In the Court of Appeal of Alberta

Citation: McElhone v Indus School, 2019 ABCA 97

Date: 20190315
Docket: 1801-0241-AC
Registry: Calgary

Between:

Amanda Nicole McElhone, a Minor, by Her Litigation Representative, Laurie Tucker and Her Majesty the Queen In Right of Alberta

Respondents
(Plaintiffs)

- and -

Indus School, The Board of Trustees of the Rocky View School Division No. 41, Chael Wyper and Anthony Green

Appellants
(Defendants)

- and -

Jeffrey Rodehutskors, a Minor, by His Litigation Representative, Elizabeth Barrett

Not a Party to the Appeal
(Defendant)

The Court:

The Honourable Madam Justice Patricia Rowbotham
The Honourable Madam Justice Jo'Anne Strekaf
The Honourable Madam Justice Jolaine Antonio

Reasons for Judgment Reserved of the Honourable Madam Justice Rowbotham
Concurred in by the Honourable Madam Justice Strekaf and
The Honourable Madam Justice Antonio

Appeal from the Order by
The Honourable Madam Justice J.R. Ashcroft
Dated the 5th day of July, 2018
Filed the 7th day of December, 2018
(Docket: 1501-04434)

Reasons for Judgment Reserved
of The Honourable Madam Justice Rowbotham

Introduction

[1] Rule 5.44(5) of the *Alberta Rules of Court*, Alta Reg 124/2010 provides that a court may, on application, impose limitations on a medical examination by a health care professional. This appeal concerns the test to be applied by the court under this Rule.

Background

[2] The respondent minor was injured at school when a classmate threw a badminton racquet which struck her, causing permanent damage to her eye. She alleges injuries including general shock and nervous upset. She alleges that as a result of her injuries, her vocational potential is adversely affected and she will have reduced income in the future. She also pleads that her relationship with her twin sister has been strained and damaged.

[3] The parties agreed that the respondent should undergo a vocational assessment, but the respondent refused to consent to an examination that included an interview which would occur without counsel present. Accordingly, the appellants applied for an order pursuant to Rule 5.41(2) directing that the respondent submit to an examination by a clinical psychologist who would prepare a vocational assessment. The psychologist proposed to conduct an interview of the respondent and to perform a number of tests. The psychologist swore an affidavit setting out his qualifications, a proposed examination, and a sample vocational assessment. He was cross-examined on his affidavit. The respondent opposed the application. A master ordered that the respondent attend for an examination which was restricted to testing agreed upon by the parties and without an interview. When no agreement was reached, the appellants appealed the master's order to a chambers judge.

[4] The chambers judge imposed limitations on the length of the interview, on two questions that the psychologist proposed to ask, and on the number of tests. She restricted the length of the assessment to seven hours, including a one-hour interview. The chambers judge permitted most of the proposed testing but concluded that four of the proposed tests could not be conducted and further that there could be no standard psychological tests unless agreed to by the respondent.

[5] The chambers judge ordered:

> 1. The Plaintiff, Amanda Nicole McElhone, shall attend for a vocational assessment to be scheduled by counsel for the School Defendants within the next three months, that shall have the following restrictions placed on it:

a. The assessor may interview the Plaintiff and ask questions relevant to assessing the Plaintiff's vocational capacity but such questions may not touch upon family relationships or birth control. The interview is restricted to one hour in length.

b. The standardized testing shall be restricted to the following assessments:

   i. The Wechsler Adult Intelligence Scale-IV (WAIS-IV);

   ii. Brief Test of Attention (BTA);

   iii. Wide Range Achievement Test-4 (WRAT-4);

   iv. Trail Making Test A & B;

   v. Controlled Oral Word Associated Test (COWAT);

   vi. General Aptitude Test Battery (GATB);

   vii. Word Memory Test (WMT)

   viii. b-Test

   ix. Canadian Work Preference Inventory (CWPI)

   x. Campbell Interest and Skill Survey (CISS)

2. There shall be no psychological standardized testing except as agreed to by the Plaintiff.

3. The vocational assessment shall be a maximum of 7 hours in length, inclusive of the interview portion of the assessment.

4. During the vocational examination as scheduled by the School Defendants, the Plaintiff may do one or more of the following pursuant to Rule 5.42:

   a. Nominate a health care professional to be present during the interview;

   b. Videotape the interview;

   c. Make a word-for-word recording of the interview.

The cost of the nominee or the videographer will be paid by the Plaintiff pursuant to Rule 5.43(2) but will be subject to the final order of costs at the

> conclusion of this action either by settlement negotiations or after the trial of this action.

[6] The appellants appeal paras 1(a), 1(b), 2 and 3. They submit that the chambers judge erred in imposing the limitations.

Analysis

[7] Rules 5.41 to 5.44 provide for medical examinations by health care professionals. Appendix A to the Rules lists the health care professionals to which the Rules apply. A psychologist is a health care professional as defined in the Rules. Rules 5.41 to 5.44 provide:

> **Medical examinations**
>
> 5.41(1) The parties may agree that the mental or physical condition of a person is at issue in an action and agree on a health care professional to conduct a medical examination.
>
> (2) On application, the Court may in an action in which the mental or physical condition of a person is at issue do either or both of the following:
>
> > (a) order that a person submit to a mental or physical medical examination;
> >
> > (b) appoint a health care professional to conduct a medical examination.
>
> (3) The Court may order a second or further medical examination by a health care professional.
>
> (4) If the plaintiff has been the subject of a medical examination by a health care professional of the plaintiff's choice who will or may be proffered as an expert, the Court may order that the plaintiff be the subject of a medical examination by one or more health care professionals of the defendant's choice.
>
> **Options during medical examination**
>
> 5.42(1) Unless otherwise ordered by the Court, a person who is to be the subject of a medical examination by a health care professional may elect to do one or more of the following:
>
> > (a) nominate a health care professional to be present during the medical examination;

(b) videotape the medical examination;

(c) make a word-for-word recording of the medical examination.

(2) The Court may

(a) define or limit the presence or role of the nominated health care professional,

(b) direct that any part of the medical examination, including any standardized tests, not be recorded, and

(c) otherwise provide direction as to the conduct of the medical examination.

Payment of costs of medical examinations

5.43(1) Unless the Court otherwise orders, the party who applies for the order for a medical examination must pay the cost of the medical examination.

(2) Unless the Court otherwise orders, the cost of

(a) the attendance of a nominated health care professional at a medical examination, or

(b) videotaping or recording a medical examination,

is to be paid by the party appointing the nominated health care professional or electing to have the medical examination videotaped or recorded.

(3) The party arranging for the videotaping or recording must provide a copy of the videotape or recording to the other party as soon as practicable after the medical examination is completed.

(4) The videotape or recording

(a) may be shown or played at trial only with the Court's permission, and

(b) may only be used to verify events at the medical examination.

Conduct of examination

5.44(1) A health care professional conducting a medical examination may ask the person being examined questions relating to that person's mental and physical condition and medical history, and the person being examined must answer the questions.

(2) If the person to be examined agrees in writing, or if the Court so orders, the examining health care professional may

> (a) take or obtain samples from the person being examined, and make an analysis of the samples, and
>
> (b) perform any test recognized by medical science.

(3) The party causing the medical examination to be conducted

> (a) must, on request, deliver promptly to each of the other parties a copy of a detailed written report of the health care professional's findings and conclusions, and
>
> (b) is, on request, entitled to receive promptly from the person examined a report of every medical examination previously or subsequently made of the physical or mental condition of the person resulting from the injuries sustained or the mental or physical condition that is in issue.

(4) If a party refuses to provide a report in the manner described in subrule (3), the Court may order the report to be provided, and if the health care professional refuses to make the report in writing, the Court may make any order it considers proper, one of the provisions of which may be the exclusion of the health care professional's evidence if that person's evidence is offered at trial.

(5) On application, the Court may make any order it considers necessary to limit or curtail a medical examination.

[8] This appeal is not about the threshold question of when a party can be examined by a health care professional under Rule 5.41(2). By the time this case reached the chambers judge the parties agreed that the respondent would attend at the medical examination. This appeal considers a different issue. Once the court has ordered the examination, what limits can be imposed on the health care professional, and what is the test for imposing such limits?

[9] As a basic principle, health care professionals ought to have the ability to control their own examinations. Courts should be able to rely on the professional integrity and responsibilities of health care professionals, absent evidence which should override such trust. I agree with the comments of Acton J in *Crone v Blue Cross Life Insurance Company of Canada*, 2001 ABQB 787 at para 26, 297 AR 351:

> [I]t seems eminently reasonable that defence medical examiners, indeed all medical professionals, should be left to conduct their medical examinations as they see fit unless there is a compelling reason for the court to interfere or the rules permit it, as for example the rule allowing the presence of a medical nominee chosen by the plaintiff. The court cannot, in any event, compel a doctor to conduct an examination under circumstances which the doctor objects to, so if the courts begin to place constraints on how particular plaintiffs are examined, the predictable effect is that the number of doctors willing to perform defence medical examinations will decline, raising both the price and length of time to complete the discovery process in personal injury actions.

[10] To similar effect is the comment of Read J in *Feniak v Backhouse*, 2010 ABQB 332, 534 AR 1, who observed that "[i]n the course of his or her examination, an examiner must be permitted to conduct such diagnostic tests as the examiner considers necessary in order to enable them to reach their conclusions and form their opinion": at para 59. Although these cases were decided under the old Rule 217, the rationale remains sound. See also *Wong v Wong*, 2006 BCCA 540 at para 43, 227 DLR (4th) 220.

[11] Given this rationale, what must the party seeking to limit the examination (who I will refer to as the plaintiff) establish and how does the plaintiff meet its onus?

[12] The appellants submit that a plaintiff must establish a "real risk of substantial injury."

[13] There are very few cases which have considered this rule or its predecessor. *Ms R v WA* 2001 ABQB 853, 304 AR 78 was a case involving initial resistance to the examination. There, the plaintiff had "gone a long way" towards establishing a real risk of substantial harm: at para 49. She suffered from post-traumatic stress as a result of the abuse alleged, and there was evidence of self-harm and that the plaintiff would rather drop the suit than submit to a medical examination. To address this concern, the court set a protocol. The court appointed an expert selected by both parties to review the written materials on the file and assist the court in assessing whether the plaintiff could undergo an initial examination. That examination would then determine whether she could undergo a full examination.

[14] In *Feniak*, the plaintiff initially opposed the medical examination by a psychiatrist. The court concluded that the defendant had established the necessity of the examination and the plaintiff had not met her burden of establishing a risk of serious injury in undergoing the examination. The court then considered limitations to the examination as the plaintiff opposed an

interview longer than one hour in duration. After considering expert evidence adduced by the plaintiff regarding her condition, Read J found that the risk of harm to the plaintiff was significant enough to outweigh the defendant's right to have the examination conducted in one sitting. She directed that the examination be conducted in intervals of no more than one hour in duration.

[15] In *Nystrom v Ranson*, 2011 ABQB 116, [2011] AJ No 201, the master noted that real risk of serious injury was a valid consideration, citing *Feniak*. He declined to impose limits both as to the length of testing (nine hours) and the number of psychological tests because the plaintiff's evidence related to harm failed to "[cross] the line set by the decided cases.": *Nystrom* at para 19.

[16] In other jurisdictions, the reference to the risk of serious harm test arises most often in the initial stage of resisting the examination. Cases rarely deal with the situation where the court is concerned only with the imposition of limits. In *Murdock v Reid*, 2005 NBCA 116, 295 NBR (2d) 219, the New Brunswick Court of Appeal found that "[a]bsent exceptional circumstances (e.g. risk of serious harm associated with an examination by a medical practitioner who lacks specialized training), judicial deference for the moving party's choice of medical practitioner should be automatic in cases where the requirements of [the relevant rule] have been met": at para 16. The plaintiff had not established a valid objection to the order sought. The court suggested that limitations might be imposed where the proposed examination involved risk or painful invasive procedures; there may be hardship or inconvenience to the party to be examined; or the plaintiff had a previous unsatisfactory experience with that doctor.

[17] In my view a test that would require the plaintiff to establish a real risk of serious injury at the stage of imposing limits on the examination sets the bar too high. A more appropriate test is that the plaintiff must establish a compelling reason for limiting the test. This might include a risk of injury but could include other types of hardship.

[18] For a reason to be compelling it must be examined in light of the purpose of Rules 5.41 to 5.44. The discovery provisions in Part 5 arise from the foundational principle that lawsuits should be decided on the merits. A party must disclose all relevant and material records and answer all relevant and material questions, whether helpful or unhelpful. There is no need to curtail an examination by limiting it to relevant and material questions, because that limit is implicit. In the context of an examination by a health care professional, a plaintiff cannot put her health in issue and then fail to disclose her medical condition.

[19] With these principles in mind, a reason to limit an examination is compelling if the plaintiff's interest in maintaining the confidentiality of the information or otherwise curtailing the examination (a) significantly overrides the objectives of full pre-trial discovery, and (b) does not unfairly prevent the defendant from responding to the claim.

[20] As the onus is on the party seeking to limit the examination, it is that party's obligation to adduce evidence in support of the need for limitations. This might include an affidavit of a medical professional or of the plaintiff, deposing to the circumstances which could justify the limitations.

The burden could be met by presenting relevant evidence from a cross-examination of a proposed health care professional.

[21] Here, the chambers judge limited the medical examination based on what appeared to be no more than the names of the tests themselves, based on her own interpretation of their merit. The plaintiff did not adduce any affidavit evidence to show why the tests proposed were harmful to her, or any expert evidence to show the tests would be beyond the scope of a typical vocational assessment. The only evidence adduced was the cross-examination of the psychologist whose evidence did not provide any compelling reason to limit the examination. The respondent submitted that because the psychologist changed his mind about the number of tests that he needed to perform, this indicated that some of the tests were unnecessary. The chambers judge seems to have accepted this. It is important to note that when the psychologist swore his affidavits and was cross-examined, he had no information about the respondent beyond what was contained in the pleadings. He could only indicate what he might need to ask her or what tests he might perform. This was not a sufficient evidentiary basis upon which to limit the examination.

[22] The respondent is concerned about a particular question which the medical professional might ask. At the cross-examination on his affidavit, the psychologist was asked whether he would inquire of the respondent if she took birth control. He initially indicated that he would not, but then later stated that he might, as this could affect emotional functioning. Rule 5.44(1) provides that the medical professional may ask questions that relate to the plaintiff's medical and physical condition, including medical history and the plaintiff must answer the questions. In my view, and mindful of the fact that the psychologist is not yet familiar with the respondent, the court must rely upon the professional expertise and judgment of the expert as to whether he needs this information. Moreover, there is no evidence on the record to support any compelling reason to limit the question. Similar considerations apply to questions the psychologist suggested he might ask about the respondent's relationship with her twin sister. She has put that relationship in issue. It is not the court's role to second guess.

[23] The chambers judge relied on *Tat v Ellis*, 1994 ABCA 260, 155 AR 390, and the respondent urges us to do so in this case. However, reliance on *Tat* is misplaced. *Tat* was decided according to the old *Rules* and on a "narrow and precise issue" of whether the court could order a test by someone other than a physician, when the physician stated that the test was a necessary preliminary to his opinion. On appeal, this court held that the lower court could order such a test and set out a number of factors to be considered. *Tat* is not applicable where one seeks to limit the parameters of testing conducted by a health care professional. At most, the *Tat* factors might be used as a threshold test to determine whether the proposed assessment should be ordered at all. For example, in *Phillips v Posein*, 2005 ABCA 318, 380 AR 390, this court set aside an order requiring the plaintiff to attend for a psychiatric assessment where the plaintiff did not allege any injuries of a psychiatric or psychological nature. This court concluded that the defendant had not laid an evidentiary foundation to demonstrate that a psychiatric examination was necessary.

[24] It is important to note that there are other protections for a plaintiff who undergoes a medical examination. Rule 5.42(1) permits a plaintiff to nominate a health care professional to be present during the examination, to videotape the examination and to make a word-for-word recording of the examination. The chambers judge encouraged the plaintiff to make use of these protections.

[25] In conclusion, I allow the appeal and set aside paragraphs 1(a) and (b) and paragraphs 2 and 3 of the chambers judge's order.

Appeal heard on January 14, 2019

Reasons filed at Calgary, Alberta
this 15th day of March, 2019

Rowbotham J.A.

I concur:

Authorized to sign for: Strekaf J.A.

I concur:

Antonio J.A.

Appearances:

T.J. Boyle
for the Respondents

D.M. Pick
for the Appellants