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ADVOCATE FOR NO PARTY, SUPPORTER FOR ALL

In the recent decision of Alladina v. Calvo, 2014 ONSC 2550, the Defendants brought a motion for an order that the Plaintiff attend at a medical assessment with psychiatrist Dr. Lawrence Reznek and that the assessment be conducted without video recording. This case considered a variety of factors in determining the onus required for a Plaintiff to challenge the competence and bias of an expert to conduct a defence medical assessment.

This decision is the latest addition to an array of cases which considered whether a Plaintiff can be videotaped at his or her defence examinations due to possible expert bias.

In opposing the Defendants' motion, the Plaintiff contended that although the Defendants are entitled to a medical assessment, a psychiatrist other than Dr. Reznek should conduct the assessment due to his bias and lack of professional competence. In the alternative, if Dr. Reznek conducted the medical assessment, it should be videotaped or audiotaped.

The Plaintiff provided affidavit evidence from the Plaintiff's lawyer, Guy Farrell, who believed that Dr. Reznek is biased based on his own personal beliefs and past experiences when "at least three"of his clients were examined by him. In particular, Mr. Farrell took issue with Dr. Reznek's methodology in conducting the examination, which allegedly involved improper evaluation of the DSM criteria.

What is interesting in this decision is that Dr. Reznek provided his own affidavit in response to this motion. In his affidavit Dr. Reznek emphasized that he does not view himself as an advocate for any party and views his responsibilities as owing to the court. He further noted that he does not tailor his medical conclusions to align with the interests of insurance companies and uses the same set of criteria for assessment no matter the source of the retainer. On cross-examination Dr. Reznek expressed reservations about assessments being videotaped and stated that the video camera introduces a third person.

In the end Master Glustein granted the Defendants' motion and concluded that the Plaintiff led no substantial or compelling evidence that the medical assessment should be videotaped or audiotaped. More importantly, Master Glustein added that it would be unfair to the Defendants to have the assessment videotaped or audiotaped when the Plaintiff's psychiatrist expert was not subject to videotaping or audiotaping. He stated that at a minimum substantial and compelling reasons are required before the motions court can exclude a health practitioner from conducting a defence medical assessment.

In his analysis, Master Glustein referred to the Ontario Court of Appeal decision, *Adams v. Cook,* 2010 ONCA 293, where the Court noted that a Defendant's medical assessor has the right to conduct the assessment in a manner in which "in the judgment of the doctor, best facilitates the examination." The Court of Appeal in *Adams* also followed the principle that recording defence medical assessments should not be routine and that experts must be independent and objective with the role of assisting the court and not the parties. In that regard, Master Glustein noted that a Plaintiff must show "substantial

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"Apparently, a democracy is a place where numerous elections are held at great cost without issues and with interchangeable candidates"
~ Gore Vidal

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and compelling reasons" to obtain a court order for recording the defence medical examination.

Master Glustein also rejected the Plaintiff's proposition that courts should consider challenges by a Plaintiff to a Defendant's chosen health practitioner in light of past judicial decisions, affidavit evidence, and cross examination for both determining objectivity and competence of the health practitioner. He also rejected the notion that the courts make a determination of competence based on a Plaintiff's lawyer's assessment of an expert's methodology. He noted that such issues are best dealt with at trial.

Overall, this decision sets out the threshold for the Plaintiff to meet in order to exclude a health practitioner from conducting a defence medical examination and in order to compel video/audio recording of it. It will be interesting to see the court's treatment of Dr. Reznek's detailed Affidavit evidence and subsequent cross examination in future cases and whether such evidence will be considered a breach of the implied undertaking rule.

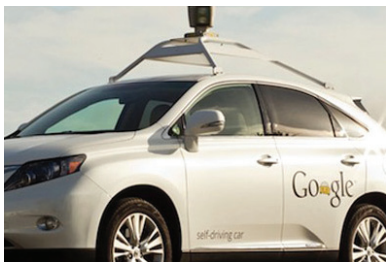
Lida Moazzam articled at Dutton Brock and joined the firm as an associate in 2014. She is developing a broad litigation practice.

More Transit Issues: Who's Driving this Bus?

On May 28, 2014, Google introduced a prototype of its new driverless car. Differentiating this from the traditional vehicle is a lack of both a steering wheel and pedals. Google's robotic cars use a combination of lasers, cameras and sensors in an effort to scan their environment. This allows vehicles to effectively drive and react to traditional obstacles: stop signs, other vehicles, and pedestrians.

The plan for robot domination is in the works with automobile manufacturers entering the race in an effort to develop their own autonomous vehicles. Additionally, the American states of Nevada, Florida, California and Michigan have all passed laws permitting the use of autonomous cars. The UK government has announced that it will allow driverless cars on public roads in January 2015.

The rise of autonomous vehicles has been a popular topic in various news broadcasts recently. All signs point towards a future without human drivers. Hundreds of thousands of Canadians are injured and killed every year in car accidents due to human error. Proponents of driverless vehicles suggest that the accident rate will reduce substantially once human error is taken out of the equation.



The driverless car may have a downside, however, as a number of industries will be impacted if drivers become obsolete. The insurance industry will see far less claims, medical clinics far less patients, and personal injury lawyers, far less files.

Before driverless vehicles hit the road, however, experts in motor vehicle legislation and insurance will need to come together in an effort to properly legalize and regulate this technology. Autonomous cars will inevitably create an unforeseen shift in motor vehicle legislation.

Current legislation, such as the *Highway Traffic Act,* revolves around the actions and omissions of people. New legislation will have to account for technological error. If implemented, motor vehicle legislation may shift away from regulating speed limits and careless driving, towards a focus on vehicle maintenance and repair, and implementing technological standards.

For the time being the American states that have legalized the use of autonomous cars require that a human driver be present in the vehicle. The Ontario Ministry of Transportation's proposed plan has recommended the same requirement.

The transition period (from driver to driverless vehicles) will pose difficulties as well, and will certainly be difficult to legislate. Autonomous cars are programmed to abide by the rules of the road and speed limits. Will they impede the flow of traffic, causing further congestion and accidents before eliminating both issues altogether? If so, governments may have to mandate that all citizens use driverless vehicles in certain areas, and with Google vehicles containing approximately $150,000 in equipment, such goals may be unrealistic.

Interesting liability issues will also arise. Though collisions may occur with far less frequency, if they do occur, who will be the responsible party? Will it be the manufacturer of the technology or the owner of the vehicle? Even more obscure, will it be the autonomous "robot" that controls the vehicle or the human think tank behind the ideas? It is conceivable that countless future motor vehicle lawsuits will be *Smith v. Google, or Smith v. Robotic Vehicle #1323?*

Though driverless cars are indeed the future, it is clear that autonomous vehicles will complicate motor vehicle legislation and insurance before making things simpler.

Joanna Reznick articled with Dutton Brock and joined the firm as an associate in 2013. Joanna does not fear for a future ruled by robots over mankind.

New Rules May Impact On Who Wins

The *Rules of the Small Claims Court* were amended on July 1, 2014 to give additional power to the Court. The Small Claims Court is a branch of the Superior Court where claims

under $25,000 can be commenced. This Court has its own process and its own set of Rules. There are no juries, no examinations for discovery, and a claim can proceed to trial fairly quickly, often within a year. Costs are limited to 15% of the amount claimed by the Plaintiff which means that costs are often under $3,750 (15% of $25,000).

The Small Claims Court is a great forum for litigants who cannot afford a lawyer or a paralegal. The Rules are simple and the process is easy to follow. It is nicknamed "the people's court" and it plays an important role in giving Ontarians access to justice.

Unfortunately, the Small Claims Court is also a preferred forum for vexatious, self-represented litigants. The court is a low-risk, high-reward forum for vexatious litigants because costs awarded to the winning party are relatively inconsequential.

The recent amendments give the Court powers to dismiss, on its own initiative, frivolous and vexatious claims. Under Rule 12.02(3), the Court can now dismiss an action if it is "inflammatory", "a waste of time", "a nuisance" or "an abuse of the court's process". This is a great asset to defendants and their insurers that have grown frustrated with the increase costs in defending frivolous claims.

The new Rules permit a clerk at the Court to send a notice by mail to the Plaintiff when it considers dismissing a claim pursuant to Rule 12.02(3). The Plaintiff will have 20 days after receiving this notice to file written submissions to the Court. If a Plaintiff files written submissions, a Defendant will have 10 days to make written responding submissions. Presumably, the Plaintiff will have to prove that his or her claim has merit.

The new Rules indicate that any party to the action may file with the clerk a written request for an order under this new rule. Accordingly, defence counsel should write to the Court as soon as they are retained to defend a vexatious claim. Counsel should make reference to the new Rules and give a brief explanation as to why the Court should send a notice to the Plaintiff under Rule 12.03(3). If the court fails to dismiss a frivolous claim at the Pleadings stage, defence counsel should consider raising the same argument at a Settlement Conference.

It is anticipated that if the Court will often be unwilling to take away a claimant's day in court; but the new rule could be extremely beneficial to the defence. Access to justice appears to be preserved by giving a Plaintiff a chance to make written submissions before having his or her claim dismissed. The new Rules will need to be monitored going forward to determine how often they are invoked by the Court in the coming months and years.

Alexandre Proulx is an Associate in Dutton Brock's tort group, specializing in defence work. He articled at the firm before being called to the Bar in 2010.

Resolving Agreements When the Parties Agree to Disagree

In May the Supreme Court of Canada released the decision of *Union Carbide Canada Inc. v. Bombardier Inc.* (2014 SCC 35), which discussed the common law exception to settlement privilege that applies where a party seeks to prove the existence or scope of a settlement. The appellants and respondents had been involved in ongoing litigation over defective gas tanks used on Sea-Doo personal watercraft. They participated in a private mediation and signed a standard mediation agreement that contained a confidentiality clause. Counsel for Dow Chemical submitted a settlement offer at the mediation, which was kept open for 30 days. Counsel for Bombardier accepted this offer a couple of weeks later, and before the expiry date.

Two days after the acceptance, counsel for Dow Chemical advised that his client considered this to be a global settlement amount and that the release ought to absolve Dow of liability in any future litigation, not only in Quebec but anywhere else in the world. Counsel for Bombardier indicated that the accepted offer concerned the Montreal litigation only.

The two parties could not agree on the scope of the release to be signed, and when Dow refused to forward the settlement amount, Bombardier filed a motion for homologation of the transaction. Dow then brought

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a motion to strike out certain allegations in the motion for homologation on the grounds that they referred to events during the mediation in violation of the mediation agreement. Dow's motion was granted in part by the Quebec Superior court but this ruling was successfully appealed at the Quebec Court of Appeal. The subsequent appeal to the Supreme Court was dismissed.

Settlement privilege is a common law rule that protects communications exchanged by parties as they try to settle a dispute. The purpose of this doctrine is to promote honest and frank discussions between parties in order to encourage settlement. The Court confirmed that settlement privilege applies even in the absence of statutory provisions or contract clauses with respect to confidentiality. An exception to settlement privilege arises when the disclosure of a communication that led to a settlement is necessary to prove the existence or the scope of the settlement.

In addition to the common law rule of settlement privilege parties may also tailor confidentiality requirements by way of entering into a contractual agreement. The Court, however, rejected the presumption that an absolute confidentiality clause in a mediation agreement automatically displaces settlement privilege, and more specifically, automatically displaces the exception to that privilege that exists at common law. For example, it cannot be argued that parties who agree to confidentiality in respect of a mediation session thereby deprive themselves of the application of settlement privilege after the conclusion of the mediation session.

It was found that a court may, after balancing competing interests, refuse to enforce a broad confidentiality agreement if it is not "watertight". The Court did leave the door open to the possibility of a mediation agreement depriving the

parties of the ability to produce evidence of communications made in the mediation context if a court finds that this was the intended effect of the agreement and that its terms were clear. It was found that it was still open to parties to go so far as to limit their ability to prove the terms of any settlement so long as this is their clear intent.

In light of this decision, it is apparent that express language will be required in a mediation agreement in order for a court to set aside the common law exception to settlement privilege regarding proving the scope of a settlement. The confidentiality clause at issue in this case seemed quite clear on its face, and yet it was still not watertight enough for the Court to uphold it. As such, the consideration, and even discussion between counsel, of a seemingly inconsequential standard mediation agreement may ultimately be quite important in the event that a sensitive settlement falls apart.

George M. Nathanael joined Dutton Brock in October of 2013. George practices insurance defence litigation with a focus on first party accident benefit disputes.

WEB-CONTEST

Last issue's trivia contest was apparently the most difficult one to date. Only Jennifer Massie correctly answered on the first guess without any assistance by yours truly, by naming Tim Roth as portraying Mr. Orange in Reservoir Dogs and Gary Oldman as Sirius Black in the Harry Potter movies.

This issue's trivia question is based on our newsletter mayoral election theme. We call it, "Who Said Dat?" All you need to do is advise which mayoral candidate said what quote.

1."That is very disconcerting, very alarming, and should be a wake-up call to all of us."
2."It's hard to hide 300 pounds of fun."
3."You'd think there was a sighting of Elvis Presley."
4."This government wants to give with one hand and take away with the other."
5."In politics you're like a toilet seat. You're up one day, you're down the next."
6."As long as I can remember, since I've been a little boy, we always used to go up north to our cottage and I'm carrying on the tradition that my father had."

Email your answers to dlauder@duttonbrock.com. Do NOT email answers by hitting reply to this email address, as it will get lost in spam-limbo.

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