Focus PERSONAL INJURY

Onus on the defence to justify further discovery

Dale Orlando
Alison Burrison

KYCSTUDIO / ISTOCKPHOTO.COM

The rules make it clear that examination for discovery of a party is a one-time event. A party that wants to conduct a further examination must seek leave of the court and that leave should be rarely granted. Despite this clear direction, it is common practice in personal injury actions for counsel for defence to simply schedule a further discovery of the plaintiff, often without even seeking consent of plaintiff counsel as though a further discovery was an entitlement. There may be strategic reasons for plaintiff's counsel to agree to a further examination, but typically, a second kick at the can by defence counsel is unlikely to improve the case from the plaintiff's perspective and could have very adverse effects.

The motivation for the request for a second exam may be that the file has changed hands or the lawyer doing the trial realizes that the person that conducted the discovery left some gaps in the evidence. Perhaps defence counsel has obtained surveillance evidence and wants an opportunity to impugn the plaintiff's credibility. The most common stated reasons are to get an update on how the plaintiff is doing since the last discovery or to ask questions regarding facts, opinions and conclusions in expert reports served since the first discovery. Whatever the motivation, the law is clear that a party may not be re-examined for discovery unless circumstances have fundamentally changed since the initial examination.

In the case of *Suchan v. Casella* [2006] O.J. No. 2467, the defendants argued that the plaintiff's brain injury symptoms had deteriorated so significantly since her first discovery that a further examination was required before trial. Master Ronald Dash reviewed the records and the expert reports produced and denied the defendant's request, stating that "exceptional circumstances such as a substantial deterioration in the plaintiff's condition are necessary before the court will allow a further examination of a plaintiff for the purpose of updating the plaintiff's condition. If this were not the case, the court would be sanctioning a practice of allowing counsel to fully examine an adverse party in the normal course, sit back and wait to see how 'things turn out' and then update their evidence as the trial date approaches." In his reasons, Master Dash found that the symptoms described in pre-discovery medical reports were substantially the same as those noted in post-discovery medical reports. The expert reports simply provided a more definitive diagnosis and perhaps, a grimmer prognosis than the defendants expected.

Likewise, in the Sept. 15 ruling in *Gauze v. Toronto Hydro Corporation et al*, Master Ronna Brott reaffirmed the high onus that must be met by the defendant before a second examination for discovery of an injured plaintiff is granted. In *Gauze*, the defendant alleged that productions from answers to undertakings, the service of expert reports and a change in the plaintiff's job position was enough to meet the onus for an order granting leave to examine the plaintiff for a second time. In refusing the defendant's request, Master Brott concluded: "In my view, no symptoms or injuries referred to in the reports delivered after the Plaintiff was examined for discovery are substantially different from what was disclosed to the Defendant, Industrial, prior to the Plaintiff's examination... Rather, like in *Suchan*, the Plaintiff has received a more definitive diagnosis and prognosis of his condition. The appropriate next step for Industrial may be a defense medical examination to have its expert answer 'why' the condition has allegedly worsened."

Leave may be granted in circumstances where the plaintiff has refused to answer proper questions posed at the initial discovery. In these circumstances, the court will order a re-attendance to answer the questions improperly refused and questions arising from those answers; however, the plaintiff will not be required to answer new questions about issues that the defendant had the opportunity to examine on at the first discovery.

Leave may also be granted for a narrow-scope examination where a combination of the transcript from the original discovery and documents produced by way of answers to undertakings require clarification on the part of the plaintiff to render the information understandable and useful at trial (See: *Senechal v. Muskoka (Municipality)* [2005] O.J. No. 1406). Even if clarification is required, the court has discretion to order answers in writing, or to decline to order further examination where it appears the cost or the onerous nature of what is proposed outweighs the possible benefit. The onus rests on the defendant to establish the need for clarification by specifically setting out the information provided by way of undertaking and the corresponding areas of inquiry.

Dale Orlando is a founding partner in McLeish Orlando and past president of the Ontario Trial Lawyers Association. Alison Burrison is a partner in McLeish Orlando. Both practise exclusively in the area of plaintiff's personal injury litigation.