Case Name:

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

Between
Justyna Lesniowski, and
H.B. Group Insurance Management Ltd., Coseco Insurance Company, Directprotect and Catherine Chung

[2002] O.J. No. 3194

[2002] O.T.C. 607

23 C.P.C. (5th) 88

115 A.C.W.S. (3d) 956

Court File No. 01-CV-207180CM

Ontario Superior Court of Justice

Master Dash

Heard: July 25, 2002.
Judgment: August 12, 2002.

(47 paras.)

Barristers and solicitors -- Duty to court -- Counsel as a witness -- Effect of -- Practice -- Discovery -- Examination -- Exclusion of party from examination of co-party -- Answers by counsel.

The defendant insurers moved for an order removing the plaintiff Lesniowski's counsel, and to require the plaintiff's witnesses to answer certain discovery questions. Lesniowski was injured in a motor vehicle accident in March of 2000. She was sent a letter by the defendant insurer informing her that interviews had been conducted with her and that she was not entitled to collision coverage. The plaintiff, who had not been interviewed and was in a coma at the relevant time, claimed for damages, alleging breach of the insurer's duty of good faith. Her lawyer, Smith, allegedly had a telephone conversation with a representative of the defendant insurer in which she told him that the letter was a form letter sent to all insured, and that they had indeed not discussed the accident with

Lesniowski. The defendants sought Smith's removal as Lesniowski's counsel due to the fact that he might be a witness. Lesniowski argued that the defendants had failed to bring this motion by the time stated in a previous court order. She also sought an order that the defendants' representatives could not be present at each other's discovery examination, as there was a chance of tailoring testimony. Also at issue was whether Smith must answer a question relating to the conversation between Smith and the representative.

HELD: Application allowed in part. The application to remove Smith as counsel was dismissed, as it was premature and it was not certain that Smith would be a witness as to the conversation. Further, the court order requiring the motion to be brought earlier, precluded the defendants from making the motion now. The defendants had not provided any good reason for failing to comply with the order. There were other means by which the evidence could be put forward, including testimony by the insurer's representative, who had yet to be discovered. Should Smith have to testify, the matter could be brought at that time. The plaintiff was ordered to answer the questions, including the one relating to Smith's conversation with the representative, but this answer was to be provided in writing, and sealed. The order that the defendants' representatives could not attend at each other's examinations would issue, as there was a risk of tailoring evidence and of intimidation where one was a superior.

Statutes, Regulations and Rules Cited:

Highway Traffic Act.

Ontario Rules of Civil Procedure, Rules 31.03, 31.06(3).

Counsel:

Michael Lax, for the plaintiff.
Ted Charney, for the defendants.

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1 MASTER DASH (endorsement):-- The unusual facts in this case managed action have given rise to a number of procedural standoffs between counsel. This has resulted in motions before me to remove plaintiff's counsel, to compel plaintiff to answer a question asked on discovery respecting a conversation her solicitor had with the defendant adjuster and to determine whether the defendant adjuster and her supervisor can sit in while the other is being examined for discovery.

Background

2 The plaintiff was injured in a single vehicle accident that occurred on March 12, 2000. There is a companion action against the City of Toronto, being managed on a common timetable with this

action, based on the City's failure to maintain the roadway. The plaintiff alleges she lost control of her vehicle when it hit a rut in the road. The plaintiff was insured with the defendant Coseco Insurance Company ("Coseco"). The defendant H.B. Group Insurance Management Ltd. ("H.B.") provided claims management services to Coseco. The plaintiff alleges that while she was in a coma following the motor vehicle accident, the defendant Chung, an employee of H.B., and on behalf of Coseco, wrote a letter to the plaintiff dated March 17, 2000 stating that H.B. had discussed the motor vehicle accident with all involved parties, taken a statement from an independent witness and had conducted an investigation that indicated that the plaintiff was responsible for the accident. As a result H.B. denied any claim for repair to the plaintiff's vehicle. No claim in fact had been advanced by the plaintiff for property damage at that point, although a relative of the plaintiff had advised Coseco that the plaintiff had been in an accident and that the vehicle was damaged. The plaintiff claims that this letter caused her anxiety and upset and that it exacerbated her medical condition.

3 In or about early June 2000, Derek Smith, the plaintiff's solicitor, spoke to Ms. Chung. In a letter to Ms. Chung dated June 7, 2000 Mr. Smith confirmed that during that conversation Ms. Chung advised that the March 17 letter was a standard form letter sent to all insureds who had been in a single car accident, that H.B. had not, as stated in the March 17 letter, discussed the accident with all involved parties, or taken any statement from an independent witness, or investigated the accident. The plaintiff pleads that the statements in the letter were false, sent maliciously to intimidate the plaintiff from advancing a claim and that the letter was routinely sent to all insureds involved in single car accidents as part of a pattern of conduct designed to discourage claims in the pursuit of profit. The plaintiff claims punitive damages for breach of the insurer's duty of good faith.

4 The insurer's version of the telephone call with Mr. Smith has yet to be revealed, as Ms. Chung has not been discovered, the reasons for which will be described further in this endorsement. In their statement of defence, however, the defendants claim that the letter was sent to inform the plaintiff that she did not carry collision coverage, that the statement in the letter respecting witnesses was an "error" and that its inclusion was "inadvertent." The defendant further pleads that coverage for direct compensation for property damage in the plaintiff's policy applies only where the operator is not entirely at fault and where more than one vehicle is involved, and since the plaintiff carried no collision coverage, her policy with Coseco would not respond to any claim for vehicle loss or damage. It is noted, however, that despite filing a proof of loss, the plaintiff does not claim in this action for loss of her vehicle.

Litigation History

5 At a case conference on Feb. 21, 2002 a dispute occurred between Mr. Smith and Mr. Charney, the solicitor for the defendants, respecting the setting of discovery dates. Mr. Charney opined that Mr. Smith should be removed as counsel before discoveries since he would be giving evidence about his telephone conversation with Ms. Chung. Mr. Smith would not commit to whether he would be a witness until he examined Ms. Chung and ascertained whether she would admit the substance of their telephone conversation. I summarized this standoff in my case conference

endorsement as follows:

> Mr. Charney also opines that Mr. Smith must be removed as plaintiff's counsel, at least in the action against the insurers, since the evidence that the insurer sent a standard form letter of denial will come from remarks made by the defendant Chung, an adjuster with the insurers, to Mr. Smith. Mr. Charney states that Mr. Smith has an inherent conflict, as he cannot be counsel in an action in which he must give material evidence, nor can he act as counsel at discovery, examining the very witnesses against whom he will be giving evidence. This may be avoided if Mr. Smith undertakes not to give evidence at trial. Mr. Smith of course is unwilling to do so until he is able to ascertain at discovery whether the same evidence can be adduced by admissions from Ms. Chung or from further documentary productions from the insurers. This is a difficult issue to resolve, as Mr. Charney will not produce Ms. Chung for examination while the issue of Mr. Smith's representation remains outstanding.

6 To resolve this standoff (the first of three standoffs), and consistent with case management principles of avoiding unnecessary cost and delay, I ordered that "any motion to remove the plaintiff's solicitor shall likewise be served with supporting material by March 29, 2002 with a return date no later than May 10, 2002, failing which such motion shall not be brought until after examinations for discovery of all parties." I ordered discoveries to proceed on June 10, 11 and 12, 2002.

7 No motion was brought within this time frame. Much earlier in this action, on July 27, 2001, in response to Mr. Charney's enquiries whether Mr. Smith would be a witness at trial for the plaintiff, Mr. Smith stated that "it was not my intention to be a witness at this trial" and that he planned an extensive discovery of the defendants to determine from the defendant's files whether Coseco sent a similar standard form letter to other insureds involved in single car accidents. On August 1, 2001 and again on March 14, 2002, after the Feb. 21 case conference, Mr. Charney again asked whether Mr. Smith would be a witness at trial. Mr. Smith, by letter of March 25, 2002, within the deadline I had given Mr. Charney to serve a motion to remove Mr. Smith, gave a response identical to that in his earlier correspondence, i.e. "it is not my intention to be called as a witness to trial." On March 28, the day before the deadline, Mr. Charney again asked Mr. Smith to state without qualification whether the plaintiff agreed that Mr. Smith would not be a witness at trial, so that Mr. Charney could proceed to discoveries without the necessity of bringing a motion to remove Mr. Smith as plaintiff's solicitor. On April 15, 2002, after the deadline for service, Mr. Charney wrote to Mr. Smith requesting a response to his March 28 letter since he was still "trying to determine whether we need to serve motion materials to challenge your firm's representation in this matter." On May 9, 2002 Mr. Smith gave the same answer he had given on both earlier occasions and reminded Mr. Charney that he was now out of time for serving such motion. The defendants' motion to remove the plaintiff's solicitors was not brought prior to the May 10 deadline or in fact at any time prior to the scheduled discoveries.

8 On June 10, 2002 Mr. Charney discovered the plaintiff with respect to her claim against these defendants. During that discovery Mr. Lax, Mr. Smith's partner, who was representing the plaintiff in place of Mr. Smith, refused to provide a synopsis of the information obtained by Mr. Smith in his telephone conversation with Ms. Chung since Ms. Chung had not yet been examined. That resulted in the second standoff and will be discussed in more detail later in these reasons.

9 On June 12, 2002 Mr. Lax attended to examine the defendant Chung, to be followed by Rose Ullsse-Meden, a representative of the defendants H.B. and Coseco. Ms. Rose Ullsse-Meden is in fact Ms. Chung's current supervisor, although she was not so employed at the time the alleged "standard form" letter was sent to the plaintiff. Mr. Charney stated on the record, "we have Catherine Chung, and Ms. Ullsse-Meden here to be examined ... Ms. Chung was to be examined first and she's available to do that today." Mr. Charney then added that Ms. Ullsse-Meden, as a representative of the defendant companies wished to observe and be present during the examination of Ms. Chung. Mr. Lax took the position that each party needed to be examined without the other parties in the room. This resulted in the third standoff, and the examination of the defendants did not take place. The plaintiff then requested a further case conference. It must be noted however that Mr. Charney was prepared to allow Mr. Lax to conduct the examination of the defendants notwithstanding that the issue of Mr. Smith giving evidence had not been resolved to Mr. Charney's satisfaction. The examination would have proceeded on June 12 if Mr. Lax had been prepared to examine each defendant in the presence of the other.

10 At a case conference held on June 18, 2002 I summarized this standoff as follows:

> Those witnesses were to be examined on June 11. On that date counsel for those defendants, Mr. Charney refused to allow either witness to be examined unless each witness was allowed to sit in and observe the examination of the other. This was refused by the plaintiff's solicitor who was obviously concerned about tailoring evidence. This must be determined by motion to be brought by Mr. Charney.

11 To resolve this conflict I ordered that the defendants would be examined for discovery on September 27, 2002, and that neither could sit in on the examination of the other unless a motion were brought by those defendants prior to the scheduled discovery date, and I made an order to the contrary. This has resulted in the aforesaid motions heard by me on July 25, 2002. As indicated, the defendants have moved not only to determine whether the defendants can sit in on the other's discovery, but also to compel answers to two refusals from plaintiff's discovery, and to remove Mr. Smith and his firm as solicitors for the plaintiff.

Removal of the Plaintiff's Solicitors

12 It is clear law that counsel conducting a trial should not be a witness as to a controverted material fact in that proceeding. In those circumstances the case should be entrusted to other counsel. See Rule 4.02(2) of the Rules of Professional Conduct and the commentary thereunder,

adopted by Master Clark in Newmarch Mechanical Constructors Ltd. v. Hyundai Auto Canada Inc., [1992] O.J. No. 2791. Gillese J., as she then was, in Urquhart v. Allen Estate, [1999] O.J. No. 4816, added that because of the hardship to a litigant resulting from being denied counsel of choice, there is some scope to determine the issue on a case by case basis in order to consider the likelihood that counsel will be called as a witness and the significance of the evidence to be led. In Essa (Township) v. Guergis (1993), 15 O.R. (3d) 573 the Divisional Court cited a number of factors to be considered before counsel is removed. These included the stage of the proceedings, the likelihood the witness will be called, the good faith of the party seeking removal, the significance of the evidence to be led, the impact of removing counsel on the party's right to be represented by counsel of choice, the likelihood of a real conflict arising, the likelihood that evidence would be tainted, and the relationship between counsel, the prospective witness and the litigants.

13 The plaintiff takes the position that the defendants should not be entitled to bring the motion at this stage given my order of Feb. 21, 2002 requiring such motion to be served by March 29, 2002 with a return date no later than May 10, 2002, failing which such motion could not be brought until after discoveries were complete. Mr. Lax indicated that if I were inclined to allow this motion to be heard, the motion should be adjourned to allow the filing of further material, cross-examination on the affidavits in support and possibly retaining counsel to argue the motion. He further argued that he be granted the right to discover the defendants in advance of the motion.

14 I agree with the plaintiff's objection. To allow this motion to proceed at this time would allow the defendants to circumvent my order of Feb. 25, 2002. That order was made in the spirit of case management as an effective way to move this action along, avoid further delay, resolve the impasse outlined at the Feb. 25 case conference, and allow the defendants to bring the motion prior to discoveries if they were so instructed. Counsel must be made aware that orders, including deadlines set out in timetabling orders, are made to be honoured, and not breached without a valid and compelling reason. No valid reason whatsoever has been presented to indicate why the motion was not made by the deadline. It is not credible that the defendants' solicitors could have been misled by Mr. Smith's response of May 9, 2002 (after the deadline) since it was identical to responses given July 27, 2001 and March 25, 2002 (before the deadline.) In my view, the meaning of Mr. Smith's letters were plain and obvious. He did not plan to be a witness, but he could not undertake not to be a witness since that determination could not finally be made until after the defendants' discoveries were completed. If Mr. Charney had any doubts as to the meaning of Mr. Smith's letters he had more than enough time prior to the deadline to bring his motion. My order of Feb. 25 was never appealed and no motion has been made to extend the deadlines set out in that order. Finally, I note that Mr. Charney would have allowed Mr. Lax to examine his clients on June 12, 2002, without the motion to remove Mr. Smith's firm being brought, and in fact the discovery would have proceeded on that date but for the unrelated disagreement over whether each of Mr. Charney's clients could sit in on the examination of the other. The failure of the examinations to proceed on June 12 should not provide Mr. Charney with an opportunity to circumvent my order and now raise the issue of the plaintiff's representation.

15 There is a second reason for not removing Mr. Smith's firm at this stage. Courts should be reluctant to make what may be premature orders preventing solicitors from continuing to act. In view of the waste of time and money and substantial delay that can result from an order removing solicitors, and the undesirability of removing a party's counsel of choice, courts should only remove a solicitor at a pre-trial stage in the clearest of cases. See Essa (Township) v. Guergis, supra and Shibley Righton v. 833471 Ontario Inc., [1997] O.J. No. 3328, a decision of Master Polika. At this stage it is far from clear whether Mr. Smith will be required to give evidence at trial that Ms. Chung told Mr. Smith that the letter of March 17, 2000 was a "standard form letter" and that some of the statements in that letter were false. While evidence of these matters is undoubtedly material to the plaintiff's case, the evidence need not necessarily come from Mr. Smith. It could for example come from admissions by Ms. Chung at her examination for discovery confirming Mr. Smith's version of that conversation. Evidence might also come from the defendant insurer's documentary productions which may indicate for example that such a "standard form" letter was sent routinely to other insureds in single vehicle accidents. Until the examination for discovery of the defendants is complete it will not be known whether Mr. Smith will be required to give evidence of a material fact. In short, this motion is premature.

16 There are similarities with the situation in Antongiovanni v. Phung, [2001] O.J. No. 4659 where an action arising out of a motor vehicle accident was commenced well after the two year period under the Highway Traffic Act. To meet the limitations defence the plaintiff pleaded that she discovered that her injuries met the threshold under the Insurance Act within two years prior to issuing the statement of claim. The defendants sought to remove the plaintiff's solicitors on the basis that the solicitors would be required to give evidence as to the plaintiff's due diligence in order to establish the date that she should have been aware that her injuries met the threshold. I held in that case that until the plaintiff gave evidence at discovery as to her solicitor's efforts and knowledge, it was "unknown whether the solicitors have relevant evidence to provide that cannot be given directly by the plaintiff."

17 It is further my view that the mischief which is sought to be addressed by the rule that counsel must step down if they are to give evidence of material facts is less critical at the discovery stage. At trial, or on a motion, if counsel were to give material testimony it would put counsel's own credibility on the line, and thereby blur the roles of counsel and witness. At the discovery stage no determination is being made in reliance on counsel's testimony. For this reason courts should be particularly vigilant before removing counsel at this early stage.

18 Mr. Charney also takes the position that it is inappropriate for Mr. Smith to question Ms. Chung about an exchange that took place between them. He suggests that it is improper for a potential witness who is not a party to be allowed to directly examine a party adverse in interest. He also suggests that if Mr. Smith is to be a potential witness regarding what was said in this conversation he should not have the benefit of hearing what Ms. Chung has to say as there would be a real risk of tailoring evidence. He therefore opines that Mr. Smith must confirm he will not be a witness before examining Ms. Chung or he must be removed before that examination. He states that

having another member of the firm do the examination will not help as information among partners will be shared.

19 To answer this dilemma I adopt the approach taken by Master Clark in Newmarch Mechanical Constructors Ltd. v. Hyundai Auto Canada Inc., supra. In that case the plaintiff's solicitor, Mr. Groia, and the defendant's in-house counsel were the only witnesses to pre-arbitration events. Mr. Groia would therefore have been the plaintiff's only source of evidence on the one issue, which Master Clark felt was only one discreet part of the claim. The Master however was concerned at the discovery stage that when Mr. Groia's client was asked for a summary of the evidence of Mr. Groia, who would be present as counsel, "the line between witness and counsel will become badly blurred." Master Clark dismissed the motion to remove Mr. Groia's firm on terms that Mr. Groia personally not participate as counsel in any discoveries, without prejudice to the defendant's right to bring the motion at the opening of trial. The prohibition would be lifted if the claim involving Mr. Groia's evidence were abandoned.

20 Similarly in this case I am prepared to order that Mr. Smith not personally participate as counsel in any of the discoveries, unless he confirms he will not be a witness at trial. This will not prejudice the plaintiff since Mr. Lax was prepared to conduct the discoveries in any event, and Mr. Charney was prepared to allow Mr. Lax to proceed on June 12. Mr. Charney's concern about tailoring will be met by having Mr. Smith commit in writing to his evidence concerning the telephone discussion with Ms. Chung, in the manner set out in the refusals motion discussed below. However, this is a case managed action and in my view it is not appropriate to wait until trial to determine this issue if it appears Mr. Smith must give material evidence as a witness. The resulting delay and expense would run contrary to the principles of case management if Mr. Smith was removed at the commencement of trial. As a result Mr. Smith will be required to confirm after the completion of the defendants' discovery, including compliance with all undertakings and dealing with all refusals, whether he will be a witness at trial or whether he can undertake that he will not be a witness. A deadline for the bringing of refusals motions will be set at the case conference scheduled for October 1, 2002, following the Sept. 27 discovery. At the conclusion of this process the defendants will be in a position to renew their motion unless Mr. Smith either resigns or undertakes not to appear as witness.

21 The plaintiff was concerned that if he gave an undertaking it should only apply to the pleadings as they are presently constituted. If the pleadings are amended in any material way, either party may apply to be relieved from their respective undertakings not to call Mr. Smith as a witness at trial.

Plaintiff's Refusal to Disclose Counsel's Evidence of the Conversation

22 Two refusals were argued arising out of the discovery of the plaintiff. At question 184 Mr. Charney asked for the plaintiff to provide a summary of the verbal information obtained from Ms. Chung in her telephone conversation with Mr. Smith, the plaintiff's counsel. Mr. Lax refused to

provide that information and gave no reason on the record. Mr. Lax did say on the record that correspondence from Ms. Chung confirming aspects of that conversation will be relied on, but "verbal information that is not confirmed in writing will not be relied on. And if that position changes, I will let you know." That answer is not responsive to the question. This action is concerned with the plaintiff's allegation that Coseco sends standard form letters to insureds involved in single vehicle collisions. The genesis of the allegations pleaded in this lawsuit stem from the conversation between Ms. Chung and Mr. Smith where Ms. Chung is alleged to have admitted to Mr. Smith that the March 17, 2000 letter was a "standard form" and that the statements in the letter respecting the insurer's prior investigation were untrue. As a result, the information conveyed orally by Ms. Chung to Mr. Smith respecting the letter obviously has a semblance of relevance to the issues in this action. Whether or nor Mr. Smith will be a witness at trial, it cannot be disputed that he is a person with relevant information concerning occurrences in issues in this action. The defendants are entitled to the information within the knowledge of the plaintiff, or of her counsel, respecting material issues in the action, and as such the question must be answered.

23 The plaintiff however is concerned that if Ms. Chung hears Mr. Smith's evidence before giving her version of the conversation there is a perceived danger that Ms. Chung may tailor her evidence. Likewise the defendants are concerned that if the plaintiff is made aware of Ms. Chung's version of the conversation before committing to his own version there is a perceived danger of Mr. Smith tailoring his evidence. To resolve this standoff the question will be answered in the following manner. Plaintiff's counsel will prepare an answer in writing detailing Mr. Smith's recollections of the verbal information communicated by Ms. Chung in the conversation between Mr. Smith and Ms. Chung. The answer in writing shall be placed in a sealed envelope addressed to Mr. Charney. The sealed envelope will be brought to the examination for discovery of Ms. Chung, will be in the view of both solicitors during the examination of Ms. Chung, but not delivered to Mr. Charney until Mr. Lax has completed his examination of Ms. Chung. If following Ms. Chung's examination, undertakings or refusals remain outstanding such that the examination for discovery of Ms. Chung is not "completed", the letter will nonetheless be delivered provided that Ms. Chung has given her evidence with respect to the information conveyed by her during the telephone conversation with Mr. Smith. If any issues arise as to whether the letter should be delivered both counsel will initial the envelope on the seal and the issue will be determined by motion or at the October 1 case conference.

24 Mr. Lax was concerned that the defendant may use the contents of Mr. Smith's answer as a basis to call Mr. Smith as a witness for the defence, even if the plaintiff does not call him as a witness, thereby leading to the disqualification of counsel. I noted that Mr. Charney gave a clear undertaking before the Court not to call Mr. Smith as a witness.

Plaintiff's Refusal to Disclose Expert Findings in the Engineering Report

25 The second refusal arises at question 230. The plaintiff has listed in schedule B of her affidavit of documents an engineering report. It appears that the engineering report may deal with issues of

causation for the accident i.e. the rut in the road. The plaintiff claims litigation privilege. Mr. Lax refused to either advise as to the findings, testing and conclusions of the author or to confirm that he would not be calling the author as an expert witness at trial. Rule 31.06(3) clearly provides that the defendant is entitled to the findings, opinions and conclusions of an expert retained by the party being examined that relate to matters in issue in the action unless the report was made in preparation for contemplated or pending litigation and an undertaking is given not to call the expert as a witness at trial. Mr. Lax argues that the report, while it may be relevant to the action against the City, it is not relevant to the action against Coseco. He argues that the case against Coseco does not depend on whether the accident was in fact caused by the fault of the plaintiff or by a rut in the road, but rather the fact that a letter alleging fault was sent by Coseco without having done an investigation. While that is an attractive argument, the fact that the plaintiff has listed the document in her affidavit of documents is an admission that the document is relevant. Rule 30.03 requires a party to serve an affidavit of documents disclosing "all documents relating to any matter in issue in the action." It matters not whether the document is listed in schedule A and produced or listed in schedule B and not produced based on a claim of privilege. In any event the plaintiff has made fault an issue by virtue of paragraphs 7 and 8 of her statement of claim where it is pleaded that the accident was caused by a rut in the road. The question will be answered.

26 I have no knowledge whether the report has been delivered to the defendant City in the related action. These actions are being managed together although no order has yet been made with respect to trial together. Waiver of privilege and deemed undertaking have not been argued, and no request has been made at this stage for the plaintiff to produce the actual report.

The Right of Each Co-Defendant to Attend the Discovery of the Other

27 It has been settled law in Ontario since the decision of Borins J. (as he then was) in Baywood Paper Products v. Paymaster Cheque-Writers, (1986), 57 O.R. (2d) 229, [1986] O.J. No. 2076 that a party, or a representative of a corporate party, has a right to be present throughout all stages of an action, including examinations for discovery. Borins J. adopted the reasoning of the British Columbia Court of Appeal in Sissons & Simmons v. Olson, (1951), 1 W.W.R. (N.S.) 507 which had held that a plaintiff had the right to be present at the examination for discovery of his co-plaintiff, subject to the right of the presiding judicial official at any stage to exclude a party "should a violation of an essential of justice occur or be threatened, if exclusion is not directed." Borins J. held:

> Although the cases which I have reviewed ... for the most part were concerned with the exclusion of a co-party from the examination for discovery of another co-party, in my opinion the principles which they establish should apply equally to the exclusion of a party from the examination for discovery of an opposite party. I agree with the views of O'Halloran J.A., in the Sissons case, that every person has an inherent right to be present at his or her trial or any other proceedings which form part of the trial process. This would include the

> examination for discovery of the opposite party. A party has as much right to be present at the examination for discovery of the opposite party as he or she has to be present in the courtroom and listen to this testimony at the trial.
>
> ... I do not believe that the true principle is that counsel is entitled to have his or her client present to give instructions, although this, no doubt, is important.
>
> Rather the entitlement is that of the client, who is entitled to be present because it is his or her lawsuit. The presence of a party at the examination for discovery, like the presence of a party at trial, is consistent with due process and the right to protect his or her interests by observing the conduct of the examination. Similarly, where a corporation is a party, a representative of the corporation should be entitled to be present to insure that its interests are adequately protected.

28 With respect to the test for exclusion of a party at another party's examination Borins J. said:

> What may require the exclusion of a party on the ground that it is necessary to do so to secure the ends of justice depends on the particular situation. Thus, a party cannot be excluded from the examination for discovery of the opposite party except for cause. What may constitute cause depends on the circumstances in each case.

29 In ICC International Computer Consulting & Leasing Ltd. v. ICC Internationale Computer and Consulting GmbH, 66 O.R. (2d) 187, [1988] O.J. No. 1751 (H.C.J.) Anderson J. held that there was a "broad discretion to exclude a party where proper cause is shown." He summarized the principles as follows:

> (1) A party to an action has an inherent right to be present during the examination of any other party for discovery.
> (2) This right extends to a corporation, which is entitled to be present by its agent.
> (3) There is a discretion in the court and its judicial officers to exclude a party where such exclusion is necessary to secure the ends of justice.
> (4) A party seeking to exclude another from examination must show cause for such exclusion.
> (5) What will constitute cause is a matter to be decided on the facts in each individual case.

30 The cases diverge into two streams on the issue of what is required to establish sufficient cause to exclude the presence of one party from the examination for discovery of another party,

whether it be an opposite party or co-party. One line of authority holds that more must be shown than a "possibility" of tailoring of evidence. For example in ICC, supra one defendant wished to exclude a co-defendant who was adverse in interest and who had relevant evidence that may be in conflict with his own. Anderson J. said with respect to the possibility of tailoring:

> No doubt such a possibility exists. It must exist in every case given the frailty of human nature. It will no doubt be often a cause for concern. But, again, in my view, it is necessary that something more be shown than such a possibility.

He refused to exclude in that case because "there does not appear to be any major issue of fact which is solely or even principally dependent on the evidence of either." He determined that in order to exclude:

> it requires a prospective clash of evidence between the individuals which is both more central and more material than any which appears in this case.

31 A similar sentiment was expressed by West J. in Lamb v. Percival, (1992), 7 O.R. (3d) 775 where a possibility of tailoring was held to be insufficient reason for exclusion of the defendant husband from the discovery of the defendant wife, however the husband had signed the non-competition agreement before he knew the wife.

32 Likewise in Caputo v. Imperial Tobacco Ltd., 44 O.R. (3d) 554, [1999] O.J. No. 1655 (S.C.J.) Winkler J. refused to exclude co-affiants in a class action certification from attending the other's cross-examination holding: "Such a deprivation ought only to be invoked in the most exceptional of circumstances."

33 The most stringent test for exclusion based on the possibility of tailoring is found in Changoo v. Changoo, [1999] O.J. No. 865 (O.C.G.D.). Cullity J. refused to exclude the co-defendant transferor and transferee from each other's examination in a fraudulent conveyance action and stated with respect to tailoring, "the credibility of each of the defendants may be an important consideration. There is, however, no evidence before me that suggests they have conspired or that they are anything other than totally honest and credible witnesses. On the basis of the preponderance of authority in this province, I am satisfied that the possibility that evidence will be tailored in these circumstances is not sufficient to discharge the burden on the plaintiff - whether that burden be described in terms of the interests of justice, exceptional circumstances or, simply, cause." He concluded that even if evidence existed that the party sought to be excluded "had no regard for the truth" the result may not be different, holding that, "I am not convinced that even a strong probability that evidence may be tailored should be treated as" a basis to exclude.

34 Cullity J. also considered a second basis for exclusion, namely intimidation. On that ground he held:

> In my opinion, each party to an action, application or motion, should be entitled

> to be present throughout the fact-finding process unless the circumstances are such as to indicate that there is a real risk that the proceedings will miscarry if this general rule is adhered to. Evidence that intimidation is likely to occur may be one such exceptional circumstance.

35 The second line of cases suggest a less stringent test for exclusion. The root case is Sissons and Simmons v. Olson, supra, the B.C. case relied upon by Borins J. in the seminal case of Baywood Paper Products v. Paymaster Cheque-Writers, supra. In Sissons the B.C. Court of Appeal established the following test for exclusion:

> The weight of authority holds, I think, that either at a trial or on discovery a party cannot be excluded while his co-party testifies, without cause shown. But I do not think the onus of showing cause thus put on the opposite party is a heavy one; and I think the onus is lighter on discovery than at a trial, since the possibility of injustice from exclusion is more remote. Even at a trial, I think the chance of injustice being done in this way is extremely small. But in many cases the chances of injustice to the opposite party from refusal to exclude may be very substantial. I think the benefit of any real doubt should be given to the party asking for exclusion. If from the pleadings or otherwise it appears that the examinations of the co-parties will cover the same ground, and that their credibility will be a factor, then it seems to me their exclusion should be ordered.

36 In Karamanokian v. Assad, [1992] O.J. No. 2284 (O.C.G.D.) Rutherford J. considered both the less onerous test set out in Sissons and the stricter test in ICC and held:

> I am inclined to the view expressed by Sidney Smith, J.A. in Sissons and Simmons v. Olson (supra) that the onus on the applicant seeking exclusion is not a heavy one and that the chance of injustice resulting from exclusion is pretty remote. Certainly none was raised in argument in this case. In the circumstances presented in this case, particularly where the matter to be the subject of the cross-examination is the central issue in the litigation, I am of the opinion that the ends of justice would be best served by ordering the exclusion of the respondents as asked. I think there is a substantial chance of injustice to the applicant if such exclusion were not to be ordered.

37 In Karamanokian the applicant applied to terminate a partnership among himself and several respondents. Rutherford J. excluded the co-respondents from each other's cross-examination notwithstanding that there was nothing in the affidavits "to raise the always present possibility that a party's evidence might be affected by first hearing the evidence of another party, to the level of probability." In nonetheless ordering exclusion he held:

> It is clear that the central issue between the applicant and the respondents as to the role and status of the former in a business undertaking in which the latter

> were all involved, will be contested and credibility will have to be assessed. Moreover, the respondents, all represented by the same counsel, are not adverse in interest as among themselves.
>
> It is difficult to imagine how the applicant could establish in evidence directly, a probability that one or other of the respondents would tailor his evidence if he had access to the evidence of the others before being cross-examined. While in rare circumstances that might be possible, direct evidence would not normally be available to demonstrate that future probability. It seems to me to be a matter which must be evaluated in the circumstances of the case and the issue or issues to be determined in the litigation.

38 In Cardona v. Ospreay, (1994), 22 O.R. (3d) 662 Master Garfield excluded co-defendants who had common and identical defences from the examination for discovery of the other. He held because of their common interests they "may conceivably tailor their evidence." Master Garfield adopted the test in Basu v. Bettschen, (1975), 55 D.L.R. (3d) 755 where the Saskatchewan Queens Bench held:

> Where co-parties have interests in common it is important in the interests of justice that they be excluded when fellow parties are testifying on an examination. If it were otherwise, they would be in the advantageous position of knowing what another has said at the time that they are examined.
>
> ...
>
> I can see that considerable harm might be suffered by the plaintiff if the parties were allowed to be present when each was examined. On the other hand, there appears to be little, if any, prejudice to the defendant if they are excluded.

39 In Blomme v. Eastview Racquet and Fitness Club, 26 O.R. (3d) 496, [1995] O.J. No. 3441 Sheppard J. also preferred the less stringent test for exclusion in Karamanokian and in Sissons to the stricter test in Baywood and in ICC when the co-parties have a common interest. He held that "... where the co-defendants' interests are common and the issue is the credibility of the plaintiff versus the multiple defendants, I think the general rule enunciated in Baywood and ICC should give way to the views expressed by O'Halloran J.A. and Sydney Smith J.A. in Sissons." His rationale for this position is stated as follows:

> Counsel for the plaintiff submitted the main issue for the court at trial will be credibility and it is unfair to the plaintiff that the non-discovered individual defendant should be present at the plaintiff's discovery of the other defendant.

> Counsel's submission was persuasive and it lent itself to me. If the defendants are telling the truth, why shouldn't they be discovered separately? From a different point of view, if they are permitted to be present at each other's discovery, is it not open to them to "tailor" their evidence so as to maintain a common front?
>
> ...
>
> All the defendants are common in interest; indeed are represented by the same counsel. Credibility will be the main issue.
>
> ...
>
> In the circumstances of this case it would be advantageous to the defendants to attend each other's discovery thereby enabling the second defendant to be discovered to become aware of the questions to be answered and to "parrot" the answers previously given by his co-defendant. In these circumstances, that seems to give the co-defendants an unfair advantage by denying to the plaintiff the opportunity at least to explore inconsistencies in the defendants' evidence by excluding each from the other's discovery.

In Blomme the plaintiff alleged the two defendants agreed to treat the plaintiff's investment in a partnership as a loan, which was denied by the defendants. Not only did Rutherford J. exclude each defendant from the examination for discovery of the other, he further ordered that "no disclosure of evidence given by a co-defendant may be made to any other co-defendant until discoveries of all co-defendants are completed."

40 Finally Ground J. in Rando v. 917429 Ontario Ltd., [1998] O.J. No. 2640 opined that the "weight of Ontario authority appears to follow ... Sissons." He excluded co-defendants from each other's discovery on the following basis:

> The pleadings clearly raise issues of credibility. In fact, as submitted by Mr. MacDonald, credibility may be the only issue in that the statement of claim and statement of defence put forward totally contradictory versions of the transactions, which makes the case at bar somewhat unique. Both defendants were directly involved in the transactions which are the subject matter of the action. There is a close relationship between the defendants, the defendants are not adverse in interest, the defendants are both represented by the same counsel

> and there appears to be no prejudice to the defendants if the exclusion order is granted.

41 Interestingly, each case cited where exclusion was ordered involved exclusion from examinations of a co-party, rather than a party adverse in interest. In my view the risk of tailoring is greater when a party observes the evidence of his co-party at discovery before testifying himself, as there may be a subconscious (or conscious) desire to achieve consistency. As a result, as stated in Sissons and the cases that followed, the onus of showing cause why a party should be excluded from the examination of a co-party is not a heavy one, and is even lighter at discovery than at trial, and the benefit of the doubt should be in favour of the party seeking exclusion. This is particularly appropriate where the credibility of the witnesses may be an issue and the parties to be examined have a commonality of interest. Different considerations apply at trial after the parties have already committed their evidence under oath at discovery. There is also a greater risk that parties will be unable to protect their interests if they are excluded from part of the trial.

42 In this case, the plaintiff has made serious allegations against the defendant insurer and its adjuster, the defendant Chung, that the insurer sent a false and malicious letter as part of a pattern of conduct to dissuade insured persons involved in single car accidents from advancing claims. The defendants deny this allegation and plead that the false statements in the letter were sent in error. The representative of the insurer who is instructing counsel and who will be the discovery witness on behalf of the insurer is the supervisor of the defendant Chung. It is that supervisor who advances her fight to observe the discovery of the adjuster before giving her own evidence.

43 In my view the factors supporting exclusion as set out in cases such as Sissons, Karamanokian, Cardona, Blomme, and Rando are present in this action. The defendant insurer and the defendant adjuster are not adverse in interest, in fact their interests and their defences are identical. Part of their evidence will cover the same ground, namely the standard practice, if any, with respect to single vehicle accidents. The adjuster and her supervisor, by virtue of their positions, have a close relationship. They are represented by the same counsel. Credibility is a significant issue in the action as the plaintiff and the defendants put forward contradictory versions of the significance of the letter, and of the alleged course of conduct in sending such letters. The major issue in this action, the alleged systemic practices of the defendants, may substantially depend on the testimony of these witnesses. It would be most advantageous for the supervisor to know what evidence the adjuster will give with respect to whether the terms of the letter were included in error or as a standard practice, with respect to the allegedly systemic practices of the insurer in sending such letters and the reasons therefor, and with respect to the instruction and training given to adjusters on how to respond to single vehicle accident claims. There is no specific prejudice to the defendants alleged if they are excluded from each other's examination, other than the loss of the right as a party to be present during one part of the action. The possibility of prejudice is remote. On the other hand there could be considerable prejudice, or at least an unfair disadvantage to the plaintiff if she is denied the right to at least explore potential inconsistencies between the defendants free from the taint of one defendant having been privy to the testimony of the other.

44 In my view the plaintiff has met the onus of showing cause why the defendants should be excluded from each other's examination. As indicated in Sissons, and the cases that follow, the onus is not a heavy one, particularly at the discovery stage, and the benefit of any doubt should go to the party asking for exclusion. Because of the particular and somewhat unique allegations involving false statements, systemic practice and bad faith, the relationship of the co-defendants, their commonality of interest, and the issues of credibility there is a real risk of tailoring evidence if the co-defendants are permitted to observe the examinations of the other. The ends of justice would be best served if the co-defendants were excluded from each other's examination for discovery, and I exercise my discretion accordingly.

45 In addition to the risk of tailoring, there is a second reason to exclude Ms. Ullsse-Meden from the examination of Ms. Chung. Ms. Ullsse-Meden is Ms. Chung's current supervisor, and presumably has some say in the evaluation, tenure and promotion of Ms. Chung. There is therefore a real risk of intimidation of Ms. Chung by Ms. Ullsse-Meden, whether conscious, or more likely subconscious. The mere fact that her supervisor is in the room watching her testify about the company's practices creates a risk that Ms. Chung may be less than forthright or candid about company practices. I do not wish to imply that there is any evidence that Ms. Chung will intentionally distort the truth, but there is an obvious risk that this may occur for no other reason than the mere presence in the room of the person who has a significant role to play in her employment. As Cullity J. said in Changoo, supra, "I accept that, where the court is satisfied that there is a real probability of intimidation, the interests of justice could justify the exclusion of a party." I am satisfied that is a real probability in the unique circumstances of this case.

Order

46 The following order is made, as endorsed on form 77c:

1) The motion to remove Lax, Smith as solicitors of record for the plaintiff is dismissed, but on the following terms:

    (a) within 21 days after the completion of the examinations for discovery of the defendants (including the answering of all undertakings and either the resolution of any refusals motions or the passage of such time as may be ordered for bringing refusals motions), the plaintiff's solicitors shall advise the defendants' solicitors whether Derek Smith undertakes that he will not be a witness at trial;
    (b) in the event that the plaintiff's solicitors fail to undertake that Derek Smith will not be a witness at trial within the above time frame, and the plaintiff's solicitors fail to resile from their representation of the plaintiff, then after completion of discoveries, undertakings and

refusals as aforesaid, the defendants will be at liberty to renew this motion; and

(c) Derek Smith shall not personally conduct the examinations for discovery of the defendants.

2) The motion to allow the defendant Catherine Chung and Rose Ullsse-Meden on behalf of the defendant insurers to be present during the examination for discovery of the other is dismissed. Catherine Chung and Rose Ullsse-Meden will be excluded from the examination for discovery of the other. The evidence of each shall not be revealed to the other until the examination for discovery of both have been completed, but such prohibition need not extend to the time for undertakings and refusal motions.

3) Question 184 from the examination for discovery of the plaintiff shall be answered in the following manner. Plaintiff's counsel will prepare an answer in writing detailing Derek Smith's recollections of the verbal information communicated by Catherine Chung in the conversation between Mr. Smith and Ms. Chung. The answer in writing shall be placed in a sealed envelope addressed to Mr. Charney, the solicitor for the defendants. The sealed envelope will be brought to the examination for discovery of Ms. Chung, will be in the view of both solicitors during the examination of Ms. Chung, but not delivered to Mr. Charney until the plaintiff's solicitor has completed his examination of Ms. Chung.

4) Question 230 from the examination for discovery of the plaintiff shall be answered within 30 days, unless prior to that deadline the plaintiff undertakes not to call the expert as a witness at trial.

5) The examinations for discovery of the defendants will proceed as scheduled on September 27, 2002. At the case conference scheduled for October 1, 2002 a date will be set for the completion of undertakings and refusals motions and any other issues arising out of the examinations for discovery will be discussed.

Costs

47 I am prepared to determine costs of this motion, and to fix the quantum of those costs if ordered, upon brief written submissions of the parties, including where costs are claimed an appropriate bill of costs. The solicitors for the plaintiff shall make any written submissions within 14 days of the release of these reasons, and the solicitors for the defendants shall make any written submissions within 10 days of the receipt of the plaintiff's submissions.

DASH J.

cp/s/qlrme/qlkjg