1992 **93-983**

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Noseworthy v. Murphy, 1999 NSSC 103

BETWEEN:

MARY NOSEWORTHY & CAROLYN JONES

PLAINTIFFS

- and -

ROBERT MURPHY

DEFENDANT

DECISION

HEARD:	**at Halifax, Nova Scotia before The Honourable Justice Walter R.E. Goodfellow in Chambers on February 24th, 1999**
DECISION:	**February 24, 1999 (orally)**
WRITTEN RELEASE OF ORAL DECISION:	**March 8, 1999**
COUNSEL:	**M. Shaun O'Leary** **Solicitor for the Plaintiffs** **David A. Miller, Q.C.** **Solicitor for the Defendant**

GOODFELLOW, J.

1. BACKGROUND

The Originating Notice of Action in this matter was issued the 16th of March, 1993. The Plaintiffs were injured in a motor vehicle accident that occurred on the 12th of August, 1991 on North Street in Halifax.

The action by Carolyn Jones has been resolved and Ms. Noseworthy continues her action. At the time of the accident, she was a medical student at Memorial University in St. John's, Newfoundland and post the accident, completed her medical studies, her internship and undertook and completed a residency in the medical specialty of pediatrics, and is apparently practicing in Newfoundland as a pediatrician. Dr. Noseworthy's solicitors have provided the defendant with the following medical reports and medical records:

1. Outpatient Emergency Record of the South Shore Regional Hospital.
2. Dr. Elizabeth Mate-Downer, Family physician
3. Dr. Edward A. Shapter, Orthopedic Surgeon (deceased)
4. Dr. C. Alteen, Former Family Physician
5. Reports of Wedgewood Physiotherapy Clinic.
6. Dr. J.P. Dobbin, Dentist
7. Dr. Noftel, Orthopedic Surgeon (seen by Dr. Noseworthy, but as yet, no medical legal report has been requested.
8. Mr. Bill Bayer, Physiotherapist. Dr. King states in his letter of July 28, 1998 “Questions were raised both by Dr. Shapter and, of whether or not she had a

myofascial pain syndrome or facet joint problem with the cervical spine.

The defendants have requested independent medical examinations of Dr. Noseworthy, in anticipation of substantial claim for damages being advanced for a soft tissue injury to her cervical spine. The defendant has requested independent medical examinations of Dr. Noseworthy by Dr. R.H. Yabsley, an Orthopaedic Surgeon and Dr. David B. King, a Neurologist, with the defendant paying the reasonable travel and lodging expenses of Dr. Noseworthy to attend in Halifax for the independent medical examinations.

Dr. Noseworthy's counsel takes the position the defendant is entitled to only one independent medical examination and proceeded at one point to line up an examination of Dr. Noseworthy by Dr. Yabsley and the defendant wishes both examinations to take place without delay.

2. CIVIL PROCEDURE RULES

This is an application by the defendant, directing Dr. Mary Noseworthy to attend for the independent medical examinations by Dr. Yabsley and Dr. King.

Object of Rules

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

Order for examination

22.01. (1) Where the physical or mental condition of a party is in issue, the court may, at any time on the application of an opposing party or on its own motion, order the party to submit

to a physical or mental examination by a qualified medical practitioner.

(2) The order shall only be made on notice to all parties and shall specify the time, place, manner, conditions and scope of the examination and the medical practitioner by whom it is to be made, and unless it is otherwise ordered, the examination shall be at the expense of the party requesting the same.

(3) The court may order a further examination or examination on such terms as to costs or otherwise as it deems just.

(4) Where the parties agree on the form of the order to be issued under paragraph (1), it may be issued by the prothonotary.

Medical reports

22.04 (1) A party causing an examination to be made under the rule 22.01 shall promptly serve on every other party a copy of any written report of the examination that the examining medical practitioner may make.

(2) The party causing an examination to be made under rule 22.01 shall be entitled upon written request to receive promptly from the party being examined, a report of any examination of that party previously made by any medical practitioner, relating to any relevant mental or physical condition of the party, and the report shall be made available to the medical practitioner making the examination.

3. INTERPRETATION ACT R.S., c. 235

s.9(5) Interpretation of enactment

(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

(a) the occasion and necessity for the

enactment;

(b) the circumstances existing at the time it was passed;

(c) the mischief to be remedied;

(d) the object to be attained;

(e) the former law, including other enactments upon the same or similar subjects;

(f) the consequences of a particular interpretation; and

(g) the history of legislation on the subject.

4. CPR 22.01

Requires that the proposed examiner be property qualified; however, any issue of objectivity is to be resolved at trial. **Grant v. Foster et al [1992] 111 N.S.R.(2d) 178.**

5. ISSUE

Does CPR 22.01 permit more than one medical examination?

In **MacInnis v. Maritime Beverages Ltd. [1989] N.S.J. No. 280,** June 9, 1989, Kelly, J. granted an order that the plaintiff be tested by a psychologist, who specialized in rehabilitation counseling of the head injured. The Rule authorize examinations only by a "qualified medical practitioner" and the court was satisfied there was a real requirement for this type of testing, to enable qualified medical practitioners to give an opinion and CPR Rule 22 was liberally interpreted, taking into consideration the expanding field of medical diagnosis and treatment.

6. PRINCIPLES

A persons medical background is entitled to a high degree of privacy and confidentiality. Professionally, a patient's medical condition and records are privileged. With some rare statutory exceptions i.e. s.23 of the *Children and Family Services Act* requires reporting any information,

whether or not it is confidential or privileged, that indicates a child is in need of protective services.

Civil Procedure Rule 22.01 allows an invasion of the privacy of a person that is intrusive. Any such invasion must be clearly justified.

The principles to be considered include:

1. The onus is upon the party applying for the independent medical examination to satisfy the court, on a balance of probabilities, that such a request is reasonable, and that the proposed examiner is properly qualified.

2. The entitlement of a party to personal privacy physical and psychological integrity must not be breached lightly and only when the court is satisfied such is necessary to secure the just determination of the issues before the court. A claimant should not be accorded an unfair evidentiary advantage that can arise by permitting that person to have his/her medical and psychological condition examined, assessed and advanced without providing the opposing party, against whom relief is sought, a reasonable opportunity to respond fully.

3. The party who advances a claim for damages, alleging that they flow from the negligent act of another party, removes the entitlement of privacy, to the extent and only to the extent that the claims advanced relate to the medical conditions that are being advanced or should be disclosed as relevant to the relief sought in damages.

4. The court, in order to meet the object of the Civil Procedure Rules, CPR 1.03 has repeatedly indicated that the Rules are to receive a

liberal interpretation. Civil Procedure Rules are our tools and not our masters.

5. The *Interpretation Act* provides some general guidance, although it may not specifically apply to rules of court.

Unlike some jurisdictions, our CPR 22.01 does not expressly set out or limit the number of medical examinations or require separate and subsequent applications, where two or more initial examinations are warranted. CPR 22.01(3) does provide for a further examination or examinations on such terms as to cost or otherwise as it deems just. This provision has arisen in the past, usually in circumstances where an independent medical examination has taken place and this has been followed by a lengthy period of time, rendering the independent medical examination out of date or where, after the independent medical examination, a claim arises, the extent of which was not known or addressed at the time of the independent medical examination. CPR 22.01 does not preclude the granting of an order directing two medical examinations. The rule itself acknowledges the separate headings of physical or mental condition of a party. It would be absurd to preclude more than one medical examination in a case where a party is advancing multiple injuries, i.e. brain injury, brain damage, neurologist (psychiatrist), loss of a leg, physiatrists/physiotherapist, loss of hearing, audiologist, etc.

Interpretation of the rule should reflect the reality that has faced the courts for several years, namely substantial and multifaceted claims are now advanced, allegedly as a result of tortuous action that produces little, often no visually perceptive injuries so that claims are advanced for injuries that can not be said to be in water tight compartments. Physical and emotional claims are intertwined, overlap and are intertwined and often we have cervical injury without any organic damage when substantial claims for depression fiabromalga etc. etc. etc.

Where there exists here, a multifaceted claim, apparently of substantial magnitude, it becomes increasingly difficult, if not impossible, to avoid an unfair evidentiary advantage without

permitting the party against whom substantial damages is sought from examining the medical, physical and psychological condition of the party advancing the claims by more than one discipline, even within a discipline experts' focus on specific areas.

My remarks are not to be construed as suggesting anywhere near an automatic entitlement and the principles, including the onus must be met before an order will issue, invading the privacy of a person.

7. CONCLUSION

The material before me indicates that Dr. Noseworthy is making a substantial claim, extending over her entire working life as a medical specialist, and Dr. Yabsley, in his letter of July 28, 1998, indicated that he had reviewed some of the medical reports of Dr. Noseworthy and stated "I do note that findings of a neurological nature were recorded and I believe the neurological opinion would be valuable, in regard to formulating an opinion concerning Dr. Noseworthy's difficulties." Dr. David King, in his letter of July 21, 1998, indicated that he had reviewed some of Dr. Noseworthy's medical records and stated, "Her course was complicated by the development of paraesthesia in the third and fourth digit of her left hand, implying some neurological complications. She had some recurrent flare-ups of this. Dr. Shapter felt that these neurologic complications related to excessive movement at the C4-5 level of her cervical spine. Further investigations were arranged for her on the basis of this."

I interject that Dr. Shapter was Dr. Noseworthy's initial orthopedic surgeon and as he has passed away, Dr. Noseworthy has attended upon Dr. Noftel, another orthopedic surgeon.

Dr. King went on to say:

> **This woman had complications following the motor vehicle accident. I have not reviewed her clinically and am not in a position to make a diagnosis. Her course has been complicated by some suggestive neurologic symptoms and some findings which were felt to be valid by Dr. Shapter, from his perspective.**

> **To my knowledge, she has not had a neurologic examination previously. To date, her problems based on the myofascial and joint derived pain supposition has not resulted in sustained benefits.**
>
> **You will be aware that I see many cases of this nature. Sometimes a neurologic perspective can be useful.**

Dr. King went on to record that Whiplash Associated Injury is not an uncommon problem for neurologists to review, then stated:

> **It seems to me what is important in the medico legal context is the expertise of the examiner rather than his specialty.**

I do not interpret this last sentence by Dr. King, as it is interpreted by Dr. Noseworthy's counsel, to mean only one examination is necessary. This sentence may be more from ..., by I hasten to add that Dr. King has been accepted frequently as a highly qualified specialist. Dr. King went on to say management in most cases is medical and not surgical and usually, in the hands of neurologists or physiatrists. It seems to me the only reasonable conclusion is that where Dr. Noseworthy has been examined by one and now a second orthopedic surgeon and her first orthopedic surgeon express the view there were probably neurological complications. The request for an examination by an orthopedic surgeon and a neurologist, is reasonable and necessary to meet the claims being advanced by Dr. Noseworthy.

I will therefore sign an order directing the medical examinations of Dr. Noseworthy by Doctors' Yabsley and King, on the basis advanced, namely all reasonable expenses of Dr. Noseworthy associated with her attendance for these medical examinations are to be paid by the defendant.

8. GENERAL

Dr. Noseworthy's counsel suggested that if there were to be two medical examinations, that one should await the determination of one medical examination, to see what light it might shed upon the necessity of a second medical examination. I have concluded to the contrary, and point out the practical side effect of my determination is consistent with Civil Procedure Rule 1.03. This action arose out of a motor vehicle collision on August 12, 1991 and we are rapidly approaching the 8th anniversary of that accident and it is clear Dr. Noseworthy has progressed through, and completed her medical training. To order one medical examination and then a separate further second medical examination would only add unnecessarily to the already extensive delay in bringing this matter to a conclusion and it would add not inconsiderable costs, plus additional inconvenience to Dr. Noseworthy. My determination at least avoids these consequences

9. COSTS

Counsel have spoken with respect to the matter of costs and it is agreed that in all the circumstances, the cost of this interlocutory application shall be cost in the cause.

J.