Civil Procedure
Winter Term 2024

LECTURE NOTES NO. 11

DISCOVERY (cont'd)

EXAMINATION FOR DISCOVERY

INTRODUCTORY POINTS

Take a pragmatic approach:

Effective discovery requires **preparation** and **planning**; don't waste your client's money and your time in proceeding to discovery before you can make the maximum use of the opportunities that you have.

Understand the law and what you, and the other side, have to prove to succeed.

Be conscious of the costs of discovery - prioritize, and construct a discovery plan that is proportionate to what is at stake in the litigation.

How Do I Prepare Effectively?

- Obtain and review the documents in your possession that are central to the litigation – understand how they figure in your case and the other side's case;
    - Seek admissions of authenticity;
    - Seek explanations if there is uncertainty;
    - Understand the 'factual matrix' in which the document was made if the case revolves around interpretation of the contracts;
    - Etc.
- Review the discovery documents.
- Plan your questioning in sections – this way you can read answers into the trial record and the keys answers will be in context:
    - Plan to use both open-ended and directed questioning –
        - 'Did you see anything out of the ordinary before the

accident?"
- 'There was a red signal at the intersection. Is that correct?'

- Isolate key facts and issues to develop in the examination;

- As questions with precision if intended to garner an admission - below, an admission of failing to pass on a key document:

  - 'You were the staff doctor on duty on May 11, 2012'?
  - 'You were the staff doctor on duty on May 12, 2012'?
  - 'It is standard practice for the staff doctor to be responsible for providing a surgeon with any available up-to-date pathology report before the scheduled surgery'?
  - 'There were two pathologists reports made in respect of my client'?
  - 'One pathology report was made on May 10?' [show witness and ask to confirm authenticity; Productions, Vol. 1, Tab A]
  - 'A second and updated pathology report was made on May 11'? [show witness and ask to confirm authenticity; Productions, Vol. 1, Tab B]
  - 'You received the pathologist's updated report dated May 11 on May 12, 2012 at approximately 12:30am?'
  - 'You knew the operation was scheduled for May 12, 2012 at 5:00am?'
  - 'You yourself did not provide the updated pathologist's report to the surgeon before the scheduled surgery'?
  - 'You yourself did not ask anyone to provide the updated pathologist's report to the surgeon before the scheduled surgery'

- Ask open-ended questions to close sections:

  - 'Do you know of anyone that provided the surgeon with the updated report?'
  - 'Is it you belief that the surgeon had the updated report? Why?'

Prepare a Discovery Plan and Make an Agreement with Opposing Counsel

The Discovery Plan:

Rule 29.2

...

29.1.3 (1) Where a party to an action intends to obtain evidence under any of the following Rules, **the parties to the action shall agree to a discovery plan in accordance with this rule**:

1. Rule 30 (Discovery of Documents).
2. Rule 31 (Examination for Discovery).
3. Rule 32 (Inspection of Property).
4. Rule 33 (Medical Examination).
5. Rule 35 (Examination for Discovery by Written Questions).

(2) The discovery plan shall be agreed to before the earlier of,
(a) 60 days after the close of pleadings or such longer period as the parties may agree to; and
(b) attempting to obtain the evidence.

(3) The discovery plan shall be in writing, and shall include,

(a) the intended scope of documentary discovery under rule 30.02, taking into account relevance, costs and the importance and complexity of the issues in the particular action;
(b) dates for the service of each party's affidavit of documents (Form 30A or 30B) under rule 30.03;
(c) information respecting the timing, costs and manner of the production of documents by the parties and any other persons;
(d) the names of persons intended to be produced for oral examination for discovery under Rule 31 and information respecting the timing and length of the examinations; and
(e) any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action.

(4) In preparing the discovery plan, the parties shall consult and have regard to the document titled "The Sedona Canada Principles Addressing Electronic Discovery" developed by and available from The Sedona Conference.

29.1.4 The parties shall ensure that the discovery plan is updated to reflect any changes in the information listed in subrule 29.1.03 (3).

29.1.05 On any motion under Rules 30 to 35 relating to discovery, the court may refuse to grant any relief or to award any costs if the parties have failed to agree to or update a discovery plan in accordance with this Rule.

- The need for a 'discovery plan' was introduced in 2010. This directly relates to another important change – limiting the parties to 7 hours of oral examination, except with consent or leave (2 hours for simplified proceedings under R.76); see Rule 31.05.

- The problem in the past has been lengthy and expensive discoveries in simple cases which abused the system; the accent now is on 'proportionality'

Prepare your client for discovery:

Suggested points to explain:

- It's not in a courtroom, but in an office with a court reporter;
- Answer truthfully – lies will come back to haunt you ;
- Answer only the question asked;
- Ask for clarification if unsure of what is being asked;
- Talk slowly and clearly;
- Don't talk at the same time as your lawyer or the other lawyer;
- If given a document to review and answer question, read the document;
- Don't strive to impress, intimidate, or befriend the other lawyer.

Understand Undertakings, 'Taken Under Advisement', and Refusals:

Obligation:
A person examined must answer *relevant* questions.

No answer, but an undertaking to answer:
Giving an undertaking is (i) a promise to answer and (ii) an admission that the question is proper and relevant. A lawyer who undertakes to provide the

answer at a later time must do so. An undertaking is a promise that can result in discipline if broken. Moreover, the Court may compel the answer to be given, take an adverse inference, etc – up to the lawyer or party in contempt.

No answer, 'Taken Under Advisement':
This means 'we're not sure we know or we have to tell you but we'll get back to you'. If no answer is forthcoming in 60 days, it is deemed a refusal.

A refusal is just that –
Counsel may refuse his or her witness to answer on the basis that the evidence sought is irrelevant, immaterial, inadmissible (e.g. privileged), or there is some other valid reason that makes the question improper. A 'refusal motion' is a motion under Rule 37 to compel the person examined to answer.

Lawyers use charts to track undertakings, under advisements, and refusals for themselves. On a refusals motion, one must prepare such a chart from the transcript.

FORM 37C

Courts of Justice Act

REFUSALS AND UNDERTAKINGS CHART

(General heading)

REFUSALS AND UNDERTAKINGS CHART

REFUSALS

Refusals to answer questions on the examination of ..... , dated ..... .

Issue & relationship to pleadings or affidavit *(Group the questions by issues.)*	**Question No.**	**Page No.**	**Specific question**	**Answer or precise basis for refusal**	**Disposition by the Court**
1.					
2.					
3.					

UNDERTAKINGS

Outstanding undertakings given on the examination of ....., dated ..... .

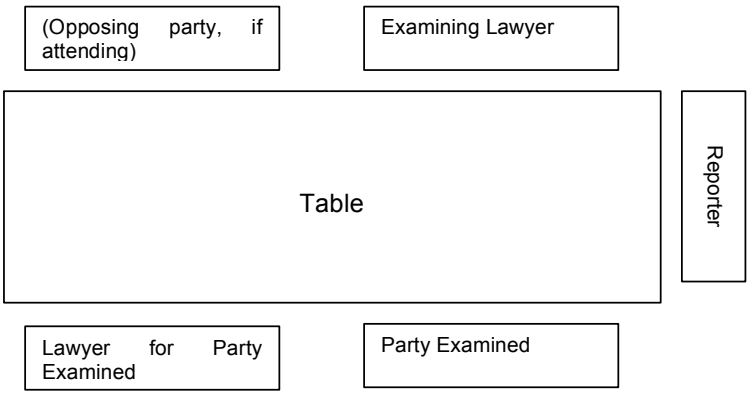
Issue & relationship to pleadings or affidavit *(Group the undertakings by issues.)*	**Question No.**	**Page No.**	**Specific undertaking**	**Date answered or precise reason for not doing so**	**Disposition by the Court**
1.					
2.					
3.					

(Date)

(Name, address and telephone and fax numbers of the party filing the refusals and undertakings chart)

RCP-E 37C (November 1, 2005)

- *Most Important – **where do I sit?***



THE CONTENT AND SCOPE OF THE EXAMINATION FOR DISCOVERY

29.2.3 (1) **In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,**

(a) the time required for the party or other person to answer the question or produce the document would be unreasonable;

(b) the expense associated with answering the question or producing the document would be unjustified;

(c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;

(d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and

(e) the information or the document is readily available to

the party requesting it from another source.

31.6 (1) **A person examined for discovery shall answer**, to the best of his or her knowledge, information and belief, **any proper question relevant** to any matter in issue in the action or to any matter made discoverable by subrules (2) to (4) and no question may be objected to on the ground that,

(a) the information sought is evidence;

(b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness; or

(c) the question constitutes cross-examination on the affidavit of documents of the party being examined.

Ontario v. Rothmans Inc.
2011 ONSC 2504 (Ont. S.C.J.)
("Proportionality')

Here Justice Perrell reviewed the law on examinations for discovery and cross-examinations generally and held:

[120] In J.W. Morden and P.M. Perell, *The Law of Civil Procedure in Ontario* (1st ed.) (Toronto: NexisLexis, 2010), at p. 487 I describe the purposes of an examination for discovery as follows:

> The examinations for discovery provide an opportunity to define the issues that are contested and uncontested and to move forward in the proof or disproof of contested facts. In *Modriski v. Arnold*, [1947] O.J. No. 132 (C.A.), the Court of Appeal stated that the purposes of production and discovery are: (1) to enable the examining party to know the case he or she has to meet; (2) to enable the examining party to obtain admissions that will dispense with formal proof of his or her case; and (3) to obtain admissions that will undermine the opponent's case.
>
> In *Ontario Bean Producers Marketing Bd. v. W.G. Thompson & Sons* (1982), 1982 CanLII 2084 (ON SC), 35 O.R. (2d) 711 (Div. Ct.), the Divisional Court elaborated and extended the various aims of discovery. The Court noted the following purposes for

> examinations for discovery: (1) to enable the examining party to know the case he or she has to meet; (2) to procure admissions to enable a party to dispense with formal proof; (3) to procure admissions which may destroy an opponent's case; (4) to facilitate settlement, pre-trial procedure, and trials; (5) to eliminate or narrow issues; and (6) to avoid surprise at trial.
>
> …

[124] The basic scope of an examination for discovery is set out in rule 31.06 (1) with rules 31.06 (2), 31.06 (3), and 31.06 (4) extending the scope of the examination. These rules overcome restrictions that had developed in the case law under the former Rules of Practice. Particularly important changes are found in paragraphs (a) and (b) of rule 31.06 (1), which stipulate that no question may be objected to on the grounds that the information sought is evidence or that the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness.

…

[129] The case law has developed the following principles about the scope of the questioning on an examination for discovery:

- **The scope of the discovery is defined by the pleadings; discovery questions must be relevant to the issues as defined by the pleadings: Playfair v. Cormack (1913), 4 O.W.N. 817 (H.C.J.).**

- **The examining party may not go beyond the pleadings in an effort to find a claim or defence that has not been pleaded. Overbroad or speculative discovery is known colloquially as a "fishing expedition" and it is not permitted. See Cominco Ltd. v. Westinghouse Can. Ltd. (1979), 1979 CanLII 489 (BC CA), 11 B.C.L.R. 142 (C.A.); Allarco Broadcasting Ltd. v. Duke (1981), 1981 CanLII 723 (BC SC), 26 C.P.C. 13 (B.C.S.C.).**

- **Under the former case law, where the rules provided for questions "relating to any matter in issue," the scope of discovery was defined with wide latitude and a question would be proper if there is a semblance of relevancy… The recently amended rule changes "relating to any matter in issue" to "relevant to any matter in issue," which suggests a modest narrowing of the scope of examinations for discovery.**

- **The extent of discovery is not unlimited, and in controlling its process and to avoid discovery from being oppressive and uncontrollable, the court may keep discovery within reasonable**

and efficient bounds: Graydon v. Graydon (1921), 67 D.L.R. 116 (Ont. S.C.) at pp. 118 and 119 per Justice Middleton ("Discovery is intended to be an engine to be prudently used for the extraction of truth, but it must not be made an instrument of torture …"); Kay v. Posluns (1989), 1989 CanLII 4297 (ON SC), 71 O.R. (2d) 238 (H.C.J.) at p. 246; Ontario (Attorney General) v. Ballard Estate (1995), 1995 CanLII 3509 (ON CA), 26 O.R. (3d) 39 (C.A.) at p. 48 ("The discovery process must also be kept within reasonable bounds."); 671122 Ontario Ltd. v. Canadian Tire Corp., [1996] O.J. No. 2539 (Gen. Div.) at paras. 8-9; Caputo v. Imperial Tobacco Ltd., [2003] O.J. No. 2269 (S.C.J.). The court has the power to restrict an examination for discovery that is onerous or abusive: Andersen v. St. Jude Medical Inc., [2007] O.J. No. 5383 (Master).

- **The witness on an examination for discovery may be questioned for hearsay evidence because an examination for discovery requires the witness to give not only his or her knowledge but his or her information and belief about the matters in issue: Van Horn v. Verrall (1911), 3 O.W.N. 439 (H.C.J.); Rubinoff v. Newton, 1966 CanLII 198 (ON SC), [1967] 1 O.R. 402 (H.C.J.); Kay v. Posluns (1989), 1989 CanLII 4297 (ON SC), 71 O.R. (2d) 238 (H.C.J.).**

- **The witness on an examination for discovery may be questioned about the party's position on questions of law: Six Nations of the Grand River Indian Band v. Canada (Attorney General) (2000), 2000 CanLII 26988 (ON SCDC), 48 O.R. (3d) 377 (S.C.J.).**

…

[159] The proportionality principle is a manifestation of the policy of frugality that led to the introduction of the simplified procedure to the Rules of Civil Procedure. To use a metaphor, the normal Rules of Civil Procedure are the Cadillac of procedure, an expensive vehicle with all the accessories. However, not all actions or applications require such an expensive vehicle, and a Chevrolet, a serviceable, no frills vehicle, will do just fine for many cases, and it will provide access to justice and judicial economy.

[160] Proportionality is a parsimonious principle. In Javitz v. BMO Nesbityt Burns Inc., 2011 ONSC 1322 at para. 28, Justice Pepall noted that the proportionality principle was introduced because the system of justice was under severe strain because cases were taking too long and costing too much for litigants. In the passage quoted by the Master from Chapter 5 of Lord Woolf's

report, Lord Woolf said that his overall aim was to "improve access to justice by reducing the inequities, cost, delay, and complexity of civil litigation." In Abrams v. Abrams, 2010 ONSC 1928 at para. 70, Justice D.M. Brown, stated: "Proportionality signals that the old ways of litigating must give way to new ways which better achieve the general principle of securing the "just, most expeditious and least expensive determination of every proceeding on its merits."

[161] In the case at bar, however, because of his concern about Lord Woolf's ideal of an "equality of arms," and because of the strategic importance he gave to the jurisdictional motion, the Master concluded that proportionality could have an expansive influence and thus the jurisdictional motion in an action with an enormous claim called for a Rolls-Royce of procedure, where the court should have as much relevant information as possible, as complete a record as is available, and all reasonably available relevant evidence regardless of its age or the difficulties associated with finding it.

[162] In adopting this approach, the Master departed from his own views, with which I agree and would endorse, expressed in Warman v. National Post Co. 2010 ONSC 3670 (CanLII), 2010 ONSC 3670 (Master), where he stated at paras. 84-86:

> **[84] The time has come to recognize that the "broad and liberal" default rule of discovery has outlived its useful life. It has increasingly led to unacceptable delay and abuse. Proportionality by virtue of the recent revisions has become the governing rule. 84. To the extent that there remains any doubt of the intention of the present rules I see no alternative but to be explicit.**
>
> **85. Proportionality must be seen to be the norm, not the exception -- the starting point, rather than an afterthought. Proportionality guidelines are not simply "available". The "broad and liberal" standard should be abandoned in place of proportionality rules that make "relevancy" part of the test for permissible discovery, but not the starting point.**
>
> **86. If embraced by the courts, parties and their counsel, such proportionality guidelines offer hope that the system can actually live up to the goal of securing for the average citizen "a just, speedy and inexpensive determination" of his or her case**

> **[163] In my opinion, an expansionary approach to proportionality is wrong. A parsimonious proportionality principle provides a useful tool for cases large and small. The base line is that the Rules of Civil Procedure are designed for cases of all sizes, but the proportionality principle allows the court to downsize the procedure and still do justice for the parties. If downsizing is not procedurally fair then the normal rules should apply to the proceedings without augmentation.**

Noble v. York University Foundation
2010 ONSC 399 (Ont. S.C.J.)
('relevance')

Two defendants refused to answer questions on oral examination in a defamation action. The Question and refusal by one witness:

> Q. And can you say whether some - - or I guess some or many of the individuals [listed in the plaintiff's publication critical of York University and the defendant], whether they are pro-Israel lobbyists, activists or fundraising agencies?
>
> A. Don't answer that. We've been through that issue once today already. That's not a proper question. Asking whether or not someone is pro-Israel is like asking if someone is pro-American. You can be pro-American and have differing views on all kinds of issues. It isn't a black and white matter. So I don't think that's a proper question and I'm not going to allow it.

And the other question to the other witness:

> Q. . . . I'm wondering if you can identify which, if any, of the board members listed here would be pro-Israeli in their political orientation, and I'll be more specific about the question, that's to say with respect to the dispute in Israel-Palestine whether these individuals would have a proclivity one way or another, whether you would call them pro-Israeli or pro-Palestinian?
>
> A. Don't answer that. I don't think that's a question that's capable of being answered in such simplistic terms. I don't think this witness could possibly know what is in the minds of other people and I think that the question couldn't be answered in the way that you've framed it in any event.

Master Muir:

> 14 **In deciding the issues on this motion I have applied the relevance test set out in Rule 31.06(1), as amended effective January 1, 2010. This test replaces the "semblance of relevance" test previously applicable to motions such as this.** While the examinations of Marsden and Marcus took place in May, 2008 and this motion was scheduled in December, 2009, it was not heard until January 15, 2010 after the Rules amendments came into force. The January 1, 2010 Rules amendments do not contain any transition provisions relating to the change from "semblance of relevance" to "relevance". Consequently, it is my view that the "relevance" test is applicable to this motion. This is also the view taken by Justice Belobaba in *Onex Corp. v. American Home*, [2009] O.J. No. 5526 (Ont. S.C.J.) in relation to the Rules amendments dealing with summary judgment.
>
> **15 In applying the relevance test I am mindful of the comments found in the *Summary of Findings and Recommendations of the Civil Justice Reform Project* led by the Honourable Coulter A. Osborne, upon which the January 1, 2010 Rules amendments are based. In particular I note the comments at part 8 of the Report dealing with discovery:**
>
> > **I agree with these views. The "semblance of relevance" test ought to be replaced with a stricter test of "relevance." This step is needed to provide a clear signal to the profession that restraint should be exercised in the discovery process and, as the Discovery Task Force put it, to "strengthen the objective that discovery be conducted with due regard to cost and efficiency." In keeping with the principle of proportionality, the time has come for this change to be made, which I hope in turn will inform the culture of litigation in the province, particularly in larger cities.**
>
> **This reform is not targeted at lawyers who make reasonable discovery requests, but rather at those who make excessive requests or otherwise abuse the discovery process.** Therefore, a change from "relating to" to "relevant" would likely have little or no impact on those lawyers who already act reasonably during the discovery process. Its effects will be felt by those who abuse discovery or engage in areas of inquiry that could not reasonably

be considered necessary, even though they currently survive "semblance of relevance" analysis.

16 At paragraph 7 of their statement of defence, the defendants Marsden, Marcus and the Foundation state quite clearly that the plaintiff's allegation in his flyer that the Foundation "is biased by the presence and influence of staunch pro-Israel lobbyists, activists and fundraising agencies", is false. At paragraph 9 of their statement of defence, the defendants Marsden, Marcus and the Foundation state that they were concerned with the contents of the plaintiff's flyer insofar as it appeared to suggest that the directors of the Foundation listed in the flyer were "pro-Israel lobbyists controlling the University".

17 It is well settled law that the pleadings determine whether a particular question is relevant and must be answered. On discovery, the plaintiff is entitled to test the statements made by Marsden, Marcus and the Foundation in their pleading. They have stated that the plaintiff's allegations about the Foundation are false. The plaintiff is entitled to know what evidence each of them may have in relation to that statement. Subsequent to the scheduling of this motion, both Marsden and Marcus agreed to answer the plaintiff's questions about whether they personally are "pro-Israel". Presumably because they now agree that those questions are relevant. If these defendants are going to take the position that the plaintiff's allegations about the Foundation's directors are false, they must answer the plaintiff's questions about what they know about the relevant beliefs and activities of the directors.

18 In my view the questions asked by the plaintiff of Marsden and Marcus, set out above, are directly relevant to issues raised by those defendants in their pleading and should be answered. The questions more than meet the standard of relevance established by Rule 31.06(1).

Ornstein v. Starr
2011 ONSC 4220 (Ont. S.C.J.)
('evidence', proportionality)

> 31.06 (1) **A person examined for discovery shall answer**, to the best of his or her knowledge, information and belief, any proper question relevant to any matter in issue in the action or to any matter made discoverable by subrules (2) to (4) and **no question may be objected to on the ground that,**
> **(a) the information sought is evidence**;
> (b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness; or
> (c) the question constitutes cross-examination on the affidavit of documents of the party being examined

A child (plaintiff) needed surgery on a finger; a surgeon operated on the wrong finger. Shortly before the scheduled oral examination of the surgeon, counsel for the surgeon and hospital (defendants) admitted that the standard of care was breached by the surgeon and that this caused a second surgery. The defendants refused to put forward its witnesses for discovery on the question of damages. The surgeon appeared but would not answer questions.

Master Short:

Seven Words of Discovery

1. Q: Please state your full name for the record
   A: Joseph Auby Starr.

2. Q: And you are a doctor?
   A: I am.

3. Q: And do you have a specialty?
   A: Plastic surgery.

4. Q. And how long have you been carrying on as a plastic surgeon?

   Counsel: Don't answer that.

I. Motion

[1] While the transcript of the above examination continues for eight pages, the witness, defendant doctor, is not recorded as

uttering another word on his examination for discovery.

[After reviewing admissions made by the defendant and that damages were very much in issue, the Master continued]

IV. Hospital's Refusal to Attend Discovery

23 In my years in practice I do not believe I ever encountered an outright refusal to produce *any* witness for discovery. In this case counsel for North York sent a letter by facsimile on January 20, 2011, in response to an email confirming that he intended to proceed with the scheduled discovery of a representative of the Hospital:

> Given the admissions contained in Ms. Findlay's letter dated January 19, we are unable to conceive any questions relevant to the remaining issues in this action that necessitate the discovery of the Hospital Representative.
>
> Unless you are able to provide us specific, relevant issues that the Hospital Representative can reasonably be expected to have knowledge of, we will not be producing the Hospital Representative for discovery on January 24, 2011.

24 In response, by email sent at 4:54 PM the same afternoon, Mr. Linden advised that the Plaintiffs required questions to be answered with respect to causation and damages alone. **In the plaintiff's factum the following position is asserted:**

> **6. The Plaintiffs are under no obligation to provide the defendants with a list of questions to be asked at discovery nor is the Plaintiff required to convince the Defendant of the relevance of any line of questioning prior to an examination for discovery. Simply because counsel for the Defendant could not "conceive any questions relevant to the remaining issues in this action" does not mean that such questions do not exist.**

25 This seems a reasonable position in the circumstances of this case. I see no reason to refuse discovery while elements of causation and damages remain at large.

...

33 In her factum the plaintiff submits:

> 14. The condition of Sophie's hands before and after the

surgery goes directly to the issue of damages. As does Dr. Starr's ability to comment on it.

15. The observations made by the doctor and the nurse at the hospital will shed light on the functionality of her hand before and after, her psychological state before and after, the appearance of scarring (or lack thereof) before and after the first surgery, the nature of the surgical error as well as other facts which will go to the Plaintiffs' damages case.

34 It seems to me that these areas of enquiry were clearly relevant to the remaining live issues. I find the requirement that all further questions be submitted in writing or placed on the record during the aborted discovery to be disingenuous in the circumstances of this case.

35 I accept the view of plaintiff's counsel set out in the written submissions before me:

16. It would be prejudicial to the Plaintiffs' to be forced to put all of their questions on the record when it is clear that they would all be objected to as the Defendant could then prepare answers to those questions with counsel in advance of the discovery.

17. The Plaintiffs' should not be barred from asking questions relating to the issue of damages simply because that same question could be interpreted to also go to the issue of liability/the standard of care.

18. In this case, Dr. Starr's observations and the observations of the attendant nurse relating to the condition of Sophie's hand might simultaneously go to damages and liability but this does not mean the Defendants can refuse to answer the questions. Some overlap is unavoidable and the same overlap will not prejudice the Defendants as they have already admitted a breach in the standard of care.

36 It is difficult to understand why both defendants have taken such a resistant position in a case where there appears to be no cogent reason for not admitting the liability apparently already acknowledged *ab initio* in the physician's dictated Day Surgery Report.

37 Perhaps the correspondence sent in the weeks before the scheduled examinations provides some insight. The first letter sent on January 13, by Dr Starr's counsel apparently sought to confirm an arrangement, which I understand had *not* been accepted by plaintiff's counsel:

> The defendants in this action, Dr. Starr and the North York General Hospital, together hereby acknowledge a breach of the standard of care.
>
> As a result, I write to confirm that all parties have agreed that the examinations for discovery of Dr. Starr and a representative of North York General Hospital are no longer required. The defendants reserve their right to assert at trial that the plaintiffs have not suffered the damages asserted in the Statement of Claim and that the damages asserted in the Statement of Claim have not been caused (or contributed to) by the defendants' failure to meet the standard of care.

38 A second letter was sent dated January 19 containing a further admission but again denying an entitlement to any discovery by the plaintiff. An admission of causation on the second surgery is now made:

> The defendants this action, Dr. Starr and the North York General Hospital, together hereby admit that Sophie Ornstein.("Miss Ornstein") was admitted, to North York General Hospital under the care of Dr. Starr on, July 13t 2006 for surgery to relieve the digital tenovaginitis stenosans ("trigger finger") affecting her right fifth finger' ("The Procedure"). The defendants admit that the standard of care was breached as the surgery was performed on Miss Ornstein's right thumb, rather than her right fifth finger. The defendants admit causation to the limited: extent that due. to the breach of the standard of care which took place on July 13, 2006. Miss Ornstein required a second surgery on her right fifth finger.

39 The letter continues:

> "Given the admissions made by Dr. Starr and the North York General Hospital above, an examination of Dr. Starr is not required as he has no relevant evidence on the' issues that remain in dispute in the litigation. **As a defendant in this action, Dr. Starr cannot reasonably be expected to comment on the plaintiff's damages.**

> If you insist on examining Dr. Starr In these circumstances, we will rely upon the defendants' formal admissions contained herein for determining issues of relevance at Dr. Starr's examination for discovery when speaking to the issue of costs if this matter ultimately proceeds totrial on damages We will be forwarding to you a proposed discovery plan enshrining these points shortly."
>
> [my emphasis]

40 If the defendant as witness on discovery, can *not* reasonably be expected to provide *evidence* that can be relied upon, on the issue of the plaintiff's claimed damages and the matters in dispute in that regard, who can?

...

VII. Proportionality

46 Counsel for the hospital argues in their factum that as a result of the amendment to Rule 31.06(1), the scope of oral discovery has been restricted. It is asserted that "Honourable Coulter A. Osborne's comments, as found in the *Summary of Findings and Recommendations of the Civil Justice Reform Project*, articulate the reasoning behind the change.

47 The portion of Justice Osborne's report to which I was directed reads:

> "During consultations, the vast majority of those consulted agreed that the scope of discovery ought to be restricted and replaced with a simple test of "relevance." Indeed, this was the recommendation of the Discovery Task Force. The task force recognized that this change may lead to further motion activity and judicial interpretations of "relevant," and that any change is unlikely to end the debate over the proper scope of discovery. Nevertheless, it said a narrower test is required to help curb discovery abuse.
>
> I agree with these views. The "semblance of relevance" test ought to be replaced with a stricter test of "relevance." This step is needed to provide a clear signal to the profession that restraint should be exercised in the discovery process and, as the Discovery Task Force put it, to "strengthen the objective that discovery be conducted with due regard to cost and efficiency."46 In keeping with the principle of

> proportionality, the time has come for this change to be made, which I hope in turn will inform the culture of litigation in the province, particularly in larger cities.
>
> *This reform is not targeted at lawyers who make reasonable discovery requests, but rather at those who make excessive requests or otherwise abuse the discovery process. Therefore, a change from "relating to" to "relevant" would likely have little or no impact on those lawyers who already act reasonably during the discovery process*. Its effects will be felt by those who abuse discovery or engage in areas of inquiry that could not reasonably be considered necessary, even though they currently survive "semblance of relevance" analysis."
>
> [my emphasis]

48 In order to address this concept properly, a brief historical review to establish the intent of the requirement for "*proportionality*" is appropriate.

49 The Right Honourable the Lord Woolf delivered an interim report entitled "*Access to Justice*" in June of 1995.

50 One of the Hallmarks of his work was the importance given to the concept of "Proportionality". In the chapter entitled *The Importance of Civil Justice* he observes:

> 3. In considering the problems of the civil justice system I have had in mind the basic principles which should be met by a civil justice system so that it ensures access to justice:
>
> (a) It should be *just* in the results it delivers.
> (b) It should be *fair* and be seen to be so by:
>
> - ensuring that litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights;
>
> - providing every litigant with an adequate opportunity to state his own case and answer his opponent's;
>
> - treating like cases alike.
>
> (c) Procedures and cost should be *proportionate* to the nature

of the issues involved.

(d) It should deal with cases with reasonable *speed*.

. . .

(h) It should be *effective*: adequately resourced and organised so as to give effect to the previous principles.

51 Lord Woolf further noted:

"1. The overall aim of my Inquiry is to improve access to justice by **reducing the inequalities, cost, delay and complexity of civil litigation** and to introduce greater certainty as to timescales and costs. My specific objectives are:

(a) to provide appropriate and proportionate means of resolving disputes;

(b) to establish **"equality of arms" between the parties involved in civil cases;**

(c) to assist the parties to resolve their disputes by agreement **at the earliest possible date**; and

(d) to ensure that the limited resources available to the courts can be deployed in the most effective manner for the benefit of everyone involved in civil litigation."

[my emphasis]

52 When a case such as this arises I believe it is incumbent on the court to encourage a reconsideration of previously employed tactics with a meaningful reflection on how all parties can strive to achieve the goals of improved access to justice.

VIII. What Does Proportionality Require?

53 The Hospital's counsel referred me to *Abrams v. Abrams* (2010), 102 O.R. (3d) 645, 2010 ONSC 2703 (Ont. S.C.J.) a decision of Justice D.M. Brown. The passage to which I was directed included a discussion of the decision of the Supreme Court of Canada in *Marcotte c. Longueuil (Ville)*, [2009] 3 S.C.R. 65, [2009] S.C.J. No. 43, 2009 SCC 43 (S.C.C.) and the developing concept of proportionality:

> [70] The debate in the *Marcotte* case about the operative function of proportionality in civil litigation took place in the realm of *obiter*. However, I have strong concerns that the narrower view set out in the minority reasons could see the work of the principle of proportionality frustrated before it even had a chance to start. I think that Justice Colin Campbell of this court accurately captured the dynamic and reach of the introduction of an express principle of proportionality into the Rules of Civil Procedure by describing it as a step which signals a shift in the practice and culture of civil litigation. While the Rules of Civil Procedure are not often compared to the Little Red Book of Chairman Mao popularized during China's Great Proletarian Cultural Revolution, **I do not think it an exaggeration to characterize the recognition of proportionality in our own Little Blue (or White) Book as a "cultural revolution" in the realm of civil litigation. Proportionality signals that the old ways of litigating must give way to new ways which better achieve the general principle of securing the "just, most expeditious and least expensive determination of every proceeding on its merits".** These new ways need be followed by the bar which litigates and by the bench, both in its adjudication of contested matters and in its management of litigation up to the point of adjudication.

54 While the beauty of proportionality may be in the eye of the beholder, I agree with the approach and goal of the concept as adopted by Justice Brown. A cultural revolution may well be needed if the overarching principles of Rule 1.04(1.1) are to be achieved.

...

X. Disposition

70 When all is said and done my goal is to promote a fair and just system. If patients are proven to have been harmed as a result of negligent medical care (or it is admitted that this is the case) fairness must dictate that timely arrangements be made to compensate those patients in an appropriate and timely manner. I cannot imagine that any defendant would attempt to rag the puck in an attempt to exhaust the injured party's finances or spirit. Certainly such an approach would not accord in any way with my view of fairness.

71 Fairness and justice dictate the clear need for timely

resolution of medico-legal matters. Regardless of the circumstances, medico-legal matters are stressful for all involved: physicians, other health care providers, patients and their families. I fail to see how the apparent tactics and strategy adopted in this case, "actively promote measures that respect the right to procedural fairness and encourage the timely resolution of such matters."

72 It has not been demonstrated to me that this approach could possibly "improve accessibility to justice and reduce the stress experienced by physicians and their patients."

73 After warning the defendant that the examination would be aborted and resort to a motion if the Doctor did not answer proper questions, his counsel continued to refuse to allow him to answer proper questions. The following exchange occurred between questions 14 and 19:

> 14. Q. In any event, Dr. Starr, when did you first meet the plaintiff, Sophie Ornstein?
>
> Mr. Sutton: Don't answer that.
>
> Anything relating to care has been admitted.
>
> 15. Mr. Linden: Well, I haven't asked about care yet. I am going to ask about his observations of the condition of her hand before he performed the surgery.
>
> Mr. Sutton: Don't answer that.
>
> 16. Okay. Let's just go off the record.
>
> 17. Mr. Linden: I am going to ask three more if you object to all of them, we are just going to stop, just go to court, and we will have a court order your client to answer questions he is supposed to.
>
> Mr. Sutton: No. You can put the questions on the record and establish the relevance ...
>
> 18. Mr. Linden: No. I am going to ask three more questions.
>
> Mr. Sutton: No. You can establish the relevance of your questions. If your question is relevant, I will allow him to answer. You haven't established the relevance of your

question.

19. Mr. Linden: we are going to try three more and then we will call it a day.

Mr. Sutton: That is your choice.

20. Q. Sir, when did you first meet Sophie Ornstein?

Mr. Sutton: Don't answer that.

21. Q. Did you examine her hands at the time when you met

her?

Mr. Sutton: Don't answer that

22. Q. Did you made any observations of the condition of her fingers when you first examined her?

Mr. Sutton: Don't answer that

Mr. Linden: Okay. That is enough.

74 In my view it is indeed enough. Enough to justify making the order sought with costs on a substantial indemnity basis, payable forthwith.