Case Name:

Elaiathamby v. Sivarajah

RE: Elaiathamby, and Sivarajah et al

[2013] O.J. No. 527

2013 ONSC 819

224 A.C.W.S. (3d) 591

18 C.C.L.I. (5th) 303

37 C.P.C. (7th) 403

2013 CarswellOnt 1302

Court File Nos. 08-CV-346661 and 09-CV-373238

Ontario Superior Court of Justice

Master J. Haberman

Heard: January 22, 2013.
Judgment: February 6, 2013.

(61 paras.)

Civil litigation -- Civil procedure -- Discovery -- Physical or psychological examination -- Availability -- Motion by defendants insurer for second defence medical examination of plaintiff allowed -- Plaintiff put his mental and physical health in issue in motor vehicle accident claim and submitted to examination by at least four experts -- Plaintiff's insurer, defendant in plaintiff's second action for damages for insurer's failure to pay benefits because of alleged fraud, not obliged to use same report -- Insurer entitled to its own defence medical -- Insurers not aligned in interests.

Insurance law -- By insured against insurer -- By third parties against insurer -- Defences -- Fraud -- Practice and procedure -- Discovery -- Motion by defendants insurer for second defence medical examination of plaintiff allowed -- Plaintiff put his mental and physical health in issue in motor vehicle accident claim and submitted to examination by at least four experts -- Plaintiff's insurer, defendant in plaintiff's second action for damages for insurer's failure to pay benefits because of alleged fraud, not obliged to use same report -- Insurer entitled to its own defence medical -- Insurers not aligned in interests.

Motion by Intact for a defence medical examination of Elaiathamby with a psychiatrist in his 2008 action. Elaiathamby moved for a declaration such an examination would also serve as a defence medical in a 2009 action. Intact, Sivarajah's insurer, had itself added to Elaiathamby's 2008 motor vehicle accident injury claim in March 2009, delivering a statement of defence in which it was alleged that Elaiathamby did not sustain those injuries he claimed and that Elaiathamby caused or contributed to his injuries by failing to wear a seat belt and to properly adjust his headrest. Elaiathamby put his physical and mental health in issue in the proceeding. He had been assessed by at least two psychologists, a psychiatrist and a physiatrist, and a number of expert reports indicated Elaiathamby suffered from psychological impairments. Elaiathamby was prepared to submit to a second defence medical examination on behalf of Intact and its insured, but only if this would preclude State Farm, Elaiathamby's insurer, from seeking its own defence medical in Elaiathamby's 2009 claim against State Farm in relation to the same motor vehicle accident. In that claim, Elaiathamby asserted he was entitled to payment of accident benefits from the time of the accident, and that State Farm had refused to make such payments, claiming the accident was part of a fraudulent scheme.

HELD: Motion by Intact allowed; motion by Elaiathamby dismissed. The insurers were adverse in interest. Intact would argue at least some of Elaiathamby's mental and physical problems could be attributed to State Farm's conduct in denying him benefits and asserting he had participated in a fraudulent scheme. State Farm would endeavour to have the court find any damages Elaiathamby sustained were caused wholly by his injuries from the accident with Intact's insured. Any defence medical State Farm sought in the 2009 action would be a first defence medical to which it was entitled as of right.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 105(4)

Human Rights Code, R.S.O. 1990, c. H.19,

Insurance Act, R.S.O. 1990, c. I.8,

Ontario Rules of Civil Procedure,

Counsel:

Nassar, C., for the statutory third party, Intact.

Katzman, M., for the plaintiff.

Baxter, M., for the defendant, State Farm.

REASONS

1 MASTER J. HABERMAN:-- On January 22, 2013 I heard two motions in these related actions and disposed of them as follows:

* the third party's motion for a defence medical examination with a psychiatrist (brought in the 2008 action) was granted; and
*

the plaintiff's motion in the 2009 action, seeking a declaration that the above examination in the 08 action would also serve as a defence medical examination for the defendant in this action was dismissed.

My Reasons for both follow.

The 2008 action: Tort action by the plaintiff in which Intact has added itself as a statutory third party

2 The plaintiff commenced this action by statement of claim issued on January 8, 2008. The claim is relatively straightforward and there is no dispute that the plaintiff put both his physical and mental health in issue in the pleading.

3 By order dated March 24, 2009, Intact, the defendant's insurer, had itself added as a statutory third party. Shortly thereafter, they delivered a statement of defence in which they denied that the plaintiff sustained the injuries as alleged and claiming that he caused or contributed to his injuries by failing to wear a seat belt or to properly adjust his head rest. Intact also denied that the plaintiff met the statutory threshold and they claimed that any damages he may be awarded for his non-pecuniary losses should be reduced by the statutory monetary deductibles prescribed by the provision of the *Insurance Act.*

4 The thrust of this action, from the plaintiff's perspective, is that the defendant, Intact's insured, is responsible for the accident and, hence, for paying any damages flowing from it. In view of the relationship between Intact and its insured, by adding itself as a third party to the action, Intact retains its ability to challenge coverage afforded to the defendant, while also effectively defending against the plaintiff's claim. Intact's interest at this time is therefore to minimize the nature and extent of the plaintiff's injuries and to assert that he is personally responsible for his injuries as a result of contributory negligence.

5 The evidence filed by Intact suggests that the plaintiff has been assessed by at least two psychologists, a psychiatrist and a physiatrist and a number of the reports prepared by these experts indicate that the plaintiff suffers from psychological impairments. Intact appended a report prepared by Dr. Kanagaratnam, a psychologist, dated May 26, 2011, which discusses some of the plaintiff's challenges.

6 Intact has already had a first defence medical examination. The plaintiff was seen previously by an orthopaedic surgeon on their behalf. As a result, the current request is for a second defence medical examination pursuant to s. 105(4) of the *Courts of Justice Act.*

7 In the normal course, there can be no doubt that Intact would be entitled to conduct this defence medical examination in view of the expert evidence tendered by the plaintiff thus far, a position with which the plaintiff agrees. They state in their factum:

> *I (Mr. Wilson, plaintiff's counsel) can advise this Honourable Court that the plaintiff is agreeable to attending at the Defence Medical Assessment with Dr. Jeffrey Wyndowe as per Intact's request, however the plaintiff has concerns that State Farm will see this as an opportunity to obtain a further Defence psychiatric examination to corroborate the opinions of Dr. Wyndowe arising from the assessment requested herein.*

8 Thus, although the plaintiff has agreed to attend this defence medical examination as requested, he is only prepared to do so in the event that State Farm is precluded from seeking a further psychiatric

examination.

9 During submissions, plaintiff's counsel softened their position somewhat, to indicate that if the situation changed and new information in this area came to light in the context of a new plaintiff's report, he would consider a request for a psychiatric examination by State Farm at that time, which could be dealt with by the court if required.

10 In this scenario, however, instead of being entitled, as of right, to have this examination conducted as a "first" defence medical examination as a result of the injuries pleaded, the onus would be on State Farm to prove their entitled to the examination as though it were a subsequent examination. In effect, the plaintiff seeks to have the psychiatric examination requested by Intact treated as a first defence medical examination for State Farm.

11 As a result of the plaintiff having taken this position, this motion was put over, at the plaintiff's request, from October 10, 2012 when it was first before me. The purpose of the adjournment was to give the plaintiff time to bring its own motion in the related action in order to ensure that any order made in this file would bind State Farm. Although State Farm was served with the materials that were before me for the October hearing date, as they are not a party to that action, their view was that I could not make an order biding them at that time. In that regard, they were correct.

The 2009 action: action against State Farm for tort and breach of contract damages

12 Though this action also involves allegations of negligence, the focus is very different from the 2008 action. This action is about the relationship of the plaintiff with State Farm, his own insurer, and what he considers to be their improper assessment of his entitlement to accident benefits under his policy of insurance. It is also about what he views as the exacerbation of his physical and mental health issues triggered by the accident by State farm's approach to this matter.

13 Here, the plaintiff claims are based on the assertion that that he was entitled to payment of accident benefits from the time of the accident, but that State Farm refused to make any payments, instead claiming that the accident was part of a fraudulent scheme.

14 The plaintiff claims punitive damages of $1 million. He alleges that his rights under the *Human Rights Code* were infringed and he seeks damages for mental anguish as a result of the humiliation and hurt feelings he experienced due to the position that State Farm has taken.

15 The plaintiff claims further that State Farm's approach has caused him *significant additional anxiety, stress, tension and an exacerbation of his disability.*

16 There is no claim for accident benefits, per se. Instead, the claim focuses on State Farm's failure to pay these benefits and how their position adversely affected the plaintiff's health and increased the health challenges caused by the accident.

The plaintiff's position and whether it is factually supportable

17 An order for trial together of these two actions was made in April 2012. I note that it is reflected only in the case history for the 2008 action as the motion was brought in that action only. It is this order that appears to be the root of the plaintiff's concerns, as all of the evidence with respect to both actions will be available to the trier of fact. The plaintiff suggests that, absent the order they seek, the two defendants will effectively "gang up on them", and meet each plaintiff report with two of their own.

18 The foundation for the plaintiff's position is their assertion that the two insurers have identical

interests. This position was softened somewhat in argument. Mr. Katzman conceded that their interests were not identical, but he pressed the point that those interests were not adverse to one another.

19 This position, however, conflicts with the evidence filed by the plaintiff on this motion. In his affidavit of October 4, 2012, submitted in the 2008 action, Mr. Wilson takes a strong stance and states as follows:

> *In respect of both actions, the interests of the third party in the 2008 action, Intact Insurance Company ("Intact"), are* ***completely aligned*** *with the interests of the defendant in the 2009 action State Farm Mutual Automobile Insurance Company ("State Farm").*

20 In the affidavit he submitted in the plaintiff's motion in the 2009 action, he has elevated this assertion, stating that:

> *The basis for the position taken by the plaintiff is that the interests of Intact in the 2008 action are* ***perfectly aligned*** *with the interests of State Farm in the 2009 action. In other words,* ***there is a complete absence of any adversity in the interests between the two parties in the context of the two actions.***

21 This statement leaves no room for doubt as regards the plaintiff's position on this motion. Mr. Wilson did not simply submit that there was an identity of interest between the two insurers -- he was prepared to put his position in a sworn affidavit.

22 There are actually two statements in the Wilson affidavits and each must be examined separately. Neither can simply be accepted by the court at face value, notwithstanding the fact that Mr. Wilson chose to include them in his sworn evidence.

23 Wilson first says that the interests of the two insurers are *completely* and *perfectly aligned*. In so far as each insurer takes issue with the plaintiff's assertion that he sustained injuries in an accident, it can be said that the interests of the two insurers are certainly aligned, but within a limited context. To the extent that each insurer wishes the court to find that this plaintiff did not sustain injuries from this event, their interests coincide. As a result, they are both adverse in interest to the plaintiff, so they have that in common.

24 That, however, does not mean that their interests are *perfectly* or *completely* aligned or that they are adverse in interest vis a vis one another. In order to ascertain if that is the case, one need go no further than the pleadings and the state of the record (see J.W. Morden and P.M. Perell, *The Law of Civil Procedure in Ontario*, (Toronto: LexisNexis, 2010)).

25 It is the plaintiff's own pleadings that brings the adversity between the parties into clear focus and pits these two parties against one another. By asserting that State Farm's actions have caused him to suffer **additional** anxiety, stress and tension, and by claiming that their actions have **exacerbated** his disability, the plaintiff set the foundation for finger pointing between the two insurers. This approach has put Intact in the position of having to seek medical opinions that will assist them in thrusting a larger share of the blame, and hence damages payable, over to State Farm. They will, no doubt, ask their experts to assess the extent to which the plaintiff's issues with State Farm are partly or largely responsible for his current mental and physical state.

26 Thus, while trying to establish that the plaintiff suffered no injuries or that the injuries flowing from the accident were minimal, Intact's position at trial will be that, to the extent that the plaintiff suffered

any damages, these should by viewed as having been entirely or largely caused by State Farm's handling of their file. Conversely, State Farm will endeavour to have the trier of fact find that any damages suffered by the plaintiff were caused wholly by the injuries he sustained in the accident.

27 This situation is compounded by the plaintiff's reliance on the *Human Rights Code* and his claim for punitive damages in the State Farm action. The trial judge or jury will ultimately have to determine if the plaintiff's current state is wholly, largely or marginally the result of the accident. The trier of fact will also have to consider how State Farm's handling of the plaintiff's accident benefits claim post-accident may have impacted on that state. In other words, if the plaintiff did sustain injuries in the accident that have left him with physical and psychological problems, how much of those problems are attributable to the alleged exacerbation of his symptoms which he claims were caused by State Farm? This is an issue that divides the two insurers and each should have the opportunity to marshal his own medical evidence to support their distinct position.

28 In *Menzies v.* McLeod, [1915] O.J. No. 128, Chancellor Boyd stated:

> *"Adverse interest" is a flexible term, meaning pecuniary interest, or any other substantial interest in the subject matter of the litigation.*

29 In that each insurer will surely want the trier of fact to find the other primarily responsible for the status quo, I conclude that the two insurers are "adverse in interest". They each have a very separate and distinct interest to promote in terms of the cause of the plaintiff's current physical and mental status, each likely to point the finger at the other as being the more causally connected to things as they now stand. The fact that they are each challenging the nature and existence of the plaintiff's injuries is only a part of the story - their relationship to one another cannot be ignored. As there will be a global assessment of damages at the end of the day, they will each want an opportunity to brief their own experts as to their theory of the case and where they want the expert to focus attention.

30 The plaintiff submits that because the insurers have aligned interest, they should effectively share medical experts. Mr. Wilson accuses State Farm of sitting in the weeds, waiting for Intact to conduct its defence medical examinations before it commits to a position.

31 In the affidavit supporting the plaintiff's position, Mr. Wilson goes on to say that he viewed State Farm's advice that their counsel had no instructions to conduct a defence medical examination at this time as *particularly problematic.* He continued as follows:

> *I can advice this Honourable Court that my practice has been virtually exclusively limited to motor vehicle accident litigation since 1994. I can further advise this Honourable Court that there is a tendency in this type of litigation for insurers to attempt to have the plaintiff submit to a multitude of defence medical examination, not because the same are necessary for the purposes of permitting the defendant to meet the case at trial, but rather to factually disadvantage the plaintiff at trial.*

32 I am well aware of Mr. Wilson's views in this regard as I have seen it expressed in the context of other motions, via affidavits submitted by his assistant, a wholly inappropriate candidate for qualification as an expert in this field. I find it equally inappropriate for counsel to put himself forward as an export witness in an area of the law, as Mr Wilson has done here, and convert what should be the subject of submissions into sworn evidence.

33 The court needs no expert assistance regarding the development of the law in the area of defence

medical examinations or the use of medical evidence in trials of this kind. My own involvement with this area of the law goes back to 1982, and personal injury work of one sort or another featured in my practice for many years. I have been on the Bench for more than 14 years and I can state unequivocally that at least 50% of this court's civil work stems from motor-vehicle accident related injuries. None of us on the Bench doing civil work is a stranger to this area of the law and, in view of my background, I can take judicial notice of the changes that have occurred in this area over the course of the last 30 years.

34 As a result, I, too, have observations in this area and they are markedly different from those of Mr. Wilson. What I have noticed is an increase in specialization among medical practitioners over time. By way of example, while orthopaedic medicine is a specialty, orthopaedic surgeons are more and more inclined to sub-specialize -- some deal primarily with backs, other with knees, some with only hands or feet.

35 Further, technological and medical advancements have led to new diagnostic techniques, equipment and therapies. As a result, plaintiffs with soft tissue issues may be seen for consultation, treatment or for medical-legal opinions by orthopaedic surgeons, neurologists, physiatrists, psychologists, psychiatrists and neuropsychologists. Then, there is always the family doctor and a dentist or ophthalmologist may be involved in some cases. Plaintiffs may be sent to some of these experts by their family doctors for treatment, but may also be sent for medical-legal opinions to different doctors practicing in the same areas at those already treating them.

36 As a result, a defendant may face a situation where, legally, he is entitled as of right to only one defence medical examination if a plaintiff puts his physical or mental health in issue, but, though facing a barrage of plaintiff's expert reports, he must to go to court, where he bears the onus of establishing his entitlement to each further defence medical examination.

37 Thus, while defendants may now be seeking a multitude of medical examinations as Mr. Wilson states, my observations suggest that this tends to occur in situations where the plaintiff has already provided a multitude of reports from a wide variety of medical experts. This is the result of the current state of medicine and of the law, which allows for each party to each put together his own case, which includes his own expert evidence.

38 As a result, I do not find Mr. Wilson's observations in this regard compelling or, for that matter, correct, particularly on these facts. This is not a case where a plaintiff is a passenger with injuries caused by a collision between two vehicles and the insurer of each wants a full set of defence medical examinations. It is also a case where a plaintiff is involved in a multi-vehicle collision and facing multiple insurers. There is no basis here for an argument to be made that the two insurers have identical interests.

39 The end product of the plaintiff's approach is that he wants an order that, while allowing Intact to have their psychiatric defence medical examination, declares that such examination serves as the psychiatric examination for both parties. As a result, any examination sought by State Farm down the road would not be a first defence medical examination, to which they would be entitled as of right. Instead, if State Farm decides later on that it needs its own reports at trial, it would be up to them to move before the court and they would bear the onus on such motion.

40 The fact that Mr. Wilson takes this potion now is of interest, as he imposed no such condition when agreeing to Intact's request for an orthopaedic defence medical examination. In his supporting affidavit, Mr. Wilson claims that he did not appreciate the interests of the two insurers were aligned when he agreed to this.

41 Mr. Wilson concludes by stating he believes what he proposes is fair.

The position of the two insurers in the two actions

42 Intact simply wants to conduct a defence psychiatric examination. It has clearly made its case for doing so, as the plaintiff concedes. As a result, they have made no submissions as to whether their examination should also stand as the examination on behalf of State Farm.

43 State Farm has filed a responding motion record, containing the affidavit of Andrew Harapa, an associate with the firm handling the file for them. Mr. Harapa was quite candid in discussing why State Farm has yet to request a medical examination. He states that the plaintiff has yet to produce supporting evidence for their claim that State Farm's denial of benefits caused the plaintiff additional anxiety, stress and tension, or that this exacerbated his disability. There, is therefore, no provable claim they feel they must refute at this time and no need for them to seek a defence medical examination.

44 Mr. Harapa goes on to say that if and when such evidence is produced, then State Farm will likely want the opportunity to conduct a defence medical examination of its own, likely of a psychiatric nature. However, if the plaintiff is willing to undertake now that he will not proceed with a psychiatric or other assessment dealing with his emotional health vis a vis State Farm, they are prepared to consider the plaintiff's proposed condition.

45 If no such undertaking is provided, Mr. Harapa states that he believes this request is premature as the plaintiff is yet to show his hand regarding the evidence he has in this action. No such undertaking was provided by the plaintiff. Presumably, if he plans to continue with this action against State Farm, further medical evidence to support the assertions pleaded regarding damages will have to be obtained.

The Law and conclusions

46 Although it is my view that Intact and State Farm are, indeed, adverse in interest, such that the plaintiff has no evidentiary leg to support his legal thesis, in view of how the plaintiff presented this case, I believe that it would beneficial to put his complete argument to rest at this time.

47 The plaintiff bases his case on what he says is the requirement that only parties adverse in interests are entitled to separate defence examinations. They take this from a series of cases which state that *every defendant, **adverse in interest** and separately represented, is entitled to his or her own defence medical examination unless multiple examinations would cause the plaintiff unnecessary inconvenience or embarrassment.*

48 There is no suggestion in this case, and certainly no evidence has been filed to allow the plaintiff to develop an argument that he fits within the proviso clause at the end (*unnecessary inconvenience or embarrassment)* so we are left with the basic principle as articulated by the cases.

49 The plaintiff has filed a series of cases where this line is simply tossed in, as obiter. In no case which he filed was the court required to grapple with whether the parties were adverse in interest or, indeed, whether they had to be.

50 Instead, where the courts have actually looked at this factor, they appear to have reached a different conclusion.

51 Beaudoin J. (Master, as he then was) dealt with the issue of two sets of defence medical emanations being sought by two different insurers in *Laforest v. Le Vouge et al.* [2004] O.J. No. 3570. That case also involved a plaintiff who had sustained injuries in a motor vehicle accident. There, the tort claim had

already been settled and the defence psychiatric examination was sought by the insurer in the accident benefits claim.

52 Before the tort action was settled, defence medical examinations were sought and obtained by the defence insurer in that action. Among them was a psychiatric assessment. There was no agreement that these would serve as the examinations for all defendants.

53 In that the tort action had already been settled in that case, it is difficult to see how the tortfeasor and the accident benefits insurer could be said to be adverse in interest at the time that the insurer made this request. In view of the settlement of the tort action, the tortfeasor's insurer were no longer going to be involved in the trial so any adversity of interest that may have existed was now gone.

54 Despite that Beaudoin J stated that each defendant was entitled to their own medical examination so the fact that the insurer of the tortfeasor had obtained a set was no impediment to the accident benefit insurer doing the same.

55 More recently, Perell J. dealt with this issue head on in *Moore v. Bertuzzi*, [2012] O.J. No. 4342, 2012 CarswellOnt 11371, where he stated:

> *In my opinion, where multiple defendants seek a medical examination, adversity between the defendants in a* ***sufficient but not a necessary condition*** *for authorizing a second medical examination.* ***The fundamental measure is not adversity but fairness*** *or due process, and adversity between co-defendants may justify that each defendant have its own defence medial but there be other circumstances where fairness requires multiple and independent defence medicals.* ***The critical issue is whether a second medical examination is required to ensure fairness in the adversarial process regardless of the adversarial orientation between the co-defendants.***

56 This passage lays to rest any suggestion that only defendants who are adverse in interests are entitled to independent defence medical examinations.

57 The plaintiff tried to rely on a decision from a Manitoba court and an Ontario case from 1978. Our Rules have been revamped repeatedly since that time and counsel was not able to show me the legislative provisions that were in force at the time that case was decided, nor did he have the applicable Manitoba provisions on hand. It was therefore not possible to consider the application of those cases.

58 I therefore find that:

1) it is not necessary for these two defendants to be adverse in interest in order for each to be entitled to their own defence medical examinations;
2) the critical consideration when assessing whether a party should be entitled to defence medical examinations beyond a "first' examination is fairness;
3) in any event, these two defendants in two separate actions, each dealing with different issues, though aligned in their common interests vis a vis the plaintiff, are adverse in interest vis a vis one another;
4) There are no cases which conclude the defendants are required to share defence medical examinations in this factual scenario;
5) The legislature has not seen fit to deviate from the regime it has put in place for defence medical examinations in this province;

6) there is nothing about the facts of this case which would justify the court intervening to make new law as suggested by the plaintiff in this case. Fairness does not dictate doing anything other than what the law provides for in these circumstances; and

7) there is no evidence that this plaintiff would suffer actual hardship here, only a perception by counsel that the current regime is generally unfair to plaintiffs. That is something, which if correct, would be more properly dealt with by the legislature than this court.

Costs

59 Costs generally follow the event and are ordered payable within 30 days. Plaintiff's counsel sought an exception this general rule on the basis of the novelty of the argument.

60 A novel argument, in my view, is one based on facts that can be proven and unsettled law. That was not the case here. The plaintiff's case turned factually on counsel's repeated assertion that these defendants were not adverse interest and in that regard, he was clearly not correct. It was also based on the legal submission that they had to be adverse in interest to be entitled to separate defence medical examinations. That, too, was not correct. This is not a novel case, in my view, simply an ill-founded one.

61 I therefore order costs as follows:

1. To Intact: **$2180, payable within 30 days;**
2. To State Farm, **$3000, payable within 30 days.**

MASTER J. HABERMAN

cp/e/qlcct/qlrdp/qlced/qljac