**1996** **S.H. 73885**

**IN THE SUPREME COURT OF NOVA SCOTIA**

**BETWEEN:**

**VAUGHN M. HORNE**

**Plaintiff**

**- and -**

**INDUSTRIAL ESTATES LIMITED and THE ATTORNEY GENERAL OF NOVA SCOTIA, representing Her Majesty the Queen in the right of the Province of Nova Scotia,**

**Defendants**

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# D E C I S I O N

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**HEARD:** **at Halifax, Nova Scotia before The Honourable Justice Walter R. E. Goodfellow on July 4, 1996 in Chambers**

**DECISION:** **July 26, 1996**

**COUNSEL:** **Blair H. Mitchell,**
**for the Vaughn M. Horne**

**Meinhard Doelle,**
**for Industrial Estates Limited**

**Marian F. H. Tyson, Q.C.**
**for the Attorney General of Nova Scotia**

GOODFELLOW, J.:

## 1. APPLICATION

This is an application by the plaintiff, pursuant to **Civil Procedure Rule** 18.14 (1) (c) for an order that the discovery deposition of Dr. William Deagle, formerly of Elmsdale, Nova Scotia, now a resident in the state of Colorado, Unites States of American taken in Nova Scotia on August 13, 1991 may be used by the plaintiff in the trial of this action insofar as is admissible under the Rules of evidence for any purpose by any party to this proceeding.

## 2. BACKGROUND

Vaughn M. Horne issued his Originating Notice (Action) and Statement of Claim August 9, 1990 alleging that he suffered injuries in a gymnasium, the premises of which it is alleged were owned and occupied by Industrial Estates Limited. Mr. Vaughn alleges the gymnasium premises were occupied, maintained, controlled, designated and equipped by the defendants and expressly dedicated for the use by tenants and employees of tenants.

Mr. Horne seeks special and general damages for injuries he alleges occurred to him in the gymnasium on the 10th of May, 1988.

Defences were filed denying liability, and liability remains an issue.

The plaintiff filed his list of documents May 8, 1991 referring to documents including a report from Dr. W. R. Deagle of January 19, 1989, and in the plaintiff's supplementary list

of documents filed June 26, 1991, there is reference to a letter December 7, 1989 to Dr. J. Martin from Dr. Deagle, a letter to Dr. P. Nance from Dr. Deagle, March 23, 1990 and a letter from Dr. Deagle to Dr. Dhawan December 21, 1990.

There followed a second, third and fourth supplementary list of documents, the last dated August 1, 1991. No further letters or reports from Dr. Deagle are listed.

The defendant, Industrial Estates Limited filed its list of documents June 20, 1991, and the defendant, The Attorney General of Nova Scotia filed its list of documents July 12, 1991.

The discovery of Dr. Deagle took place August 13, 1991, and both defendants were represented by counsel. Counsel for Industrial Estates Limited participated in the examination of Dr. Deagle, and counsel for the Attorney General of Nova Scotia, while in attendance, apparently chose not to participate in his examination.

Very little transpired in the Court's file other than a series of notices of intention to proceed, **CPR** 3.04. In due course the Prothonotary caused a notice to be given pursuant to **CPR** 28.11 indicating that three years had passed since the matter was placed on the general list of cases with no notice of trial , and that the matter would be dismissed if the plaintiff did not indicate his intention to proceed and file a notice of trial within 30 days.

The notice of trial was filed February 13, 1996 and refers to expert evidence being adduced on behalf of the plaintiff and attaches Dr. Deagle's medical/legal report of June 10, 1991 to counsel and copies of medical reports from Dr. Dhawan to Dr. Deagle, the last one being dated May 13, 1991. Other experts' reports, including that of an actuary were also attached to the notice of trial.

The application by Mr. Horne to use a discovery deposition of August 13, 1991 was supported by the affidavit of his solicitor, Blair H. Mitchell, sworn June 26, 1996 and a supplementary affidavit by Mr. Mitchell sworn July 3, 1996.

The affidavit in opposition by David A. Miller, Q.C., solicitor for Industrial Estates, sworn June 28, 1996 has attached to it a memorandum by Mr. Mitchell which was provided to Mr. Miller by letter of September 6, 1995, and that memorandum is as follows:

MEMO TO: HORNE FILE

DATE: SEPTEMBER 5, 1995

SUBJECT: TELEPHONE CALL WITH DR. W. DEAGLE

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Contacted Dr. Deagle in Colorado Springs (1-719-776-8750) further to BHM's letter of July 13, 1996.

Dr. Deagle indicated:

1. he would be willing and interested to come to N.S. for any trial;

2. he would require **two to three months** lead time re dates;

3. he would require travel costs, trial costs, expenses and something he

called portal to portal costs.

He has the letter at home and has promised to try to get a more detailed response to you within the next week.

## 3. ISSUE

Is all or any of the discovery evidence of Dr. Deagle taken August 13, 1991 admissible pursuant to **Civil Procedure Rule** 18.14 (1) (c)?

## 4. CIVIL PROCEDURE RULES

**Object of rules**
1.03.

The object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding.

**Persons who may be examined**
18.01.

(1) Any person, who is within or without the jurisdiction, may without an order be orally examined on oath or affirmation by any party regarding any matter, not privileged, that is relevant to the subject matter of the proceeding.

**Examination out of the jurisdiction**
18.06.

(1) The court may order any person who is temporarily or permanently resident out of the jurisdiction to be examined before an examiner for such purposes, at such time and place, and in such manner as the court thinks just.

(2) Service of the order and all papers for the examination may be made upon the appropriate solicitor, and the attendance fee of the person to be examined may be paid to the solicitor.

**Use of depositions as evidence**
18.14.

(1) At a trial or upon a hearing of an application, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at an examination for discovery, or who received due notice thereof, for any of the following purposes,

(a) to contradict or impeach the testimony of the deponent as a witness;

(b) where the deponent was a party, or an officer, director or manager of a party that is a corporation, partnership or association, for any purpose by an adverse party;

(c) where the deponent is dead, or is unable to attend or testify because of age, infirmity, sickness, or imprisonment, or is out of the jurisdiction, or his attendance cannot be secured by subpoena, or exceptional circumstances exist that make it desirable in the interest of justice to allow the deposition to be used, for any purpose by any party.

**Power to order deposition to be taken**

32.01.

(1) The court may grant an order for an examination on oath or affirmation of any person, at any place, before a judge, officer of the court, or other person.

[Amend, 12/12/74]

(2) The court under paragraph (1) may, on such terms as the court thinks just including directions as to discovery before the examination, grant,

. . .

(b) where the person to be examined resides outside the jurisdiction and in a country with a government that allows a person in that country to be examined before a person appointed by the court, an order in Form 32.01B;

**Conduct of examination**

32.05.

(1) Subject to the directions contained in an order or letter of request, any person to be examined shall be examined upon oath or affirmation, and he may be

(a) examined, cross-examined and re-examined in the same manner as a witness at a trial, and

## 5. CASES - TEST

The literal meaning of Rule 18.14 (1) (c) is that the discovery transcript of a party out of the jurisdiction may be introduced into evidence simply because he or she is out of the jurisdiction. This meaning was considered and rejected in **Nova Scotia (Minister of Government Services) v. Picker Canada Ltd. and Ohmite Manufacturing Co.** (1989), 92 N.S.R. (2d) 382, **Midland Doherty Limited v. Rohrer and Central Trust Company** (1983), 62 N.S.R. (2d) 73 and **Southwest Properties Ltd. v. Radio Atlantic Holdings Ltd.** (1994), 134 N.S.R. (2d) 161 .

In each of these cases, the Court determined that it was not satisfied the witness outside of the jurisdiction was unavailable to give evidence.

The onus is upon a party seeking to tender discovery evidence to satisfy the Court that despite all reasonable efforts the witness' attendance cannot be attained.

The test is therefore one of establishing to the Court the "unavailability" of a witness now out of the jurisdiction.

The Court does have a discretion to intervene in a situation where unnecessary, unreasonable expenses are being incurred. This is part of the mandate of the object of the Rules.

An example of such a situation might be where a witness (a party or otherwise) was examined on discovery on notice or with the other party in attendance, and the witness now resides out of the jurisdiction and although "available", attendance would be at a considerable price due to expense, great personal inconvenience due to health or the disruption of personal or business concerns etc. In such circumstances, it might not justify rigid adherence to the test if the evidence to be achieved by attendance is uncontroversial, ie. ownership, payment, condition of an all-terrain vehicle at the time of the accident, then in such circumstances, it would be unreasonable in the extreme to insist on the personal attendance if the existing discovery transcript would establish what was necessary and what would otherwise be achieved by going to the expense and inconvenience of the personal attendance of the witness.

Mr. Mitchell, in his brief, states:

> In this case it is submitted that the evidence is clear that the deponent is unavailable with the meaning of the Rule and the deposition of Dr. Deagle should be admitted.

Mr. Horne's position is, therefore, that Dr. Deagle is unavailable because of expense and Mr. Horne's lack of financial capacity.

The evidence in support is advanced by Mr. Mitchell's two affidavits. Nothing turns on the affidavits being those of the plaintiff's solicitor primarily because there is no objection. Nevertheless, the Court cautions solicitors that a solicitor's affidavit normally should be used only for procedural, non-controversial facts, ie. date of receipt or sending of

a letter, statutory compliance as to filing, etc. and not to facts that are the personal knowledge of the client.

Mr. Horne's position is that Dr. Deagle is "unavailable" in the sense of it being beyond Mr. Horne's financial capacity to attend and have Dr. Deagle's evidence taken in Colorado.

It is clear from the file, in the memorandum of Mr. Mitchell's telephone conference September 5th with Dr. Deagle which is attached to Mr. Mitchell's affidavit, that Dr. Deagle did express a willingness to come and give evidence provided he is given advance notice and his travel, trial and other expenses. The only other evidence of Dr. Deagle's unavailability advanced is contained in the affidavit of Mr. Mitchell in the exhibit attached, being his letter of October 13, 1995 to opposing counsel which recites:

> I have heard from Dr. Deagle by telephone message left at my office machine on Thanksgiving Day. Dr. Deagle's message indicates that he is busy with courses and his practice and hasn't had the opportunity to supply the information that I requested earlier. He now doubts, however, that he will be able to come to Canada.
>
> He tells me, however, that he is fully agreeable to participating in a deposition to be conducted in Colorado.

No other evidence of Dr. Deagle's "unavailability" is advanced except for Mr. Horne's argument "unavailability" exists due to his lack of financial capacity. The evidence in support of this is advanced by Mr. Mitchell's affidavits. In his first affidavit, para. 11 states:

> Mr. Horne is of limited financial circumstances, and the expenses of the trip

> from Colorado to Halifax or, Dr. Deagle's apparent request that the counsel in the proceeding go to Colorado are entirely beyond the plaintiff's capacity to carry.

In his supplementary affidavit, Mr. Mitchell attaches the income tax returns of Mr. Horne and swears, in para. 11:

> I have spoken to Vaughn Horne in connection with this matter, and I am advised by Mr. Horne and do verily believe that his financial situation remains poor, that his gross income for the year 1995, from all sources, was in the region of $12,500, and his net income after business expenses was in the area of $7,500 to $7,600 for the same year. From that income Mr. Horne has to pay his share of living, utilities, housing and personal expenses, shared with a room mate, and he has no other source of income.

Attached to Mr. Mitchell's supplementary affidavit is the actuarial report of July 17, 1995 which recites:

> **Residual Income**
>
> You have informed us that as a result of the injuries sustained in the accident, Mr. Horne's earnings are currently limited to an average $289 per week or $15,028 per annum. Note that this income should act as a direct offset to loss of earnings contained in schedule 1.

There is no evidence before me, by estimate or otherwise of the costs of securing the evidence of Dr. Deagle in Colorado by use of **CPR** 32.01(2)(b).

On argument in chambers, the Court and counsel entered into a discussion of how Dr. Deagle's evidence might be secured at the least expense. I note the cooperative attitude of counsel for the defendants where they have agreed on Dr. Deagle's medical report being

tendered without his attendance, and I am sure they will cooperate fully in reducing expenses. I see no reason why counsel should not explore the cost of the appointment of an examiner being the court reporter, use of agents to whom extensive guidance could be given in the form of prepared questions by counsel on record, etc. etc.

Indeed, I am far from certain that Dr. Deagle, given advance notice, might not still attend in Halifax perhaps on a flight seat sale, limiting his time and inconvenience to a day or at the most one overnight.

There is very little before me as to the estimated cost of a further discovery with the evidence to be tendered by consent or the cost of commission evidence. There is no evidence of what, if any assets or resources are available to Mr. Horne, his borrowing capacity, etc.

Overall, the evidence of financial incapacity is unsatisfactory, and there is no real capacity for the Court to relate financial incapacity to the expenses. For these reasons the application must stand dismissed.

Additionally, "unavailability" is not limited to the actual attendance of Dr. Deagle in Nova Scotia although this is preferred and may be determinative in cases to be decided solely on credibility. The actual situation in each case will dictate and possibly the availability and cost of video evidence may be an appropriate alternative where credibility is a major feature.

"Unavailability" basically relates to giving evidence "in the trial" so as to provide the defendants with their entitlement to cross examination. Cross examination is particularly important in this case so the defendants can put to the plaintiff's expert opposing expert's opinion. Wide latitude must be given to a party to test an opposing party's expert opinion evidence.

It is clear that economic conditions and other reasons are increasing the exodus of people into and out of Nova Scotia, and given this general knowledge, counsel should be able to indicate to the Court whether or not an opportunity existed to take the evidence of a witness prior to her/his departure. This may well be a factor for the Court's consideration.

The application is dismissed with costs to each of the defendants taxed and allowed in the amount of $250 each, payable when the final order concluding this matter is issued.

J.