Time to allow routine recording of defence medicals

Social Justice

By Alan Shanoff

The Rules of Civil Procedure are to be "liberally construed to secure the just, most expeditious, and least expensive determination of every civil proceeding on its merits."

Yet, in a 3-2 decision in *Adams v. Cook*, the Ontario Court of Appeal ruled against the routine recording of defence medical examinations (also known as independent medical examinations) and sanctioned the continued practice whereby a plaintiff must establish "something about the facts of a specific case that suggests to the court that an examination should be recorded."

So instead of routine recordings, we must continue with expensive motions in which plaintiffs attempt to meet an elusive standard. Why? Because it's always been that way? Because we should wait for the civil rules committee to study the issue? Well, times have changed, and it's time the courts recognized the need for routine recording of defence medicals.

The chief reason for a defence medical is the pursuit of evidence to establish an exaggeration of injuries, malingering or outright fraud. The defence medical is thus part of the adversarial process and an integral part of the discovery phase of a lawsuit.

So why don't we record them? At trial and in their reports, experts are allowed to express their opinions. The opinions must be based on facts. The facts come from a number of sources, including statements made during the defence medical. So why would we want any process in which the facts underlying an opinion could be in dispute? Do we really want to encourage a situation where the defence expert and plaintiff argue about what was said during an examination? But isn't this exactly what we invite when we don't allow the defence medical to be recorded?

The board of directors of the Canadian Society of Medical Evaluators objects to the routine recording of defence medicals. Recently, it stated its position "that the use of electronic recording is generally undesirable and unnecessary and creates a significant potential to invalidate the evaluation process." No reasons are given to support the conclusion that the mere existence of an inexpensive tiny electronic recording device would invalidate or adversely impact a defence medical. The society also says there are "no identified medical indications to record" defence medicals. Of course, there are no medical indications in such cases. The physician conducting the medical isn't treating the plaintiff. The plaintiff isn't attending the defence medical for therapeutic reasons. But there are legal indications to support recording it.

Others argue the very fact an examination is being taped will affect the integrity of the process. If so, I suppose we should stop taping proceedings before the Supreme Court of Canada. Isn't it obvious that recording an event enhances evidence of the event and has little impact on its integrity? Isn't that why we now require police interviews with suspects to be taped? In the electronic world in which we live, taping is fast becoming the norm of daily life.

I understand some doctors will refuse to participate in a defence medical if taping is required. Good. Get rid of those doctors. They shouldn't be conducting defence medicals in the first place. They clearly don't understand the role of an expert in our adversarial litigation system.

The Trial Lawyers Association of British Columbia has recently issued a recommendation that defence medicals be routinely taped. It points out that the recording of the medical "enhances the court's access to the truth." It states, correctly, that "with respect to parties or witnesses, however, whether lay or expert, the dynamics of an adversarial system introduces pressures that leave the door open to conscious or even subconscious polarization. It is naive to assume . . . that a medical expert who generates significant income from providing [medicals] for a particular 'interest group' is completely immune to these pressures, whether they are acted on or not." Surely, this should be obvious to any reader of the Goudge or Osborne reports.

The affidavit in support of the plaintiff's position in *Adams* gave four specific examples of systemic bias among health practitioners who conduct defence medicals. So if we want "to secure the just, most expeditious, and least expensive determination" of personal injury actions on their merits, it's time to allow the routine recording of defence medicals. LT

Alan Shanoff was counsel to Sun Media Corp. for 16 years. He currently is a freelance writer for Sun Media and teaches media law at Humber College. His e-mail address is ashanoff@gmail.com.