did your best, you were honest, and that is the best anyone can do under these circumstances. Whatever conclusion the insurance draws from the D.M.E. report, has nothing to do with you, or how you presented yourself during the exam.

I hope this information is helpful. If you have any questions, please give me a call.

Best of luck with your examination!

John McKiggan