

## PERSONAL INJURY

# New rules impose seven-hour limit on discovery

## Limit forces personal injury lawyers to focus on key issues

Buried within the new regulation outlining major changes to Ontario's *Rules of Civil Procedure* is a welcome seven-hour cap on examinations for discovery by a party. Finally, plaintiff's personal injury lawyers have a tool to shut down the familiar "royal commission" approach taken by some — often junior — defence counsel.

On Dec. 11, 2008, Ontario's attorney general announced important changes to Ontario's court system. These changes, which will become effective Jan. 1, 2010, include jurisdictional increases to the small claims court limit to \$25,000 and to the simplified procedure limit to \$100,000. While these jurisdictional changes are significant, they will have a minimal impact on personal injury practices, since personal injury claims are rarely issued for damages of less than \$100,000 (except in certain fatality cases or accident benefit claims).

Personal injury claims are usually in excess of \$100,000 largely because the plaintiff's lawyer is charged with the responsibility, at the time of issuance of the claim, to "crystal ball" the maximum potential damages. Typically, out of an abundance of caution, plaintiff's counsel will claim damages using a worst-case assumption.

But one additional change to the rules may have a profound impact on personal injury claims. New rule 31.05.1(1) imposes a seven-hour examination for discovery limit on each party. It states:

"31.05.1(1) No party shall, in conducting oral examination for discovery, exceed a total of seven hours of examination, regardless of the number of parties or other persons to be examined, except with the consent of the parties or with leave of the court."

The new rule serves to restrict



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the total time counsel for a party can spend on all their examinations for discovery. This would therefore include the total time taken by a party on the discovery of all plaintiffs (including family law act claimants) and of all co-defendants.

There are some obvious ways defence counsel can avoid the spirit of rule 31.05(1), such as splitting up the discovery of the plaintiffs between co-defendants. Alternatively, defence counsel may choose to avoid the seven-hour limit altogether by proceeding by way of written examinations for discovery in accordance with rule 35, rather than proceeding by way of the traditional oral examination for discovery.

In cases where the seven-hour time limit is inappropriate, such as some medical malpractice claims or complex product liability actions, parties are able to consent in advance to avoid the application of the rule.

With the introduction of rule 31.05.1, plaintiff's counsel will now be in a position to remind defence counsel that they may wish to focus on the heart of the issues within the limited time they have for discovery, noting that defence counsel wishing to end the examination for discovery "subject to answers to undertakings" better leave time to complete their examination for discovery within the mandated seven-hour limit.

The seven-hour limit can also be extended by the court. The broad factors to be used by the court to consider the issue of leave are set out in rule 31.05.1(2). These factors

include the amount of money at issue, the complexity of the issues, the amount of time that ought reasonably to be required, the financial position of each party, the conduct of the parties during the discoveries, a party's refusal to admit anything that ought to have been admitted and any other reason that should be considered in the interest of justice. By virtue of this subrule, the court has been given ample discretion to extend the seven-hour time limit where appropriate, but plaintiff's counsel fighting a motion for leave will enjoy highlighting for the court the time wasted by defence on tangential issues.

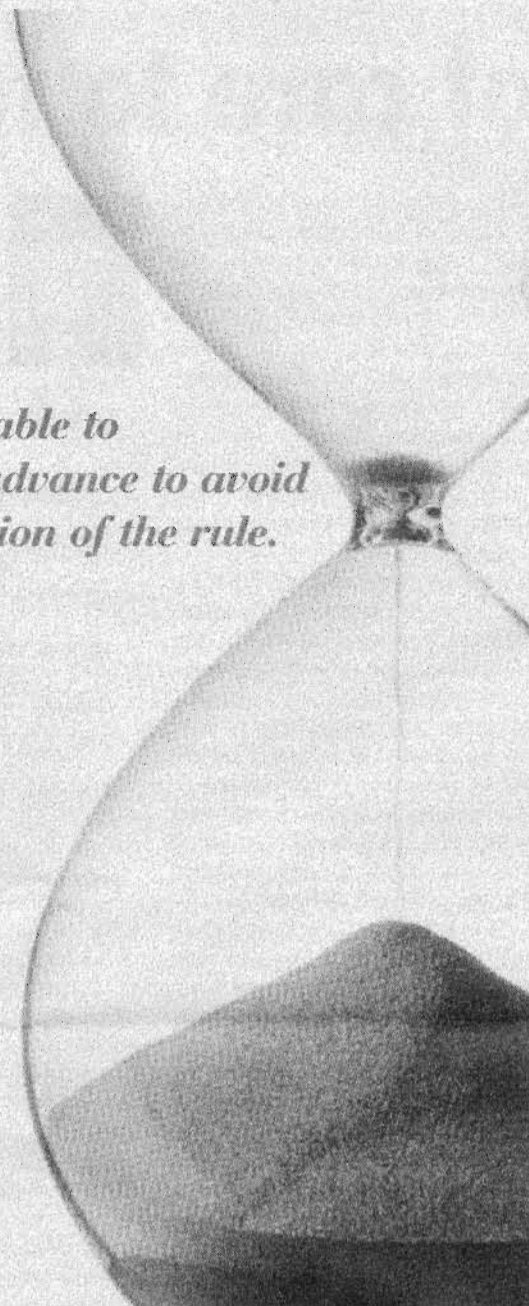
As a corollary to the new discovery time limit, rule 31.06(1) was amended to restrict questions to those "relevant to any matter in issue" as opposed to the early wording of "relating to any matter in issue." It remains to be seen whether this small word change will alter the extremely broad approach the court has traditionally taken to the appropriateness of questions on discovery. Hopefully, the courts will recognize that these rule changes are more than an attempt to prevent "fishing expeditions" but are rather a genuine attempt to focus the examinations on the key issues.

The new seven-hour cap on examinations for discovery should be a reminder to all personal injury lawyers to stop peering under every single pebble, and stick to checking under the rocks. ■

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