*Case Name:*

# Lesniowski v. H.B. Group Insurance Management Ltd.

**Between**
**Justyna Lesniowski, Plaintiff (Respondent), and**
**H.B. Group Insurance Management Ltd., Coseco Insurance Company, Direct Protect and Catherine Chung, Defendants (Appellants)**

[2003] O.J. No. 6263

57 C.P.C. (6th) 374

2008 CarswellOnt 9238

Court File No. 01-CV-207180CM

Ontario Superior Court of Justice

**R.S. Echlin J.**

Heard: June 23, 2003.
Judgment: July 11, 2003.

(22 paras.)

**Counsel:**

Michael T. Lax: Counsel for the Plaintiff (Respondent).

Ted Charney: Counsel for the Defendants (Appellants).

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JUDGMENT

**1 R.S. ECHLIN J.**:-- Ever since the elimination of the Star Chamber, an essential element of our justice system has been the right of parties to face their accusers and look them straight in the eye.

Transparency is a hallmark of the common law.

**2** Parties are entitled to be present at all stages of the proceedings, unless cause can be shown for exclusion. This is consistent with our understanding of due process and natural justice.

**3** This appeal involves an important practice issue: under what circumstances can a party be deprived of the fundamental right to attend at examinations for discoveries?

**4** The facts of this case are as follows: On March 12, 2000, Justyna Lesniowski was seriously injured in a car accident. She alleges that Catherine Chung, the insurer's adjuster, wrote to her denying liability for the accident on March 17, 2000 while she was still in a coma. This correspondence also contained statements that were admittedly false. The letter and the circumstances surrounding its preparation and distribution gave rise to a wide-ranging variety of claims. Ms. Lesniowski is suing her insurance company, Coseco Insurance Company, Catherine Chung, and others for more than one million dollars.

**5** (She also sued the City of Toronto in another lawsuit. This appeal does not involve that action. The City was not represented, nor did it provide any material, argument or play any part in this appeal.)

**6** This lawsuit is case managed. On August 12, 2000, the Master dismissed an unusual application that Coseco and Catherine Chung had to bring seeking to be present during each other's discoveries. He also ordered that the evidence of each should not be revealed to the other until their discoveries had been completed.

**7** The defendants appeal this Order.

**8** There are two issues to be determined:

1. Did the learned Master properly exercise his discretion in issuing an exclusion order?
2. If not, should Catherine Chung & Rose UlIsse-Meden, the insurer'a representative, be excluded from each other's examinations?

## 1. THE MASTER'S EXERCISE OF DISCRETION

**9** Master's order should stand as a proper exercise of his discretion, unless the order is clearly wrong. The guiding principles were enumerated by Southey J. in Marleen Investments Ltd v. McBride et al. (1979), 23 O.R. (2d) 125 (H.C.). The Insurer's counsel argued that the Order is wrong because the Master misapprehended the applicable law, decided a pure question of law, and/or took judicial notice of extraneous factors

**10** While I am reluctant to interfere with the Master's exercise of discretion, in this case, I must.

**11** The Master ordered that the defendants be excluded from each other's examinations without formal notice or proper material being presented. He then required the defendants to bring a motion to show cause why they SHOULD be able to sit in. The defendants' previous application proceeded on the basis of whether there were sufficient grounds NOT to exclude the defendants, rather than whether there were sufficient grounds to exclude them.

**12** In his Costs Addendum of September 9, 2002, the Master found that "most counsel will consent to an exclusion" and that the defendants "should have advised the plaintiff in advance that each defendant intended to be present at the other's examination". There was no evidence that those practices are consistently accepted by most Ontario counsel.

**13** Finally, the Master stated that "the cases diverge into two streams" on the issue of what is required to establish cause to exclude. The Master also analysed considerable conflicting caselaw and decided a pure question of law. He should have declined jurisdiction in this instance and referred the matter to a Judge.

2. SHOULD CATHERINE CHUNG & ROSE ULLSSE-MEDEN BE EXCLUDED FROM EACH OTHER'S EXAMINATIONS?

**14** The plaintiff fears that if both Catherine Chung and Rose UlIsse-Meden attend each other's examinations, evidence may be tailored, parroted, or be less than forthcoming, due to intimidation. No specific evidence was presented to support those assertions.

**15** The defendants assert that as parties to the lawsuit, they have the fundamental right to participate in any phase of the proceedings. Their position is supported by Baywood Paper Products Ltd. v. Paymaster Cheque-Writers (Can) Ltd. (1986), 57 O.R (2d) 229 (Dist. Ct). I adopt the reasoning of Borins D.C.J. (as he then was) in that decision.

Basic principles

**16** There is no definitive Ontario appellate authority on this subject. I adopt the following comments of Goodfellow J., of the Nova Scotia Supreme Court:

1. it is the inherent right of a party to attend a co-party's examination for discovery;
2. the onus of establishing the exclusion is upon the party seeking exclusion;
3. the onus is the same, whether the application is for exclusion at examinations or at trial;
4. a body corporate speaks and acts through its officers and agents and therefore such representative will have a prima facie right to attend.

(V.A.C. v. H.I.B. [1996] N.S.J. No. 278 (S.C.)

**17** I find, as a matter of law, that the exclusion of a party from an examination for discovery should be ordered rarely, sparingly, and only in exceptional cases: (Parro v. Mullock supra and ICC V. ICC Infra).

Where cause can lead to exclusion:

**18** There are certain circumstances in which cause could lead to an exclusion order. They are:

* where evidence is likely to be tailored: Parro v. Mullock (1982), 35 O.R. (2d) 168 (H.C.);
* where evidence is likely to be parroted Blomme v. Eastview Racquet & Fitness Club (1995), 26 O.R. (3d) 496 (Ont. Ct (Gen. Div.));
* where a party is likely to be intimidated: Changoo v. Changoo [1999] O.J. No. 865 (Ont. Ct. (Gen. Div.));
* where the proceedings are likely to be disturbed or disrupted: Caputo et al. v. Imperial Tobacco Ltd. (1999), 44 O.R. (3d) 554 (Sup. Ct.);
* where the ends of justice require exclusion: ICC International Computer Consulting & Leasing Ltd. v. ICC Internationale Computer and Consulting GmbH (1988), 66 O.R. (2d) 187 (H.C.).

**19** I find that although the plaintiff has expressed potential concerns, there is not sufficient evidence for me to extinguish a co-defendant's fight to be in attendance at all of the examinations, even if credibility is a factor. The parties are under oath when testifying.

**20** The nature of one party's potential evidence or relationship to another party, by itself, is not enough to constitute cause to order exclusion. There must be more than just a possibility of cause: Lamb v. Percival (1992), 7 O.R. (3d) 775 (Ont. Ct. (Gen. Div.)). That possibility exists in every case, given "the frailty of human nature" (ICC v. ICC supra at p. 190). There must be a real & substantial probability.

**21** In view of the parties' inherent right to attend at all stages of a lawsuit in order to instruct counsel; to protect their interests throughout; and the important purposes of discoveries; I set aside the order of the Master and order that Catherine Chung and Rose UlIsse-Meden are at liberty to attend at each other's examinations in this action.

**22** Cost in the amount of $5000 shall be payable by the plaintiff to the defendants within 30 days.

R.S. ECHLIN J.

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