

SUPERIOR COURT OF JUSTICE

B E T W E E N:

GEETA ANAND, DHARAM DEV ANAND and
SANDEEP ANAND

Plaintiffs

- and -

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY et al
Defendant(s)

---Before THE HONOURABLE MR. JUSTICE STINSON, with a jury, at
The Superior Court of Justice, 393 University Avenue,
Toronto, Ontario, Commencing on April 12, 2010 at
Approximately 10: a.m.

RULING ON April 23rd, 2010
re Admissibility of the Evidence of the Statutory Accident
Benefits Assessors

A P P E R A N C E S:

J. Strype for the Plaintiffs

S. Smith for the Defendant(s)

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APRIL 23, 2010

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THE COURT: These reasons concern a motion by the plaintiffs in this motor vehicle accident tort action for a ruling that the defendant not be permitted to call three witnesses who examined the lead plaintiff in the course of her statutory accident benefits claim. The witnesses are two doctors who are orthopaedic specialists, and an occupational therapist. The plaintiffs argue that those examinations were conducted with the plaintiff's consent for the limited purpose of the accident benefits process, and thus the examination results are not available for use at the trial of the tort action. The plaintiff's further argue that the reports constitute opinion evidence, and the proposed witnesses do not meet the prerequisites of Rule 53.03.

FACTS:

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This is an action seeking damages arising from a motor vehicle accident that occurred on April 26, 2003. The plaintiff, Geeta Anand, was a passenger in a motor vehicle operated by her son, the plaintiff, Sandeep Anand. The Anand vehicle was struck from behind by a vehicle driven by an uninsured motorist.

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The tort action for damages has proceeded to trial only as against the defendant State Farm Mutual Automobile Insurance Company, pursuant to the uninsured motorist provisions of the plaintiff's automobile insurance policy. Liability for the accident is not disputed, but the issues of causation and quantification of Mrs. Anand's damages are.

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The motor vehicle accident gave rise to both this tort action and a statutory accident benefits claim and arbitration application by Mrs. Anand for income replacement benefits. The statutory accident benefits examinations that resulted in the assessment reports in issue, took place on May 5 and September 30, 2003 by occupational therapist Kylie James; February 13, 2004 by orthopaedic specialist Dr. M. Chapman; and May 19 and June 29, 2005 by orthopaedic specialist Dr. Gilbert Yee. As noted, all these assessments were conducted in the course of the lead plaintiff's claim for statutory accident benefits. None of these assessors was retained by the defendant to examine the plaintiff in connection with the tort action. As it turns out, however, each of these assessment reports was commissioned by the defendant State Farm in its capacity as statutory accident

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benefits provider.

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State Farm has acknowledged and attested to the practice that it maintains a firewall between its Statutory Accident Benefits Department and its Tort Claims Department, such that information is not shared between the two. The assessment reports came into the hands of the defendant's litigation counsel by way of a request made to the plaintiff during the discovery process in the tort action, and were produced by the plaintiff as a result.

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ANALYSIS;

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The assessment reports contain a range of information, from the basics of the accident as relayed by the plaintiff to the assessor, to the assessor's opinion as to the cause of the plaintiff's injuries and the extent of her disability. During the course of submissions on the motion, which was argued on day nine of the trial, defence counsel advised that although she had the previous day served Form 53 certificates signed by each of the assessors as required by Rule 53.03, on reflection she did not intend to call them as expert witnesses. The defendant's initial position was that these witnesses could read their reports in
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the witness stand. Defence counsel then conceded that to the

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extent the reports contained assessors' opinions as to the causes of the plaintiff's problems, that evidence could not be adduced. She maintained, however, that the factual observations made by the assessors in the course of their examinations were mere matters of fact that were admissible, as would be the personal observations of any witness who observed the plaintiff.

I agree with the concession made by the defendant regarding the inadmissibility of opinion evidence from these three witnesses. In *Beasley v. Baron* (2010) O.N.C.J. 2095, Justice Moore recently analyzed at length and in detail the application of the principles underlying Rule 53.03, and the inappropriateness of statutory accident benefit assessment reports being used at trial as expert reports. Thus, had I been required to do so, I would have followed Justice Moore's lead in *Beasley*, and ruled the assessors could not testify as experts, and could not provide opinion evidence to the court.

The issue thus becomes twofold, whether non-opinion evidence, that is, factual observations by statutory accident benefit assessors should be excluded, and, if not, where is the line between fact and opinion to be drawn in the

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5 reports in question, and what limits should be imposed on the assessors' evidence.

10 Dealing with the former issue, it has long been the standard practice for defendants in motor vehicle accident actions to request production of the contents of statutory accident benefit claim files arising from the same accident. It has also long been the law in Ontario that the contents of such files, including medical reports, are
15 producible. See, for example, *Tanner v. Clarke* (2002), 60 O.R. (3d) 304, Divisional Court. As noted in that case at paragraph 28:

20 "The authorities support the proposition that no privilege of any kind attaches to the documents."

25 It seems to me that it would be inconsistent with that authority to somehow impose at trial a limitation on the use of the factual information contained in a report that emanates from the accident benefits file. It is true that the plaintiff consented to the medical examinations during her accident benefits claim as part of the accident
30 benefits process, but the law at the time was clear that any reports generated in the course of that exercise would be producible to the defence in any tort action she might

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commence. In view of that reality, I have difficulty
accepting that the observations made of the plaintiff by the
examiners should be shielded by reason of an absence of
consent argument.

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Plaintiff's counsel did not cite any express
authority for the proposition that information disclosed as
a result of the production of the accident benefits file was
somehow inadmissible. The admissibility of that information
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at the trial of the tort action, at which the plaintiff's
physical condition is directly in issue, would be consistent
with the truth-seeking function of the trial. To prohibit
those who obtained the information from testifying about
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their personal observations during their examination of the
plaintiff, would be to extend some form of privilege to the
insured's accident claims assessor, that has so far not been
recognized.

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In my view, it is not improper for persons who
have direct knowledge of the plaintiff's condition, even when
that knowledge may have been gleaned through an accident
benefits claim-based examination, from testifying about those
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facts at trial. I therefore hold that these witnesses may be
called to testify, but only as fact witnesses.

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The remaining issue concerns the parameters of permissible testimony by the assessors. Their reports contain a combination of facts, observations, interpretation of information and opinions. For reasons previously mentioned, opinion evidence cannot be adduced from these witnesses. While it may present a challenge, counsel must confine their examinations of these witnesses solely to their observations and not their conclusions and opinions. For these reasons, I rule that the witnesses may testify subject to the limitations indicated.

CERTIFIED CORRECT

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Y. Clarke
Official Court Reporter
SUPERIOR COURT OF JUSTICE

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