No justification needed for accident benefit examinations: ruling

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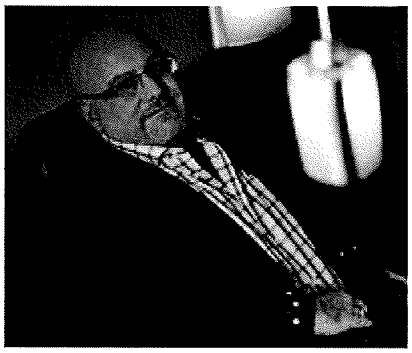
The Ontario Court of Appeal has ruled that insurance companies do not need to provide justification to compel an accident benefits applicant to participate in an examination under oath.

In *Aviva Insurance Company of Canada v. McKeown*, the Court of Appeal reversed an application judge's declaration that insurers must give applicants such a justification. Insurance Act regulations require applicants to submit to an examination under oath if requested, but there has been some debate as to whether the insurer has to explain why one is necessary.



Eric Grossman says that a recent Court of Appeal decision is important as it sets the parameters for how examinations under oath are to be conducted.

Insurance defence lawyers trumpeted the Court of Appeal's decision, saying the lower court ruling would have undercut the legislation and severely truncated insurers' ability to enforce their right to examination.

"It's a very sharp, bright line. It clears up the muddiness in the waters that existed after the lower court's decision," says Jay Skukowski, a partner with Blaney McMurtry LLP, who was not involved in the decision.

Aviva brought an application before the Ontario Superior Court asking for a declaration that insurers do not need to provide justification when requesting an applicant attend an examination. The company also requested an order compelling the six applicants to attend the examinations.

Last year, the application judge, Justice Wendy Matheson, issued a declaration to the opposite effect and denied the request for an order.

Matheson had found that requiring insurers to provide a justification was in keeping with their obligation of good faith, and that it would ensure that insurers did not request examinations under oath "as a matter of course."

Allowing insurers to request examinations without providing justification would also increase the overall cost of the system, she said.

Matheson also rejected a concern that insurers would lose a tactical advantage by providing a justification, as this kind of tactical advantage has already been removed from litigation.

The insurance company had argued that requiring a justification could also spur more litigation.

"If a justification is required, then it becomes a matter of opinion as to whether the justification is subjectively a reasonable one," says Eric Grossman, the lawyer representing Aviva.

Grossman says that if Matheson's decision was upheld, it would have frustrated insurers' ability to get questions answered that they had about a claim.

"The legislative objective of the provision which gave rise to the examination under oath was to reduce insurance costs, address fraud and improve accountability within the system," says Grossman, a partner at Zarek Taylor Grossman Hanrahan LLP.

"It may be that people don't appreciate this tool being given to insurers by the legislature, but it was. And frustrating the ability to make use of that tool doesn't seem like a particularly good result and it certainly frustrates the intentions of the drafters of the legislation."

In its appeal, Aviva appealed only three of the six applicants.

The Court of Appeal found Matheson drew "unsupported inferences" by adopting the word "justification" for "reason" in her analysis of s. 33(4)3 — a section of the regulations under the Insurance Act that requires insurers to provide reasonable advance notice of the "reason or reasons" for the examination.

The court also rejected Matheson's reasoning that the use of examinations under oath would increase costs and found that her reasoning was not based on a "textual analysis" of the section in its entire context.

"In my view, reading the words 'reasons or reasons' in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of the legislature leads to the conclusion that s. 33(4)3 does not require an insurer to include in its notice to an applicant a justification for its request the applicant attend and [examination under oath]," Justice Russell Juriansz said in the decision.

Grossman says the Court of Appeal decision was important as it set the parameters for how examinations under oath are to be conducted and that the approach before that counsel had adopted was unpractical.

Personal injury lawyer Rose Leto of Neinstein LLP says the decision did not properly balance the rights of injured victims to receive the care they need with the need to reduce abuse.

"It seems to ignore or abandon the whole spirit and intent of the legislation and it seems to focus on fraud as a prevailing concern, whereas it should be balancing fraud with the need for accident victims to receive the care that they need," says Leto, who was not involved in the case.

The Court of Appeal accepted the insurance company's view of why the provincial legislature created examinations under oath for accident benefit claims. Aviva contended that the legislative objectives of these examinations were to decrease insurance costs, tackle fraud and boost accountability in the system.

The applicants offered a narrower view that the examinations were intended to be limited to cases in which insurers suspected fraud.

Leto says that the Court of Appeal decision does not actually provide that much more clarity, as it still requires insurers to provide a "general statement of the purpose" that gives notice of the type of questions that will be asked in an examination under oath.

"I don't know if that gives an insurance company or a claimant any more clarity on what is required," she says.

"It took one word that was ambiguous and it substituted two different ones that are equally ambiguous."

Brian Goldfinger, a personal injury lawyer who was not involved in the case, says that while the decision is technically correct, he says it is based on law that heavily favours insurance companies.

"The Court of Appeal case is yet another example of the scales of justice tilting in favour of deep-pocketed insurers against innocent accident victims across Ontario," he says.

Goldfinger says examinations under oath give insurance companies a way to intimidate applicants and allows them to peer into the accident victim's personal life to get information that may or may not be relevant to the claim.

He pointed to the fact that there are no equivalent tools for applicants to examine insurance companies under oath.

"There are fewer tools that plaintiffs have on our end to require the other side to do something similar," he says.

"We can't require them to attend an examination under oath."

Valinie Chowbay, the lawyer representing the three applicants, did not respond to requests for comment.