Case Summary: Ewashko v Hugo

Defence + Indemnity

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The Alberta Court of Appeal held that co-defendants who are not adverse in interest are not required to share experts.

***Ewashko v. Hugo*, 2020 ABCA 228**

Facts + Issues

Plaintiff Ewashko, represented by his mother, suffered a significant birth injury due to brain asphyxia. Ewashko commenced an action against the physicians who attended the birth and the hospital at which it occurred, alleging that they failed to meet the appropriate standard of care.

After receiving separate Statements of Defence from the physicians and the hospital, Ewashko obtained and provided an expert report on future care costs. The physicians also retained an occupational therapist to complete a cost of future care report, and the hospital subsequently requested similar access to Ewashko to have an expert report prepared on future care costs. Ewashko refused on the grounds that the physicians and hospital were not adverse in interest and should be required to reply on the expert report prepared for the physicians'.

The hospital made a successful application for an order requiring Ewashko to be observed in his own home and at school to assist in preparing its expert report on the cost of future care, pursuant to Rule 5.41(4) of the Alberta *Rules of Court.* In an oral decision, the chambers judge stated that separate defendants do not have to agree to rely on the same expert witness and that plaintiffs should not be dictating to the defendants whom they can retain as experts. If only one defence expert report were allowed, it would become a race between defendants as to who can get an examination first.

Ewashko appealed the decision, and the issue was whether Rule 5.41(4) grants discretion to a judge to order expert medical examinations and whether he should have done so in this case.

HELD: Appeal dismissed, the chamber judge's decision disallowing the Defendant hospital to have its own future care costs expert was reversed.

The Court held that it was unlikely that Ewashko would experience a significant intrusion as a result of an examination because of the extent of his disabilities and the fact that he would not be subject to a physical exam.

Absence of an affidavit from the proposed expert addressing the necessity for the preparation of an additional report was held to be not fatal to the application.

a. The Court of Appeal differentiated this case from cases where the Court overturned a decision allowing an expert examination because of an absence of evidentiary foundation demonstrating the examination was necessary:

[12] The respondents maintain that no affidavit was necessary as an evidentiary foundation could readily be inferred from the fact that the appellant's claim exceeded $10 million for cost of care and was complex in nature as well as amount. In ***Phillips*** at para 5, by way of

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comparison, this Court overturned a decision allowing an expert examination given the absence of an evidentiary foundation demonstrating that such an examination was necessary where the Plaintiff did not allege injuries of a psychiatric or psychological nature, nor proposed to call her own expert in the area. Here, the pleadings allege catastrophic injuries that necessitate ongoing cost of care expenditures and the appellants have had their own cost of care expert observe Aiden for the preparation of a report into the issue

b. The Court of Appeal further noted that an expert opinion based on document review or information provided at questioning could be afforded less weight at trial than one provided by an expert based on actual observations. The expert may wish to apply different tests and administer those tests differently from one another.

c. Finally, the Court of Appeal noted that if counsel for the hospital were required to tender affidavit evidence identifying any alleged deficiencies in the physicians' expert report as a pre-requisite to its application for permission for its own expert to examine Ewashko, but was unsuccessful in obtaining that permission, with the result that they would be required to reply on the respondent physicians' expert at trial, their effective reliance on evidence that they had earlier challenged as incomplete or reliable would be blunted.

The Court held that separate defendants are entitled to select and employ their own experts, even if they are not adverse in interest on the issues in question.

a. The Court noted that co-defendants may be adverse in interest or employ different strategies despite not making direct claims against each other and that their respective experts may not come to the same conclusions:

[16] Simply because Notices of Claims for Contribution and Indemnity or Third Party Claims have not been filed by the respondents does not mean their interests are aligned for all purposes, for all time. While they may have a "common indivisible interest" to the extent that a joint damages award may be made against them after trial, that is not synonymous with identical positions in law, in fact, in tactics or in strategy. Each clearly has a discrete interest in attempting to establish that some or all of the damages sustained, including future care costs, should be borne by the other Defendants.

[17] Each defence counsel may well instruct their experts differently. They will each ask their expert to focus on certain things, to agree or disagree with certain findings of the appellants' expert and to include a rebuttal with their initial report or separately. Further, while both these experts may well be qualified to give opinion evidence on future care costs, that is no assurance that each will come to identical opinions. As noted in *Kubi**ca v Hagans***, 2007 ABQB 741 [***Kubica***] at paras 12-13, an expert report prepared for one Defendant may express an opinion which is inconsistent or unfavourable to the position taken by the other Defendant.

b. The Court noted that there was no authority which suggested that where one Defendant has not made a claim against another defendant, that they should be considered to be the same party for the purpose of Rule 5.41(4). Even when a single party seeks permission to call more than one expert at trial in a given area, that request is not rejected if the applicant establishes relevant, necessity, absence of an exclusionary rule and a suitably qualified expert.

c. The Court also noted that the hospital's counsel would have an interest in obtaining an expert opinion, which minimized any aspect of the future care costs for which the hospital might ultimately be proven liable and the opposite is true for the physician's counsel. Thus, there is a risk that the future care costs report prepared for the latter purpose may be insufficient to fully advance the hospital's defence.

It was held that while it is in the interests of the Court to not unnecessarily prolong the litigation process by permitting an excessive number of expert examinations, in cases where multiple expert reports on various subjects are expected, unnecessary delay is not the inevitable result from allowing the hospital's occupational therapist expert to conduct their examination. Allowing the examination does not offend Rule 1.2 because allowing all defendants to obtain expert opinion evidence may facilitate the settlement process, leading to attempted resolution of some of all of the issues in dispute without the need to go to trial.

COMMENTARY

The main takeaway from this decision is that co-defendants who are not adverse to each other are not required to share experts and that plaintiffs cannot dictate their choice of expert. Co-defendants may not have identical positions in law, facts, tactics, or strategy. Each has a discrete interest in establishing the other defendants should bear some or all of the damages sustained. There are instances where co-defendants' interests may diverge, even if there are no direct claims between the parties, and expert reports may be essential tools to further settlement negotiations.