

SUPREME COURT OF NOVA SCOTIA

Citation: *Gushue v. Nova Scotia Health Authority*, 2022 NSSC 346

Date: 20221202

Docket: Hfx No. 458127

Registry: Halifax

Between:

Olivia Grace Gushue, by her litigation guardian Robin Nicole Gushue, Robin
Nicole Gushue and Craig Donald James Gushue

Plaintiffs

and

Nova Scotia Health Authority, a body corporate, carrying on business as the Cape
Breton Regional Hospital, Angus Gardner, Saima Haleem, Victor Espinal, Ayman
A. Habiba, John Doe

Defendants

DECISION ON MOTION

Judge: The Honourable Justice Glen G. McDougall

Heard: November 10, 2022, in Halifax, Nova Scotia

Decision: December 2, 2022

Counsel: Raymond Wagner, K.C., Lauren Harper, and Nick Hooper,
for the Plaintiffs
Karen Bennett-Clayton, Erin McSorley, and Christa Korens,
for the Defendant, Nova Scotia Health Authority,
carrying on business as the Cape Breton Regional
Hospital
Brian Downie, K.C., and Jillian Strugnell, for the Defendants
– Angus Gardner, Saima Haleem, Victor Espinal, and
Ayman A. Habiba

**The original text of this decision has been corrected according to the erratum
dated December 30, 2022**

By the Court:

Background

[1] A motion was brought on behalf of the Plaintiffs for an order allowing either of Lauren Ching, Flora Campbell, or Robin Gushue “to act as a translator to assist and/or facilitate Olivia Gushue in giving testimony at the trial of this action.”

[2] The motion is brought pursuant to Nova Scotia Civil Procedure Rules 48.03 and 48.04. These rules allow for the following:

48.03 Assistance for witness to communicate

(1) A party who calls a witness at trial, or presents a witness on the hearing of an application, must provide a translator or signer if the witness cannot adequately understand the questions, or cannot give answers that are adequately understood, without the assistance of a person who is able to translate or sign.

(2) The party must satisfy the judge that the proposed translator or signer has the ability to clearly understand the questions to be asked and the answers to be given, and to accurately translate the questions and answers.

(3) The translator or signer must swear to or affirm all of the following, unless the judge permits otherwise:

(a) the translator or signer will accurately translate each question asked of, and each answer given by, the witness;

(b) except to translate, the translator or signer will not communicate with the witness during the examination without advising the judge and awaiting the judge’s permission;

(c) the translator or signer is not related by blood or marriage to the witness, is not an employer or employee of the witness, and is independent of the witness.

(4) A party who calls a witness with another kind of difficulty communicating in court may make a motion for means to assist the communication.

48.04 Assistance for person with disability

A judge presiding at a trial or hearing may order services for a person with a disability that impedes the person in court.

[3] In order to gain a better appreciation for the proper interpretation and application of Rule 48 – Translation, Interpretation, and Assistance – it is important to look at Rule 48.01 and Rule 48.02.

[4] Rule 48.01 falls under the sub-heading – Scope of Rule 48 – and reads:

48.01 Scope of Rule 48

A party who has difficulty understanding what is being said in court, a witness who has a difficulty communicating in court, and a person with a disability that impedes them in court may be assisted in accordance with this Rule.

[5] Rule 48.02(1), (2), and (3) are also relevant to the determination of the issue now before the Court. Rule 48.02 provides the following:

48.02 Assistance for party to understand proceeding

(1) A party with a hearing impairment, or who has difficulty understanding the language in which a trial or hearing is conducted, may make a motion to be assisted by a translator, interpreter, or signer.

(2) A party with a mental or physical disability that impedes them in court may make a motion for appropriate assistance.

(3) A judge who makes an order to assist a party may include terms to ensure a fair balance between the need of the party to understand the trial or hearing and the need of all parties for a trial or hearing conducted without unnecessary disruptions.

[6] Rule 48 is quite broad in that it provides for assistance in three areas:

- (i) To a party who has difficulty understanding what is being said in court;
- (ii) To a witness who has difficulty communicating in court; and,
- (iii) A person with a disability that impedes them in court.

Factual Background

[7] The infant Plaintiff, Olivia Grace Gushue, is represented by her litigation guardian, Robin Nicole Gushue. Robin Gushue is Olivia’s mother. She gave birth to Olivia at the Cape Breton Regional Hospital in Sydney, Nova Scotia on the 28th day of October, 2010. The birth, by caesarean section, was complicated and difficult. The child was later diagnosed with spastic cerebral palsy and quadriplegia. She is non-verbal.

[8] According to para. 6 of the Affidavit of Robin Gushue, filed on October 5, 2022, in support of this motion:

6. From infancy to young childhood, we **relied on Olivia’s facial expressions, posture, body movements and vocal expressions to interpret her wants and needs.**

(Emphasis added)

Robin Gushue’s affidavit further indicates, in para. 7, that Olivia was first introduced to what has been referred to as “hand-eye gaze communication” by a learning centre teacher at St. Margaret’s Bay Elementary School when she entered grade two:

7. When Olivia entered grade 2, she began working with Allyson Walker, a learning center teacher at St. Margaret’s Bay Elementary School.

The hand-eye gaze method is described as follows, in para. 8, of the Affidavit of Robin Gushue:

8. ... In this form of communication, “yes” or “no” questions are posed to Olivia, and she responds utilizing here eye gaze, directionally, to look either at the hand that denotes “yes” or at the hand that denotes “no”.

[9] According to the evidence presented, including excerpts taken from a video recording made of Olivia (that was included with affidavits filed by counsel for the Defendants), if she directs her eyes towards the right hand of the person asking her a question that denotes a “yes”. Conversely, if her eyes appear directed towards the left hand of the person asking the question then that signifies a “no” response.

[10] After being introduced to this method of communication, Olivia’s parents began using it at home along with “interpretation of (her) facial expressions, posture, body movements and vocal expressions, to communicate effectively.” [See para. 11 of the Robin Gushue affidavit.]

[11] Two other individuals who have, or have had, familiarity with their use of this communication technique and who have worked with the child either at school or at home are Flora Campbell and Lauren Ching. Miss Campbell was Olivia’s personal Education Program Assistant (“EPA”) at St. Margaret’s Bay Elementary School from grade three to grade five. Miss Ching first met Olivia in June 2022 when she began providing respite care for her and her family. According to her affidavit (filed October 5, 2022), Miss Ching is “... a qualified Speech Therapist in New Zealand with a background in alternative speech pathology.” She possesses a “Bachelor of

Speech Language Therapy” from “the University of Canterbury, New Zealand.” [See para. 1 of the Lauren Ching affidavit].

[12] Miss Ching states in her affidavit that she “provided respite services three days a week for approximately five to six hours per visit.” [See para. 7 of the Lauren Ching affidavit.]. She also indicates that she “... will be providing respite services one day per week, after school, for approximately six to eight hours.” [Para. 7, *ibid*].

[13] Miss Ching states that she has “personal experience communicating with Olivia via hand-eye gaze communication.” [Para. 8, *ibid*]. She also indicates that she has “... assisted Olivia with increasing her skills in communicating via Olivia’s eye gaze technology available on her tablet.” [Para. 11, *ibid*].

[14] She goes on to state “Olivia is still learning this technology, and therefore this is not our main means of communication.” [Para. 11, *ibid*].

[15] Miss Campbell’s familiarity with the eye gaze method of communicating with Olivia ended when Olivia finished grade five and moved on to another school. She also indicated that “During my time on Olivia’s educational support team ..., we on occasion also communicated via an eye gaze technology available on Olivia’s tablet.” [See para. 10 of the Flora Campbell affidavit filed on October 13, 2022].

[16] The main reason for asking the Court to appoint someone to act as a translator to assist and/or facilitate Olivia Gushue in giving testimony at the trial – can be found at para. 12 of the Robin Gushue affidavit:

12. Despite Olivia’s skills with hand-eye gaze communication, **she can have difficulties when communicating with someone who is unfamiliar to her – resulting in her becoming flustered and shutting-down.**

(Emphasis added)

Position of the Defendants

[17] It was previously indicated that excerpts from a hard drive containing video footage of Olivia Gushue (provided to counsel for the Defendants by counsel for the Plaintiffs) was attached to affidavits filed by counsel for Nova Scotia Health Authority and counsel for the Defendant doctors. These video clips were offered to illustrate the concerns that defence counsel have with the reliability of the eye gaze method as well as the reliability and accuracy of Olivia’s answers. Counsel in their written and oral submissions also raised concerns with the proposed method of questioning should Olivia be called to testify at trial. They foresee the likelihood of

having to object to leading questions on direct examination if the witness can only be asked questions that elicit “yes” or “no” answers. They submit that this could significantly impact the flow of the trial and result in numerous delays and other frustrations that would impede trial efficiency and run counter to the object of the Rules which are to promote a “just, speedy, and inexpensive determination of every proceeding.” [See Civil Procedure Rule 1.01].

Analysis/Determination:

[18] I have previously indicated to counsel that I would not be granting the Plaintiffs’ motion. Counsel for the Plaintiffs have correctly pointed out that it would be premature for the Court to delve into the infant Plaintiff’s capacity to testify. They point to the decision of former Chief Justice Beverley McLachlin, C J. C., in the case of *R. v. D.A.I.*, 2012 SCC 5, where, at para. 16, she stated:

16 ... witnesses are presumed to possess the basic "capacity" to testify. However, in the case of children or adults with mental disabilities, the party challenging the competence of a witness may be called on to show that there is an issue as to the capacity of the proposed witness.

[19] This case dealt with s. 16(3) of the Canada Evidence Act but it has application to the matter before this Court. The issue of testimonial capacity to understand and provide answers to questions put to the infant Plaintiff, should she be called to testify, will be left to another day. Likewise, her understanding of the difference between the truth and lying will have to be explored should she present as a witness at trial. The reliability of the eye gaze method of communicating will also likely get a lot of close attention from Defendants’ counsel at that time.

[20] I accept Plaintiffs’ counsels position that I should assume the infant Plaintiff has the requisite testimonial capacity and that she will be able to demonstrate an appreciation for the difference between telling the truth (either under oath or pursuant to a solemn affirmation to tell the truth) and lying.

[21] My decision to deny the motion is two-fold: First off, none of the three proposed translators/facilitators is truly independent of the witness. In the case of Robin Gushue, she is clearly ineligible to serve in this capacity. Rule 48.03(3)(c) requires a translator or signer to swear or to affirm that she/he “is not related by blood ... to the witness.” As the child’s mother, she is precluded from acting “..., unless the judge permits otherwise:” [See Rule 48.03(3)].

[22] The other two individuals, although not related by blood to the witness, both enjoy or previously enjoyed a working relationship with the witness (and her family). Miss Campbell was Olivia's personal EPA at St. Margaret's Bay Elementary School for three years while she was enrolled there between grade three and grade five. Although it was primarily a working relationship, I have no doubt that it would likely have become a close personal relationship as well.

[23] Similarly, Miss Ching has, for the past five to six months, provided respite care for Olivia and her parents. She continues to spend a considerable number of hours per week working with the child. This would, inevitably, lead to the development of a personal relationship with, not only Olivia, but her parents as well.

[24] None of these proposed translators/facilitators has the requisite independence to satisfy the requirements of Rule 48.03(3)(c). I am also not persuaded to exercise the discretion afforded to me under this rule to allow any of them to fill the role.

[25] Secondly, I also have serious concerns with the role being proposed by Plaintiffs' counsel should a translator/facilitator/signer be appointed. Assuming that questions could be crafted in a manner that would elicit relevant evidence (without unduly leading the witness) just what would the translator/facilitator/signer's function be. I can accept counsel's suggestion that any of the three proposed appointees would likely make the courtroom experience a little less intimidating for the young witness but that is not the purpose for the rule. Indeed, if I was to accede to the request to appoint one of them as a translator/facilitator/signer there is a serious concern that their interpretation of what the witness is indicating could be influenced not only by eye gaze but also by the witness's "... facial expressions, posture, body movements and vocal expressions, ...". [See para. 11 of Robin Gushue's affidavit]. This goes far beyond the role contemplated in Rule 48. This would usurp the role of the trier-of-fact to decide what the evidence reveals and whether the witness is, or is not, telling the truth. To appoint someone who the witness is familiar with (and presumably more comfortable with) to simply repeat, word for word, what counsel has asked in the first instance serves no purpose.

[26] If Plaintiffs' counsel choose to call the infant Plaintiff to testify at trial, a voir dire to determine testimonial capacity (in the presence of the jury) will have to take place. Assuming she is found to have sufficient capacity to testify, it will then be left to the jury to determine what evidence they accept and what weight they are prepared to give to it.

[27] This ruling does not prevent counsel for the Plaintiffs from subsequently bringing a motion to appoint a support person to accompany the witness if, and when, she testifies.

Conclusion

[28] The motion to appoint either of Lauren Ching, Flora Campbell, or Robin Gushue to act as a translator to assist and/or facilitate Olivia Gushue in giving testimony at the trial of this action is denied. Motion dismissed.

McDougall, J.

SUPREME COURT OF NOVA SCOTIA

Citation: *Gushue v. Nova Scotia Health Authority*, 2022 NSSC 346

Date: 20221230

Docket: Hfx No. 458127

Registry: Halifax

Between:

Olivia Grace Gushue, by her litigation guardian Robin Nicole Gushue, Robin
Nicole Gushue and Craig Donald James Gushue

Plaintiffs

and

Nova Scotia Health Authority, a body corporate, carrying on business as the Cape
Breton Regional Hospital, Angus Gardner, Saima Haleem, Victor Espinal, Ayman
A. Habiba, John Doe

Defendants

ERRATUM

Judge: The Honourable Justice Glen G. McDougall

Heard: November 10, 2022, in Halifax, Nova Scotia

**Written
Decision:** December 2, 2022

Counsel: Raymond Wagner, K.C., Lauren Harper, and Nick Hooper,
for the Plaintiffs
Karen Bennett-Clayton, Erin McSorley, and Christa Korens,
for the Defendant, Nova Scotia Health Authority,
carrying on business as the Cape Breton Regional
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Brian Downie, K.C., and Jillian Strugnell, for the Defendants

– Angus Gardner, Saima Haleem, Victor Espinal, and
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Erratum

December 30, 2022

**Cover page, counsel’s name, where it reads “Erin
McSorely” should read “Erin McSorley”.**