Forced by Your Insurer to Undergo a Vocational Assessment > Your Accident Lawsuit

The Issue

- You are injured in an accident and sue. An insurance company defends your lawsuit
- What types of assessments can the opposing insurance company force you to attend, in your lawsuit?
- Can they force you to see a vocational assessor (i.e. not a medical doctor), who will assess your present and future abilities to work?

Rule 33 of the *Rules of Civil Procedure* and the *Courts of Justice Act* allow a defendant to conduct an assessment of a plaintiff. Specifically, **section 105(2) of the *Courts of Justice Act*** states:

> Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more *health practitioners* (italics added).

The issue which arises in these cases is under which circumstances will the court allow a defendant to conduct an assessment which falls outside of section 105(2) ie. which does not involve an examination by a "health practitioner"?

Why This Matters

This case continues along the expansion of the rights of defendants (insurers) to force a different type of assessment – vocational – upon a plaintiff in a personal injury lawsuit.

The purpose behind this section of the *Courts of Justice Act* is to allow courts to ensure fairness between litigants in the discovery and trial process. Defendants therefore have an opportunity

to have a plaintiff examined by a health practitioner where the plaintiff claims that he/her has suffered personal injuries.

Where a plaintiff claim an economic loss ie. that he or she is unable to work in the future, defendants claim that the courts still have an inherent jurisdiction to ensure fairness between the parties by allowing the defendant to refute this allegation through a vocational assessment.

Now, a plaintiff forwarding a claim for loss of income and/or diminished earning capacity may have to submit to a vocational assessment arranged by the defendant.

The Details

In the case of ***Ziebenhaus et al. v. Bahlieda et al.*, 2012 ONSC 2787 (CanLII)**, the Superior Court of Justice of Ontario considered the case where a plaintiff suffered an alleged brain injury and the plaintiff's solicitor had obtained an economic loss report which calculated his economic loss at between $1,500,000 to $3,000,000.

The defendant had the plaintiff seen by a neuropsychologist but also wanted to have the plaintiff seen by a vocational specialist. The parties agreed that the vocational specialist did not come under the definition of "health practitioner" as defined in section 105(1) of the Courts of Justice Act:

> "a person licensed to practice medicine or dentistry in Ontario or any other jurisdiction, a member of the College of Psychologists or Ontario or a person certified or registered as a psychologist by another jurisdiction."

The court noted that the plaintiff's residual earning capacity would be a fundamental part of the trial.

The court noted that there was a growing tendency in these types of motions to order non-medical assessments, "where after a review of all of the evidence, the court can come to the conclusion that such an assessment is reasonably required and will not result in an inherent unfairness to the plaintiff."

In allowing the vocational assessment, Judge Edwards stated:

> *[12] There is no issue between the parties that the vocational assessor in this matter does not fall within the definition of "health practitioner". Equally there does not appear to be any issue between the parties that the plaintiff in this case has suffered an injury that may be considered both physical and/or mental.*
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> *[13] Plaintiff's counsel notes that the plaintiff has already been seen at the request of the defence by four health specialists including a neurologist, a neuropsychologist, a neuropsychiatrist, and a future care expert. To be fair it equally has to be pointed out that the plaintiff's have reports from similar specialists.*
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> *[14] The divergence in the judicial views on the issue before this court is best expressed by B.T. Granger J. in Vanderidder v. Aviva Canada Inc. [2010] O.J. No. 5011 where at paragraph 23 the following is found:*
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> > *The jurisdiction to order non-medical expert assessments is an area of controversy in Ontario courts. The decisions on this topic divide into two streams at the Superior Court of Justice level, and there does not appear to be a Court of Appeal decision settling the matter. In the first set of cases, courts generally interpret **s. 105** and R. 33 narrowly, allowing non medical assessments only if required as diagnostic aids for medical practitioners. The divergent stream invokes the discretionary inherent jurisdiction of the court to ensure justice is done in any particular case. In these cases, a non-medical expert assessment is usually ordered in the interests of fairness and justice.*
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> *[15] From my review of the jurisprudence it is not necessary to come down on one side or the other of this debate. Even in those cases where the courts have looked to the jurisdiction found in **Section 105** of the **Courts of Justice Act** it becomes readily apparent that there is a greater tendency now to order an assessment by a non medical practitioner, where after a review of all of the evidence, the court can come to the conclusion that such an assessment is reasonably required and will not result in an inherent unfairness to the plaintiff.*

*[16] I have found the analysis of Shaughnesy RSJ. in Bernier v. Assan et al. **2006 CanLII 16481 (ON SC)**, 2006 CanLII 16481 (ONSC), to be of considerable assistance in determining the appropriateness of the request for a vocational assessment on the facts before this court. As well the analysis of McDermid J. in Cook v. Glanville [2012] O.J. No 133, is also of assistance in this courts determination.*

[17] The plaintiff in this case has placed his past, present, and future medical history at issue. The plaintiff is seeking a substantial award for past and future wage loss that has been quantified in an amount ranging between $1,500,000.00 and $3,500.000.00. Under the circumstances it cannot be said that the plaintiff would not have reasonably contemplated, with the advice of his counsel, that he would have to attend various assessments at the request of the defence. The real issue is whether or not there is any inherent unfairness now in having the plaintiff seen for the purposes of a vocational assessment and whether it is reasonable under the circumstances. In coming to the conclusion that a vocational assessment as requested by MSL is appropriate I have taken into account the following:

> *(a) The vocational assessment sought by MSL is directed to an important issue in this case, specifically what if any residual earning capacity the plaintiff may have in terms of vocational potential given his alleged cognitive difficulties;*
>
> *(b) While the assessment undoubtedly will involve the plaintiff taking time away from his normal day to day activities (as it is anticipated the assessment could take upwards of 1 day) such an assessment is not unnecessarily intrusive to the plaintiff;*
>
> *(c) While Dr. Saint-Cyr was asked to comment on issues concerning the plaintiff's vocational capacity, there is no evidence to suggest that Dr. Saint-Cyr has any expertise in vocational assessments and does not hold himself out as having the same qualifications as Dr. Voorneveld who in her report notes that she was requested to undertake a psychovocational assessment and who administered vocational tests to the plaintiff. There is no indication from my review of the report of Dr. Saint-Cyr that such vocational tests were put to the plaintiff by Dr. Saint-Cyr in his assessment;*

> *(d) I am satisfied that the report sought by the defence may, if this matter proceeds to trial, be of assistance to the trier of fact, as the court will benefit from the testimony of expert witnesses like the vocational assessor who possesses special knowledge as it relates to the potential vocational capacity of the plaintiff;*
>
> *(e) While plaintiff's counsel points to the fact that the plaintiff will have to submit to an interview with the vocational assessor and thereby effectively submit to a form of discovery over which plaintiff's counsel will have no control, I am not satisfied that even with such concern the plaintiff will not suffer any undue hardship or prejudice.*

[18] Plaintiff's counsel raised a procedural issue with respect to the necessity for the vocational assessment, in the form of an argument that the defence did not put any evidence before the court that would establish a proper evidentiary basis for the assessment. It was argued that there was no affidavit evidence from any qualified health practitioner indicating that an assessment with a vocational assessor was required. While plaintiff's counsel is entirely accurate that there are many cases in which the evidence of a health practitioner supporting the need for an assessment by a non health practitioner is required, I do not see this as an impediment in this, or for that matter, all cases.

[19] Where a plaintiff advances a past and future wage loss claim of the nature advanced in this case, it can hardly be said that the plaintiff would not have anticipated the potential for a vocational assessment. Similar concerns were expressed by Granger J. in Vanderidder (supra) to the following affect:

> *In my view, given the facts of this case and the claim being made by the plaintiff for future care costs, fairness can only be achieved by ordering Vanessa Vanderidder to participate in a life care assessment by a person other than "a health practitioner" notwithstanding that there is a lack of evidence before me from a health practitioner that such an assessment is needed by a health practitioner as a "diagnostic aid."*

[20] Under the circumstances while in many cases it would be preferable to have an evidentiary basis, through the report of a medical practitioner expressing the necessity and the reasons why a vocational assessment is required, this court does not see it as an

> *impediment on the facts of this case to require the plaintiff, in the interest of fairness, to attend a vocational assessment as requested by MSL. An order will therefore issue requiring the plaintiff to attend an assessment with Graham Pett on a date to be agreed upon between the parties. If there are any qualifications as to how the assessment is to be undertaken I may be spoken to by way of written argument.*

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**