



# OBA Submission On Audio or Video Recording of A Defence Medical

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# Table of Contents

Introduction .....	2
If such an order is made on a more or less routine basis, should the court order that subsequent medical examinations by expert doctors, retained by the plaintiff, be subject to the same requirement? .....	2
What else can be done to “level the playing field” for the defendant with respect to medical examination conducted by plaintiff’s experts? .....	3
What about unrecorded medical examinations that have been done by the plaintiffs’ experts prior to the defence seeking an order for a medical? The concern here is that routine recording of the defence medical will give the plaintiff an unfair tactical advantage. ....	4
What obstacles, if any, are there in the conduct of an effective medical examination if all examinations are routinely recorded? Is it possible to generalize or are we driven back to the position of Doherty J.A. that what is involved is a case specific analysis? .....	4
Why did the Honourable Coulter Osborne not make a recommendation that defence medicals be routinely recorded? .....	5
Will the reforms related to expert witnesses recommended by Coulter Osborne and implemented by amendments to the Rules of Civil Procedure be sufficient to deal with the perceived problems concerning defence medical experts? .....	6
How can the views of the medical profession be comprehensively canvassed together with the views of The Advocates’ Society, the Ontario Trial Lawyers Association, the American College of Trial Lawyers, the Canadian Medical Protective Association, the Medico-Legal Society, and other interested organizations? .....	6
Working Group Members .....	7

## Introduction

The Ontario Bar Association (OBA) is pleased to provide comment as requested in your letter of May 10, 2010 in relation to the issue of audio or video recording of defence medical examinations.

The OBA working group consulted within the Insurance Law and Civil Litigation Sections and circulated the responses through our 35 practice sections for additional feedback. The responses, which address the questions contained in your letter, provide the Civil Rules Committee with a reasoned and balanced commentary on this issue.

Thank you for the opportunity to provide input to the Civil Rules Committee.

### **If such an order is made on a more or less routine basis, should the court order that subsequent medical examinations by expert doctors, retained by the plaintiff, be subject to the same requirement?**

#### *Such orders should not be made on a routine basis*

Orders ought not to be made on a routine basis without evidential foundation establishing they are necessary. The purpose for making such an order ought to be based on a bona fide concern as outlined in the *Bellamy* decision and the jurisprudence that has developed supporting the need for such. The test is based on whether there is a bona fide concern as to the reliability of the doctor's or plaintiff's account of any statements made during the examination. Orders have been restricted to cases where the cognitively impaired plaintiff is unable to communicate with counsel on what has transpired during the examination or where bias on the part of the examiner has been established. The latter orders are extremely rare and are only made where compelling evidence shows the expert to have known bias. These experts are precluded from giving evidence in any event under the new *Rules of Civil Procedure*. Therefore the real issue is whether we should be protecting the cognitively disabled.

It is only in very limited circumstances that the courts have allowed such recordings in order to protect the rights of those with compromised cognitive abilities. This of course is not unusual since the *Rules of Civil Procedure* (which dictates how litigation in the province of Ontario is to be conducted) has always afforded special rules to be employed to protect individuals with disabilities.

Unlike various jurisdictions in the United States, where an individual has the right to have the Defence Medical Examination (DME) taped, Ontario has adopted a restrictive approach that places the onus on the plaintiff to establish that the recording is necessary. This ought to be maintained.

*Such orders should also apply to plaintiff's experts in order to achieve procedural fairness*

These orders are not made to give a tactical advantage to the plaintiff. They are made to protect those suffering from specific disabilities that impact their ability to communicate. Unlike defence medical examinations, a plaintiff is not compelled to be examined by their own doctors in order to move forward with the litigation. The plaintiff's experts may be treating doctors and the relationship is not just legal but therapeutic as well. A plaintiff with cognitive impairments may agree to have a third party [parent or friend] attend their own medical examinations to communicate what has transpired during the examination and relay that information to counsel. Defence examinations generally do not allow this to take place.

If, however, video taping is done on a "routine basis", then there must be a means to achieve procedural fairness. That would include a term requiring plaintiff's expert examinations to be videotaped as well.

## **What else can be done to "level the playing field" for the defendant with respect to medical examination conducted by plaintiff's experts?**

*It is not a question of "leveling the playing field"*

Again, these orders should not be "routine" and ought to be ordered in limited cases. The *Rules of Civil Procedure* already establish when a defendant is entitled to conduct a defence medical examination. The Rules and jurisprudence also establish when, and by whom, these examinations can be conducted. It would be improper to look at these orders as a means of giving plaintiff counsel an added advantage. They are used very rarely and are to protect cognitively disabled plaintiffs. Part of the reason for these orders is because a plaintiff is unable to communicate what transpired during the examination due to their cognitive disability. Without these orders the plaintiff is placed in an unfair disadvantage within the litigation. To try and make further orders to allow the defendants to "level the playing field" would create an increased disadvantage to an already disadvantaged plaintiff.

*Using costs to "level the playing field"*

If, however, it is considered necessary to make these orders on a "routine basis", the playing field ought to be leveled. To simply have all defence medicals routinely recorded and not have the same apply to plaintiffs' experts would create an unfair tactical advantage to the plaintiff at trial. One way of leveling the playing field, in addition to requiring that the plaintiffs' experts record their examinations, would be in regards to costs. The playing field would be leveled if the costs are to be paid by the plaintiff and can only be ordered to be reimbursed by the trial judge. This will mean only plaintiffs with an absolute belief that it is necessary will seek the routine order.

### *Transition Rules*

If the recordings of medical assessments are to be routine, then during the transition, a rule should be made to permit production of the notes of any medical examinations which were already conducted and were not subject to video recording.

**What about unrecorded medical examinations that have been done by the plaintiffs' experts prior to the defence seeking an order for a medical? The concern here is that routine recording of the defence medical will give the plaintiff an unfair tactical advantage.**

### *Recording of defence medicals should not be routine*

As previously stated, there should not be routine recordings. They should be limited to the circumstances set out in the jurisprudence.

If, however, these orders are to be made on a routine basis and examinations have been conducted by the plaintiffs' experts and reports prepared with respect to the same (without taping), one solution to rectify any procedural unfairness would be to allow defence counsel to cross-examine the plaintiffs' expert(s) in advance of the trial to explore what happened and what was discussed during the assessment, including any witnesses to the assessment (such as a nurse).

In terms of cross-examining the plaintiffs' expert, a specific suggestion is to allow a provision for pre-trial discovery of the plaintiff's medical expert, for a fixed period of time, if it is fair and just in the circumstances to do so.

An additional or alternative suggestion is that the plaintiffs' medical experts (unrecorded) should make available their clinical notes and records.

**What obstacles, if any, are there in the conduct of an effective medical examination if all examinations are routinely recorded? Is it possible to generalize or are we driven back to the position of Doherty J.A. that what is involved is a case specific analysis?**

### *Recording of defence medicals should not be routine*

There should not be routine videotaping of medical examinations. Recording of medical examinations should be limited to the circumstances set out in the jurisprudence. Again, these orders are to protect those who suffer disabilities. Courts have always provided protection under the Rules to the disabled. This is only one additional mechanism to protect them. Each case ought to be determined on an individual basis.

### *Costs as an obstacle*

The real “obstacle” to routine videotaping is costs. Litigation costs are not consistent, especially regarding disbursements incurred for experts. This extra cost will ultimately be borne by the defendants (which is always the case - i.e. mediation costs) and the system itself.

### *The position of the Canadian Society of Medical Evaluators as an obstacle*

Routine videotaping will also impact on the number of medical professionals prepared to engage themselves in the court process. There may be reluctance by the medical profession to videotape medical examinations. In turn, this may result in inefficiency, delay, increased costs, and unfairness in the discovery process. A greater restriction in the number of medical practitioners willing to participate in medical assessments will lead to an increased reliance on a select few.

The Canadian Society of Medical Evaluators (hereinafter “CSME”) has put out a Statement of Electronic Recording of Independent Medical Examinations (hereinafter “IME”). It states:

“It is CSME’s position that the use of electronic recording is generally undesirable and unnecessary and creates a significant potential to invalidate the evaluation process.”

The CSME has also indicated in its statement: “However, given that there may be individual cases where an IME is recorded, CSME’s position is that any clinician who undertakes a recorded IME should have appropriate experience, training and/or expertise to do so.”

## **Why did the Honourable Coulter Osborne not make a recommendation that defence medicals be routinely recorded?**

### *The concern for excessive costs, delay and inefficiency*

It is likely due to the increased costs, delay and inefficiency that would be created within the system. Routine recordings will only give rise to increased costs, delayed proceedings, and fewer and fewer practitioners being prepared to cooperate in the legal system. This would be contrary to the overall recommendation that was made. Routine recordings would dramatically increase disbursements and trial costs.

### *The issue may be dealt with indirectly under the new rule 53.03 and rule 1.04(1.1.)*

Under the amended Rules, and specifically, rule 53.03 which governs experts, and rule 1.04(1.1) which deals with the overarching objective of proportionality, this issue may have been addressed indirectly.

## **Will the reforms related to expert witnesses recommended by Coulter Osborne and implemented by amendments to the Rules of Civil Procedure be sufficient to deal with the perceived problems concerning defence medical experts?**

It is believed that the reforms and amended Rules may be sufficient to deal with the perceived problems concerning defence medical experts.

However, while the reform restricting biased practitioners from giving evidence will restrict the need for video taping in those circumstances, there remains the need for orders that are sought to protect the cognitively disabled. The doctrine of proportionality will allow the court to set terms to ensure procedural fairness while reducing unnecessary costs.

## **How can the views of the medical profession be comprehensively canvassed together with the views of The Advocates' Society, the Ontario Trial Lawyers Association, the American College of Trial Lawyers, the Canadian Medical Protective Association, the Medico-Legal Society, and other interested organizations?**

Provided that these orders do not become routine and are restricted to the present jurisprudence, all medical examiners should understand that the flood gates are not open and it is limited to only rare occasions where a court will order the videotaping. The vast majority of daily defence medical and insurance assessments in Ontario take place without videotaping. Those who conduct such assessments only have to reflect on the number of times, during the course of their practice, that videotaping has been conducted. When a court requires videotaping in order to protect the cognitively impaired within the legal proceedings, the medical professionals ought to respect that decision and participate accordingly.

It is unnecessary to comprehensively canvass the views of the various organizations. This is not a pressing issue. Motions requesting these types of orders are very rare.

Doctors are professionals; they are assumed to conduct themselves with professionalism and in accordance with the medical profession's standard of ethical conduct. If there is a legitimate concern, in appropriate cases, the court is in the best position to make the order.

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