Treating Healthcare Practitioners: Off-Limits to Defence Counsel

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The Ontario Superior Court of Justice ("ONSC") indicated in *Roy v. Primmum Insurance Company*[1] that defence counsel are not permitted to communicate with a plaintiff's treating healthcare practitioners, without the plaintiff's consent, even if the healthcare practitioners were retained by the insurer to perform assessments. This includes preparing treating healthcare practitioners for trial.

Facts

In *Roy*, the plaintiff was seriously injured in a motorcycle accident in 2004. He received statutory accident benefits through Primmum. In 2010, the plaintiff applied for a determination that he was catastrophically impaired ("CAT"), which was denied by Primmum.

In 2014, Primmum conceded that the plaintiff was, in fact, catastrophically impaired and paid retroactive CAT benefits (i.e. attendant care, housekeeping and home maintenance benefits) from 2010 onwards.

The plaintiff takes the position that he is entitled to retroactive CAT benefits from 2004, when the accident occurred. This is the issue to be adjudicated at trial.

Primmum intended to rely on the reports prepared by three occupational therapists that had previously treated the plaintiff in support of their position that the plaintiff was not entitled to additional CAT benefits prior to 2010.

While the three occupational therapists were treating the plaintiff, each prepared reports pursuant to s.42 of the *Statutory Accident Benefits Schedule* at the request of Primmum. The contents of these reports differed from the retroactive Form 1 assessment that the plaintiff intended to reply upon at trial. Accordingly, Primmum intended to call the three occupational therapists to testify at trial.

On the eve of trial, Primmum advised that it wished to speak the three occupational therapists in order to prepare them to testify. Plaintiff's counsel opposed this request on the basis that the three witnesses were the plaintiff's treating occupational therapists and consent had not been given for defence counsel to communicate with them.

Issue

Is defence counsel entitled to speak to the plaintiff's treating occupational therapists?

Analysis

Ontario courts have long recognized that special rules apply when counsel for one party seeks to interview a physician who treated another party.

The court in *Roy* cited *Burgess (Litigation guardian of) v. Wu*[2] wherein Justice Ferguson identified the rules concerning access to confidential medical information outside the courtroom, as follows:

(1) Unless the patient consents, counsel for another party may not have any communication at all with the patient's health care professionals concerning the patient. A plaintiff's health care professionals have a corresponding duty to refuse to disclose the information about their patient unless required to do so by law.

(2) In the absence of consent, access to confidential medical information before trial can be obtained in only two ways: (a) by obtaining pre-trial discovery pursuant to the rules of the court, notably rule 31.10, or (b) by seeking a special disclosure order from a judge exercising inherent jurisdiction.

(3) Even where access is permitted, the person under a duty of confidentiality cannot be asked for opinions beyond those formed during treatment of the patient unless this is specifically consented to or ordered.

Primmum advanced two arguments in support of its position that defence counsel should be free to communicate with the occupational therapists.

(1) <u>The duty of confidentiality does not apply</u>

Primmum argued that the principles enunciated in *Burgess* do not apply as the three occupational therapists had been previously retained to conduct s.42 assessments of the plaintiff on behalf of Primmum.

Further, Primmum argued that in discussing their testimony, the occupational therapists would not be disclosing any information that the plaintiff had not already consented to disclosing via his participation in the s.42 assessments.

The court rejected this argument. The court stated that Primmum's decision to retain treating occupational therapists as s.42 assessors cannot and does not imply that the patient (i.e. plaintiff) loses the protection that the law otherwise extends with respect to the relationship between patients and health care professionals.

Further, the court found that the plaintiff did not waive his right to confidentiality with respect to the information that was obtained by the occupational therapists through the s.42 assessments, by the plaintiff's participation in same.

(2) The plaintiff consented to disclosure

Primmum argued that the plaintiff agreed to disclosure of information by the occupational therapists by way of written consent.

The court found that the written consent only applied to two of the three occupational therapists at issues and further, the consents did not permit Primmum to obtain information from the two occupational therapists to which they applied beyond the scope of the contents of the s.42 assessment reports they prepared.

Further still, the court found that the authorizations were only in effect for twelve months from the date of signature such that they could not be used by Primmum for the current disclosure that was sought, 14 years after the fact.

Determination

The court found that Primmum was not seeking further discovery, but rather sought to engage in off the record discussions with the plaintiff's treating occupational therapists.

Had the occupational therapists in question not had a prior relationship with the plaintiff, there would be no issue with defence counsel wanting to prepare the witnesses for cross-examination, refresh their memory and to gain a better understanding of how the witnesses would present to the trier of fact.

The court held that even though defence counsel may maintain that no confidential information is to be sought by the treating physicians, the confidentiality of the relationship between patient and physician must be respected.

Further, the court held that the defendant's desire to ensure that their witnesses will say that they expect, or want, them to say, is not a justification to allow defence counsel to speak with the plaintiff's treating physicians.

Accordingly, the defendant's motion was dismissed.

Take-aways

- Defence counsel may not speak with a physician (or medical/rehabilitation professional) that currently or previously treated the plaintiff, even when defence counsel intends to call the treating physician as a witness for the defence

- Primmum argued that that its decision to retain treating occupational therapists to perform s.42 assessments should be applauded, because they had much better insight into the plaintiff's condition than an independent expert would. In theory this makes perfect sense. However, it is now clear that such a move by an insurer will likely cause issues in being able to appropriately prepare the practitioners to testify.

- Consent by a plaintiff for disclosure of medical information in compliance with the *Personal Information Protection and Electronic Documents Act,* S.C. 2000, c.5 may be given a very narrow reading by a court if the defendant intends to rely on the consent to speak directly with the medical professionals to which the consents apply.

[1] 2019 ONSC 6361.
[2] 2003 CanLII 6385 (ON SC).