SUPREME COURT OF NOVA SCOTIA
Citation: Marshall v. Annapolis County District School Board, 2009 NSSC 376

Date: 20091008
Docket: Hfx. No. 123323
Registry: Halifax

Between:

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

Plaintiff

v.

Annapolis County District School Board and Douglas Feener

Defendants

v.

Betty Acker and Vaughn Caldwell

Third Parties

Judge:	The Honourable Justice Arthur W.D. Pickup.
Heard:	Thursday, October 8, 2009, in Halifax, Nova Scotia
Oral Decision:	October 8, 2009
Written Decision:	December 9, 2009
Counsel:	Robert K. Dickson, Q.C.,R. Malcolm Macleod, Q.C. and Cynthia Scott, for the plaintiffs G. Grant Machum, Scott C. Norton, Q.C. and Sara L. Scott, for the defendants Betty Acker and Vaughn Caldwell for the third parties, no submissions made on issue - not present for argument

By the Court:

[1] This jury trial is in respect of an automobile/pedestrian accident that took place on April 12, 1994 on route 201 near Paradise, Annapolis County, Nova Scotia. The trial commenced on September 17, 2009 and is scheduled for forty-two days.

[2] The defendants object to the late filing of expert medical reports from Dr. Allan Cook and Dr. Sarah Shea, both dated September 14, 2009. They allege that these reports have not been filed within the time limits set forth in the *Civil Procedure Rules* (old and new) and can only be admitted into evidence with leave of the court. The plaintiff`s seek leave for the introduction of these two medical rebuttal reports. The position of the plaintiffs is that both reports address issues raised as a result of the defence medical opinions of Dr. Christian Soder (January 27, 2009) and Dr. Robert B. Gates (report dated July 24, 2009) and were anticipated by the defendants.

[3] The plaintiff contends that by correspondence of June 26, 2009 they advised defendants' counsel that they would be consulting with medical experts to respond to a report prepared by Dr. Soder. The plaintiff says they further advised defendants' counsel that they expected delays in responses from the doctors due to the summer vacation.

[4] The defendants had initially objected to the admission into evidence of Dr. Soder's report. Justice Moir heard this motion as case management judge and did not exclude Dr. Soder's report. Justice Moir's decision is reported at 2009, N.S.C.C. 2003. According to the plaintiffs, the defendants asserted before Moir, J. that there would be no prejudice arising from the late receipt of Dr. Soder's report because the plaintiffs would have an opportunity to provide a rebuttal report.

[5] On July 23, 2009, Dr. Allan Cook, a Neuropsychiatrist, was asked to undertake a review and assessment and provide an opinion with respect to the plaintiff's competency.

[6] The defendants say the portion of Dr. Cook's report dealing with the opinion with respect to the plaintiff's competency was prepared for a Chambers application to obtain a guardian for the plaintiff, Jonathan Marshall, under the *Incompetent*

Persons Act. They suggest that the paragraph of the report dealing with Dr. Soder`s report "was tacked on" to the original report submitted in support of the guardianship application under the *Incompetent Persons Act.*

[7] On July 29, 2009 the plaintiff sent a letter to Dr. Sarah Shea, a Developmental Pediatrician, enclosing medical documentation and opinions. On August 11, 2009 Dr. Shea was sent the reports of Dr. Soder and Dr. Gates and her opinion was requested.

[8] The plaintiff advised defendants' counsel by correspondence of August 27, 2009 that they were still awaiting the response of a number of experts in response to the Soder and Gates reports. There is no evidence of any objection by the defendants as a result of the receipt of this August 27, 2009 letter.

[9] The plaintiff contends that at a pre-trial conference on September 15, 2009 they advised that they would be submitting two experts reports by the end of the day. The minutes that I received of the September 15, 2009 pre-trial conference state as follows:

> 19. Two new expert reports filed by the Plaintiff to respond to Dr. Soder's report by end of day.

[10] There does not appear to have been any objection made by the defendants to the filing of these reports at the pre-trial conference. The plaintiff received reports from Dr. Allan Cook and Dr. Sarah Shea on September 15, 2009 and delivered these to Mr. Norton the same date.

[11] On September 16, 2009 Mr. Norton provided me with correspondence objecting to the admission of these reports on the basis that the reports were filed late, that is, less than thirty days prior to trial. The trial commenced on September 17, 2009 with jury selection.

The Reports

Dr. Sarah Shea - Developmental Paediatrician

[12] Dr. Shea's report is in response to a request from plaintiff's counsel for an opinion regarding whether Jonathan Marshall's poorer functional and cognitive

outcome are on the basis of pre-existing developmental abnormality or related to his traumatic brain injury. In her report, Dr. Shea commented on the fact that Jonathan Marshall was not toilet trained and provided an opinion as to whether this could be interpreted as proof that he had a pre-existing cognitive abnormality and whether there was any other indication of pre-existing developmental abnormality. She commented on Dr. Gates' conclusion that Jonathan's learning impairment was due to a developmental disability. She also commented on Dr. Soder's conclusion that Jonathan's brain injury was mild.

Dr. Allan M. Cook - Neuropsychiatrist

[13] Dr. Cook's report was dated September 14, 2009. He stated in the first paragraph, "I would like to respond to your request for an opinion with regard to Mr. Marshall's competence to make financial and physical care decisions, in view of his serious injuries in the motor vehicle collision of April 12, 1994." He then recites a number of documents that were provided to him including neuropsychological reports from Dr. Wayne MacDonald, one from Dr. Andy Cancelliere dated November 27, 2007, reports from Dr. Donald Craswell, reports from Dr. W. M. Franks, a physical medicine and rehabilitation expert, as well as hospital records from Soldiers Memorial Hospital in Middleton and the IWK Children's Hospital in Halifax. Initially he makes no mention of Dr. Soder's or Dr. Gates reports.

[14] Dr. Cook indicated that he met with Jonathan Marshall, his mother and step-father and his aunt Gladys. He stated that he was in agreement with Dr. Cancelliere and Dr. MacDonald that Jonathan suffered a brain injury in the motor vehicle accident. He pointed out that this opinion was at variance with the family physician, Dr. Craswell, with whom he disagreed. He went on to provide the opinion that Jonathan Marshall is "not competent to make personal care or financial decisions independently and that he will require the assignment of a surrogate decision maker".

[15] His report finished with a one paragraph review of Dr. Soder's report as well as those of Dr. Gates and Dr. Franks, and he provided his opinion that Mr. Marshall's brain injury has significantly contributed to his educational and cognitive impairment which, in his opinion, cannot be ascribed to pre-existing development delay.

Civil Procedure Rules

[16] I am satisfied that the 1972 *Civil Procedure Rules* apply to a determination of this issue.

[17] Rule 92 (of the new Rules) deals with the transition from the old Rules to the new Rules. Rule 92.02(1) is as follows:

> **92.02** (1) These Rules apply to all steps taken after January 1, 2009 in an action started before January 1, 2009, unless this Rule 92 provides or a judge orders otherwise.

[18] Rule 92.04(g) is as follows:

> **92.04 Each of the following steps that is outstanding in an action on January 1, 2009 must be completed under the *Nova Scotia Civil Procedure Rules* (1972), unless the parties agree or a judge orders otherwise:**
>
> ...
>
> (g) in an action in which a party files a notice of trial before that date, the assignment of trial dates, **delivery of an expert's report**, and discovery;
>
> [Emphasis Added]

[19] I am satisfied the 1972 Rules apply to the delivery of expert reports.

[20] The relevant 1972 Rule is Rule 31.08, which provides as follows:

> **31.08.** (1) Unless a copy of a report containing the full opinion of an expert, including the essential facts on which the opinion is based, a summary of his qualifications and a summary of the grounds for each opinion expressed, has been
>
> (a) served on each opposite party and filed with the court by the party filing the notice of trial at the time the notice is filed, and
>
> (b) served on each opposite party by the person receiving the notice within thirty (30) days of the filing of the notice of trial,

> the evidence of the expert shall not be admissible on the trial without leave of the court.

[21] Therefore, any admission of expert reports that are served outside the thirty day period following the filing of a notice of trial requires leave of the court. The notice of trial was filed by the plaintiff in February of 2008. All expert opinion filed beyond the thirty day period following the filing of the notice of trial is done by consent or leave of the court.

[22] The defendants' position is that this provision allows the party who has not filed the notice of trial thirty days before the date of the trial to file their reports. In any event, the filing of the subject medical reports are outside the thirty day period and leave of the court is required.

[23] In *Corkum v. Sawatsky* [1993] N.S.J. No. 24 (N.S.S.C.), the court set out the applicable considerations in permitting admission of an expert report that was not filed within the appropriate timelines. The court stated as follows at p. 8 (QL):

> **There is a burden of persuasion upon the defaulting party to show that the interests of justice would merit its late reception.** I heard no such submission during argument. Rather, Mr. Newton explained that it was a decision come by lately and that Ms. Gmeiner's report might be "helpful to the court". That is not reason to grant leave to waive the clear requirements of C.P.R. 31.08. **The Rule is intended to avoid surprise or costly delay brought on by a request for an adjournment. Adherence to the Rule should promote settlement by giving each side sufficient time to address the content of an expert's report and obtain reasoned instructions which might lead to an early resolution.** It was after all the plaintiff who pressed for trial during the term of the Supreme Court in Kentville. While much of the docket was taken with criminal jury trials I assigned the last days available to this case. In his Notice of Trial, Mr. Corkum certified his readiness and certified that all interlocutory steps had been taken. It was for all of these reasons that I rejected Ms. Gmeiner's report.
>
> [Emphasis added]

[24] Further, in *Fowler v. Schneider National Courriers Inc.* [2000] N.S.J. No. 116 (N.S.S.C.), the court noted that in addition to looking at the reasons for the late filing, the court should also consider the probative value of the content of the report against the prejudicial effect on the opposing parties and whether it assists the jury. Wright, J. said, at para. 8:

> Also, the Court will weigh the probative value of the content of the report against the prejudicial effect to the opposing parties in determining its admissibility**.** In so doing, the Court must here consider whether the admission of the Daecher report is necessary to assist the jury in reaching a proper and just verdict, or whether the report is lacking in probative value in the sense that the jury can just as easily make findings of fact and draw any necessary inferences without the assistance of that expert report.

Decision

Dr. Sarah Shea

[25] I am satisfied that Dr. Shea's report responds to Dr. Soder's and Dr. Gates report. The defendants had prior notice that the plaintiff would be obtaining this report. The plaintiff objected to the admission of Dr. Soder's report but it was dealt with by Moir, J., who gave a decision on June 29, 2009 denying the plaintiff's motion to exclude Dr. Soder's report. At that point the plaintiff took steps to obtain Dr. Shea's report. I am not satisfied in the circumstances that there was undue delay. I am not satisfied there is any evidence of prejudice or surprise as the defendants were aware that the plaintiff was awaiting medical evidence in response to the opinion, in fact, by correspondence to the defendants, it was confirmed by plaintiff's counsel by letter of August 27, 2009 that he was still awaiting the reports. There was no objection from the defendants. It was also mentioned at the pre-trial conference held on September 15, 2009 that these reports would be forthcoming. I am prepared to grant leave to allow the admittance of Dr. Shea's report subject to the usual qualification as an expert.

Dr. Allan M. Cook

[26] The defendants' objection to Dr. Cook is that his report provides opinions on the plaintiff's competence to make financial and personal care decisions and on requirements for future care. The defendants suggest that if these issues are addressed by other reports there is no necessity for this report, and if it is not addressed in other reports then it is entirely new and delivered only one full day before the jury was selected. The defendants say they had no time to search for and retain and instruct a neuropsychiatrist to respond to this report. Finally, they suggest the only paragraph in response to Dr. Soder's report is at the end of the report.

[27] I am satisfied that Dr. Cook's report, in relation to his comments contained in the second last paragraph at page two of his report, is relevant and probative and will be of some assistance to the jury. As well it responds to Dr. Soder's report. The defendants were aware that the plaintiff was obtaining this opinion in response to the report of Dr. Soder. I am satisfied that it is just to allow the admission of this portion of Dr. Cook's report into evidence. Leave is granted.

[28] The rest of the opinion preceding the above paragraph is more problematic. The opinion was apparently elicited by correspondence from Mr. Dickson dated July 23, 2009. Dr. Cook commented:

> In particular, I would like to respond to the request for an opinion with regard to Mr. Marshall's competence to make financial and physical care decisions, in view of the serious injuries from the motor vehicle collision of April 12, 1994.

[29] This does not appear to be in response to opinions of Dr. Soder or Dr. Gates, but appears to be what the defendants characterize as a new opinion on a new area. The burden is on the plaintiff to show that the interests of justice merit the late reception of this part of the report. I am not persuaded that this burden has been met. It is too late for the defendants to obtain expert evidence from a neuropsychiatrist to respond to the report. I have also considered the probative value of the content of the report against its prejudicial effect on the defendants and whether it would be of assistance to the jury. Dr. Cook appears to review the evidence of the plaintiff's witnesses, Dr. Andy Cancelliere, Dr. Wayne MacDonald and Dr. Donald Craswell, the family physician, but does not mention Dr. Cook or Dr. Soder. This is not a rebuttal report as the plaintiff maintains.

[30] I am satisfied that it is not in the interests of justice to allow the portion of Dr. Cook's report dealing with Jonathan Marshall's mental competency to be admitted into evidence and, therefore, the application for leave is denied. I will limit the admission of Dr. Cook's report to the second last para. on p. 3, dealing with his response to Dr. Soder's opinion subject to the usual qualification when he is called as a witness at trial.

Pickup, J.