Date: 20020404
Docket: CA172291

NOVA SCOTIA COURT OF APPEAL
[Cite as: *Madore v. Ibrahim*, 2002 NSCA 46]

Roscoe, Cromwell and Hamilton, JJ.A.

BETWEEN:

JOSEPH MICHAEL MADORE

Appellant

- and -

DR. A.H.S. IBRAHIM

Respondent

REASONS FOR JUDGMENT

Counsel:	Hugh R. McLeod for the appellant Colin J. Clarke for the respondent Dr. Ibrahim James L. Chipman for Dr. M.D.Miller
Appeal Heard:	February 15, 2002
Judgment Delivered:	April 4 , 2002
THE COURT:	Leave to appeal is granted and the appeal is allowed in part per reasons for judgment of Hamilton, J.A,; Roscoe and Cromwell, JJ.A. concurring.

Hamilton , J.A.:

[1] The appellant applies for leave to appeal and, if granted, appeals the interlocutory order of Justice Simon J. MacDonald, dated September 5, 2001, refusing to appoint Dr. M. D. Miller a court expert and refusing to order Dr. Miller to answer certain interrogatories, the majority of which call for his opinion concerning the medical services provided by the respondent, another physician, to the appellant.

[2] Dr. Miller is not a party to this action. He is a urologist who treated the appellant when the appellant went into the emergency department of the Cape Breton Regional Healthcare Complex complaining of pain, three days after the respondent performed a circumcision on him. The appellant has commenced an action against the respondent alleging negligence in the performance of the circumcision. There is no action against Dr. Miller nor any allegation of wrongdoing by him, although I note that interrogatory No. 23 dated February 2, 2001 inquires of Dr. Miller:

> In performing completion of the circumcision for Michael Madore, was there any negligence that you committed or anything that you should have done?

[3] The respondent did not attend the hearing and indicated by letter that he supports Dr. Miller's position.

[4] Dr Miller has provided the appellant with a complete copy of his file and has answered several interrogatories concerning the medical services he provided to the appellant. Dr. Miller declined to be an expert witness in this action when asked by the appellant and provided the names of three other urologists to the appellant. Appellant's counsel indicates the other three urologists whose names were provided by Dr. Miller also declined to act as an expert witness. There is no evidence of any other attempts by the appellant to engage an expert witness.

[5] The issues listed by the appellant in his factum are:

1. Is Dr. Miller in breach of his own *Code of Ethics*?
2. Should Dr. Miller be appointed a court expert and be required to answer all questions put to him in both sets of interrogatories?
3. Should Dr. Miller be required to re-answer the questions submitted in this Factum with the directive that he answer them fully and in language that is capable of being understood by a layman?

4. Should Dr. Miller be required, specifically, to give a complete and full explanation as to what went wrong in the first operation and why it was necessary for him to do a second corrective surgery?

[6] The order appealed from is an interlocutory order and the standard of review is as stated by Chipman, J.A. in **Global Petroleum Corporation v. CBI Industries Inc.** (1998), 172 N.S.R. (2d) 326 (N.S.C.A.).

> This Court will not interfere unless wrong principles were applied or a manifest injustice has resulted. In so doing, we consider the consequences of the order under review, whether the Chambers judge gave insufficient weight to relevant matters, whether all relevant circumstances were brought to the attention of the Chambers judge, and whether the judge misapprehended the facts.
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> This Court should narrowly confine the scope of the appellate intervention on appeals respecting interlocutory decisions, particularly those involving procedural rulings.

[7] With respect to the first issue raised by the appellant, this issue is not properly before the court. This issue was not raised before the chambers judge or dealt with in his decision and was not included in the notice of appeal.

[8] With respect to the second issue raised by the appellant, the appellant has not satisfied me that the chambers judge erred in refusing to appoint Dr. Miller as a court expert for the purpose of answering all questions put to him by the appellant's interrogatories. It is difficult to imagine the circumstances under which a court would appoint an expert who was not willing to so act.

[9] With respect to the third issue raised by the appellant, I am not satisfied the chambers judge erred in not ordering Dr. Miller to re-answer the interrogatories he did answer "in language that is capable of being understood by a layman", as appellant's counsel phrases it. While it would have been better if Dr. Miller used plainer language in answering some of the interrogatories, he has not strayed so far that the trial judge erred when he determined that they did not have to be redone.

[10] With respect to the fourth issue, I will deal with this by addressing the two types of objections made by Dr. Miller to answering some of the interrogatories, namely: the interrogatories were not relevant and the interrogatories need not be answered because they call for opinions; since the answering of these unanswered interrogatories was the issue before the chambers judge.

[11] Dr. Miller objects to answering four interrogatories on the basis they are not relevant because they concern his own professional experience with circumcisions. There is no dispute that only relevant interrogatories need to be answered. The chambers judge considered these interrogatories and determined they were not relevant. He did not err in his determination. Interrogatories relating solely to Dr. Miller's qualifications and experience are not relevant to the subject matter of this action.

[12] Dr. Miller objects to answering the balance of the interrogatories on the basis they call for his opinion, without further explanation. He does not indicate whether he is unable to give any of the opinions sought, perhaps because he does not have the required expertise, did not form any opinions, does not recall any opinions he formed, was not present at the time of the circumcision or lacks sufficient factual information. The appellant argues Dr. Miller is required to provide all opinions sought, even if this involves reviewing information from other sources, including his opinion on the relevant standard of care, whether it was breached by the respondent and whether the appellant suffered damage as a result of the breach.

[13] The chambers judge considered this issue of opinion and I am satisfied he erred by overstating the basis upon which a non-party witness may object to answer an interrogatory calling for an opinion, when he stated, "Dr. Miller cannot be compelled to provide opinion evidence simply because he was a subsequently treating physician to Mr. Madore even though he may possess an expertise in the area of treatment." The main case the chambers judge relied on in his decision, **Eckersley v. Terwiel**, (1991) 59 B.C.L.R. (2d) 94 (B.C.S.C.), has since the time of his decision been overruled by the British Columbia Court of Appeal in **Christensen v. Sinclair**, [2002] B.C.J. No. 156 (B.C.C.A.) 65.

[14] Dr. Miller's counsel argues that Dr. Miller has answered all of the interrogatories that relate to his diagnosis and treatment of the appellant. He indicates Dr. Miller previously gave the appellant his complete file dealing with him. He points out what the appellant admits, that the appellant is planning to get his expert evidence through interrogatories directed to Dr. Miller. Dr. Miller's counsel argues this is not permitted because there is a specific rule governing the presentation of expert opinions, **CPR 31.08**, that must be followed. He points out the possibility of subsequent interrogatories and discoveries of Dr. Miller and argues that to require people in Dr. Miller's position to give answers to interrogatories that amount to expert opinions is dangerous because it may result in unreliable temporary

opinions, given by people without all of the relevant factual information before them. He argues these types of opinions will not be helpful to the trier of fact. He argues that the safeguards provided in **CPR 31.08** will not be available to provide fairness to the parties, the experts and the court, if expert opinions are obtainable through interrogatories. He argues the appellant may attempt to add Dr. Miller as a party after the interrogatories are answered, which may prejudice Dr. Miller. He suggests the compensation the appellant would pay for interrogatories would be far less than that required to hire an expert because of the steps that must be taken by an expert to ensure his or her report is in accordance with **CPR 31.08.** He suggests this practice would wreak havoc with emergency room medical staff who may want to avoid involvement and would cause disorder in trial preparation and conduct.

[15] He distinguishes the **Christensen v. Sinclair** case, **supra,** saying it was an exceptional case because the defendant physician in that case was incapable of giving evidence, there was evidence to indicate there was no other expert available and the physician ordered to answer had previously agreed to be an expert witness and had previously given his opinion that the defendant physician was negligent. There is no evidence of any of these factors in this case. In **Christensen v. Sinclair** the court ordered a non-party who was a subsequently treating physician, to be discovered and to answer questions requiring his opinion on the medical services provided by the defendant physician, but limited his examination to previously formed opinions and knowledge of the plaintiff and provided that he would only be obliged to answer questions that he could answer without new research. The court also provided that the physician need not perform a literature review for his discovery. The questions ordered to be answered in that case include those directed to the possible negligence of the defendant physician, namely: the standard of care, a breach of that standard and resulting damages.

[16] The appellant on the other hand argues that Dr. Miller is required to answer all interrogatories that require his opinion, including his opinion as to the applicable standard of care, its breach and resulting damages, because the wording in **CPR 19** does not permit Dr. Miller to object to answer an interrogatory on the basis that it requires an opinion. He relies on the **Christiansen v. Sinclair** case as authority for requiring a physician in a situation similar to Dr. Miller to provide such opinions. Even though the **Christiansen v. Sinclair** case did not require the physician to review the records and transcripts of discoveries of other care providers or provide

current opinions, the appellant asks this court to require Dr. Miller to do this. The appellant is candid in admitting he plans to use the answers to Dr. Miller's interrogatories as his expert evidence in place of an expert witness and indicates he is willing to pay for Dr. Miller's preparation time.

[17] The appellant is correct in stating that **CPR 19** does not state that a non-party witness can object to answering an interrogatory on the basis it calls for an opinion. **CPR 19.01(2)** indicates that a non-party is, subject to **Rule 19.03**, required to "answer each interrogatory to the best of his personal knowledge and, if necessary, by adding any explanatory information . . ."

[18] **CPR 19.03(2)** provides that "an objection to answering any interrogatory may only be taken on the ground of privilege or that it is not relevant to the subject matter involved in the proceeding . . ." (underlining added)

[19] In some circumstances a non-party may be required to answer interrogatories that require an opinion. In some cases the distinction between fact and opinion may not be clear. **Gratt v. R** (1982), 31 C.R. (3d) 289 (S.C.C.) Under **Rule 19.02** interrogatories are governed by the same general rule relating to scope as applies to oral discovery: see **Rule 18.09.** The key tests are relevance to the subject matter of the proceeding and that the answer lies within the knowledge or means of knowledge of the witness. When the question calls for an expert opinion it must also be shown that the witness is qualified to answer the question. I will address the additional concern of not unduly burdening the witness in paragraph 21. The question here is whether the opinions sought by the interrogatories in this case are opinions which **CPR 19** requires be provided.

[20] With respect to the interrogatories that seek to determine what Dr. Miller did, these have been answered. With respect to the interrogatories that seek to determine Dr. Miller's reasons for treating the appellant as he did from September 4, 1998 to March 10,1999, the appellant is entitled to also have these answered, even if this requires Dr. Miller to disclose the opinions that went into the formation of his judgment in diagnosing and treating the appellant during this period of time. Dr. Miller is also required to answer interrogatories seeking to determine his opinion at the time he treated the appellant as to what would have happened to the appellant if Dr. Miller had not treated him as he did. These opinions relate to the treatment provided by Dr. Miller.

[21] With respect to opinions that Dr. Miller may or may not have formed since he treated the appellant or may now be able to form if he reviewed sufficient

factual information and prepared, opinions similar to those an expert witness may provide, he is not required to answer interrogatories calling for such opinions. To require him to do so would be to misinterpret the scope of **CPR 19**, which must be read in the context of the whole of the rules, including **CPR 31.08** dealing specifically with expert opinions, and in light of the provisions of the **Judicature Act** that permit the court to control its practice and procedure to ensure orderliness and fairness.

[22] **CPR 19** deals with interrogatories generally. It makes no mention of experts one way or the other. **CPR 31.08** on the other hand deals specifically with expert opinion and goes to some length to provide how an expert opinion is to be prepared.

[23] **CPR 31.08 (1)** and **(2)** provide as follows:

> **31.08.** (1) Unless a copy of a report containing the full opinion of an expert, including the essential facts on which the opinion is based, a summary of his qualifications and a summary of the grounds for each opinion expressed, has been
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> (a) served on each opposite party and filed with the court by the party filing the notice of trial at the time the notice is filed, and
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> (b) served on each opposite party by the person receiving the notice within thirty (30) days of the filing of the notice of trial,
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> the evidence of the expert shall not be admissible on the trial without leave of the court.
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> (2) Where an opposite party wishes to conduct discovery examination of an expert, the opposite party shall pay the expert a reasonable fee for his attendance at the examination. If the fee is not paid in advance, the opposite party shall have no right to discover the expert. Unless otherwise ordered, if the opposite party is awarded costs following the trial, that party shall be entitled to recover as a disbursement the amount paid to the expert for his attendance at discovery.

[24] The detail required by this Rule ensures the factual basis of the expert's opinion is clear to the trier of fact who will have to assess the weight to give the opinion taking this into account and ensures adequate notice to the parties of experts opinions to avoid surprise and help the trier of fact discover the truth. This rule also provides specifically for discoveries of experts and their reimbursement. To allow interrogatories to be used to usurp this function, without the presence of such safeguards for the parties,

the experts and the court, would not be in accordance with the orderly and fair trial practice and procedure that the **Civil Procedure Rules** promote.

[25] Taking the above into account, I am satisfied it is not sufficient for Dr. Miller to have objected to answer the balance of the interrogatories by simply stating they require an opinion. Depending on the nature of the opinion, it may be necessary for him to provide it. For instance, opinions relating to the diagnosis and treatment provided are required, such as those suggested in interrogatories numbers 8, 9 and 10 of the first set of interrogatories; namely, Dr. Miller's opinion as to whether the appellant had received a complete circumcision when he first saw his penis on September 4, 1998; his reasons for performing surgery in September, 1998; and what Dr. Miller thought in September, 1998, would be the consequences to the appellant if he had not operated. Accordingly, Dr. Miller should re-answer the interrogatories he previously objected to on the basis of opinion, but without prejudice to his right to raise a properly supported and articulated objection to answering any particular one as he may be advised, which he will probably be able to do with respect to many of the interrogatories which seek opinions about the respondent's care of the appellant rather than Dr. Miller's treatment of the appellant.

[26] Dr. Miller should also answer the parts of interrogatories number 20 and 21 of the first set of interrogatories that do not seek an opinion, namely as to what he observed as to the removal and sewing down of the foreskin of the appellant's penis when he first saw it and whether the appellant was referred to him by Dr. Ibrahim.

[27] While I recognize medical terminology may be involved, in answering these questions Dr. Miller should attempt to use language that can be understood by the appellant, his counsel and the court.

[28] This decision expressly does not deal with the issue of physicians who are co-defendants or non-party physicians who have not subsequently treated a party to the litigation.

[29] I am satisfied the chambers judge did not err in providing in the order that in the event the appellant serves further interrogatories or requests discovery of Dr. Miller, the appellant will pay Dr. Miller's reasonable hourly rate.

[30] Accordingly, leave to appeal is granted and the appeal is allowed in part as hereinbefore provided.

[31] Since success on the appeal has been divided, there should be no order for costs.

Hamilton, J.A.

Concurred in:

Roscoe, J.A.

Cromwell, J.A.