CITATION: Adams v. Cook, 2010 ONCA 293
DATE: 20100422
DOCKET: C50177

COURT OF APPEAL FOR ONTARIO

Laskin, Sharpe, Gillese, Armstrong and Lang JJ.A.

BETWEEN

Lindsay Adams

Plaintiff
(Respondent in Divisional Court)
(Respondent)

and

Helen Cook and DaimlerChrysler Financial Services Canada Inc.

Defendants
(Appellants in Divisional Court)
(Appellants)

Douglas A. Wallace and James D. Allingham, for the appellants

Mikael Dallimonte, for the respondent

Heard: October 29, 2009

On appeal from the Order of the Divisional Court (Kent, Wilson and Pierce JJ.), dated November 17, 2008.

ARMSTRONG J.A.:

INTRODUCTION

[1] Although not expressly requested by the parties, this case invites us to reconsider this court's judgment in *Bellamy v. Johnson* (1992), 8 O.R. (3d) 591(C.A.). *Bellamy* set the ground rules for an order permitting the audio recording of a defence medical. The circumstances of this case do not fall within the parameters of those ground rules and therefore we must consider whether the parameters should be changed. The effect of the Divisional Court judgment, under appeal, is to provide for the recording of defence medical examinations in most, if not all, cases where a request is made.

BACKGROUND

[2] The plaintiff was injured in an automobile accident. Her family doctor diagnosed her injury as cervical whiplash. Counsel for the defendant sought an order to have the plaintiff examined by a specialist in physical medicine and rehabilitation ("the medical specialist"). The plaintiff was agreeable but only on condition that the medical exam-ination would be audio recorded. Counsel for the defendant did not accept the proposed condition.

[3] Counsel for the defendant moved in the Superior Court to compel the plaintiff to attend an examination by the medical specialist without any conditions. Counsel for the plaintiff filed an affidavit that attached a letter he had written to counsel for the defendant in which he explained that the plaintiff's rationale for the proposed conditions was based on his belief that the conditions were necessary to ensure fairness. In his experience, defence medicals were used to gather admissions against interest from plaintiffs by a defence expert "in the guise of a defence health practitioner".

[4] Counsel for the plaintiff made no allegations against the particular medical specialist. However, he supported his opinion on the basis that there was a systemic bias among health practitioners who undertook medical examinations for the defence. He made reference to a number of instances where the doctor conducting a defence medical was no more than a "hired gun". He expressed concern that defence medical reports contained statements alleged to be made by injured plaintiffs, which, if contested, would create credibility issues. In his opinion, these issues could be avoided by audio or video recording of the defence medical examination.

[5] The following excerpt from the letter of plaintiff's counsel sets out what he describes as his firm's experience in respect of the systemic bias that exists on the part of those engaged in conducting defence medical examinations. Indeed, he refers to "the temptation to use corrupt practices and ulterior strategies":

> With regret, this firm has experienced defence medical assessors making findings unsupported by the testing methods used or claimed to have been used during defence assessment. These types of assessments have become a money making industry for health practitioners and the temptation to use corrupt practices and ulterior strategies is rife within the industry. Admonishable and suspect defence medical assessor practices are easily precluded by audio taping and videotaping the assessments.
>
> Often defence counsel refer to these types of assessments as 'independent medical examinations'. Quite frankly, these examinations are anything but 'independent'. These assessors are paid a handsome sum (in the thousands of dollars and in some instances $10,000.00 or more) to conduct an examination and deliver a report. The whole purpose of the exercise is focussed on damaging an injured Plaintiff's cause of action or damages claim. In this setting, asking that a defence medical report be audio taped and videotaped essentially is an exercise to preserve the integrity of truth, justice and fairness.

[6] The above statements were followed by reference to four cases of inappropriate conduct in respect of defence medicals. None of the cases related to the medical specialist in this case.

[7] On the motion in Superior Court, Justice John H. Brockenshire dismissed the defendant's motion to conduct the defence medical without the proposed conditions. He held that the affidavit of counsel for the plaintiff demonstrated, "the potential for a *bona fide* concern – that could be construed as compelling." In the result, he found the defendant had failed to establish that the proposed conditions were unreasonable or would interfere with the proposed examination.

APPEAL TO THE DIVISIONAL COURT

[8] The appellant obtained leave to appeal the order of the motion judge to the Divisional Court.

[9] The Divisional Court observed that no specific allegation of abuse had been made against the medical specialist chosen by counsel for the defence. No issue was raised in respect of the medical specialist's credentials or credibility. However, the court was persuaded to uphold the order of the motion judge on the basis of the evidence of general bias in the conduct of defence

medicals as attested to in the affidavit of counsel for the plaintiff.

[10] The Divisional Court also referred to the report of the Honourable Coulter A. Osborne and the concerns expressed by him in respect of expert evidence in civil actions generally. [1]

[11] The Divisional Court made extensive reference to the reasons for judgment in *Bellamy* and came to the following conclusion:

> We conclude that the *bona fide* reason for the request to record stipulated in *Bellamy v. Johnson* should not be interpreted to require a specific factual foundation of potential abuse or concern directly attacking the credibility of the doctor chosen by the defence, or identifying specific frailties of the plaintiff. This approach necessarily becomes highly personal. It is also an approach that is not required on the wording of the *Bellamy* decision itself, in which Doherty J. A. provided two scenarios where tape-recording would be appropriate. Those scenarios were not exhaustive illus-trations, however. We find that raising potential significant systemic problems also meets the onus upon the plaintiff that may found an order that a defence medical may be recorded.

APPEAL TO THE COURT OF APPEAL

[12] Counsel for the appellant submits that Bellamy governs this case but that that the Divisional Court misapplied the law as set out in *Bellamy*. The respondent submits that *Bellamy* governs and that the courts below committed no error in its application. Neither party asks us to revisit *Bellamy* and expand its reach to provide for recordings in the circumstances of this case. That said, we have sat as a five judge panel and, in accordance with our practice, we are free to do so if we consider this an appropriate case.

ANALYSIS

[13] The court's authority for ordering a medical examination of a party to a civil proceeding is found in s. 105 of the *Courts of Justice Act* R.S.O. 1990, Chap. C.43 which provides:

> 105(1) "Health Practitioner" defined – In this section, "health practitioner" means a person licensed to practise medicine or dentistry in Ontario or any other jurisdiction, a member of the College of Psychologists of Ontario or a

> person certified or registered as a psychologist by another jurisdiction.
>
> (2) Order for physical or mental examination – Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners.
>
> (3) Idem – Where the question of a party's physical or mental condition is first raised by another party, an order under this section shall not be made unless the allegation is relevant to a material issue in the proceeding and there is good reason to believe that there is substance to the allegation.
>
> (4) Further examinations – The court may, on motion, order further physical or mental examinations.
>
> (5) Examiner may ask questions – Where an order is made under this section, the party examined shall answer the questions of the examining health practitioner relevant to the examination and the answers given are admissible in evidence.

[14] The procedure for obtaining an order under s. 105 is set out in rr. 33.01 and 33.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194:

> 33.01 A motion by an adverse party for an order under section 105 of the *Courts of Justice Act* for the physical or mental examination of a party whose physical or mental condition is in question in a proceeding shall be made on notice to every other party.
>
> 33.02(1) An order under section 105 of the *Courts of Justice Act* may specify the time, place and purpose of the exam-ination and shall name the health practitioner or practitioners by whom it is to be conducted.
>
> (2) The court may order a second examination or further examinations on such terms respecting costs and other matters as are just.

Rule 33.05 provides that only the person being examined may attend such examination together with the examining health practitioner and his or her assistants unless the court orders otherwise.

[15] I turn now to *Bellamy v. Johnson*. In that case, the local master in London made an order permitting Mr. Bellamy to attend a defence medical examination with a tape recorder. The master relied on statements in an affidavit filed by Mr. Bellamy's lawyer and on the cross-

examination of the lawyer. The master concluded that "the demonstrated defence orientation of Dr. Peerless and the demonstrated lack of accuracy in his report satisfy the onus on the plaintiff". The master's order was set aside on appeal to the High Court, which concluded that the evidence did not support the findings of the master. An appeal to the Divisional Court was dismissed.

[16] This court dismissed the appeal from the Divisional Court. Brooke J.A., writing for himself and Finlayson J.A., concluded that the master's finding of the doctor's defence orientation was "clearly wrong". In respect of the master's finding of a "demonstrated lack of accuracy" in the doctor's report, Brooke J.A. also concluded that it was unsupported by the evidence.

[17] Brooke J.A., at p. 594, was of the view that in a proper case, "the court has inherent jurisdiction to make such an order [for the tape recording of a defence medical examination] if justice required to ensure that the discovery provided by the section and the rules is facilitated."

[18] Brooke J.A. described the proper scope of an order permitting the tape recording of a defence medical at page 593 as follows:

> In my view, the master had jurisdiction to make the order. If there is a right to tape-record one's conversations, that right is subject to the provisions of the *Courts of Justice Act*, the Rules of Civil Procedure, and the inherent jurisdiction of the court to control the discovery process. By virtue of the statute and the rules, the plaintiff is obliged to submit to physical or mental examination and to answer any relevant questions asked by the examiner. The answers are admissible in evidence. But the section and the rules are silent as to how the examination will be conducted. I think it is contemplated that the examination will be carried out in the fashion that, in the judgment of the doctor, best facilitates the examination. However, it must be kept in mind that the quality of the examination contemplated by the rules is not dependent upon the confidence which is the basis of a doctor/patient relation-ship. It is, rather, dependent on the skill and integrity of the doctor in conducting the examination in a manner that will best facilitate discovery in the adversarial process. The plaintiff has no right to determine how the examination is to be conducted or whether it is to be recorded. However, the judgment of the doctor as to how the examination is to be conducted is not final, and the court has jurisdiction to set terms and conditions relating to the examination

including a condition relating to the recording of the examination.

[19] Doherty J.A. delivered concurring reasons in *Bellamy*. At page 595, he set out the factors that he thought the court should take into account when deciding to permit the recording of a defence medical examination:

> 1. the opposing parties' ability to learn the case it has to meet by obtaining an effective medical examination;
>
> 2. the likelihood of achieving a reasonable pre-trial settlement;
>
> 3. the fairness and effectiveness of the trial.

[20] In Doherty J.A.'s view, the first factor is predominant. In his view, an effective defence medical should produce the information set out in rule 33.06(1):

> After conducting an examination, the examining health practitioner shall prepare a written report setting out his or her observations, the results of any tests made and his or her conclusions, diagnosis and prognosis and shall forthwith provide the report to the party who obtained the order.

If the tape recording would interfere with the ability of the medical examiner to obtain the information he or she requires to prepare a report in accordance with rule 33.06(1), the tape recording should not be permitted.

[21] Doherty J.A. made it clear at page 596 of his reasons that the particular facts of each case will determine whether an order should be made:

> Each application to permit tape-recording during the examin-ation will depend on its own facts. If the moving party demonstrates the potential for a *bona fide* concern as to the reliability of the doctor's or plaintiff's account of any statements made during the examination, and if the moving party proposes a method and terms of recording the examination which would provide both parties with a full and accurate record of those statements in a timely fashion, then an order permitting the recording would be appropriate.

[22] The Divisional Court in this case referred to the concurring reasons of Doherty J.A. in *Bellamy* and quoted liberally from them. The Divisional Court pointed out that there was no

evidence that the audio recording proposed in this case would interfere with the examination and no evidence that the doctor objected to it. The Divisional Court concluded that audio recording the examination would "promote transparency and enable both counsel to be fully informed concerning the conduct of the examination." As indicated, the Divisional Court further noted that there was no evidence to suggest that the proposed medical specialist in this case had a history of abuse or bias and that his expertise and credibility were not subject to criticism.

[23] As indicated in paragraph 11, *supra*, the Divisional Court concluded that Doherty J.A.'s reasoning in *Bellamy* did not "require a specific factual foundation of potential abuse or concern directly attacking the credibility of the doctor chosen by the defence". While I agree that it may not be necessary to attack the credibility of the doctor, there has to be something about the facts of the specific case that suggests to the court that an examination should be recorded. It is not enough simply to allege general bias on the part of doctors who do defence medicals in order to obtain such an order.

[24] The Divisional Court then turned to the affidavit evidence filed by counsel for the plaintiff. The Divisional Court was of the view that the affidavit evidence raised serious systemic problems. It also agreed with the conclusion of the motion judge that the evidence "demonstrates the potential for a *bona fide* concern". The court observed that there is "a growing awareness of the significant difficulties with respect to proliferation of expert reports and potential bias and lack of objectivity with respect to expert evidence, particularly in personal injury cases." As already mentioned, the court noted the concerns expressed by the Honourable Coulter Osborne in his report. At paragraph 21 of its reasons, the Divisional Court referred to his recommendations as follows:

> The Osborne Report makes several recommendations to address the problem including a requirement that all experts retained by either party certify in their report that their obligation is to the court, not to the client who is retaining them and paying their fees.

I note that the Honourable Mr. Osborne did not recommend the routine recording of defence medical examinations.

[25] In my view, both the Divisional Court and the motion judge made two errors. The first error was in the interpretation of the reasons for judgment of Doherty J.A. in *Bellamy*. As I have already said, I do not agree that Doherty J.A. contemplated orders to record medical examinations could be made based on anything other than the facts of a specific case. The decision in *Bellamy* was made on the evidence or lack of evidence directly related to that case. In my view, the Divisional Court's treatment of *Bellamy* is tantamount to a rejection of its ratio. The second error is directly related to the first. By accepting the evidence of systemic bias, both the motion judge and the Divisional Court have not only extended the application of *Bellamy* beyond its limits, they have accepted that the medical specialist in this case is tainted with systemic bias. While the Divisional Court has acknowledged that there was no attack on either his personal expertise or credibility, it concluded that the medical specialist was affected by the alleged bias of others.

[26] I note that the British Columbia Court of Appeal had occasion to comment on the alleged bias of medical experts in *Wong (Guardian Ad Litem of) v. Wong* [2006] B.C.J. No. 3123 (B.C.C.A.) in the context of an application for a defence medical. The British Columbia Court of Appeal appears to have taken a different view from the Divisional Court in this case. Finch, C.J.B.C., writing for the court at paras. 40, 41 and 43 said:

> It is in the nature of all expert evidence that opinions, based on the same factual basis, may differ in whole or in part or in degree. This does not mean that the experts are biased in favour of one side or the other. It reflects only the fact that the best medical science can offer is a high degree of probability, but never certainty.
>
> A fundamental premise for the admission of expert opinion evidence, whether tendered for the plaintiff or defence, is that it is *prima facie* objective and impartial. That premise can of course be challenged by cross-examination or by contra-dictory evidence. But in the typical case, differing opinions usually

> arise from honest, professional disagreements, and nothing more.
>
> ...
>
> With those considerations in mind, I agree with the views of Brooke J.A. that the rules contemplate an examination conducted in a manner that "in the judgement of the doctor, best facilitates the examination." The quality of the examination is "dependent on the skill and integrity of the doctor in conducting an examination in a manner that will best facilitate discovery in the adversarial process." In the words of Doherty J.A., the most important consideration is "the opposing party's ability to learn the case it has to meet by obtaining an effective medical evaluation."

[27] If *Bellamy* applies, the plaintiff has not proven specific facts that justify audio recording of the defence medical in *this case*. [Emphasis added.] On the basis of the two errors that I find were made by the Divisional Court, I would allow the appeal and set aside the original order of the motion judge and order the medical examination to proceed without conditions.

[28] That said, I recognize that this court constituted as a panel of five judges is in a position to broaden the application of *Bellamy* and, in effect, make the recording of defence medicals a more or less routine practice. No doubt a case can be made for doing so. Arguably, the litigation landscape has changed in the 18 years since *Bellamy* was decided. Legitimate concerns have been expressed by the Honourable Coulter Osborne and others in respect of the role of experts in the civil litigation process. The findings and recommendations of my colleague, Justice Goudge in his report, *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (Toronto: Ontario Ministry of the Attorney General, 2008) suggest similar concerns arise in criminal cases. Some contend that the routine recording of defence medicals and the transparency it produces would improve the discovery process. Given the electronic world in which we now live, it is perhaps at least questionable whether the presence of a small recording device is likely to have any adverse affect on a medical specialist's examination.

[29] However, in my view, the record in this case is insufficient to broaden and set new parameters for the making of orders requiring the recording of defence medical examinations,

which would take into account all of the complexities and nuances that go with the conduct of such examinations. First of all, I do not accept that the evidence of alleged systemic bias, as testified to by the plaintiff's lawyer in this case, is sufficient to draw any general conclusions. The evidence here provides the lawyer's opinion of systemic bias in one area of the province and gives four specific examples. The lawyer was not cross-examined on his affidavit because counsel for the defendant was of the view that little would be accomplished given the likely limits that would be placed on such cross-examination by the deemed undertaking rule and solicitor/client privilege. In my view, a number of other questions arise should the court attempt to define the expanded parameters of an order for the recording of defence medicals:

> 1. 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 plain-tiff be subject to the same requirement?
>
> 2. What else can be done to "level the playing field" for the defendant in respect of medical examinations 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 to 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?
>
> 5. Why did the Honourable Coulter Osborne not make a recommendation that defence medicals be routinely recorded?
>
> 6. Will the reforms related to expert witnesses recom-mended 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?
>
> 7. 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 organiza-tions?

[30] A case such as this is not the best place to address these issues. This is a matter that is best studied by the Civil Rules Committee, which has just spent more than a year considering the Osborne recommendations. The Rules Committee is better able to canvass the views of the interested groups province-wide and make reasonable recom-mendations, if so advised.

CONCLUSION

[31] I would not expand the scope of *Bellamy* in order to support the routine recording of defence medicals. While arguments of a general nature can be advanced, the record in this case does not support it. The evidence here contains counsel's opinion based on what would appear to be the fairly narrow experience (four cases) of one law firm. It is acknowledged by counsel for the plaintiff that the concerns expressed in respect of the bias of medical practitioners who undertake defence medicals are not an evident concern in respect of the medical specialist proposed by the defendant. To put it bluntly, there is not a scintilla of evidence that he is a "hired gun".

[32] As indicated above, I would allow the appeal, set aside the original order of the motion judge and order the medical examination to proceed without conditions.

[33] In accordance with the agreement of counsel, I would award the costs of the appeal to the appellants in the amount of $3,500 including disbursements and G.S.T.

"Robert P. Armstrong J.A."

"I agree John Laskin J.A."

"I agree Robert J. Sharpe J.A."

Lang J.A. (Dissenting):

OVERVIEW

[34] In this personal injury action, the defendant moved for an order, without the imposition of any conditions, that the plaintiff attend an examination by the defendant's medical examiner. The defendant opposed a condition permitting the plaintiff to record the examination. On the basis of the plaintiff's unchallenged evidence of systemic problems with the reliability of defence medical opinions, the motion judge exercised his discretion to grant the defence medical, but subject to the condition that the plaintiff be permitted to record the examination. The Divisional Court upheld the motion judge's exercise of discretion. The defendant appeals to this court. I would dismiss the appeal.

[35] In my view, the record in this case, together with increased awareness about the partisan nature of expert evidence, supports the conclusion that a plaintiff should be allowed to audio record a defence medical if that recording would advance the interests of justice. Generally, a recording advances the interests of justice by providing the parties with a reliable record of the examination, which will serve to enhance their settlement discussions as well as the effectiveness of trial. However, the interests of justice are not enhanced if the recording would compromise the examiner's ability to conduct an effective medical examination.

The Motion Judge's Decision

[36] After considering the decision of this court in *Bellamy v. Johnson* (1992), 8 O.R. (3d) 591, the motion judge concluded that the "[d]efence has not produced any evidence to show that the ... recording ... would in any way interfere with the proposed [examination]" and that the condition permitting recording of the defence medical was reasonable.

[37] This conclusion was consistent with the unchallenged evidence on behalf of the plaintiff that defence medical reports have become "lengthy epistles", significant portions of which

consist of "alleged statements that the injured plaintiff made to the defence medical assessor". Counsel on behalf of the "unsophisticated" plaintiff took the position that this type of one-sided record keeping by an examiner created a potential credibility conflict about what was actually and said done during the examination. He argued that a recording of the examination would provide a means of verifying its contents. This would preclude any allegation such as an allegation that the examiner's report either "neglected or ignored" the plaintiff's account of the examination.

[38] On the motion, the plaintiff agreed to provide an unedited copy of the recording to the defendant's counsel in a timely manner. She also undertook to record and to provide the defendant with a copy of any future expert examinations that responded to the defence medical. [2]

Since the plaintiff had no earlier medical examinations, other than by her treating doctor, there was no suggestion that recording the defence medical would somehow be unfair to the defendant.

The Divisional Court's Decision

[39] In upholding the motion judge's decision, the Divisional Court observed that the supporting affidavit filed by counsel on behalf of the plaintiff illustrated "disturbing examples of abuse by medical experts in other personal injury cases in [the plaintiff's counsel's] law firm" and referred to evidence that "serious systemic problems" were said to have "caused significant difficulties in the lawsuits in question." In addition, the Divisional Court addressed the "growing awareness" of the lack of objectivity in expert reports and expressed concern about the "hired gun" approach of defence examiners, particularly in personal injury cases. The Divisional Court also noted "the problematic dynamics inherent in defence medicals" and cited the recommendations to promote objectivity in expert reports by the Honourable Coulter A. Osborne in the *Civil Justice Reform Project: Summary of Findings and Recommendations* (Toronto: Ontario Ministry of the Attorney General, 2007) (the Osborne Report).

ANALYSIS

[40] The defendant based the appeal on the interpretation of this court's decision in *Bellamy*. I will first address that interpretation and then consider the reasons to permit or refuse a recording condition in an order for a defence medical.

The Bellamy Decision

[41] My colleague, Armstrong J.A., interprets this court's decision in *Bellamy* to hold that a recording condition will be granted only when the plaintiff establishes actual bias on the part of the defence examiner, or another reason that is particular to the facts of the case. To support this interpretation, he relies on the concurring reasons in *Bellamy* at p. 596, where Doherty J.A. said that the disposition of an application to record "will depend on its own facts" and that an order to record will be appropriate if the moving party demonstrates "the potential for a bona fide concern as to the reliability of the doctor's or plaintiff's account" of the examination. Based on these extracts, Armstrong J.A. concludes that Doherty J.A. did not contemplate that orders to record medical examinations could be based on "anything other than the facts of a specific case" and that the Divisional Court in this case erred in interpreting *Bellamy* otherwise.

[3]

[42] I agree that a recording condition may be imposed for a case-specific reason. However, I do not read Doherty J.A.'s reasons to preclude a recording condition based on broader grounds.

[43] Although Doherty J.A. referred to the reliability of "the doctor's or plaintiff's" account of the examination, as opposed to the more general terminology of "a" doctor and "a" plaintiff, this wording must be considered in the context of the argument. In that

case, the plaintiff argued that the proposed defence examiner had displayed an actual defence orientation. In my view, because Doherty J.A. was dealing with an allegation against *the* doctor,

he did not refer to *a* doctor. In that context, the extract cannot be interpreted to restrict the grounds for a recording condition to case-specific concerns.

[44] I find support for this interpretation in Doherty J.A.'s further observation that a recording condition is not the appropriate remedy where the plaintiff demonstrates that the particular proposed examiner has shown a defence orientation. In such a case, Doherty J.A. concludes at p. 597 that the examination should not be recorded but the examiner replaced. He explains that "[f]airness to all involved in the process demands no less." If the remedy for case-specific bias is removal of the examiner, there is little point in ordering a recording of the examination.

[45] Moreover, Doherty J.A.'s reasons, taken in context, focused on the purpose of the defence medical: to assist the defendant in learning about the plaintiff's case. With this purpose in mind, Doherty J.A. provided at p. 596 that a court should consider the impact a recording would have on:

1. the opposing party's ability to learn the case it has to meet by obtaining an effective medical evaluation;
2. the likelihood of achieving a reasonable pre-trial settlement;
3. the fairness and effectiveness of the trial.

[46] However, it was not Doherty J.A. but Brooke J.A. who wrote for the majority in *Bellamy*. He did not address the test proposed by Doherty J.A. Instead, he dealt primarily with the question of jurisdiction. In addition, while he found no evidence to support the plaintiff's allegation of actual bias, he concluded that a case-specific basis was a pre-condition for obtaining a recording condition.

[47] Brooke J.A. explicitly rejected the notion that a recording would be justified simply because there was a risk that the plaintiff and the doctor may have differing recollections of what took place at the examination. He wrote at p. 595:

It is suggested that since there is evidence of such disputes [i.e. over the accuracy of the selected assessor's reports] it would be proper to make an order permitting the plaintiff to tape-record the examination. I think it would be wrong to do so. It was not the appellant's case here or below that the evidence of such disputes was all that was needed to win the day. While the rule requires that the doctor make a report and that a copy be delivered to the plaintiff, the record of what occurred lies in the evidence of the parties. I think the rules proceed on the basis that there may be some disparity between the memory of the doctor and the memory of the plaintiff from time to time.

The system has worked well in this regard, as is evident from the absence of any change in the recent revision of the rules of practice. There is no suggestion on the record before us that any injustice has occurred. To make an order in the circumstances of these appeals is almost to write an addendum to the rules.

[48] Although one might now query the assumption that the "system has worked well in this regard", Brooke J.A. appears to foreclose the possibility that orders to record can be granted based on the need for a reliable record, without something more.

[49] However, it is the concurring reasons of Doherty J.A. that are generally cited in subsequent decisions as providing the legal test. For example, see *Willits v. Johnston* (2003), 121 A.C.W.S. (3d) 827 (Ont. S.C.); *Byczko v. Hamilton* (2006), 152 A.C.W.S. (3d) 51 (Ont. S.C.); *Dempsey v. Wax* (2007), 86 O.R. (3d) 634 (S.C.). I interpret the analysis in Doherty J.A.'s reasons to apply to the type of concerns discussed by the Divisional Court in this case.

Revisiting *Bellamy*

[50] The Chief Justice constituted this five-judge panel specifically so that it could reconsider the principles in *Bellamy*. In light of the developments since *Bellamy* was decided 18 years ago, that reconsideration should take place.

[51] As I have said, it appears that the majority in *Bellamy* concluded that a case-specific reason or bias on the part of the proposed examiner is required. In my view, any requirement for a case-specific bias on the part of a defence examiner is overly-restrictive for three reasons.

[52] First, it is unreasonable to expect that an individual plaintiff or a plaintiff's lawyer could

amass the data necessary to support such an allegation. Such an undertaking would be inordinately difficult, expensive and time-consuming.

[53] Second, in *Bellamy* at p. 593, Brooke J.A. quoted the Divisional Court's statement that a defence orientation "is immaterial short of misconduct that should be subject to a report to the College of Physicians and Surgeons". If it is necessary to prove a defence orientation to the level of professional misconduct, rarely would a court impose a recording condition when ordering a defence medical.

[54] Finally, the inevitably personal nature of an attack alleging actual bias, if unsuccessful, could put the plaintiff at risk of alienating the examiner who will pronounce on his or her medical condition. The plaintiff may unnecessarily be left with an increased concern about the examiner's ability to report objectively.

The relevant considerations for a recording condition

[55] In any event, in my view, the nature of the relationship between the plaintiff and the examiner, the changes in approach to expert reports, the advances in technology, and the advantages to be gained by an accurate record all lead inevitably to the conclusion that a recording condition to a defence medical is generally in the interests of justice, absent any adverse impact on the examiner's ability to conduct an effective examination.

(a) The relationship between the plaintiff and the examiner

[56] As Doherty J.A. explained at p. 598 of *Bellamy*, there are important differences between the nature of the relationship between the plaintiff and the defence examiner and one between a patient and a treating doctor.

[57] The patient/treating physician relationship is a long-term one that builds the trust and confidence essential to an open discussion about the patient's condition and informs decisions

about appropriate treatment. In such a relationship, the patient discloses personal information with the expectation that the physician will keep it private and confidential and will not repeat it publicly.

[58] In contrast, a plaintiff in a lawsuit is not the patient of the examiner, who is chosen by the defendant. The purpose of the examination is to provide the defendant with information to test the plaintiff's allegation of physical or mental damage and not to propose treatment. The plaintiff generally sees the examiner only once. In light of their roles, the plaintiff expects that the examiner's opinion may well support the defendant's position and minimize the extent of the injuries. The plaintiff also knows that the history and complaints he or she presents to the defendant's examiner will later be disclosed to counsel, used in settlement discussions and publicly aired in a courtroom. To the extent the examiner's opinion is based on what the plaintiff says and does during the examination, the plaintiff may expect that, consciously or subconsciously, the examiner will rely on those observations that most support his or her opinion. Thus, the plaintiff is in an adversarial relationship with the examiner hired by her opponent.

[59] Looking at the relationship in this light, the importance of keeping an accurate record of the examination is evident. Such a recording is necessary because it gives the defendant the foundation for the examiner's opinion and equips the plaintiff with the necessary information with which to test the reliability and objectivity of the examiner's report and opinion.

(b) Relevant changes since 1992

[60] Changes since *Bellamy* also support adding a recording condition to an order for a defence medical. I will discuss three of the most salient changes.

[61] First, the importance of transparency in expert reports as well as accountability of experts for their opinions is now incontrovertible. When *Bellamy* was decided, an examiner's evidence

regarding the contents of his or her report would have been akin to "gospel." Brooke J.A. concluded in *Bellamy* that disputes about the examination could be resolved by the "evidence of [the] parties" about what occurred. Presumably, the examiner would rely on the notes taken during the examination. This presumes, however, that the examiner is both a reliable and objective record keeper. We now know that this presumption, and the *Bellamy* view that "the system has worked well", have unfortunately been proven wrong.

[62] Recognition of concerns about the reliability of expert opinion is evident from several inquiries into wrongful convictions, including the inquiry by our colleague Goudge J.A. His report, *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (Toronto: Ontario Ministry of the Attorney General, 2008) (the Goudge Report), particularly at Vol. II, pp. 179 – 192, addressed cases arising from the once highly-regarded paediatric forensic pathology opinions given by Dr. Charles Smith. The Goudge Report, as well as other cases involving wrongful convictions, has demonstrated weaknesses in expert opinion that can result from faulty factual assumptions, from the application of unreliable science or technique or from a particular examiner's agenda.

[63] Similar concerns about expert partisanship have been raised on the civil side. Although the Osborne Report did not deal with the minutiae of recording defence medicals, and while it recognized that not all experts should be tarred with the same brush, the Report specifically observed at p. 71 that it was a "common complaint" that "too many experts are no more than hired guns who tailor their reports as evidence to suit the client's needs." Precisely by reason of concern about "hired guns", the Osborne Report made significant recommendations to promote expert objectivity.

[64] In short, in 1992 expert examiners were seen to be more or less inherently trustworthy and objective. In 2010, it is recognized that examiners make assumptions and base their opinions on

factors that the plaintiff should be able to challenge through cross-examination rendered effective by the provision of an accurate record.

[65] Second, the technology has changed dramatically. In *Bellamy*, the proposed examiner objected to a recording condition on the basis that the technology would physically interfere with the flow of the examination. In his concurring reasons, Doherty J.A. rejected this as a significant concern, noting at p. 597 that "tape-recorders are compact and tapes can be made for well over an hour without any interruption." Of course, in 2010, high quality digital recording is even less obtrusive, less costly, and more user-friendly than older technology. At the same time, it enables recordings that are more easily copied and transferred and are sufficiently unlimited in duration to meet the requisite purpose. Once activated, a device need not be touched again until the end of the recording session, and the digital files are easy to manage once completed. Any technology-based concerns voiced in 1992, even if valid then, are moot today.

[66] Finally, we as a society have become inured to being recorded. Proceedings at the Court of Appeal for Ontario and the Supreme Court of Canada are now digitally recorded. Our conversations are recorded every time we call a major company for customer support. 911 calls are recorded, as are police interviews.[4] Our movements at ATM machines, in institutional buildings, and many other locations, are routinely videotaped. There are police cameras posted at problematic intersections in our cities. Incidents and events are now captured on cell phone cameras and distributed on the internet within minutes. For security and other reasons, society finds these recordings largely acceptable. As Armstrong J.A. wryly put it at para. 28, "given this electronic world in which we now live, it is perhaps at least questionable whether the presence of a small recording device is likely to have any adverse affect on a medical specialist's examination."

(c) Other reasons to permit recording

[67] There are further sound reasons to favour the recording of defence medicals. The purpose of discovery in the litigation process is to give the parties an opportunity to learn and test the parameters of the opponent's case. Oral discovery of a party by opposing counsel is recorded and takes place in the presence of the party's counsel. As Doherty J.A. noted at p. 595 of *Bellamy*, defence medicals are "an integral part of the discovery process". On that basis, there seems to be no principled reason why an examination for discovery conducted by a defence lawyer is recorded while a medical examination for discovery conducted by a defence examiner is not, unless of course the recording would disproportionately compromise the effectiveness of the defence medical.

[68] In the normal course, the elimination of disputes about the content of a defence medical, with regard to both the plaintiff's history and the examiner's techniques, would assist the truth-seeking and fact-finding function of the examination, as well as promote full, frank and informed settlement discussions. It would also promote trial fairness by levelling the playing field between the usually unsophisticated plaintiff and the usually articulate examiner whose evidence is perceived by many to be accompanied by an aura of expertise and wisdom. A recording would also eliminate the expense and delay that would be otherwise spent at trial resolving factual disputes about the foundation for the expert's opinion or to learn and challenge the method and technique employed by the examiner.

[69] Finally, I note as a matter of common sense that recording defence medicals protects the examiner as well as the plaintiff. It seems evident that it is in the examiner's interest to create an independent, objective record of what transpired during the examination. Such a record would be welcomed by most examiners. It would also serve to insulate the examiner from unmeritorious challenges to his or her opinion, as well as complaints to his or her professional body.

[70] For these reasons, an order for a defence medical should include a condition permitting

the plaintiff to record the examination unless the motion judge is persuaded that the recording would compromise the examiner's ability to learn the plaintiff's case about his or her physical or mental condition. The accuracy of the recording can be ensured by extending the recording permission sought by the plaintiff to the examiner. Alternatively, the plaintiff can be required to provide a copy of the recording at the conclusion of, or shortly after, the examination. Further conditions could be stipulated, if appropriate, including requiring the provision of a transcript of the recording in a timely manner.

Armstrong J.A.'s reasons not to re-visit *Bellamy*

[71] In his reasons, Armstrong J.A. raises various concerns he thinks should be addressed before revisiting the *Bellamy* decision. I respond as follows:

Is the record in this case sufficient to decide the issue?

[72] The unchallenged affidavit on behalf of the plaintiff was replete with concerns about systemic bias. That evidence is consistent with the observations of the Osborne Report and the Goudge Inquiry, both of which raise clear concerns about ensuring the objectivity of expert opinion. The court is entitled to consider this broader context and to take judicial notice of these concerns in this case. See for example *R. v. Spence*, [2005] 3 S.C.R. 458, at para. 30, where the Supreme Court refers to *R. v. Williams*, [1998] 1 S.C.R. 1128, where it took judicial notice of reports from Commissions and Inquiries.

Is the Rules Committee an appropriate forum to decide the question?

[73] I agree with Armstrong J.A. that the Rules Committee, if it chooses to do so, is well-placed to undertake a full consultation with a wide variety of interested organizations about the merits of recording defence medicals. Nonetheless, the silence of the *Rules of Civil Procedure* on this issue leaves the inclusion of a recording condition within the inherent jurisdiction of the court to control the discovery process. In my view, this court should exercise its jurisdiction in

this case based on the current record.

Should the court impose a further condition that subsequent examinations by the plaintiff's expert doctors be subject to the same requirement?

[74] In this case, the plaintiff undertook to record any examinations that responded to the defence medical. Accordingly, Armstrong J.A.'s suggested condition is not necessary. However, subject to the motion judge's exercise of discretion in a particular case, the benefits of recording, which I have canvassed above, would apply equally to examinations conducted by the plaintiff's examiner.

What else can be done to otherwise "level the playing field" for the defendant in respect of medical examinations by the plaintiff's experts?

[75] In my view, this question is largely answered by the reciprocity arrangement offered in this case in which the plaintiff undertakes to record her own expert litigation examinations. Any additional conditions required to ensure fairness would be within the discretion of the motion judge on a case-by-case basis.

What about earlier unrecorded medical examinations by the plaintiff's experts?

[76] As a general proposition, one does not cure a plaintiff's potential lack of candour in an earlier examination by his or her own expert by ensuring an equal opportunity for a lack of candour in a later examination by the defendant's expert. That said, this issue is not relevant to this case because there were no earlier plaintiff's expert medical examinations. In any event, if the plaintiff's prior history would somehow render the recording condition unfair to the defendant, the motion judge would take this into account in arriving at an appropriate disposition. It may be said, as a practical matter, that plaintiffs who may want to record later defence medicals should consider recording their own litigation-oriented expert examinations, or else be prepared to explain why they chose not to do so.

Are there any obstacles presented by a recording order to the conduct of a defence medical?

[77] In this case, the proposed defence examiner filed no evidence. Thus, there is no indication that recording the defence medical would adversely affect the examination or the resulting report in any way. It may be different in another case. For example, in *Bellamy* it was argued that recording a defence medical could stifle spontaneity, interrupt the flow, or otherwise adversely affect the examination. However, as I have explained, given the adversarial nature of the plaintiff/examiner encounter, these concerns are not relevant in most cases. In the normal course, a recording should not change the questions the examiner asks, the answers the plaintiff gives, the technique the examiner employs, or otherwise compromise the content of the defence medical examination.

[78] In other cases, masters and motion judges will be able to consider any allegation that the proposed recording would disproportionately impair the examiner's ability to conduct the examination. See, for example, *Jilla v. Ribeiro* (2009), 75 C.P.C. (6^{th}) 107 (Ont. S.C.), where the master refused to allow a recording on the grounds that that there was a real risk that the plaintiff would "play" for the camera, given the plaintiff's established history of exaggerating the severity of his impairment in interviews with psychiatrists.

The scope of the Osborne Report

[79] The Osborne Report did not address the recording of defence medicals as an issue one way or the other, although it raised concerns about "hired guns". In any event, the Osborne Report recommendations were not meant to be exhaustive. In addition, the law is a continually evolving process.

[80] In sum, I am not persuaded that this court should refuse permission to record the defence medical in this case by reason of the concerns raised by Armstrong J.A.

RESULT

[81] In the result, I would dismiss the appeal.

RELEASED:

"JL" "Susan Lang J.A."

"APR 22 2010" "I agree E.E. Gillese J.A."

[1]
Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings and Recommendations* (Toronto: Ontario Ministry of the Attorney General, 2007).

[2]
The defendant proposed that the defence medical would be conducted by a physiologist.

[3]
Issues specific to the plaintiff that may also lead to a recording condition include potential concerns about the plaintiff's memory or ability to communicate as a result of cognitive impairments, or language, or like difficulties.

[4]
This court has directly counselled police to record interviews of an accused where feasible: *R. v. Moore-McFarlane* (2001), 160 C.C.C. (3d) 493 (Ont. C.A.) at para. 65. It has also stated that the absence of a recording is an important factor to consider when deciding whether to accept the police version of an alleged statement: *R. v. Swanek* (2005), 194 O.A.C. 155, at para. 13; *R. v. Wilson* (2006), 213 O.A.C. 207, at paras. 20 – 21.