# SUPREME COURT OF NOVA SCOTIA

**Citation:** Marshall v. Annapolis County District School Board, 2009 NSSC 203

**Date:** 20090625
**Docket:** Hfx No. 123323
**Registry:** Halifax

Between:

Jonathan Marshall, an infant, represented by his Litigation Guardian, Gladys Hardwick

Plaintiff

and

The Annapolis County District School Board and Douglas Feener

Defendants

and

Betty Acker and Vaughan Caldwell

Third Parties

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## D E C I S I O N

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**Judge:** The Honourable Justice Gerald R P Moir

**Heard:** 22 and 25 June 2009

**Written Decision:** Oral decision edited and signed on 29 June 2009

**Counsel:** Mr. Robert K Dickson, QC and Ms. Cynthia M Scott for the plaintiff
Mr. Scott Norton, QC and Mr. G Grant Machum for the defendants
Ms. Betty Acker and Mr. Vaughan Caldwell, third parties, acting on their own

Moir, J (Orally):

[1] The plaintiff, Jonathan Marshall, was struck by a school bus in 1994, when he was only four years old. He sued the School Board and the bus driver. They joined Ms. Acker and Mr. Caldwell alleging parental negligence.

[2] After Ms. Acker and Mr. Caldwell were joined, the defendants requested case management. This task was referred to me in 1999. The main issues at that time were the possibilities of coverage or representation for the third parties and the length of time it was taking to get to trial.

[3] After a series of management conferences, it seemed that there was little more to be accomplished by judicial management. The question about the third parties had been explored and, also, I had recorded my assessment that Mr. Marshall's medical condition was insufficiently matured for the case to go to trial.

[4] Six years later, the defendants brought the case to appearance day chambers. The Defendants requested a time table to be set to complete any remaining pre-trial steps so that the matter can be set down for trial." As a result of that, case management was resurrected in January, 2007.

[5] Several conferences were held. The defendants' priority has been to get trial dates set.

[6] At a conference in April of 2007, the plaintiff advised that he may have two further expert's reports to deliver, one from a psychiatrist and the other from a neuro-psychologist. The defendants sought deadlines for the filing of those two reports and, on July 31, 2007, the defendants requested that I set trial dates although the two reports and other disclosure were outstanding.

[7] With the resolution of some issues concerning severance and trial by jury, I was satisfied I could set the case for trial when the two expert's reports were filed. A January 2008 deadline was set for the reports and a conference was scheduled for February 8, 2008.

[8] After close questioning of the parties about the course of preparation for trial, I set a lengthy jury trial to be held starting in September, 2009.

[9] The plaintiff brings three motions to me as case management judge. Justice Pickup is the trial judge. I spoke with him casually. I did not describe the motions and I did not provide any information beyond describing generally what the proceeding is about. He has no difficulty with my hearing motions on case management.

[10] The first motion made by the plaintiff seeks an order excluding expert evidence by Dr. Christian Soder on the ground that his report was delivered too late. The report was delivered in March of 2009.

[11] Mr. Dickson argues that this expert report is too late for two reasons: "the Defendants have not complied with the civil procedure rule nor with directions of the Court given in the Case Management Conference". I will discuss the first of these first.

[12] Mr. Dickson relies on a deadline for rebuttal expert's reports in the *Nova Scotia Civil Procedure Rules* that came into effect this year. Mr. Norton points out Rule 92.04(g), one of the transition Rules. He says that the deadline under the former Rules applies. The Report of Dr. Soder was delivered well before that deadline.

[13] The present Rules contain provisions for disclosure of intended opinion evidence that are significantly different from those on that subject in the former Rules. Our present Rules on that subject compare much more closely with the English practice than with the practice under our former Rules. The differences are great enough that the new Rules could not reasonably be applied to many actions that were mature before the new Rules came into effect.

[14] The application of deadlines for delivery of expert's reports to actions matured before the new Rules came into effect presents sufficient difficulty that Rule 92.04(g) applies the old deadlines to actions in which a notice of trial was filed under the old Rules "unless the parties agree or a judge orders otherwise".

[15] The Soder report was delivered before the deadline under the old Rules, which is the applicable deadline.

[16] Mr. Dickson's second point, that the report was delivered after a deadline set by a judge, requires close examination of the record.

[17] The plaintiff was supposed to deliver the psychiatric and the neuro-psychological reports in January, 2008. They were not delivered until the very day of the conference at which the trial dates were set, February 8, 2008.

[18] The transcript of the conference shows a judge who was concerned to know a great deal about witnesses. Mr. Norton suggests that that would be because I had the responsibility to gauge how much time was required. Even more than that, I was concerned about the risk of adjournment in a case that was being set down before any party was ready for trial. Under the old Rules, trial readiness was the usual threshold for getting trial dates.

[19] We set numerous deadlines on various subjects, and I am pleased to see that these appear to have been met.

[20] I did not set deadlines for delivery of rebuttal reports in response to the plaintiff's two new reports. This was not for lack of effort by Ms. Sarah Scott, who represented the defendants that day. In reply to some of my many questions she pointed out that the defendants had just received the new reports and said "so I'm not sure at this point what our position is on whether we need a response to those". Later, she confirmed that an engineer's report "and any response" were the only outstanding reports to come from the defendants.

[21] Despite Ms. Scott's references to the possibility of response experts, no deadlines were set for the defendant to deliver reports. This was an oversight and the oversight carries into my report summarizing the results of the conference.

[22] Not long afterwards, Mr. Machum followed up on the subject in a letter to me. He referred to the lateness of the reports and said:

> We are not in a position at this stage to advise Your Lordship of additional experts we may call. We will attempt to advise Your Lordship of any additional experts once we have had an opportunity to consider the new reports.

I replied to Mr. Machum by saying that he should call for another conference if he disagreed with anything in my report.

[23] Mr. Machum did not advise me, or Mr. Dickson, about “any additional experts”. To some extent, I share Mr. Dickson’s frustration over the fact that a report was delivered over a year after the conference.

[24] Mr. Norton characterizes the late delivery of the two reports as their having been “dropped” on the defendants at the conference. I would not use that word. The defendants had been insisting on delivery by Mr. Moors, who represented the plaintiff until Mr. Dickson took over shortly before the February conference. I had assisted the defendants by obtaining commitments about the two experts and setting deadlines. The reports were only late by a week or two, and they were anticipated.

[25] The defendants’ present position is inconsistent with that taken previously. They have been insistent on getting this action tried. They had good reasons to be insistent. When finally we were able to set dates, no complaint was made that the two reports were late, let alone “dropped” on the defendants. When Mr. Machum wrote to me after having obtained ten weeks of trial time despite the lack of trial readiness, he gave no hint that he would require much time to make a decision about the response reports.

[26] Had the defendants adopted at the conference in February of 2008 the position they now advance, that over a year is a reasonable time for production of response reports, trial dates would not have been set. I would have been too concerned about the enormous cost to the public and the parties of an adjournment.

[27] I think the expectations were fairly clear. For example, we set a December 31, 2008 deadline for a defendant’s response report on an opinion the plaintiff had not yet decided whether to obtain. I do not see how a person who attended that conference could conclude that delivering response reports a year later would be within the court’s expectations.

[28] The fact remains that no explicit deadline was set. Further, I do not see the prejudice to the plaintiff. In my view, there was in March, and there remains, time to properly prepare for the day when Dr. Soder takes the stand.

[29] I will not grant the motion to exclude Dr. Soder’s opinion. Of course, that says nothing about either admissibility or qualification, which are subjects for Justice Pickup.

[30] The second motion seeks to exclude evidence from RCMP officers who express opinions on speed, and even fault. These opinions are found in investigative reports that have long been known to all parties.

[31] This motion is under present Rule 55.10. Rule 55 - Expert Opinion provides for an expert’s report that is similar to that required in England. Without it, a party may not offer the expert opinion at trial or on a hearing: Rule 55.02. However, a party who wishes to have the evidence excluded on the basis that the report is insufficient must give reasonable notice: 55.10(1).

[32] Rule 31.08 of the *Nova Scotia Civil Procedure Rules* (1972) provides for a judge to require a party delivering a deficient report to correct the deficiency. Rules 55.10(2) and (3) of the present Rules go further. They permit a party who is not satisfied with the sufficiency of a report to obtain an advance ruling that is binding at trial or on a hearing.

[33] The issue on a motion for an advance ruling is “whether a report sufficiently conforms with this Rule to permit the purported expert to testify”. Thus, the advance ruling provision is restricted to opinions that are subject to the reporting requirements of Rule 55. The defendants contend that no expert’s report provisions apply to limit the admission of an expert opinion formed by an RCMP officer in the course of a public investigation. If any do, they are the provisions of the former Rule and a Rule 55.10 advance ruling is not available.

[34] The motion also calls for me to exclude the RCMP opinions on the grounds that they have no probative value and are highly prejudicial. Rule 55.10 does not extend to advance rulings on admissibility. See also, Rule 29 - Motion to Presiding Judge.

[35] Therefore, the second motion is dismissed.

[36] The third motion is for an order assisting plaintiff’s counsel in continuing their interviews of numerous teachers who may have relevant evidence to give

about Mr. Marshall's successes and challenges in elementary, junior high, and senior high school.

[37] Counsel for the School Board put a stop to the interviewing of teachers who are presently employed by the Board. I am of the view that a lawyer for one party cannot approach an employee of an opposed party to ascertain relevant information without consent.

[38] In the circumstances of this case, where the school has kept itself distant from the suit and, over many years, the teachers have discussed, for the good his schooling, Mr. Marshall's challenges, I can understand why counsel embarked on interviews without seeking consent. However, the Board has the right to put a stop to that.

[39] No doubt, the circumstances have motivated the Board to permit interviews in the presence of counsel. In my view, the Board's concession in that regard is generous.

[40] So, all motions are dismissed.

[Submissions on Costs]

[41] Despite the submissions I have heard, I think there is enough blame to go around here on my failure to set deadlines for the response reports and for the time it took to deliver response reports. Based on that, I am going to order that the parties bear their own costs.

J.