

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**CIV 2008-485-1541**

BETWEEN	LRB Plaintiff
AND	THE ATTORNEY-GENERAL First Defendant
AND	THE SALVATION ARMY Second Defendant

Hearing: 11 December 2009 (On Papers)

Counsel: J M Elliott for Plaintiff  
D A Ward for First Defendant

Judgment: 14 December 2009

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**JUDGMENT OF RONALD YOUNG J  
(Application for leave to cross-examine deponent)**

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[1] On 2 December 2009 I heard the plaintiff's application for leave to bring an action. I adjourned the application for reasons set out in my minute of that date.

[2] On 9 December 2009 at a telephone conference to timetable a further hearing counsel for the plaintiff indicated that they wished to give a notice requiring Dr Duff to be available for cross-examination. I advised counsel that a formal application should be made. I timetabled that application as well as a response from the first defendant. I indicated I would decide the issue on the papers.

[3] The hearing of 2 December was adjourned part heard because of what I considered to be a number of serious inadequacies in the plaintiff's case. It seemed,

however, fair to me, to give the plaintiff an opportunity to remedy those inadequacies, if possible, before I made a final decision.

[4] It is with that background I come to consider the plaintiff's interlocutory application to cross-examine the expert for the first defendant, Dr Mhairi Duff. It is common ground that given this is an interlocutory application leave to cross-examine is required (R 7.28 High Court Rules). I also take into account, however, that an unsuccessful application for leave to bring these proceedings out of time will mean the end of the plaintiff's case. In those circumstances it would be proper to take a more liberal approach to such an application.

[5] What is required is that the application for leave to cross-examine, establish special circumstances.

[6] As I understand the plaintiff's application it is based on the following matters. In her affidavit, Dr Duff mentions various probation reports which record such matters as counselling while on parole, the use of prescription drugs and treatment in hospital and the prescription of sedatives and tranquilisers relating to the plaintiff. However, none of the primary reports from either psychiatrists or the hospital appear now to be available relating to the treatment or use of prescription drugs.

[7] At paragraph 88 of her affidavit, Dr Duff notes that there is little information available regarding Mr B with respect to his earlier engagements with the forensic mental health services or others.

[8] Counsel for the applicant says that he should be permitted to cross-examine Dr Duff as to whether the strength of her opinion, formed in the absence of the primary reports mentioned, is compromised. Dr Duff herself acknowledges the absence of the reports and therefore recognises the limitation that absence brings. As the Crown observe after all these years, it is hardly surprising that there is an incomplete trail of documents. After all Dr Duff can only consider the information available. There is nothing that would require cross-examination here and certainly

no special circumstances. The limitations on Dr Duff's conclusion are acknowledged and self evident.

[9] The second factor raised by counsel for the applicant relates to the plaintiff's comments in his affidavit about his inability to disclose the abuse and his inability to admit the experiences to himself. The applicant says that Dr Duff has not commented on this evidence. Of course Dr Duff does not have to comment on all of the matters raised by the plaintiff. The fact that she has not done so is clearly a matter on which the plaintiff can make submissions. It is certainly not a special circumstance justifying cross-examination.

[10] The final matter raised by counsel relates to Schedule 4 of the High Court Rules and the code of conduct for expert witnesses. Expert witnesses are invited in the Code to say whether their opinion is a concluded opinion if there is insufficient information or data available. Where the witness believes her evidence may be incomplete or inaccurate without qualification then that qualification must be identified.

[11] The applicant's point is that Dr Duff has not stated whether her opinion is a concluded opinion or not and whether the lack of information previously identified may mean her opinion is incomplete. Dr Duff identifies the limitations of her opinion. In my view nothing could be gained by her cross-examination as to this.

[12] While it would not have been determinative I note that the applicant made no such application prior to the hearing of 2 December when it was assumed the application would be complete.

[13] The application for leave to cross-examine Dr Duff is refused.

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Ronald Young J

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