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1. *EXAMINATION OF PLAINTIFFS BY VOCATIONAL REHABILITATION EXPERTS; Outside Counsel; The Court Of Appeals' Recent Holding In Smith Barney*

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EXAMINATION OF PLAINTIFFS BY VOCATIONAL REHABILITATION EXPERTS; Outside Counsel; The Court Of Appeals' Recent Holding In Smith Barney

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Body

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THE LAST decade of personal injury litigation has seen a substantial rise in the utilization, by both the plaintiffs' and defense bar, of the testimony of vocational rehabilitation experts to bolster a claim or defense involving lost earnings.

The **New York Jury Verdict Reporter,** Volume 14, Issue 22 (Nov. 1996), recently reported that the earliest case in New York State where an expert vocational witness appeared occurred in 1984. Since that time, the average verdict in a personal injury case involving a vocational expert has been $4,093,526.

This is conspicuously larger than the average personal injury verdict since 1984 of $1,032,745.

The difference is more than $3 million (296 percent) higher than the average personal injury verdict during that period. In light of the high stakes involved, it can be anticipated that the use of vocational experts is a trend that will continue to flourish.

For example, in cases commenced after the enactment of the recent Omnibus Workers Compensation Act of 1996, defendant owners and general contractors will be barred, absent proof of grave injury, from deflecting blame to the plaintiff's employer through the institution of a third-party action.

As a result, to control or reduce damage awards, these defendants will be compelled to focus their efforts on proving that the plaintiff has failed to mitigate damages or has failed to seek vocational training, or even that the plaintiff is capable of securing employment which will equal or surpass prior earnings. (See, Lawrence N. Rogak, Workers Compensation Act: Ramifications for General Liability Defense,**NYLJ,** April 9, 1997, page 1.)

With these factors in mind, it appears worth the effort to become familiar with the possibilities of utilizing this potentially valuable expert witness.

As a matter of course, a vocational rehabilitation expert is permitted to review the medical records of the injured plaintiff and testify as to any conclusions or opinions derived from the records.

However, since a vocational rehabilitation examination includes the gathering and assessment of primarily non-medical information, an opinion based simply upon plaintiff's medical records will have inherent limitations. Just as importantly, few members of the bar would dispute that the testimony of such an expert will carry greater weight with a jury if the expert's opinions are based on an in-person examination of the plaintiff, rather than mere medical records.

A plaintiff may retain an expert in vocational rehabilitation to examine the plaintiff and testify on the basis of his or her observations. However, the Appellate Divisions have taken somewhat different stances on the issue of whether a defendant may compel such discovery by petitioning the trial court for an order directing plaintiff to submit to a vocational rehabilitation examination.

The crux of the disagreement can be found in the choice of a starting point. The Second Department treats such a motion as a general discovery request and applies a CPLR Sec. 3101 material and necessary analysis. **Burger v. Bladt**, 112 A.D.2d 127 (2d Dept. 1985). Thus, in most cases pending in the Second Department, especially where a sizable claim for lost earnings is made, it should not be difficult for a defendant to obtain this pretrial examination.

The First Department, however, treats this motion as a request for a physical examination and applies CPLR Sec. 3121. **D'Amico v. Manufacturers Hanover Trust Co**., 182 A.D.2d 462 (1st Dept. 1992). Since the First Department has held in D'Amico that a non-physician cannot perform a CPLR Sec. 3121 examination, most vocational rehabilitation experts will not be permitted to examine a plaintiff in the First Department. The Third and Fourth Departments have alternately cited both the Burger and D'Amico decisions.[1]

Second Department

In **Burger v. Bladt**, the Second Department reversed the trial court's order denying defendant's motion to compel examination of plaintiff by defendant's non-medical health professionals. The court directed the infant plaintiff to submit to an examination by a teacher of the neurologically handicapped and directed the plaintiff's parents to submit to an interview by a psychiatric social worker to obtain the plaintiff's developmental history.

The court further held that the information to be gained from the foregoing would yield information material and relevant to the defense (**Carden v. Callocchio**, 100 A.D.2d 608; Korolyk v. Blagman, 89 A.D.2d 578). To the extent granted, these examinations and the interview will not unnecessarily duplicate existing information and will not be overly burdensome. Plaintiffs have given no reason sufficient to support denial of this relief (cf. Goldman v. Linkoff, 45 A.D.2d 709).

Thus, the Second Department permitted these non-medical pretrial examinations pursuant to the material and necessary requirements of CPLR Sec. 3101. The court still adheres to the **Burger** decision and permits non-medical examinations of plaintiffs by non-physicians, subject to the trial court's discretion. See Gomez v. LIRR, 202 A.D.2d 633 (2d Dept. 1994).

First Department

The First Department held in **D'Amico v. Manufacturers Hanover Trust Co**., that a request for a pretrial vocational rehabilitation examination of the plaintiff is governed by CPLR Sec. 3121, and since CPLR Sec. 3121 does not provide for a physical examination by a non-physician, a vocational rehabilitation examination cannot be permitted under Article 31 of the CPLR.

However, if the vocational rehabilitation expert has also obtained a medical degree, the First Department will permit the expert to perform the examination. **Johnson v. Moran Towing and Transp. Co., Inc.**, 194 A.D.2d 445 (1st Dept. 1993). The court also has permitted non-physicians to render non-medical examinations of plaintiffs under the direction of physicians. See Paris v. Waterman S.S. Corp., 218 A.D.2d 561 (1st Dept. 1995); Massachusetts Bay Ins. Co. v. Stamm, __A.D.2d__, 654 N.Y.S.2d 752 (1st Dept. 1997). This position can be best summarized as barring the examiner but not the examination.

Accordingly, the **D'Amico** rule against vocational rehabilitation examinations can be circumvented by defendants by the retention of a vocational rehabilitation expert who is also a physician. Johnson v. Moran Towing and Transp. Co., Inc., 194 A.D.2d 445 (1st Dept. 1993); Savarese v. Yonkers Motors Corp., 205 A.D.2d 463 (1st Dept. 1994); see also Mooney v. Osowiecky, 215 A.D.2d 839 (3rd Dept. 1995); Krajewski v. Rosinski, 212 A.D.2d 886 (3rd Dept. 1995).

The First Department still adheres to the **D'Amico** decision and refuses to permit vocational rehabilitation examinations by non-physicians. See Agli v. Turner Constr. Co., __A.D.2d__, 1997 WL 362865, NYLJ, July 1, 1997, (1st. Dept. 1997).[2]

Third Department

The Third Department, in **Krajewski v. Rosinski**, 212 A.D.2d 886 (3d Dept. 1995), cited Burger while affirming the trial court's decision not to permit an examination of the plaintiff by an occupational therapist. While explaining that CPLR Sec. 3121(a) has been interpreted to exclude non-physicians such as occupational therapists, the court noted that in this instance the examination would be unnecessarily duplicative and overly burdensome.

The fact that the court was willing to consider the probative value of the information and the burden caused by the examination indicates that the Third Department position is somewhat similar to that of the Second Department. See **Popelka v. Barry, Bette and Led Duke, Inc.**, 148 Misc.2d 634 (Sup.Ct., Albany Co. 1990). However, in Mooney v. Osowiecky, 215 A.D.2d 839 (3d Dept. 1995), a different bench explicitly adopted the D'Amico decision.

Fourth Department

The Fourth Department adopted a middle of the road approach in **Peterson v. Zuercher**, 198 A.D.2d 797 (4th Dept. 1993). The court first relied on the fact that the defendants' motion to compel plaintiff to submit to a physical examination by a vocational rehabilitation specialist was untimely (the motion was made after note of issue and statement of readiness had been filed).

The court also held that the defendants failed to demonstrate special, unusual or extraordinary circumstances warranting further discovery. Lastly, it cited **D'Amico** as an additional ground for denying defendants' motion. However, the fact that the court first determined the timeliness of the motion and was willing to consider grounds for warranting such relief indicates that the Fourth Department position may be somewhere between D'Amico and Burger.

Conclusion

This issue has never been considered by the Court of Appeals. However, it appears that the Second Department's position in **Burger**, which is based upon CPLR Sec. 3101 rather than CPLR Sec. 3121, is more closely consistent with established interpretations of the CPLR and the underlying legislative intent.

As explained by Professor David Siegel in his Practice Commentary to CPLR Sec. 3101 (CPLR Sec. 3101:3, Practice Commentary,Disclosability & Devices Distinct **McKinney's** 1991): What is disclosable is governed by CPLR 3101. Regardless of the device used to secure the datum or thing, the basic question of whether it is subject to disclosure is governed by CPLR 3101 and not by the particular provision whose mechanical device the practitioner wants to use to get it. Lawyers and sometimes even the courts tend to let these things overlap.

The **D'Amico** decision stands in contrast to the legislative intent underlying the CPLR (See CPLR Sec. 104[3]) and, more specifically, Article 31 which seeks full disclosure of all matter material and necessary. Courts have long recognized that Article 31 of the CPLR is designed to foster liberal discovery and that discovery guidelines must be interpreted liberally in favor of disclosure. DiMichel v. South Buffalo Ry. Co., 80 NY2d 184 (1992); Allen v. Crowell-Collier Pub. Co., 21 NY2d 403 (1968); Hoenig v. Westphal, 52 NY2d 605 (1981); Cynthia B. v. New Rochelle Hosp. Med. Center, 60 NY2d 452, 461 (1983).

The purpose of disclosure is to advance the function of a trial to ascertain truth and to accelerate the disposition of suits.**Rios v. Donovan**, 21 A.D.2d 409, 411 (1st Dept. 1964). Such provisions are to be liberally applied to advance the desired objective of an open and fair trial. Mudge v. Thomas J. Hughes Const. Co., 16 A.D.2d 106 (1st Dept. 1962). Cases subsequent to D'Amico have had to struggle with its precedent precisely because of its restrictive approach to these provisions.

Finally, in interpreting CPLR Sec. 3121, **D'Amico** focused on the word physician instead of physical examination. The statute reads that any party may serve notice on another party to submit to a physical ... examination by a designated physician.

The first definition of physical contained in the dictionary is having to do with medicine.[4] CPLR Sec. 3121 refers to medical examinations which, of course, must be conducted by a physician. This statute was not intended to refer to anything other than a medical examination.[5]

Other examinations should be left to the discretion of the trial court who is able to monitor abuses pursuant to CPLR Sec. 3103. Obviously, all examinations need not be conducted by physicians lest the courts conclude that examinations before trial of the plaintiff must be conducted by a physician.

Practice Pointers

With the foregoing in mind, the prudent personal injury defense attorney should be careful to make a strong showing that the requested examination is material and necessary to the issue of lost earnings. This is an essential prerequisite to the granting of such relief, regardless of the Department in which the case is tried. In the Second, Third and Fourth Departments, such a showing should be sufficient to permit the trial court to compel the plaintiff to submit to the examination.

However, in the First Department (and possibly the Third) it might be wise to consider retaining a vocational expert with an M.D. degree. Should defendant retain a vocational expert without an M.D. degree, pursuant to **D'Amico**, any motion to compel the plaintiff to submit to a vocational examination will likely be denied and the vocational expert's opinion will be limited to an analysis of the plaintiff's medical records. However, as shown above, the D'Amico rationale may ultimately be rejected when this issue reaches the Court of Appeals.

The plaintiffs' bar, on the other hand, should not rely exclusively on **D'Amico** in opposition to this defense motion. Plaintiffs should seek to show that the requested examination will result in prejudice to the plaintiff, as it is unduly burdensome or cumulative. In addition, plaintiffs should argue that the defendant has failed to show that the examination is material and necessary to provide an alternate ground for denial of the defendant's motion pursuant to CPLR Sec. 3101.

1. Although this article is specifically devoted to examinations by vocational rehabilitation experts, the decisions cited are equally applicable to pretrial examinations of plaintiffs by any non-physician professionals, e.g., psychologist, speech pathologist, etc.

2. This office was appellate counsel to the defendants-respondents in **Agli v. Turner**.

3. CPLR Sec. 104. **Construction**. The civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding.

4. **Webster's New World Dictionary of the American Language** (Second College Edition 1979): phys-i-cal (fiz'i k'l) adj. [ME. phisical, having to do with medicine -- ML. physicalis -- L. physica: see PHYSIC] 1. of nature and all matter; natural; material 2. of natural science or natural philosophy 3. of or according to the laws of nature 4. of, or produced by the forces of, physics 5. a) of the body as opposed to the mind [physical exercise] b) preoccupied with bodily or sexual pleasures; carnal -- n. a general medical examination: in full physical examination -- SYN. see BODILY, MATERIAL -- physi-cal-ly adv.

5. Indeed, it is highly unlikely that the Legislature intended to exclude this type of examination when it enacted the CPLR in 1962. As reported in the **New York Jury Verdict Reporter,** Volume 14, Issue 22 (Nov. 1996), the earliest case in New York State where an expert vocational witness appeared occurred in 1984.

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