News

Discovery examination rules for minors broadened

CHRISTOPHER GULY

A recent British Columbia Supreme Court interlocutory ruling that broadens the criteria used to determine when a minor could be examined for discovery has national significance, according to the lawyer representing the young plaintiff in the damages case that goes to trial next year.

Vancouver personal injury trial lawyer John Rice, a partner with Jarvis McGee Rice, said that Justice Peter Voith "recognized that courts have a gatekeeping role to protect the interests of all litigants, particularly children and those with disabilities," in *Dann-Mills (Litigation guardian of) v. Tessier* [2015] B.C.J. No. 465, which Rice believes is a precedential decision in B.C., if not elsewhere in Canada.

"The case-management judge recognized there was a gap in the relevant jurisprudence and was interested in doing an analysis that would stand the test of time and serve as a model in British Columbia," said Rice.

In the ruling, Justice Voith held that mental competence shouldn't be the sole factor to determine whether a child could be compelled to attend an examination for discovery, and should also include "the child's age, ability to understand the truth, ability to express himself/herself, attention span, and the prospect of undue anxiety on the part of the child or potential harm to the child."

The case-management judge acknowledged that such pre-trial examinations of infants are "extraordinary." Yet as Rice noted, no B.C. court has before read into

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the province's Supreme Court Civil Rules new protections for examining children normally only called to testify in abuse or custody cases.

In his written reasons, Justice Voith said Rule 7-2 (8) pertaining to children opens with "unless the court otherwise orders" and those words "recognize that there may be cases where a court is unprepared to require that an infant attend at discovery."

Rice said adverse parties must now pass a higher threshold in order to compel a discovery of a child to provide information about a case.

Vancouver civil litigator Steve Haakonson, who represented the lead defendant in the notice of application, characterized Justice Voith's ruling as "noteworthy" and believes it could have a "potential impact" on a party's right to examine for discovery by broadening the scope of factors that will potentially be considered by a court on a leave application.

In this case, the plaintiff, Jorin Dann-Mills, was involved in a serious motor vehicle accident in 2008 when he was 17 months old that left him with a severe traumatic brain injury along with seizure and various adjustment disorders.

Haakonson, who served as counsel for co-defendant ISL Engineering and Land Services Ltd. that redesigned — and negligently changed, the plaintiff alleges — a road leading to the Abbotsford intersection where the collision occurred, argued that B.C. courts have always allowed the examination for discovery of an infant party, and that the only restriction on the right to examine based on mental competence didn't apply in now eight-year-old Jorin's case, since there was no evidence to show he is mentally incompetent under the provincial *Mental Health Act*.

However, according to tests cited in the plaintiff's medical report, the boy was found to be in the "mildly mentally handicapped range."

Justice Voith rejected the defence argument that mental incompetence would be the only factor preventing the examination for discovery of a child, or that Jorin's attendance would enable the defence "to know the case that it must meet" as one of the objectives of such an examination. The boy wouldn't be at the trial, and the defence could examine his father and grandmother (who is also his litigation guardian) and interview his teachers, special-needs assistants and caregivers to augment the case established by expert evidence.

Haakonson said he argued that the only issue the court should consider was whether any harm would be done to Jorin in conducting the examination for discovery for an "investigative" purpose and not to obtain admissions from a child witness. But the judge said he was "not particularly concerned with the prospect of harm" to the boy since he had "no doubt that counsel would be exceedingly solicitous and respectful of Jorin's age and condition."

Justice Voith also rejected the defence request for an examination for discovery to reveal how Jorin functions since it would only benefit counsel conducting that examination and not other counsel representing all six defendants listed. The judge suggested the boy could be videotaped or observed at a medical examination through a glass mirror — an idea to which defence counsel thought medical practitioners might object.

In the end, Justice Voith denied the application for an examination for discovery of Jorin.

His damages action, and that of his mother, Sharon Tessier — who also alleges she suffered a traumatic brain injury in the traffic accident (and was a defendant in the notice of application) — will be heard starting Jan. 11 in a trial scheduled for 67 days.

Rice said that given the severity of Jorin's injuries and depending on the trial judge's finding of fact concerning the lifelong care model the boy will require, the case could potentially result in one of the largest damages awards in B.C. jurisprudence.

The art of client dismissal

MICHAEL BENEDICT

The grounds for dismissing a client should no longer play second fiddle to a client's unfettered right to dismiss counsel, according to leading academic and former practitioner Trevor Farrow.

The Osgoode Hall Law School professor says modifications to the Law Society of Upper Canada's Rules of Conduct reflect the legal profession's unfortunate ongoing "obsession" with client rights. Among the changes implemented last October are several related to withdrawal from representation that clarify when and how it should be done.

"It has always been accepted that a client can withdraw at any time, but lawyers are constrained except when there is a major breakdown," says Farrow, who also chairs the Canadian Forum on Civil Justice.

Farrow says those rules should also include a broader discussion of the basis upon which lawyers can sever a client relationship.

"The Law Society changes codify a simple but important process, but what if a client asks his or her lawyer to do something legal but that is morally reprehensible to the lawyer? Is that justification for withdrawal? There is perhaps no right answer, but the issue has never been discussed."

Farrow, a former Torys LLP litigator, goes on to cite a hypothetical example of a client pushing hard for an "aggressive, almost hostile" litigation approach that is anathema to the lawyer, or a solicitor acting for a property developer who decides to replace some low-income with high-income housing.

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