

# **PRE-TRIAL EXAMINATION OF A CHILD: A DELICATE BALANCE BETWEEN THE CHILD'S INTERESTS AND THE RIGHT TO EXAMINE HIM**

## **COMMENTARY ON THE *AVIVA V. MORENCY* DECISION**

**BY GENEVIÈVE COTNAM**

### **Facts**

The plaintiffs, two insurance companies, instituted liability proceedings against two minors and their mothers after a fire damaged property owned by their insureds. According to the insurers, the actions of the two children were the direct cause of the fire. In the framework of the proceedings, counsel for the insurance companies wanted to conduct a pre-trial examination of one of the children, who was then 14 years old. Counsel for the child raised doubts about the child's ability to discriminate and the impact this could have on his examination by five attorneys who had every interest in incriminating him and eliciting admissions during the examination.

### **COMMENTARY ON THE DECISION**

#### **A. COMPELLABILITY OF A CHILD**

The courts rightfully consider that a minor can be examined out of court pursuant to the Code of Civil Procedure, which makes no distinction between the examination of a minor and an adult. The question remains whether such an examination should be conducted under the same conditions as it would for a person of full age, or whether different rules should apply depending on the child's age.

#### **B. ABILITY TO DISCRIMINATE**

For several years now, the jurisprudence has recognized that although children are compellable, measures should be taken due to their vulnerability. It is essential to first determine the child's capacity to testify and his ability to discriminate.

Accordingly, the courts have readily acknowledged that a party has the right to examine a child under 14, as long as the examination is conducted in the presence of a judge—ideally the judge who will be presiding at trial. The objective of this approach is to allow the judge to form an idea of the credibility of the child's testimony<sup>1</sup> and to appreciate the

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\* 200-17-011320-090, a decision rendered by the Honourable Justice Catherine La Rosa on April 30, 2010.

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child's development and capacity to testify. It is therefore essential to try to balance the protection of the child's interests against a party's right to examine him.

As regards the conditions, the court reminds us that in principle two steps should be taken. The first step, where the judge will determine whether the child understands the nature of an oath, or if not, if he is developed enough to relate the facts he is aware of and understands his duty to tell the truth. Next, the judge will attend the examination to ensure that it is conducted in keeping with the child's best interests.

This is the procedure that seems to have been followed by the courts, in particular in the case of children under 14. In some situations, the court might even authorize the appointment of a child advocate for the pre-trial examination.

In *Aviva v. Morency*, Justice La Rosa wondered whether a different approach should be taken when the child being examined is older than 14. The court determined—correctly, in our view—that there is no universal answer to this question, as each case is different. The mere fact that some statutes, such as the *Youth Protection Act* and the *Evidence Act*, establish certain presumptions based on the child's age, is not a sufficient guideline for the court. The cornerstone remains Article 33 of the Civil Code, which states:

*“Every decision concerning a child shall be taken in light of the child's interests and the respect of his rights. Consideration is given, in addition to the moral, intellectual, emotional and physical needs of the child, to the child's age, health, personality and family environment, and to the other aspects of his situation.”*

Whatever the child's age, it is therefore essential to consider his interests. Under these circumstances, the two steps recognized so far for children under 14 should also be followed for children over 14 where the situation calls for it.

## **CONCLUSION**

There is no doubt that the child's interests must always be the parties' and the court's prime concern when the situation calls for the examination of a child. Counsel should also ask themselves whether it is really necessary to examine the child in the specific context of the case at hand. In our view, the question of whether a child is to be examined should be raised quickly and submitted to a judge without delay for a

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<sup>1</sup> *Corbeil v. Desjardins Ste-Adèle Marine Inc.*, J.E. 93-217 (CS), confirmed by the Court of Appeal in [1993] R.D.S. 419 (CA); *King Ruel v. Centre de ski Le Relais (1988) Inc.*, [1994] RDJ 618 (CA);

determination of conditions conducive to both the child's interests and discovery. In addition, as mentioned above, various arrangements could be considered and the attorneys should demonstrate greater flexibility when it is necessary to examine a child. It is important to take into account the information provided by the child's parents regarding his abilities and his reactions as well as any advice from specialists who are following the child. For example, in the child's interests, the examination could be conducted by just one attorney designated jointly by all counsel working on the case, which would facilitate communication with the child and avoid intimidating him. The questions asked during the examination could be focused more on the central issues of the case rather than on secondary matters. It is important to avoid questions that are overly suggestive, designed to lead the child in a specific direction.