



## **82. The recording of medical expert examinations by the opposing side is forbidden**

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### **Background**

A certain plaintiff filed a lawsuit in the Jerusalem District Court demanding compensation for bodily injuries.

One of the defendants requested through attorney Gil Atar of Naschitz Brandes & Co. to have the plaintiff examined by a medical expert hired by the defendant. The plaintiff agreed only on the condition that he would be allowed to record the examination. The expert – a senior psychiatrist – opposed this demand and the issue was brought before the Jerusalem District Court. The court's decision from March 11, 2010 is presented here in outline form:

### **Summary of the plaintiff's position**

- a. The examination of the plaintiff by the defendant's expert is "antagonistic" and may create disagreements between the expert and the plaintiff regarding the course of the test and its results. The recording will allow the court to consider the credibility of both sides and rule on the disagreements.
- b. The very nature of the examination is unequal and gives an advantage to defendants. Recording the examination will reduce the inequality and promote judicial fairness.
- c. The examined person's right to record the examination is based on his fundamental right to document any examination he undergoes at his own discretion.
- d. Recording an examination is consistent with the principle of transparency of legal proceedings. Recording examinations is also in sync with the legislative trend of visual or audio documentation of the investigative process.
- e. Opposing the recording will encourage surreptitious recordings. There is no legal restriction on such a recording in the Eavesdropping Law since the examined person is part of the examination.

### **Summary of the defendants' position:**

- a. The recording may bother the examiner and disrupt the course of the examination.
- b. The recording may complicate the legal proceedings and open additional fronts.
- c. The expert opinion is not the "final word" for the plaintiff since the medical expert



can be interrogated about his opinion.

- d. If the plaintiff's examination by the defendant's experts is recorded, but the examination by his own expert is not recorded, this will create inequality and raise doubts about the integrity of the defendants' experts.
- e. The comparison the plaintiff makes between his case and the obligation to record interrogations of suspects with mental or emotional disabilities and interrogations of children is irrelevant.

The honorable Judge Yitzhak Inbar notes in his verdict that "the legal regulations are silent regarding the right of plaintiffs to make private recordings of examinations" and that "the question has been discussed several times in rulings by district courts, but their stance has varied."

Following a thorough examination of the existing rulings, the court determined as follows:

**Recording an examination requires prior authorization by the court for the following reasons:**

- a. The act of recording may intrinsically entail some disruption of the examination.
- b. The surreptitious recording of examinations, even if not a criminal offense, may infringe upon the expert physician's right to autonomously define the work environment at his clinic.
- c. The surreptitious recording of examinations may create an atmosphere of hostility and suspicion and is sometimes inappropriate and dishonorable.

After defining the criteria for exercising its discretion, the court ruled as follows:

**The request to record an examination by a medical expert, a psychiatrist – is hereby denied for the following reasons:**

- a. The plaintiff is an adult and his representative did not present any unique information supporting the recording of the examination.
- b. The plaintiff did not record the expert examination conducted on his behalf and in any case did not offer to provide the defendants with this recording.
- c. We accept the expert psychiatrist's position that claims, among other things, that: "Bringing a recording device to an examination inevitably means bringing in a distracting foreign observer who disrupts the flow, comfort and spontaneity of both examiner and examinee." The court recognizes the expert physician's right to "design his or her work environment in accordance with his or her best judgment and understanding."

The plaintiff's attorney appealed the Jerusalem District Court's decision to the Supreme Court. The Israel Bar Association decided to attend the hearing as "amicus curiae" supporting the plaintiff's position in favor of recording the medical examination.



This case was first brought to the attention of the Ethics Board by attorney Atar in May 2010.

The Ethics Board attributes great importance to the fundamental decision the Supreme Court will make. A decision requiring that the medical examination be recorded may harm the physician's status in society since it would imply mistrust and suspicion towards medical experts. In addition to complicating the legal proceedings, such a decision could create an incentive for plaintiffs to exaggerate their symptoms during the examinations. On the other hand, this could incentivize physicians to overtest and practice "defensive medicine" even when giving expert opinions to the court.

It is easy to imagine how allowing such recordings could lead to visual recordings of medical examinations, and eventually recordings of every professional encounter between physicians and patients, even outside of legal proceedings. There is no doubt that the effects of this process would not be limited to the judicial system, and the atmosphere of suspicion and mistrust would spread to the traditional relationship between physician and patient – where this effect would be destructive.

The Ethics Board held several discussions on this matter, culminating with a meeting on November 2, 2010 where the following position paper was agreed upon:

### Position paper

- According to the rules of medical ethics, physicians who serve as expert witnesses should act with integrity and complete honesty, in accordance with their objective professional opinion and after making a reasonable effort to obtain all information and documentation relevant to the examinee.
- The members of the Ethics Board believe that routinely recording or photographing medical examinations should not be allowed, even as part of forensic medicine. Such recordings should only be allowed with the consent of both physician and patient, or during extraordinary circumstances defined in advance by the court.
- Physicians are not obligated to perform medical examinations in the presence of a recording device or camera if they feel it harms the proper course of the examination.
- Due to the fundamental importance of this case and following a decision made by the Ethics Board, the IMA also decided to attend the legal proceedings as "amicus curiae" in part to counterbalance the position of the Bar Association and support the position opposing the recording of medical examinations. Attorneys Orna Lin and Barak Calev represented the IMA in these proceedings.
- On February 1, 2012, in a precedential ruling, Supreme Court justices Rivlin, Danziger and Hendel rejected the plaintiff's demand (Civil Appeal Authority 2948/10). The court stipulated that **in general, the recording of defendants' expert examinations should not be allowed during tort claims if the defendant or the medical expert oppose it, except in extraordinary cases. However, if the plaintiff, defendant and**



**expert all agree to the recording, it should not be forbidden.**

- This shows that the court accepted the position presented by the IMA stating that: “The suspicion directed towards the medical expert is unfounded. A medical expert is not a mercenary. Medical experts are physicians, and as such they are obligated to present the medical truth and are bound to the rules of medical ethics ... Approving the recording would harm the trust in medicine and turn the physician’s examination room into an interrogation chamber. This approach hurts the public’s trust in physicians and their ability to perform their professional duty.”