CITATION: Hurst v. Munch, 2012 ONSC 6592
COURT FILE NO.: CV-07-0969
DATE: 20121120
CORRIGENDA: 20121122

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
BOBBY HURST, ROBERT HURST, PATRICIA HURST Personally and as Litigation Guardian for BRANDON HURST, a minor	
Plaintiffs	
– and –	
CRAIG WILLIAM MUNCH, SYLVIA M. MUNCH and GEORGE K. COUSINS	
Defendants	
	T. Charney, for the Defendants Munch
	D. Dooley, for the Defendant Cousins
	HEARD: November 20, 2012

REVISED RULING

The text of the original Ruling has been corrected with text of corrigendum (released November 22, 2012) appended.

HEALEY J.

[1] Both counsel seek a ruling on the issue of whether the defendant Cousins may have his accident reconstructionist expert, Mr. Schnarr, be present in the courtroom during the testimony of the accident reconstructionist who is being called by the defendant Munch. The latter expert is Mr. Bigelow.

[2] At the outset of the trial, an order was made excluding witnesses. Mr. Dooley did not seek an exception at that time to allow Mr. Schnarr to sit in to hear Mr. Bigelow's evidence.

[3] Mr. Dooley relies on the direction given in Ferguson J.'s text, *Ontario Courtroom Procedure*, 2009 edition, at page 350, as follows:

> As noted below in the section E.2, because experts typically give opinions on assumed facts or fixed information, there is less concern about them being present during the testimony of other witnesses even if there is an order excluding witnesses. Experts are often exempted from an order excluding witnesses so they can assist counsel to understand the testimony and opinions of other witnesses. This also allows them to respond to the opinion of other experts and to base their own opinions on the evidence called in the trial. Therefore, it is often important for counsel to know when an opponent's expert is going to testify as they may wish to have their experts attend to listen to the testimony.

[4] So, typically, experts are exempt from exclusion orders because there is little risk that they will tailor their evidence, since experts are not the ones providing facts and therefore their credibility is not usually at issue. This rationale was discussed in *Auto Workers' Village (St. Catharines) Ltd. v. Blaney, McMurtry, Stapells, Friedman* (1997), 35 O.R. (3d) 29 (Ont.Ct.(Gen.Div.)) at page 4:

> The obvious rationale behind rule 52.06(1) is the fear that a witness will tailor his or her testimony based on evidence heard in court. This fear is not nearly as predominant with experts (who do not speak to facts) as it is with laypersons. Experts give opinions based upon facts; they do not create the facts upon which their opinions are founded. However, an expert might be more aware than counsel regarding the importance, or lack thereof, of a given fact. An expert, therefore, could be of great assistance in suggesting to counsel questions to be put to witnesses both in-chief and in cross-examination. An expert could grasp a subtle factual distinction that arises in the evidence which might otherwise might elude counsel.

[5] With respect to changing a ruling during trial, the Supreme Court of Canada has spoken to this issue in *R. v. Adams* [1995] S.C.J. No. 105, 103 C.C.C. (3d) 262. The scope of the trial judge's authority to reverse a pre-trial or mid-trial ruling was stated this way at para. 29:

> … With respect to orders made during trial relating to the conduct of the trial, the approach is less formalistic and more flexible. These orders generally do not result in a formal order being drawn

> up and the circumstances under which they may be varied or set aside are also less rigid. The ease with which such an order may be varied or set aside will depend on the importance of the order and the nature of the rule of law pursuant to which the order is made. For instance, if the order is a discretionary order pursuant to a common-law rule, the precondition to its variation or revocation will be less formal. On the other hand, an order made under the authority of statute will attract more stringent conditions, before it can be varied or revoked. This will apply with greater force when the initial making of the order is mandatory.

[6] Where the ruling is discretionary, the court said, at para. 30:

> As a general rule, any order relating to the conduct of a trial can be varied or revoked if the circumstances that were present at the time the order was made have materially changed. In order to be material, the change must relate to a matter that justified the making of the order in the first place.

[7] The decision to exempt witnesses is a discretionary ruling: *Catholic Children's Aid Society of Hamilton Wentworth v. M.S.*, [1985] O.J. No. 815 at para. 11. I find that adhering to this ruling now that the trial landscape has changed – Mr. Dooley formally advising that he is anticipating Mr. Schnarr being present and Mr. Charney providing his objection – would work an injustice. Technically, Mr. Dooley should have made the request prior to the order exempting witnesses having been made, but the fact that he did not is perhaps explained by the fact that, in the normal course, experts are usually exempt, as stated in *Ontario Courtroom Procedure* at page 348.

[8] Mr. Dooley seeks to have Mr. Schnarr present not during the examinations of the lay witnesses, but only during Mr. Bigelow's testimony, to assist Mr. Dooley with his cross-examination. This again is typical.

[9] Mr. Charney objects because he states that this is a case where the anticipated testimony of the expert is subject to a credibility attack, in the sense of changing his opinion between two separate reports. Mr. Charney wants to elicit evidence from Mr. Bigelow regarding these discrepancies, and does not want to tip Mr. Schnarr off to these issues of credibility. He relies on *Catholic Children's Aid Society of Hamilton Wentworth*, supra, at para.10, which did not involve having an expert sit in on the testimony of another. He also relies on *Thorndycraft et al v. McCully et al*, (1994) 20 O.R. (3d) 373 (Ont.Ct.(Gen.Div.)), which is a case in which Granger, J. dismissed a motion by the defendants to allow them to reveal the testimony of previous witnesses to their expert, in the face of an order excluding all witnesses other than the parties. However, the reasons given for making the order to retain the absolute exclusion were very different in that case from the basis of Mr. Charney's objection. This was that the order, if granted, would be used to allow the defendants' expert to adduce opinion evidence without the proper

foundational report, and as such would cause prejudice to the plaintiffs that could not be compensated by an adjournment or costs.

[10] Closer to point is the fact situation in *Auto Workers' Village*, supra. An order was also made in that case at the opening excluding all witnesses, and neither counsel requested that an exemption apply to expert witnesses. An amendment to the exclusionary order was made because, in part, there was no jury and the amendments could be made free from the difficulties presented where there had been a breach of the order prior to the ruling being sought.

[11] That latter situation also does not apply in this case, as counsel has sought a ruling from the outset of the issue being raised. In this case I have difficulty with the argument presented by Mr. Charney regarding credibility. Mr. Schnarr is well aware of the content of his reports and any changes made by him within the body of each report. He anticipates, no doubt, a rigorous cross-examination challenging his assumptions, findings and conclusions. Mr. Charney refutes that the inconsistencies are based on changes in the facts, particularly speed, provided by the lay witnesses, and says instead that this is an issue of professional integrity. Yet the court has already heard four differing versions of testimony regarding speed, and inconsistencies with respect to prior statements, so at this point it is difficult to easily accept Mr. Charney's position with respect to credibility.

[12] For the foregoing reasons I am amending the earlier order made excluding witnesses to direct that the experts testifying on behalf of the parties are exempt from the exclusionary order made under rule 52.06(1), with respect to only the testimony of the opposing expert witness.

HEALEY J.

Released: November 22, 2012

C O R R I G E N D A

1. Page 2, para. 3 (quote), now reads: As noted below in the section E.2, because experts typically give opinions on assumed facts or fixed information, there is less concern about them being present during the testimony of other witnesses even if there is an order excluding witnesses. Experts are often exempted from an order excluding witnesses so they can assist counsel to understand the testimony and opinions of other witnesses. This also allows them to respond to the opinion of other experts and to base their own opinions on the evidence called in the trial. Therefore, it is often important for counsel to know when an opponent's expert is going to testify as they may wish to have their experts attend to listen to the testimony.

2. Page 2, para. 4 now reads: … ones providing facts and therefore their credibility *is* not usually at issue.

3. Page 3, para. 7 now reads: … as stated in *Ontario Courtroom Procedure* at page 348.

4. Page 3, para. 9 now reads: Mr. Charney objects because he states that this is a case where the anticipated testimony of the expert is subject to a credibility attack, in the sense of ~~the~~ changing his opinion between two separate reports.

5. Page 3, para. 9 now reads: This was that the order, if granted, would be used to allow the defendants' expert to adduce opinion evidence…

6. Page 3, para. 10 now reads: Closer to point is the fact situation in *Auto Workers' Village*, supra.

7. Page 3, para. 10 now reads: An~~d~~ amendment~~s~~ to the exclusionary…

8. Page 4, para. 11 now reads: Mr. Schnarr is well aware of the content~~s~~ of his report~~s~~ and…

9. Page 4, para. 12 now reads: … witnesses to direct that the experts testifying on behalf of the parties…