Inquiring minds: insurance lawyers and their requests to talk with physicians

In personal injury cases, where the medical condition of the plaintiff is in question, information from the plaintiff's treating medical practitioners is of key importance. As a general rule, neither party in a lawsuit "owns" a witness. The lawyers for both parties are free to contact any witnesses that they anticipate will be called by the opposing side.

Pretrial interviewing of medical witnesses presents challenges that normally do not apply to other witnesses. In general, these challenges stem from the ethical duties owed by a physician to their patient through doctor-patient confidentiality, and the parallel ethical duties imposed on lawyers who approach an opponent's medical witness by the Law Society's Rules of Professional Conduct. The Canadian Medical Association's Code of Ethics requires a physician to protect the personal health information of their patients. A physician may release the personal health information to third parties with the patient's consent, or "as provided for by law." The Law Society's Rules of Professional Conduct make provisions for situations where a lawyer contacts an opponent's expert witness.

The defence lawyer will typically seek to interview the plaintiff's treating physician after having received full disclosure of all relevant clinical notes and records of that physician, and the parties have exchanged the reports of their respective medical experts. The decision of *Swirski v. Hachey,* a 1995 decision of Mr Justice Wilkinson of the Supreme Court of British Columbia, is the case that sets out the process by which a lawyer may conduct this sort of interview.

The defendant's lawyer must give notice to the plaintiff's lawyer of the intent to contact the plaintiff's treating physician. If the plaintiff objects to this meeting, the plaintiff's lawyer can bring an application to the court to stop the meeting. The only basis upon which the court will restrict the ability of the defence to discuss medical issues with the plaintiff's physicians is the risk of inadvertent release of irrelevant information, which would still be covered by doctor-patient confidentiality.

There are many reasons why a defence lawyer may wish to contact the plaintiff's treating doctors. In some cases, a medical-legal opinion may suggest that a particular medical condition could arise in the future as a result of a person's injuries, but not specify the relative likelihood that the plaintiff would actually suffer from the condition. In other cases, the defence lawyer may wish to discuss a pre-existing medical condition and its potential future effects on the plaintiff. Another possibility is that a defence lawyer would like to clarify information with the expert as a part of the trial preparation.

There is no requirement that the plaintiff's lawyer be present when the defence lawyer interviews one of the plaintiff's physicians. Often, interviews will be conducted over the telephone or as a brief scheduled visit to the physician's office. It is, however, not uncommon for the lawyers to agree between themselves that both be present for interviews with the plaintiff's physicians.

When the defence lawyer speaks with the plaintiff's physician, he or she cannot ask questions relating to matters protected by legal professional privilege, unless that privilege has been otherwise waived. This privilege covers matters relating to communication between the plaintiff and his or her lawyer, and any legal advice the plaintiff may have received.

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There is no obligation on the physician to cooperate with the defence lawyer and submit to an interview. However, a refusal may have inconvenient consequences. If the resistant physician is an important witness, the defence lawyer may decide to bring an application under Rule 28 of the Supreme Court Rules. This rule allows the court to order witnesses to attend a formal pretrial examination under oath, and they may still be required to testify at the trial.

By providing information on the process, ICBC hopes that physicians can be more at ease when dealing with interview requests from the defendant's lawyer.

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