Attempting to reconcile Kitchenham *and* Tanner*: Practical considerations in obtaining productions protected by deemed and implied undertakings*

By Kevin L. Ross and Alysia M. Christiaen, *Lerners LLP*

Kevin L. Ross

The deemed undertaking and implied undertaking rules were created to protect the privacy interests of a party compelled to disclose information in a proceeding, and to foster full and frank disclosure. These objectives are achieved by deeming the receiving party to have given an undertaking to the court that it will not use the disclosed information for any collateral or ulterior purpose outside of the litigation.

In two recent decisions of the Ontario Court of Appeal--*Kitchenham v. AXA Insurance*[1] and *Tanner v. Clark*[2]--the court was asked to determine whether a plaintiff was prohibited from producing a report arising from an independent medical examination (IME) disclosed in a prior matter to a subsequent insurer defendant, related to the same motor vehicle accident. While these decisions rely on consistent principles, the Court of Appeal provided conflicting applications of the undertaking rules, which appear to be irreconcilable. The confusion in the law surrounding the implied and deemed undertaking rules has important practical implications of which both plaintiff and insurance defence counsel should be aware.

Tanner v. Clark

Alysia M. Christiaen

Two separate plaintiffs commenced arbitrations with the Financial Services Commission of Ontario (FSCO) against their own insurer with respect to accident benefits, and a tort action for damages against the drivers. Both had submitted to IMEs during the arbitrations. The tort defendants later requested production of these IME reports. The defendants' request for production of the IME reports was denied, and a motion for production was subsequently brought. The defendants' motions were dismissed based on the application of the implied undertaking rule.

The issue before the Court of Appeal was whether the implied undertaking rule applied to prohibit a plaintiff from producing an IME report disclosed in a FSCO arbitration to the defendant insurer in a subsequent tort action. The Court of Appeal agreed with the motion judges' determination that the deemed undertaking rule in Rule 30.1.01(3) of the *Rules of Civil Procedure*[3] did not apply, as a FSCO arbitration is not a "proceeding" under the *Rules.* The Court of Appeal essentially adopted the decision of Epstein J. (as she then was) of the Divisional Court.[4]

The common law rule imposes an undertaking on a party receiving compelled disclosure to refrain from the use of the disclosure for a collateral or ulterior purpose. Essentially, the recipient is prevented from using the information outside of the matter for which it was disclosed. Epstein J. held that if the implied undertaking rule prohibited the plaintiffs from disclosing the IME reports, it would turn a "rule designed to protect privacy into a privilege that attaches to the document or information in question."[5] She held that the plaintiffs were required to produce the IME reports to the defendant insurers in the tort action. The plaintiffs had put their medical condition in issue, and the defendants were asking for disclosure of relevant documents which were not privileged. Once produced, the implied undertaking rule would limit the use of the documents by the tort defendants outside of the litigation.

In upholding Epstein J.'s decision, the Court of Appeal further stated:

> The applicants in the AB proceedings submitted to medical examinations knowing that the information they impart will not be used by the two insurance companies except in those proceedings, and will not be communicated to others for their use in other proceedings. That has not happened here. The insurers in the tort proceedings are different companies and the information is sought, not from the insurers in the AB proceedings, but from the source of that information, the respective plaintiffs in the tort actions. Those plaintiffs are not constrained in any way from the use of their medical information for any purpose.[6]

Interestingly, in *Tanner,* the Court of Appeal noted that the deemed undertaking found in the *Rules* speaks in the "same voice"[7] as

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the common law implied undertaking rule. After *Tanner*, one would expect that the law was settled. If a plaintiff had undergone an IME and the report was disclosed in a prior action or FSCO arbitration, then that report was to be produced by the plaintiff in a subsequent related matter. However, the clarity in the law that was achieved in *Tanner* was diminished with the release of the Court of Appeal's decision in *Kitchenham*.

Kitchenham v. AXA Insurance Canada

The plaintiff, Janet Kitchenham, was in a motor vehicle collision in January 1993. She commenced a tort action against the other driver. She was required to submit to an IME with a psychiatrist. The report of the psychiatrist was provided to the plaintiff, as required under Rule 33.06. The tort defendant also provided the plaintiff with a videotape containing surveillance footage at discovery, as required by Rule 30. The tort action ultimately settled.

Four years prior to the settlement of the tort action, the plaintiff commenced an action against her accident benefits insurer, AXA Insurance Canada (AXA), claiming that she was disabled and unable to work, and that income replacement benefits and rehabilitation expenses had been improperly withheld. At discoveries in the accident benefits action, the plaintiff refused to produce a copy of the surveillance videotape or the IME report provided to her by the defendant insurer in the tort action. She claimed she was prevented from disclosing the requested materials due to the operation of the deemed undertaking rule. The defendant brought a motion challenging the refusals.

The motion judge held that the deemed undertaking rule prevented the disclosure of the contested material, regardless of whether the plaintiff was the recipient of the information.[8] The matter was ultimately decided on an issue that was not argued by either party; that while the rule constrains the use of the evidence, it does not constrain the disclosure of the evidence. Heeney J. ordered that the plaintiff produce a copy of the IME report and the videotape surveillance, and limited its use by the defendant for impeachment purposes only. Both parties appealed to the Divisional Court.

The Divisional Court held that the videotape and the IME report were caught by the deemed undertaking in Rule 30.1, and could

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not be produced by the plaintiff in the discovery process in the subsequent accident benefits action without an order from the court under Rule 30.1.01(8).[9] AXA was granted leave to appeal to the Court of Appeal.

Doherty J.A., for the Court of Appeal, stated that the purpose of the deemed undertaking rule is to provide protection to the privacy interest of the person compelled to disclose information, by prohibiting the receiving party from using that information outside of the litigation, except under certain exceptions set out in the *Rules* or by order of the court.[10] Therefore, the only person constrained by the undertaking is the recipient of the information, and not the party who disclosed the information in the discovery process.

The Court of Appeal noted that an undertaking is a promise given by one party to another party to the lawsuit in order to obtain something from that party. In the discovery process, the requested information flows from the discovered party, in exchange for an undertaking from the discovering party that the information will not be used for any purpose other than the present litigation. The undertaking flows only in one direction - the discovered party is not constrained in what it can do in the future with its own information.[11]

The Court of Appeal found that its interpretation of the deemed undertaking was supported by the rationale of the Rule, namely the encouragement of full and frank disclosure, and the protection of the privacy rights of litigants. The language of Rule 30.1, specifically the verb "obtained," confirmed that only the subsequent use of the disclosed information by the recipient is targeted. The party providing the information during the discovery process has not *obtained* that information, and therefore the Rule is not meant to limit its use of the provided information.[12] Finally, Doherty J.A. held that previous jurisprudence, specifically the Court of Appeal's decision in *Tanner*, also supported the interpretation of the Rule that only the recipient of the information obtained in discovery is bound by the deemed undertaking.

The Court of Appeal identified the plaintiff as the party who "obtained" a copy of the IME report and the surveillance tape in the course of discovery. The defendant tort insurer, as the provider of the information, was therefore the beneficiary of the undertaking. The plaintiff was prohibited by the deemed undertaking rule from producing the requested material to the defendant in the subsequent accident benefits action. Therefore, AXA could only acquire the material by (a) obtaining the consent of the tort defendant to the plaintiff disclosing the material; or by (b) obtaining an order under Rule 30.1.01(8) granting relief from the deemed undertaking.[13] The Rule allows the court to grant relief from the operation of the deemed undertaking rule if it is "satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence."

In the context of this Rule, the "interest of justice" refers to the factors that favour permitting the subsequent use of the information. The more valuable the information to the "just and accurate" resolution of the subsequent proceeding, the more the interests of justice will be served by lifting the deemed undertaking.[14] Doherty J.A. noted that "where the interests of the party protected by the deemed undertaking would not be adversely affected by the use of the material, and assuming the material has relevance in the subsequent proceeding, the interests of justice would inevitably outweigh any resulting prejudice to the party who had disclosed the information."

Except for some procedural issues that had to be dealt with by the parties, the Court of Appeal would have dismissed the appeal, and upheld the Order that Rule 30.1 applied to both the surveillance tape and the IME report, and that subject to a judge's order, could not be produced by the plaintiff in the accident benefits action.

Inconsistent applications of consistent principles

Despite relying on identical principles, the Court of Appeal came to conflicting results in *Tanner* and *Kitchenham*. In *Tanner*, the plaintiffs were ordered to produce the IME reports because the implied undertaking rule was not in operation. The plaintiffs were the providers of their medical information, not the recipient, and therefore the protections afforded under the implied undertaking rule did not apply to them. In *Kitchenham,* the plaintiff was prohibited from producing the IME report due to the operation of the deemed undertaking rule. The plaintiff was the recipient of the IME report, having obtained it through discovery. Therefore, the deemed undertaking rule protections applied to the tort insurer, the party compelled to disclose the report, and prohibited the disclosure of the report by the plaintiff in the subsequent proceeding. The Court of Appeal never addressed the fact that its application of the undertaking rule in *Kitchenham* was inconsistent with its previous application in *Tanner*.

The decisions cannot be reconciled by the fact that one relies upon the common law implied undertaking rule, and the other relies upon the statutory deemed undertaking rule. In both decisions, the Court of Appeal found that both undertaking rules supported the decision made. In *Kitchenham,* Doherty J.A. stated that the "analysis of Carthy J.A. [in *Tanner*] applies with full force to the deemed undertaking as described in Rule 30.1."[16] Given that the analysis is the same, one would think that the application would be the same.

Arguably, the apparently inconsistent applications of the undertaking rules stems from the divergence in the decisions of who is

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the "recipient" of the disclosed information. In *Tanner*, the Court of Appeal found that the recipient of the information was the accident benefits insurer, as it had received the medical information from the plaintiff in order to conduct the IME. The plaintiff was the beneficiary of the undertaking, which operated to prevent the defendant from disclosing the information for a collateral purpose. Since the defendants in the tort action were not seeking the IME report from the recipient of the information (i.e. the accident benefits insurer), but from the source (i.e. the plaintiffs), the implied undertaking rule did not operate to prohibit the plaintiffs from disclosing their relevant medical information.[17]

In *Kitchenham,* the Court of Appeal came to the opposite conclusion as to which party was the "recipient" of the disclosed information. It held that the recipient of the information was the plaintiff, as she had received the IME report from the tort insurer during discovery. Therefore, the tort insurer was the beneficiary of the undertaking. The defendant in the accident benefits action could not obtain the IME report from the plaintiff because the deemed undertaking rule prevented her from disclosing it in subsequent litigation.[18]

The Court of Appeal was also not consistent in its determination of what constituted the "compelled disclosure" in the two decisions. In *Tanner*, the compelled disclosure was the medical information the plaintiffs gave to the examiner for the IME, and therefore, to the defendants. The plaintiffs were compelled to submit to medical examinations pursuant to the terms of their insurance contracts.[19] The IME report was essentially treated as a by-product of that disclosure, and caught by the implied undertaking rule. In *Kitchenham*, the compelled disclosure was the IME report itself, which the defendant was required to disclose to the plaintiff at discovery, pursuant to Rule 33. The Court of Appeal noted that the plaintiff's medical information provided to the IME examiner was not caught by the deemed undertaking rule. Doherty J.A. stated:

> Only the IME was obtained by the plaintiff in the course of the discovery in the tort action, and therefore, only the IME is subject to the deemed undertaking rule. The other medical information given to [the doctor] by the plaintiff as required by the Rules flowed from the plaintiff to [the doctor] and was not 'obtained' by the plaintiff in the course of the discovery. The same observation applies to any information conveyed by the plaintiff to [the doctor] during his examination.[20]

Despite the discrepancy regarding the recipient of the information, and what information constitutes the compelled disclosure, the Court of Appeal articulated several consistent principles underlying the operation of the undertaking rules. These principles include the relevance of the requested information and the lack of privilege protecting it, and the irrelevance of the privacy interests of the plaintiff to the operation of the undertaking rules.

The plaintiffs commenced actions which put their medical condition at issue, therefore the IME reports were relevant documents which the defendants were entitled to see. The similarity of the issues raised in the actions, the nature of the evidence, and the interrelationship between tort and accident benefit actions were reasons given to explain the relevance of the IME report in the subsequent proceeding.[21]

The Court of Appeal clearly expressed in both decisions that no privilege attaches to the plaintiff's medical information provided for the IME; such an argument is "inconceivable." The Court found that the plaintiffs were not arguing for the enforcement of an undertaking, but were attempting to create a "protective shield against production of very relevant evidence."[22] Epstein J., quoting from *Klingbeil (Litigation Guardian of) v. Worthington Trucking Inc.*,[23] stated that "if relevant to the issues in this tort action, medical reports, records and information relating to the plaintiff are not confidential and are not protected from disclosure, whether or not obtained as the result of a statutory no-fault claim."[24]

In both decisions, the Court dismissed arguments that the privacy interests of the plaintiffs prevented the disclosure of the IME reports to the defendants. In *Tanner*, the Court was asked to consider the plaintiffs' privacy interests in their confidential medical information to exercise its discretion to relieve against the application of the implied undertaking rule. The Court rejected this argument, and found that the plaintiffs waived their privacy interests by putting their medical conditions at issue.[25]

In *Kitchenham*, Doherty J.A. was very clear that it is the privacy interests of the disclosing party that the undertaking rules are meant to protect, and that the nature of the information contained in the disclosure is irrelevant. The plaintiff argued that her confidential medical information disclosed to the insurer defendant in the first proceeding was protected by the deemed undertaking rule, and she was therefore prohibited from disclosing the IME report to the defendant in the second proceeding. The court rejected this argument. The rule is only concerned with how the party requested to disclose the information came into possession of it.[26] The content of the information is not a factor the court considers when determining the application of the undertaking rules.

Practical implications of reconciling *Tanner* and *Kitchenham*

There are practical implications stemming from the Court of Appeal's apparently inconsistent applications of the undertaking rules of which plaintiff and insurance defence counsel will need to be aware. Defence counsel need to be prepared for refusals to

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produce IME reports that were disclosed in a prior matter for an identical accident. Plaintiff counsel will argue that the implied/deemed undertaking rule prohibits disclosure of information obtained by the plaintiff in an earlier matter. Plaintiff counsel will rely on *Kitchenham,* arguing that as the most recent pronouncement of the Court of Appeal, it sets out the appropriate application of the undertaking rules. In response, plaintiff counsel need to be prepared for arguments from creative defence counsel that the operation of the undertaking rule is dependent on the forum in which the documents were disclosed, and therefore, *Tanner* applies and the plaintiff is required to produce the IME report.

On the authority of *Kitchenham,* the plaintiff is prohibited from disclosing any information it obtained through discovery in a related matter to a subsequent defendant insurer. Defence counsel will no longer be able to simply request the information from the plaintiff and expect it to be provided. There is now judicial authority that allows plaintiff counsel to refuse to produce relevant information obtained from a separate insurer for injuries suffered in an identical accident.

Guidance from the court is needed to determine the necessary procedure for the parties to follow in order to obtain an IME report from a prior matter. The Court of Appeal in *Kitchenham* indicated that consent for disclosure of an IME report and surveillance tapes could be obtained from the insurer in the prior matter, as it was the party that had been compelled to disclose the information. The undertaking rules do not operate to prohibit the future use of the disclosed information by the disclosing party. It remains to be seen whether insurance companies will respond favourably to such requests. From an industry standpoint, such cooperation would be beneficial. However, there may be contractual provisions in the policies with the insureds that prevent such disclosure. There is also the issue of how the court will reconcile its earlier finding in *Tanner* that the insurer defendant is not permitted to disclose the information imparted by the plaintiff in a medical examination to third parties for their use in other proceedings.[27] It is suggested that a Rule 30.10 motion may need to be brought to compel production from a non-party, namely the insurer in the prior matter.

A second method to obtain relevant information previously disclosed in a related matter, is to bring a motion under Rule 30.1.01(8) to seek an order granting relief from the operation of the deemed undertaking to the disclosed information, and order that the plaintiff produce it. In cases where the implied undertaking rule applies (i.e. where the information was disclosed in a FSCO arbitration), a motion requesting that the court exercise its discretion to lift the undertaking would be brought. The Court of Appeal noted that the interests of justice would "inevitably outweigh any resulting prejudice" to the party who disclosed the information (i.e. the plaintiff), if the interests of the party protected by the undertaking rule (i.e. the prior defendant insurer) would not be adversely affected by the use of the material, and the material was relevant.[28]

Of considerable importance is the amount of time that it will now take to acquire relevant information disclosed in a prior matter by a former defendant insurer. If defence counsel fails to make the proper requests and follow the appropriate procedure, it may have to conduct discoveries, and possibly a trial, without access to this information. Defence counsel must make these necessary requests early on in their proceeding to ensure access to this information when needed, and to avoid scrambling at the last minute to acquire it. The practical result of *Kitchenham* is the creation of another protracted expensive procedure to obtain non-privileged and relevant information from plaintiffs.

Conclusion

Given the inconsistent application of the undertaking rules in the Court of Appeal's *Tanner* and *Kitchenham* decisions, there is a definite need for the Court of Appeal to revisit the issue and provide lower courts with clear guidance on which party is the "recipient" in regards to the operation of the undertaking rules, and exactly what information is being "obtained." There promises to be much confusion given that these two decisions are founded on consistent underlying principles. Until this necessary clarity is provided, the production of relevant information obtained in earlier proceedings promises to be a new area ripe for dispute.

Notes:

1. 2008 ONCA 877 [*Kitchenham*].
2. 2003 CanLII 41640 (Ont. C.A.) [*Tanner*, C.A.]. This case was decided with a companion case *Reimer v. Christmas*.
3. R.R.O. 1990, Reg. 194 [the *Rules*].
4. *Tanner v. Clark*, 2002 CarswellOnt 2126 (Div. Ct.) [*Tanner*, Div. Ct.].
5. *Ibid*. at para. 50.
6. *Tanner*, C.A., *supra* note 2 at para. 6.
7. *Ibid*.
8. *Kitchenham v. Axa Insurance* (2005), 17 C.P.C. (6th) 375 (Ont. S.C.J.).
9. *Kitchenham v. Axa Insurance* (2007), 284 D.L.R. (4th) 722 (Ont. Div. Ct.).
10. *Kitchenham, supra* note 1 at para. 10.
11. *Ibid*. at para. 26.
12. *Ibid*. at paras. 33-34.
13. *Ibid*. at para. 56.
14. *Ibid*. at para. 57.
15. *Ibid*. at para. 65.
16. *Ibid*. at para. 43.
17. *Tanner,* C.A., *supra* note 2 at paras. 3 & 6.
18. *Kitchenham, supra* note 1 at para. 47.
19. *Tanner*, Div. Ct., *supra* note 4 at paras. 51-52.
20. *Kitchenham, supra* note 1 at para. 50.
21. *Tanner*, Div. Ct., *supra* note 4 at para. 25 and *Kitchenham, supra* note 1 at para. 50.
22. *Tanner*, C.A, *supra* note 2 at para. 6, cited with approval by Doherty J.A. in Kitchenham, *supra* note 1 at para. 42.
23. (1999) 43 O.R. (3d) 697 (Div. Ct.).
24. *Tanner,* Div. Ct., *supra* note 4 at para. 28.
25. *Ibid*. at para. 62-66.
26. *Kitchenham, supra* note 1 at para. 51.
27. *Tanner,* C.A., *supra* note 2 at para. 6.
28. *Kitchenham, supra* note 1 at para. 65.■