



FAEs – The Growing Trend

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There is a new trend amongst the defence personal injury bar to request that Plaintiffs in tort claims attend FAEs (Functional Abilities Evaluations). These assessments, also known as FCEs (Functional Capacity Evaluations), are commonly performed by occupational therapists in order to assess the abilities of an injured Plaintiff. This examination can take anywhere from a day, to a couple of days. They often involve the individual running on treadmills, bending and lifting on a repetitive basis and performing tasks related to the type of employment the injured party is either attempting to return to, or is allegedly unable to perform. The results of the tests are evaluated in order for the assessor to come to a conclusion as to whether or not the Plaintiff is capable of returning to their employment, or return to their normal functioning.

Since the inception of the various no-fault regimes in Ontario, FAEs have become a common request of Insurers in accident benefit matters. Any Plaintiff who is unable to return to some form of employment, or return to their normal daily activities, is eventually subjected to an FAE. It is usually part of a barrage of medical examinations with such health care professionals as orthopaedic surgeons, neurologists, psychiatrists and neuro-psychologists.

In tort claims, FAEs until recently were generally unheard of. It was common practice that tort defence medicals would consist of one or a number of assessments with medical specialists like an orthopedic surgeon, psychiatrist or neurologist. The defence examiner would review all available medical material, interview the Plaintiff and after a relatively brief and noninvasive examination, a

report would be generated with opinions expressed regarding the individuals employability and functioning levels. Gradually vocational and rehabilitation experts become involved in performing defence medicals.

During the last year however, the defence personal injury bar has started a trend towards demanding FAEs. These examinations are requested pursuant to *Section 105* of the *Ontario Rules of Practice*. Usually Plaintiff's counsel would agree to permit the defence to conduct a defence medical provided the Plaintiff has either been treated by such a practitioner, or there has been a medical legal report commissioned by the Plaintiff's counsel with the same type of specialist as the defence request.

The fact that a Plaintiff has already attended on an accident benefit medical examination (or DAC) will not preclude the ordering of the defence medical in a tort claim. Perhaps in circumstances where the tort and accident benefit insurer are the same, a strong argument can be made that a further examination by the same type of practitioner should not be undertaken at all, or be undertaken by the same individual who performed the first examination. More specifically, and without regard to any accident benefit medicals, the defence bar has been asking in particular cases where there is a loss of income, or ongoing claim of disability, that the individual undergo an FAE to establish what in fact their capabilities are.

It is clear that such an examination will not be ordered where the individual is not a health care practitioner. Any expert who has a medical degree, provided they intend to conduct the examination within their specialty, will qualify as a health care practitioner. However it has been held that a kinesiologist, occupational therapist, future care expert and physiotherapist are not health care practitioners and therefore not entitled to conduct defence medicals (*Francis v Centenary Health Centre [1998] O.J. No. 1399 (OCJ)*). In this regard, as these specialties are often the type of individuals who perform the FAE, the defence will not be entitled to an FAE.

The examination should also not create an undue burden on the Plaintiff. In this regard the timing of the examination and the status of the individual's condition are relevant. There is however also a balancing consideration of fairness to the Defendant. It is not simply a matter of looking at the number of doctors that the Plaintiff has seen. The Court in ordering a defence medical examination is attempting to create a level playing field in regards to the litigants such that there needs to be a determination that the examination is necessary before it will be ordered.

An examination will be ordered if the Defendant requires a medical opinion to offset the medicals of the Plaintiff. If the health care practitioner needs an examination by someone else as a diagnostic tool, then the FAE may be ordered. The Defendant would need to prove the evidentiary foundation to justify the FAE before it would be ordered. Since it is clear from the cases that an FAE is considered to be a significant intrusion on the Plaintiff, an FAE will only be ordered where this intervention will create a level playing field. This will depend on the facts of each case.

However, the tasks involved in the FAE itself to illustrate the capabilities of the Plaintiff can be considered to go beyond the scope of a normal defence medical. Generally, the Plaintiff will be subjected in a defence medical to the taking of a history, being subjected to clinical tests such as blood pressure, heart rate and minor physical tasks such as flexion and extension movements. However, an FAE goes beyond the scope of an examination envisioned by Section 105 (*Francescutto v Bojsic [1999] O.J. No. 602 (OCJ)*) in that it involves a lengthy examination consisting of a barrage of repetitive and physical tests.

An FAE will likely be ordered if a medical examiner needs one to come to a conclusion (*Landeta v Go Transit [2000] O.J. No. 1486 (OCJ)*). However, if the defence medical examiner has already reached a opinion, the FAE will not be

ordered. An attempt to use a medical practitioner to conduct an FAE where there is already a like defence medical expert will be considered as an abuse of the rules (*Salama v Jones [2000] O.J. No. 145 (OCJ)*).

It is the inherent jurisdiction of the court to control the discovery process. Where a Defendant wants an FAE it should be requested as part of a well selected group of defence medicals that deal with issues surrounding the Plaintiff's capabilities. Alternatively, the defence doctor need conclude that an FAE is needed to come to a conclusion. The Plaintiff's bar should continue to resist FAEs on the basis of their intrusiveness and they will succeed if the Defendant has not properly set up the need for an FAE and does not use a qualified medical practitioner. Nevertheless, the facts of each case will prevail to determine if an FAE will be permitted on a case by case basis.