

APPEAL COURT HOLDS RULE 36 HAS NO APPLICATION BEFORE AN ACTION IS COMMENCED

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In a May 25, 2006 decision rendered in *TD Insurance and Auto v. Sivakumar* the Court of Appeal for Ontario was called upon to decide whether Rule 36 of the *Rules of Civil Procedure* (“the Rules”), which permits a party who intends to introduce transcript or videotape evidence of a person at trial may, with the leave of the court, examine the person under oath before the trial, applies in circumstances where no proceeding has been commenced. The application judge found that it did.

The five and a half month old minor plaintiff was injured under suspicious circumstances. He had sustained significant brain injury that required surgical repair. When the child initially presented for medical care, his mother, Ahilaverni Sivakumar, gave the history that he had fallen down a stairway while strapped in his car seat. She later retracted that account claiming that injuries occurred when her child was restrained in his car seat in the rear of a vehicle she had been driving when she lost control of it and hit a tree. As the vehicle was owned by the child’s father, the insurer was put on notice.

Because of the conflicting account of how the child was injured, the insurer retained three experts to opine on the cause of the child’s injuries. As s. 47 of the former *Limitations Act* permitted the running of time established for a limitation period to be postponed if the plaintiff is under a legal disability “at the time the cause of action accrues”, the plaintiff who was born on November 1, 2001 would have until November 1, 2021, to commence an action for damages against the owner and operator of the motor vehicle in which his mother claimed he was injured. To preserve the expert evidence obtained, the insurer brought an application seeking a mandatory order requiring the examination under oath of the three expert witnesses it retained, under Rule 36.01 of the *Rules* and preservation of this evidence on videotape.

Although the court of appeal agreed with the insurer’s assertion that there is significant potential advantage to preserving such evidence and that such advantage greatly outweighs any alleged prejudice to the minor plaintiff, the lower court’s ruling which allowed the applicant, insurer, to conduct the examinations under oath of its experts was set aside. The following reasons were given by the court:

1. *The Rules* ordinarily have application only to ongoing proceedings, as is evident from the use of the word “party” throughout the rules;
2. Although “party” is not defined in the *Rules* or the *Courts of Justice Act*, it is a well recognized legal term of art meaning a person by or against whom a legal proceeding is brought;

3. Where it is intended that a rule apply where no proceeding has been commenced, the rule clearly says so;
4. That Rule 36.01 does not apply where no proceeding has been commenced is not a procedural gap. Accordingly, the court's inherent jurisdiction to control its own process cannot be applied to confer the power that is not contained in this Rule.

The court appears to adopt a very narrow interpretation of Rule 36.01, which may have the result of depriving insurers of important tools for preserving evidence, especially in cases where minors are likely to bring lawsuits decades from when they were initially evaluated by experts following the accident & the opportunity to examine those experts may no longer be available at the time of trial.