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Defence Medicals Redefined

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The Divisional Court's decision in *Ziebenhaus v. Bahlieda* (2014 ONSC 138) crystallizes the principle that a Court may use its inherent jurisdiction to order a party to attend a "non-medical" assessment. This principle had been, up until recently, one of two divergent streams of common law on the point. This decision may well prove to be a precursor to modified or overhauled legislation (section 105 of the *Courts of Justice Act ("CJA")* and Rule 33 of the *Rules of Civil Procedure ("Rules")*) to fill the existing "gap" created by the legislature's silence on "non-medical" assessments.

This appeal actually concerns decisions from two lower Court rulings: *Ziebenhaus*, supra, and *Jack v. Crips* (March 3, 2013), (Toronto, 5010/11)[1]. In each case on appeal, the plaintiff was ordered to undergo defence assessments by non-medical practitioners (i.e., not a medical doctor, dentist or psychologist, as defined in the *CJA*). The *Ziebenhaus* plaintiff was ordered to attend a vocational assessment by a certified vocational evaluator. The *Jack* plaintiff was ordered to attend a Functional Abilities Evaluation (FAE) by a chiropractor. Each plaintiff was granted leave to appeal and, ultimately, the *Ziebehaus* order was upheld and the *Jack* order was overturned.

Not disputed in these appeals was whether the Courts can order medical examinations by qualified medical practitioners, pursuant to section 105 of the *CJA*, or examinations by non-medical practitioners *when called for as a diagnostic aid for use by a medical practitioner*. Rather, the plaintiffs argued that the legislative framework of section 105 (in conjunction with related case law) provided an exhaustive consideration of when non-medical examinations can be ordered. The Divisional Court found differently, however, and, in agreeing with the counterargument of the respondent defendants, held that a Court may invoke its inherent jurisdiction to order non-medical examinations.

In underlining the Court's authority to employ its inherent jurisdiction regarding ordering non-medical evaluations, the Divisional Court recognized and relied upon two important principles:

First, the pre-eminent existence of a Court's general inherent jurisdiction to control its own process and ensure trial fairness, subject only to the "unambiguous expression of the legislative will" (see *Baxter Student Housing* [1976] 2 S.C.R. 475); and second, the evolution of health sciences, manifested by the growing importance of "alternative" practitioners' evaluations *and* courses of actual treatment. With respect to this second point, the Divisional Court noted that limiting examinations which give rise to these "alternative" reports might lead to their exclusion, where they would otherwise be highly probative and, further, may lead to counsel pressuring medical practitioners to ask for them as diagnostic aids, contrary

[1] The *Jack* decision on appeal was a hand-written endorsement by Justice Hockin on March 3, 2013 and as such is an unreported decision without citation.

to the spirit of the *Osborne* commentary regarding the use of any expert as a "hired gun" (see, generally, Justice Osborne's report, giving rise to O. Reg. 438/08, January 2010).

The Divisional Court noted that the language of section 105 is "permissive," versus preclusive, and does not estop a Court from ordering an examination under "other" circumstances. That is, a statute which is anything other than *clear* in its intention to limit a Court's power to a certain set of circumstances, does *not* "occupy the field" on the particular topic and room exists for a Court to invoke its inherent jurisdiction.

While some of the cases in which Courts have exercised their jurisdiction to order examinations may be situations where the examination ordered is "similar" to one produced by the plaintiff, the Divisional Court commented that this is mere coincidence. The reality is that, in all of those cases, the Courts have used their inherent jurisdiction to ensure trial fairness and justice.

In fact, the Divisional Court has ruled out the possibility that a Court can order an examination strictly on the basis of "matching" the other parties' roster of tendered expert evidence.

The Divisional Court has now outlined a list of principles which apply in the determination of whether or not to exercise the court's inherent jurisdiction to order an examination:

a) The Court's jurisdiction under section 105 of the *CJA* is at least as extensive as the Court's inherent jurisdiction and, as such, there is no conflict between the two;

b) There can be no order for examination strictly for "matching" purposes. Rather, an order must come to further trial fairness and justice; and

c) The Court's inherent jurisdiction must be employed sparingly and where necessary to allow a defendant to meet the plaintiff's case.

The *Ziebenhaus* order was upheld by the Divisional Court because the defendants were entitled to obtain the opinion of a properly trained vocational assessor, even though their neuropsychologist gave a pseudo-opinion on the issue of the plaintiff's ability to work. Employing the inherent jurisdiction tests, the Divisional Court agreed with the motions judge that the vocational test was necessary to further justice and fairness and that no undue hardship or prejudice would befall the plaintiff.

The *Jack* order was overturned, more simply, because it was made on the principle of "matching." The motions judge followed a previous Court ruling with almost identical facts and ordered the FAE. The Divisional Court noted that the motions judge erred in failing to employ the proper test before exercising the Court's inherent jurisdiction.