BEARDWINTER LLP
Defender
Vol.4 | Issue 3
June, 2010

Are Accident Benefits Assessments No Longer Admissible in a Tort Action?

The decision of *Beasley v. Barrand* (2010) has the changed the landscape in which we practice. Although the decision deals with a case that was on the verge of going to trial, this case will affect our decisions as to whether to conduct a defence medical assessment and with whom. Specifically, this case deals with the admissibility of accident benefits insurer examinations in the tort world. An insurer who decides to rely on an accident benefits medical assessment at trial may find that they are left without a medical expert.

In this case, the tort defendant sought to call three medical assessors who prepared reports on behalf of the accident benefits insurer at trial. The accident occurred in 2002, the medical reports were generated in 2003, and the trial was scheduled to proceed in 2010. The Judge for a variety of important reasons, found that these reports were inadmissible. It is important to understand the reasons articulated by the Judge in order to see whether your particular file falls within the reasoning, and if so, whether anything can be done to change it.

Understanding The Reasoning

Since these reports were created for the purposes of accident benefits, the Court found that the Plaintiff will need to undertake a laborious, time-consuming, and unnecessarily complicated description, for the benefit of the Jury of the statutory accident benefits scheme. He found that the additional time, complexity and expense necessarily involved outweighs the probative value of allowing these doctors to testify.

These reports were considered to be "snapshots" of the Plaintiff's situation more then seven years ago. The court found that they can be of little, if any, help to the jury in assessing the Plaintiff's medical and vocational progress since that time.

The Court then undertook a detailed analysis of the impact of Rule 53.03 which came into affect January 1, 2010. This Rule requires any party who intends to call an expert witness at trial must serve every other party to the action with a report signed by the expert which contains specific information. The Judge found that the new Rule "advances the law that has been developing in recent years toward reigning in the growing use of and reliance upon the evidence of experts at trial". In addition to the proliferation of expert reports in recent years, it was also found that "a common complaint was that too many experts are no more than hired guns who tailor their reports and evidence to suit the client's needs". The Judge found that the rule change was in part designed to eliminate the practice of tendering opinion evidence of questionable value at trial.

In this case, the three medical reports in question were commissioned by an accident benefits carrier who has no stake in the trial and their specific instructions are not entirely clear. At the request of tort defence counsel these three doctors have now

Cary Schneider is a partner at Beard Winter LLP specializing in insurance and civil litigation matters including the growing area of cyber and privacy law. He is a member of the International Association of Privacy Professionals (IAPP), is in the process of being certified as a Certified Information Privacy Professional/Canada (CIPP/C), and studies cyber security at Harvard University. Cary advises insurers on breach and coverage situations, as well as assists businesses in preparing pre-breach data plans and post breach responses.

Your comments are appreciated and if there are any commercial or insurance related topics that you would be interested in reading about, please feel free to email us and we will certainly explore the possibility of writing an article. Contact: defender@beardwinter.com

completed the form required by Rule 53.03; but the forms were not completed entirely accurately. The Court stated that the "… letters and the forms sent are inaccurate and confusing. More troubling is the fact that the doctors appear to have signed the forms without reading or understanding their content". These medical reports were found not to comply with the new Rules and accordingly, not admissible.

Analysis

As I see it, the Court refused to allow these three doctors to be called as witnesses at trial for three fundamental and interrelated reasons: (1) the relevance of these reports (2) the goal of the Court to reduce the number of experts testifying at court and (3) technical compliance with Rule 53.03. Insurers ought to consider whether the rationale behind the Court in this case would affect their specific files.

Firstly, the reports were not considered relevant in light of the fact that they were 7 years old and dealt with matters that were in the accident benefits context as opposed to tort. This will be a difficult hurdle for insurers to overcome. Accident benefits carriers often have claimants assessed within one year of the accident by multiple assessors for multiple reasons to determine entitlement to benefits. In the tort world, it is not uncommon for a matter to proceed to trial 4-6 years after the accident occurred (if not more). So, we will always be dealing with medical reports that are old. Also, we will always been dealing with a situation in which the accident benefits world will need to be explained at trial; assuming that the accident benefits carrier is not a defendant.

The best course of action to address this concern would be to attempt to rely on a more contemporary accident benefits report that is on point. It is more likely that a more recent report addressing the claimant's entitlement to income replacement benefits will be considered to be relevant, as opposed to a report generated six months after the accident addressing the claimant's need for treatment.

Secondly, if the goal of the Courts is to reduce the number of experts who testify at trial, then this will be difficult to overcome. Perhaps the best strategy is not to seek to call numerous accident benefits assessors testify at the tort trial, but rather pick one or two specific unique assessors. For instance, the opinion of a vocational assessor may be considered to have value to the Court as she will opine on whether the claimant has the skill set to perform a variety of jobs.

Thirdly, it may be difficult and costly to have the accident benefits assessor comply with Rule 53.03. Since this doctor has not been retained by the tort defendant, it may not be worth his while to complete these specific forms. Moreover, the assessor may need to re-write parts of his report in order to comply with this Rule. A doctor may be reluctant to do this in light of the fact he surely would not remember anything specific (if at all) about the claimant. If he does re-write part of his report, this sets himself up for effective cross-examination onto how he is "changing" his report so many years later.

If a tort defendant wants to try and rely on the accident benefits assessments the best course of action is to ensure that the Rule 53 forms are done properly, and choose reports that need little to no substantive alteration.

One means of addressing all of these issues is simply retain the accident benefits assessor to evaluate the claimant again from a tort perspective. If the tort insurer likes the assessment performed by the accident benefits assessor, then why not retain this same assessor to draft a tort report? The problem here is at least twofold.

First, there is a potential conflict of interest for the doctor to take a retainer from the accident benefits carrier and then a separate retainer from the tort defendant. Secondly, there would be a viable argument to assert that there is an apprehension of bias. The tort defendant is choosing to retain this doctor to write a report because it already knows what his opinion is. This is exactly what the new Rules are trying to prevent from happening. The Rules are trying to increase impartiality. An astute Plaintiff counsel will have a field day cross-examining the doctor with regards to an apprehension of bias. On the flipside, there may be cases in which the tort defendant may cross-examine a Plaintiff assessor if he does the same thing. What's good for the goose is good for the gander.

Conclusion

What resonates from this decision is the goal to streamline trials to reduce the number of experts called, ensure the relevance of the assessments, and to add teeth to the new rule 53.03. Although an accident benefits assessment may be very helpful to a tort defendant, it may never see the light of day. Accordingly, steps must be taken to try to insure that the accident benefits reports will be admissible, or simply to generate one's own reports. The latter strategy is certainly easier and more efficient. It will also be more costly. Since about 99% of all cases settle, often a tort defendant will not obtain a defence medical assessment as it will simply rely on the conclusions reached by the accident benefits assessors. In

light of the *Beasley* decision the safe bet is for the tort defendant to retain its own defence medical assessments and assume that the accident benefits medical report will not be admissible.

Sharp Plaintiff counsel may now move cases closer to trial where there is no defence medical assessment and use this case as the proverbial "jackhammer" to try and negotiate a favourable settlement. Savvy insurance adjusters will be aware of the pitfalls of this decision, and address their files accordingly, to ensure that the defence will have a doctor who can testify at trial on their behalf.

Contact us at: defender@beardwinter.com

Disclaimer: The contents of this issue are provided for interest only and are not to be considered as, in any way providing legal advice to the readers by Beard Winter LLP or the individual authors of articles contained herein. All readers are strongly advised to obtain independent legal advice on any issue of concern to them from competent legal counsel in Ontario.

Subscribe To The Beard Winter Defender
CLICK HERE
(to receive The Defender by email)