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Date: 20020923  
Docket: SH 15774

IN THE SUPREME COURT OF NOVA SCOTIA  
[Cite as: **Carpenter-Babin v. Myers, 2002 NSSC 216**]

BETWEEN:

MARTINA MARIE CARPENTER-BABIN

APPLICANT

- and -

MARYLOU MYERS

RESPONDENT

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**D E C I S I O N**

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HEARD: Before the Honourable Justice Suzanne M. Hood at Halifax,  
Nova Scotia in Chambers

DECISION: July 24, 2002 (Orally)

WRITTEN RELEASE

OF ORAL: September 23, 2002

COUNSEL: **David W. Richey** for the applicant  
**James L. Chipman** for the respondent

**HOOD, J. (Orally):**

- [1] What I am asked to do this morning is interpret Rule 22 and in particular Rule 22.01 which deals with the costs of the independent medical examination and Rule 22.03 which deals with a medical practitioner nominated by the party being examined being permitted to be present.
- [2] Although it is true that the rule does refer to physical or mental condition (and Mr. Richey has pointed out that is the only *Rule* that he could find where that is specifically contemplated), in my view, the wording of the rest of the rule does not make the factors that are to be considered by the court any different than they are for any other sort of independent medical examination. *Rule 22.01* deals with the examination being at the expense of the party requesting the same and about the order specifying the “time, place, manner conditions and scope of the examination”. Mr. Richey asks me to tie that into the wording of *Rule 22.03* which deals with the person accompanying the person being examined. In my view, that does not affect the “manner and scope” of the examination itself.
- [3] The examination is what is done by, in this case, the psychiatrist, Dr. MacIntosh. There is not sufficient connection between the two different rules to cause me to conclude that, by implication, the cost of the examination would include the costs of the medical practitioner nominated by the party being examined.
- [4] The decision of the Alberta Court of Appeal in *Pohynayko v. Vries* 2001 Carswell Alta 68, 277 A.R. 72, 242 W.A.C. 72, [2001] 9 W.W.R. 728, 8 C.P.C. (5<sup>th</sup>) 57, 94 Alta. L.R. (3d) 288, 9 W.W.R. 728, [2001] A.J. No. 57 is, of course, not binding on this court. I have considered it. Mr. Richey asks that in addition I consider *Morales v. Seymour* 1997 Carswell Alta 564, 205 A.R. 151, 52 Alta. L.R. (3d) 112, 9 C.P.C. (4<sup>th</sup>) 248 which was a lower court decision in Alberta before the *Pohynayko* decision. I agree with Mr. Richey that *Pohynayko* did not specifically overrule that decision but it made reference to it and commented about the exceptional circumstances in that case. In the *Pohynayko* decision the court made reference to the exceptional circumstances in *Morales* and referred to the plaintiff being impecunious as well as having language problems.
- [5] If I am to take some guidance from the Alberta Court of Appeal and the Alberta Court of Queen’s Bench, it would seem to me that the rule would be that, generally speaking, the costs of a person accompanying would be borne

by the plaintiff unless there are exceptional circumstances. I do not see that as being inconsistent with our Rule, so I must consider whether or not I am satisfied that there are the exceptional circumstances in this case that would cause me to conclude that the cost of the person accompanying should be borne by the defendant.

- [6] As I have indicated, in the *Morales* decision the plaintiff was both impecunious and had difficulties with the language, in communicating. There is no evidence of the latter in this case. Although there is some reference to impecuniosity in the brief and some indirect reference in the affidavit of the plaintiff, I am not satisfied in this case that there is the evidence of impecuniosity or any other exceptional circumstances sufficient to mean that in this case the cost of that medical examination include the costs related to the person accompanying the plaintiff.
- [7] I appreciate that this is a psychiatric examination, that this claim arises out of a second accident and that there are some incidents in the plaintiff's childhood which cause particular concern. In my view, that is reason for her to have someone present. That is not a reason for the defence to pay the cost of having that person present. Therefore, the independent medical examination will be ordered.
- [8] I am not satisfied that changes should be made to the draft order proposed by Mr. Chipman. I think the common parlance is that this is an independent medical examination. I hope that Mr. Richey's comments about deleting the word "independent" are not related to the material contained in his client's affidavit with respect to extraneous matters concerning Dr. MacIntosh. I am not going to delete the word "independent".
- [9] It seems to me to be appropriate to say that the date will be agreed upon by the parties or, if agreement fails, on further application to the court. To me, it would be completely impractical to provide as Mr. Richey requests that the plaintiff be able to consult with the person who attends with her during the exam. That is not, as I understand it, the purpose of having a person present at the medical examination with a plaintiff.
- [10] The wording of Clause (2) of the draft order that Dr. MacIntosh be able to ask relevant questions and the plaintiff shall answer the questions seems to me to be the reasonable and only practical approach to conducting this examination.
- [11] With reference to reports being provided, I do not want to get specific about the sorts of reports which would be provided. The draft order to which Mr. Richey has referred talks about any reports previously made. If my

- order is dated today and a further medical report is done tomorrow, the order would either have to be amended or it could not be given to Dr. MacIntosh.
- [12] The provision in the order is that the reasonable travel and meal expenses associated with attending are agreed to be paid by the defendant and that has not been in dispute before me.
- [13] The other issues with respect to the examination and how it was conducted and the presence of Donna Curtis, if that who it is going to be; other issues relating to the possible bias of Dr. MacIntosh, if those are raised, are to be dealt with at trial. I am prepared then to grant the order which Mr. Chipman has proposed.
- [14] I recognize Mr. Chipman that you have indicated that very rarely do these requests for independent medical examinations come before the court on chambers applications. To my knowledge, and based upon what counsel have said, there have been no reported cases in Nova Scotia discussing this specific issue. Because the cost of the person accompanying has not been dealt with by the court before, I exercise my discretion to award no costs on the application.
- [15] The application is granted. The order will be issued with the change that there will be no costs or disbursements awarded.

Hood, J.