Can ICBC Talk To My Doctors About My Injuries?

April 14th, 2009

When you are injured by another motorist in British Columbia and advance an injury claim does ICBC have access to your treating physicians to receive information about the nature and extent of your injuries?

If you are seeking no-fault benefits from ICBC under Part 7 of the Insurance (Vehicle) Regulation the answer is yes. Section 98 of the Regulation reads as follows:

98 *(1) An insured shall, on request of the corporation, promptly furnish a certificate or report of an attending medical practitioner, dentist, physiotherapist or chiropractor as to the nature and extent of the insured's injury, and the treatment, current condition and prognosis of the injury.*

(1.1) The certificate or report required by subsection (1) must be provided to the corporation

(a) in any form specified by the corporation including, without limitation, narrative form, and

(b) in any format specified by the corporation including, without limitation, verbal, written and electronic formats.

(2) The corporation is not liable to an insured who, to the prejudice of the corporation, fails to comply with this section.

What if you are injured by a person insured with ICBC and make a tort claim in the BC Supreme Court against them for your pain and suffering and other losses? In the course of defending the Claim can the lawyer hired by ICBC have access to your treating physicians to discuss the nature and extent of your accident related injuries?

Reasons for judgement were released today (Scott v. Erickson) by the BC Supreme Court, Victoria Registry, dealing with this issue.

In today's case the Plaintiff was injured in a 2004 motor vehicle collision. In the course of her recovery she was treated by a neuropsychologist. The injury lawyer defending the claim brought an application to speak with the Plaintiff's treating neuropsychologist. In dismissing this application, Master McCallum of the BC Supreme Court summarized the law relating to defendants access to treating physicians in injury litigation as follows:

[8] The Defendant applies for two orders. The second application for permission to speak to a doctor may be disposed of summarily. I refer to the decision of Wilkinson J. in ***Swirski v. Hachey,*** *[1995] B.C.J. No. 2686 where the court held that there was no necessity for an application for permission to speak to plaintiff's treating doctors concerning information relevant to the claims made in the action. The court suggested that notice should be given of an intention to seek informal discussions with plaintiff's treatment providers and confirmed that treatment providers were not compelled to participate in such meetings.*

[9] The Plaintiff in the case at bar knows of the Defendant's intention to speak to Dr. Martzke and Dr. Martzke will know that he is free to participate or not as he pleases. No order is necessary. As the court said in ***Demarzo v. Michaud****, 2007 BCSC 1736, if the Defendant's counsel wishes to compel the treatment providers to participate in discussions, an application under Rule 28 is the appropriate vehicle.*

In other words, there is no property in a treating physician and a court order is not required for a defendant to approach a Plaintiff's treating physicians. However, the treating physicians are under no duty to participate in discussions initiated by the defendant in a lawsuit. As a result of the professional obligations of treating physicians in British Columbia, many decline to participate in such discussions.

Lawyers involved in the defence of BC injury claims should also keep their professional duties as set out in Chapter 8, section 14 of the Professional Conduct Handbook in mind which states as follows with respect to cotacting opposing expert witensses:

Contacting an opponent's expert

14. A lawyer acting for one party must not question an opposing party's expert on matters properly protected by the doctrine of legal professional privilege, unless the privilege has been waived.

[amended 12/99]

15. Before contacting an opposing party's expert, the lawyer must notify the opposing party's counsel of the lawyer's intention to do so.

[amended 12/99]

16. When a lawyer contacts an opposing party's expert in accordance with Rules 14 and 15, the lawyer must, at the outset:

(a) state clearly for whom the lawyer is acting, and that the lawyer is not acting for the party who has retained the expert, and

(b) raise with the expert whether the lawyer is accepting responsibility for payment of any fee charged by the expert arising out of the lawyer's contact with the expert.

[amended 09/06]

17. In Rules 14 to 16, "lawyer" includes a lawyer's agent.

In situations where treating physicians refuse to particiapte in an interview set up by the defence lawyer in an injury claim today's case appears to indicate that Rule 28 of the BC Supreme Court Rules is the proper tool to use to compel the witness to share any relevant facts he/she may have knowledge of. Rule 28 states as follows:

Order for

(1) Where a person, not a party to an action, may have material evidence relating to a matter in question in the action, the court may order that the person be examined on oath on the matters in question in the action and may, either before or after the examination, order that the examining party pay reasonable solicitor's costs of the person relating to the application and the examination.

Expert

(2) An expert retained or specially employed by another party in anticipation of litigation or preparation for trial may not be examined under this rule unless the party seeking the examination is unable to obtain facts and opinions on the same subject by other means.

Affidavit in support of application

(3) An application for an order under subrule (1) shall be supported by affidavit setting out

(a) the matter in question in the action to which the applicant believes that the evidence of the proposed witness may be material,

(b) where the proposed witness is an expert retained or specially employed by another party in anticipation of litigation or preparation for trial, that the applicant is unable to obtain facts and opinions on the same subject by other means, and

(c) that the proposed witness has refused or neglected upon request by the applicant to give a responsive statement, either orally or in writing, relating to the witness' knowledge of the matters in question, or that the witness has given conflicting statements.

Notice of application

(4) The applicant shall serve notice on the proposed witness at least 7 days before the hearing of the application.

Subpoena

(5) Where a party is entitled to examine a person under this rule, by serving on that person a subpoena in Form 21, the party may require the person to bring to the examination

(a) any document in the person's possession or control relating to the matters in question in the action, without the necessity of identifying the document, and

(b) any physical object in the person's possession or control which the party contemplates tendering at the trial as an exhibit, but the subpoena must identify the object.

[am. B.C. Reg. 95/96, s. 12.]

Notice of examination

(6) The examining party shall give notice of examination of a person under this rule by delivering copies of the subpoena to all parties of record not less than 7 days before the day appointed for the examination.

Mode of examination

(7) The proposed witness shall be cross-examined by the party who obtained the order, then may be cross-examined by any other party, and then may be further cross-examined by the party who obtained the order.

Application of examination for discovery rules

(8) Rule 27 (15), (20) and (22) to (26) apply to an examination under this rule.