

Case Name:

**Lesniowski v. HB Group Insurance Management Ltd.**

Between

Justyna Lesniowski, (moving party), and  
HB Group Insurance Management Ltd., et al., (responding  
parties)

[2004] O.J. No. 395  
Court File No. 01-CV-207180CM  
Toronto Divisional Court File No. 711/03

**Ontario Superior Court of Justice**  
**Epstein J.**

Heard: By written submissions.  
Judgment: February 9, 2004.  
(15 paras.)

[Editor's note: Original reasons for judgment were released December 19, 2003. See [2003] O.J. No. 5263 ]

*Practice — Costs — Costs of interlocutory proceedings — Appeals.*

Determination of costs in an application by the plaintiff Lesnioswki for leave to appeal an order setting aside an order by a Case Management Master. The master had found that the defendants were not at liberty to attend each other's examinations for discovery. The motions judge overturned this order. He found that a party should be excluded from an examination for discovery only in exceptional cases. The two defendants here were employee and supervisor. The judge found that the nature of the potential evidence and the relationship of the parties was not enough to constitute cause for exclusion. He found no probability of cause to justify exclusion.

**HELD:** The defendants were awarded costs of \$3,500. There was no legal conflict and no reason to doubt the correctness of the decision. There was no matter of public importance warranting consideration by the Divisional Court.

**Statutes, Regulations and Rules Cited:**

Courts of Justice Act, s. 131.

Ontario Rules of Civil Procedure, Rule 57.01.

**Counsel:**

Derek L. Smith, for the plaintiff, moving party.  
Ted Charney, for the defendants, responding.

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¶ 1 **EPSTEIN J. (endorsement):**— The plaintiff sought leave to appeal to the Divisional Court from the interlocutory order of Echlin J. dated October 20, 2003 whereby he set aside the order of Case Management Master Dash and ordered that the defendants, Catherine Chung, (an insurance adjuster) and Ullsse-Meden (a representative of the defendant, H.B. Group Insurance Management Ltd. and Ms. Chung's supervisor) be at liberty to attend each other's examinations for discovery in this matter.

¶ 2 The action arose out of a single car accident that took place on March 12, 2000. The plaintiff was seriously injured. Following the accident she spent weeks in St. Michael's hospital in a coma. Five days after the accident, Ms. Chung, on behalf of the other defendants, forwarded a letter to the plaintiff that contained statements to the effect that the defendants had conducted an investigation and had determined that the plaintiff was responsible for the accident. The defendants have admitted that these statements are inaccurate. In this action the plaintiff claims that her being provided with the false statements resulted in her suffering material harm. A central issue in the action will be the circumstances surrounding the sending of the letter.

¶ 3 On the date the defendants were to be examined for discovery, defendants' counsel refused to allow either Ms. Chung or Ms. Ullsse-Meden to be examined unless each witness was allowed to sit in and observe the other's examination.

¶ 4 Master Dash was the first judicial officer to consider whether the defendants should be able to sit in on each other's examination for discovery. The Master concluded that in the circumstances present in this case, the plaintiff had met the onus of showing why the defendants should be excluded from each other's examination.

¶ 5 Echlin J. heard the defendants' appeal from Master Dash's order. He found that the Master had made certain errors.

¶ 6 Justice Echlin went on to observe that the exclusion of a party from an examination for discovery should be ordered only in exceptional cases. He found that the evidence in the record before him did not support the conclusion that the defendants should be denied the right to be in attendance at the examinations of the co-defendants. The nature of one party's potential evidence or relationship to another party (in this case employee and supervisor) was not enough to constitute cause for exclusion. Justice Echlin said, "[t]here must be more than the possibility of cause [to justify exclusion] ... there must be a real and substantial probability". He found no evidence in the record to support such a finding and therefore allowed the appeal.

¶ 7 In considering the leave application, I found that there was no legal conflict and no reason to doubt the correctness of Justice Echlin's decision. Furthermore I held that there was no matter of public importance that warranted the case to be considered by a panel of the Divisional Court. The leave application was dismissed.

¶ 8 The parties have now made written submissions as to costs.

¶ 9 The defendants seek costs fixed in the amount of \$4,544.90, which amount includes disbursements and GST.

¶ 10 Counsel for the defendants submits that, in addition to the regular factors I should consider in fixing costs in a matter such as this, I should take into account the fact that his clients were put to unnecessary expense and inconvenience due to the manner in which the plaintiff advanced the motion for leave to appeal. Counsel recites a history that demonstrates counsel for the plaintiff was, with some

regularity, late in taking the necessary steps to move the leave application along.

¶ 11 The plaintiff's position is that the leave application was not unreasonable and that the issues argued were essentially a repeat of those argued before Justice Echlin. In all of these circumstances plus the financial disparity between the parties, the plaintiff argues that there should be no costs or a modest award in favour of the defendants. Counsel for the plaintiff also submits that I should consider factors such as the defendant's wrongful conduct that has given rise to the action, the fact that the plaintiff offered to settle the leave application on a without costs basis, the so-called "tension" in the law having to do with who bears the onus in this situation and the plaintiff's "side" of the procedural wrangle.

¶ 12 In fixing costs, the court acts under the discretion afforded by section 131 of the Courts of Justice Act and rule 57.01. The latter gives a useful reminder of the elements to be examined in the exercise of discretion. They include the result, the claim, offers, the complexity of the proceeding, the importance of the issues, conduct that tends to lengthen or shorten unnecessarily the proceeding, improper or unnecessary steps and any other matter that is relevant to the costs. This catalogue offers the court the opportunity to craft a costs order that fits the case.

¶ 13 In this matter I have taken into account the submissions, the implications of the Costs Grid and the other factors relevant to the fixing of costs.

¶ 14 While some of the arguments counsel have advanced are relevant to my costs award, I have not factored in either the defendants' conduct giving rise to this action or the offers to settle. The consequences of the defendants' actions will be determined at a later day. Given the nature and timing of the efforts to settle, I have decided, in the exercise of my discretion, not to take them into consideration. In respect of the plaintiff's procedural delays, they will be reflected, to some extent in the quantum. I have, as well, adjusted the amounts claimed for the obvious fact that many of the same issues were the subject of preparation and submissions each time the discovery issue was argued. It follows that there would be some duplication of work reflected in the amount now claimed.

¶ 15 I fix the defendants' costs at \$3,500 including disbursements and GST.

EPSTEIN J.

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