

**CITATION:** Jones v. Edwards, 2020 ONSC 5761  
**COURT FILE NO.:** CV-16-95407  
**DATE:** 20200921

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Adam Jones, Beth Jones, Griffen Jones, by his Litigation Guardian Beth Jones, Everly Jones, by her Litigation Guardian Beth Jones, and Beckham Jones, by his Litigation Guardian Beth Jones, Plaintiffs

**AND:**

Edward D. Edwards, Defendant

**BEFORE:** The Honourable Mr. Justice H. Leibovich

**COUNSEL:** Renee Vinett, for the Plaintiffs

Nestor Kostyniuk, for the Defendant

**HEARD:** September 21, 2020, in writing

**ENDORSEMENT**

[1] The defendant has brought a motion to enforce the order made by Salmers J. on June 5, 2020 requiring the plaintiff GJ to be assessed by Dr. Kumchy. In addition, the defendant seeks to have the plaintiffs pay for the unsuccessful appointment with Dr. Kumchy on July 11, 2020. GJ, is now a minor 9-year-old. On June 5, 2020, Justice Salmers, on consent, issued an order compelling GJ to undergo a medical examination by Dr. Kumchy on July 11 and August 6, 2020. GJ and his father attended for the appointment. The father wanted to be present at the outset of the assessment. Dr. Kumchy refused and ultimately the session was cancelled. The plaintiffs are proposing that GJ be allowed to attend the assessment with one of his grandparents present, on the condition that the grandparent will leave the assessment room if/when GJ becomes acclimatized and comfortable with the assessor.

[2] This motion was heard in writing, although there was a brief oral hearing to discuss some of the initial concerns the moving party had with a supplementary affidavit filed by the respondent. By the time the oral hearing was held those concerns had dissipated.

**Facts**

[3] The facts surrounding the failed assessment are contained in GJ's father's affidavit. The defendant in support of this motion has relied on the notes of Dr. Kumchy and his assistant Ms. Zhu, as well as material sent to them from Dr. Kumchy.

[4] The July 11<sup>th</sup> appointment was set to start at 9:00 a.m. GJ and his father arrived early, at 8:30 a.m. He states that the longer they waited the more anxious GJ became. According to

the father, Ms. Zhu only arrived to get them from the lobby at 9:30, half an hour late. Ms. Zhu's notes indicate that she went to the lobby at 9:05-9:10 a.m. This was a Saturday, and the assessment was the only matter scheduled.

- [5] Upon being brought up to the assessment room, the doctor's associate immediately informed GJ that it would be a very long day of assessments and writing and they needed to get started and the father would wait outside. The father believed that GJ looked uncomfortable. He was concerned that he would cry. The father told the associate that he would not allow the assessment to start if he could not be present in the room initially. Ms. Zhu attempted to reach Dr. Kumchy, who was not present at the time. However, the efforts were interrupted by a fire alarm that required everyone to evacuate the building.
- [6] GJ's father stated that "The fire alarm triggered Griffen's anxiety and PTSD like symptoms related to the accident of March 15, 2015. He became tearful and anxious. He was holding my hand as we ran down the stairs. At one point, I thought I would have to carry him. When we arrived outside, GJ immediately jumped into my arms and burst into tears. The associate was right there with us when this happened. The associate continued her attempts to reach Dr. Kumchy by phone and appeared to be as frazzled as we were." Ms. Zhu did not file an affidavit. Her notes on this point reads as follows:

**9:55 am** Ms. Zhu talked to Dr. Kumchy

The child was described as calm throughout. He made eye contact with the examiner and he smiled.

He was neither crying nor upset in the office when observed by the examiner.

- [7] GJ's father stated that while awaiting the end of the fire alarm at the Starbucks across the street, GJ was upset and did not want to return to the assessment. He only agreed to do so when his father agreed not to leave him. GJ's father stated in that he told Ms. Zhu that GJ had undergone a number of assessments since the accident and he had been allowed to stay in the room until the assessor developed a rapport with GJ. In those instances, the assessor allowed a parent in the room initially while they established rapport with GJ. Once that had occurred, GJ was able to meet with the assessor on his own for the balance of the assessment. GJ told the associate that he needed to honour GJ's request to stay with him until he felt comfortable to proceed with the assessment on his own, particularly in light of the fire alarm.
- [8] GJ's father spoke with Dr. Kumchy on the telephone. Dr. Kumchy offered to allow the father to sit outside the assessment room with the door 6 inches open so he could hear. The father wanted the door open enough so he could be seen by GJ. Dr. Kumchy refused and the assessment was over.
- [9] GJ has been assessed a number of times in the past. It appears that in the past the assessor has met with GJ and his parents initially and then GJ, although it is unclear whether GJ's parents were present during the initial part of Dr. Syed's assessment.

[10] Dr. Kumchy's concern with allowing a person in the room was that the integrity of the assessment would be compromised. She provided two articles supporting the position that test results are compromised when there are third party observers during testing.

[11] The responding party has filed a number of assessments showing that GJ does suffer from separation anxiety and PTSD symptoms. A number of letters were also provided to the court on whether GJ could be assessed independently. In response to whether GJ could be assessed by himself, Dr. Rumney stated that:

- 1) It is common practice that children be independently assessed, and it is uncommon for parents to be present;
- 2) Sometimes in cases of severe emotional disturbance a parent is needed to ensure that the child is able to participate;
- 3) In some cases, the assessment could begin with the parent in the room and then once the child is comfortable, the parent could leave; and
- 4) If there is no attempt to assuage GJ's anxieties, then the assessment could underestimate his capabilities.

[12] Dr. Hamilton stated that having a parent present during the assessment is not disallowed and that having a father present would allow GJ to manage his anxieties. If the anxieties are not managed, then the assessment may not accurately reflect his functioning.

[13] Wendy Gage, a social worker, stated that:

From my clinical experience with GJ, he can be oppositional and rigid when he is too anxious to participate. In these instances when he becomes rigid, there are no "in the moment" interventions that allow for participation. While the examiner may desire to test GJ without parental presence, he is still a nine-year-old boy who cannot understand and appreciate the implications of refusing participation. If he is too anxious on a particular day and cannot have a parent present to reduce his anxiety, he will simply refuse participation.

### **Law and Analysis**

[14] This motion raises two issues:

- 1) Can the defendant have a third party present at the initial stage of the assessment until GJ is comfortable with the assessor?
- 2) Who pays for the aborted July 11, 2020 assessment with Dr. Kumchy?

*Can the defendant have a third party present at the initial stage of the assessment until GJ is comfortable with the assessor?*

[15] The defendant seeks to have the examination conducted without the presence of a third person. The defendant has filed, and there does not seem to be any dispute, material that states that the results of the assessment could be affected by the presence of a third party. The defendant also states that the doctor and his associate know how to create rapport with young children and the GJ has been previously assessed and seen independently by assessors. The plaintiffs have requested that GJ's grandparent be present initially until GJ is comfortable and would then depart the examination. It appears that it is the responding plaintiffs' view that the grandparent would decide when GJ is comfortable. The proposal that the grandparent attend (as opposed to the parent) was made after the defendant filed this application. In regard to the plaintiffs' proposal the defendant submitted in reply:

The Defendant respectfully submits that the relief sought by the Plaintiffs is unclear and ambiguous. There has never been a dispute with respect to a third party speaking to GJ and "acclimatizing him" to his surroundings prior to the neuropsychological assessment. The dispute is in allowing a third party to attend with Griffen during the neuropsychological assessment and testing. The Defendant submits that the relief sought by the Plaintiffs at paragraph 15 of Renee Vinett's Affidavit can be achieved outside of any assessment room and outside of any neuropsychological testing.

[16] The issue of who may attend on an examination is addressed in rule 33.05 of the *Rules of Civil Procedure*, which states:

No person other than the person being examined, the examining health practitioner, and such assistance as the practitioner requires for the purpose of the examination shall be present at the examination, unless the court orders otherwise.

[17] As noted in *Bellamy v. Johnson*, [1992] O.J. No. 864 (C.A.) "the judgment of the doctor as to how the examination is to be conducted is not final, and the court has jurisdiction to set terms and conditions relating to the examination...".

[18] I agree with the defendant that it is unnecessary to have any formal conditions on the assessment. I say this for the following:

- 1) The preferred route is to have GJ assessed independently. Evidence has been filed, and not disputed, that having a third party present, even a passive third party, could affect the integrity of the assessment.
- 2) There is no evidence that on July 11<sup>th</sup> GJ was unable to participate in the assessment without his parent. He has been assessed before without a parent present. There is a dispute in the material regarding how upset GJ was on July 11, 2020. I have Ms. Zhu's notes (but no sworn affidavit) that he was not. I have the sworn affidavit of GJ's father who is also a party to the litigation that he was. I am prepared to accept that the series of events was upsetting to GJ. The early arrival, late start and fire alarm couldn't have helped him. But it appears that he was able to proceed, and he

did not refuse to participate. The fire alarm and the arrival of the fire trucks was clearly an unfortunate occurrence, but it is also one unlikely to be repeated;

- 3) The plaintiffs' proposal, to the extent it allows the third party to decide when GJ is comfortable is unworkable and has the potential to deprive the defendant of a proper examination and derail the assessment. As stated by Justice Mulligan in *Gill v. Walters*, 2014 ONSC 5364 at para. 13:

The Court of Appeal acknowledged the important role of a defence medical in *Bellamy v. Johnson*, [1992] O.J. No. 864. As Doherty J.A. stated at para. 16:

The "defence medical" provided for by s.105 and Rule 33 forms an integral part of the discovery process where the physical or mental condition of a party to the proceedings is in issue. Discovery in several proceedings said to be ... The most effective procedural device for learning the case, one has to meet and as a result, is an important condition of increased and reasonable settlements, and more effective and fair trials. [Citations omitted.]

- 4) I agree with the defendant that all the steps needed to acclimatize GJ can be done upon arrival at Dr. Kumchy's office before the official assessment begins. I do understand the plaintiffs' concern because it appears from the father's affidavit that Ms. Zhu spent almost no time with GJ and his father, apart from bringing them up in the elevator, before asking to start the assessment. According to GJ's father Ms. Zhu was late in getting them from the lobby (which is confirmed by Ms. Zhu's notes, although not as late as the father stated) which perhaps led to what feels, from the material provided, to be a hurried start. It is evident that the July 11, 2020 assessment got off on the wrong foot, with GJ and his father attending early, then Ms. Zhu bringing them up late and then the fire alarm. Perhaps in the normal course this introductory period with the father would have been expanded and the assessment would have proceeded smoothly. However, in my view, this does not require the court to impose formal conditions on the assessment that are unworkable in practice.

[19] Therefore, while GJ can have a parent or grandparent present at the doctor's office to acclimatize him to the office, he cannot have a parent or grandparent present when the actual assessment is being conducted.

*Who pays for the aborted July 11, 2020 assessment with Dr. Kumchy?*

[20] GJ's father refused to allow his son to be assessed if the father could not stay in the room. The refusal occurred before the fire alarm. Dr. Kumchy attempted to find a compromise solution by agreeing to leave the door open six inches but the father refused unless he was in GJ's sightline. The session was terminated. Justice Salmers did not impose any conditions on the assessment. Section 33.05 only allows for the person being examined to be present unless a court orders otherwise. None had. The plaintiff bears responsibility for

the cost of the aborted session but not the cost of the file review, as that work is not wasted and will serve doctor for when she ultimately does her assessment.

## Order

[21] I therefore order as follows:

1. That plaintiff GJ attend for the next available examination dates at the office of Dr. Gayle Kumchy, neuropsychologist, at 1235 Bay Street, Suite 527, in Toronto, Ontario.
2. That plaintiff GJ undergo the assessment with Dr. Kumchy's office without a parent in the assessment room. That the defendant will pay for the plaintiff's transportation cost to and from the assessments with Dr. Kumchy.
3. That the defendant pay for the plaintiff GJ's overnight accommodation at under \$200 if required.
4. That the defendant pay for the plaintiff, Adam Jones' lost wages from work for having to transport the plaintiff GJ to the assessments, upon being provided with evidence of the amount lost and that he was not reimbursed by his employer.
5. That the plaintiffs pay part of Dr. Kumchy's invoice in the amount of \$1800 plus HST for the aborted session.
6. The plaintiffs pay the defendant's costs of this motion, in the amount of \$2000.



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Justice H. Leibovich