Civil Procedure
Law 225

Winter 2024

Lecture Notes No. 12

DOCUMENTARY DISCOVERY

Warman v. Wilkins-Fournier
2011 ONSC 3023 (Ont. S.C.J.)

This is an interesting illustration of the discovery rules in relation to production of e-records necessary for the plaintiff to identify and serve Statements of Claim on two anonymous parties that allegedly libelled him through comments made on a political web-site.

Frangione v. Vandongen
2010 ONSC 2823 (Ont. S.C.J.)

Here the defendant sued by the plaintiff who allegedly received catastrophic injuries rendering him unemployable was successful in obtaining e-discovery of a number of computer records, including his Facebook account.

Master Pope:

> **[34] It is now beyond controversy that a person's Facebook profile may contain documents relevant to the issues in an action. Brown J. in *Leduc*, *supra*, at paragraph 23, cited numerous cases in which photographs of parties posted to their Facebook profiles were admitted as evidence relevant to demonstrating a party's ability to engage in sports and other recreational activities where the plaintiff put enjoyment of life or ability to work in issue.**
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> **[35] It is also good law that a court can infer from the nature of the Facebook service the likely existence of relevant documents on a limited-access Facebook profile. (*Murphy*, *supra*; *Leduc*, *supra* at para. 36)**
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> [36] The Facebook productions made to date by the plaintiff are admittedly relevant to the issues in this action. Thus I can safely infer having reviewed the photographs of the plaintiff interacting with presumably friends at a wedding and other public places, as well as

his communications with friends, that it is likely his privately-accessed Facebook site contains similar relevant documents. Although it is possible that the contents of his Facebook site may be used by the defendant to impeach the plaintiff's credibility, I am satisfied based on my review of the plaintiff's productions to date that its primary use will be to assess his damages for loss of enjoyment of life and his ability to work.

[37] On the issue of privacy, the plaintiff relies on the British Columbia case of *Park v. Mullin*, [2005] B.C.J. No. 2855. In that case the plaintiff claimed to have sustained a head injury and brain damage as a result of a motor vehicle accident. Prior to the accident, the plaintiff had been self-employed as a human resources consultant and she continued to work in that capacity since the accident. On the assumption that the plaintiff used her computer for both work and personal use, the defendant wanted access to all of the plaintiff's computer documents because arguably they were relevant both to the loss of earning capacity claim and to the assessment of the plaintiff's pre and post accident level of functioning. That court rejected the defendant's request for inspection of the plaintiff's computer because the order sought was too broad and in the nature of an authorization to search. The court took into consideration the plaintiff's privacy concerns to both her private records and those of others who used the computer. The court found that the defendant offered no plausible evidence relating to how the types of documents requested would be used by the trier of fact, and that any evidence of the plaintiff's level of cognitive functioning would be gained by an assessment of the plaintiff by experts in the field or by the examination at trial of witnesses, including the plaintiff. It was ultimately found that the types of documents requested had little if any probative value.

[38] The plaintiff's testimony on discovery was that he maintained privacy over communications with his friends that numbered approximately 200 although only five of them were close friends. In other words, he permits some 200 "friends" to view what he now asserts is private. This is a preposterous assertion especially given his testimony that only five of the 200 are close friends. In my view, there would be little or no invasion of the plaintiff's privacy if the plaintiff were ordered to produce all portions of his Facebook site.

[39] On the issue of privilege, the plaintiff did not refer to any case that cited privilege as a consideration on motions for production of Facebook documents. Further, there is no evidence that the plaintiff had communications with his counsel either pre or post commencement of this action through his Facebook site. The letter in evidence from Mr. Odinocki stated that the plaintiff's communications with third parties were privileged. As the plaintiff

failed to state the basis for a claim of privilege in his supplemental affidavit of documents, I fail to see how either solicitor and client privilege or litigation privilege would apply. However, the plaintiff is permitted to return to the court for a ruling on this issue once he delivers a further and better affidavit of documents.

[40] The plaintiff argues that from a proportionality standpoint, given the abundance of medical evidence regarding the plaintiff's injuries, the plaintiff's computer documents are unnecessary and irrelevant. I would be extremely hesitant to exclude a body of evidence such as computer documents including photographs and communications such as are typically found on a person's Facebook site merely because there is another more credible body of evidence such as medical reports that will be called into evidence at trial on the same issue. Firstly, this motion is not brought at the trial stage – it is still in the discovery stage. Secondly, despite a production order made at the discovery stage, a trial judge will ultimately decide the relevancy of a document at a time when all of the evidence is before the court.

[41] For the reasons above, the plaintiff shall preserve all material on his Facebook website until further order of this court and produce all material contained on his Facebook website including any postings, correspondence and photographs up to and including the date this order is made.

DISCOVERY OF NON-PARTIES

Rule 30

30.10 (1) The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,

(a) the document is relevant to a material issue in the action; and
(b) it would be unfair to require the moving party to proceed to trial without having discovery of the document.

(2) A motion for an order under subrule (1) shall be made on notice,
(a) to every other party; and
(b) to the person not a party, served personally or by an alternative to personal service under rule 16.03.

(3) Where privilege is claimed for a document referred to in subrule (1), or where the court is uncertain of the relevance of or necessity for discovery of the document, the court may inspect the document to determine the issue.

(4) The court may give directions respecting the preparation of a certified copy of a document referred to in subrule (1) and the certified copy may be used for all purposes in place of the original.

(5) The moving party is responsible for the reasonable cost incurred or to be incurred by the person not a party to produce a document referred to in subrule (1), unless the court orders otherwise.

Rule 31

31.10 (1) The court may grant leave, on such terms respecting costs and other matters as are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue in the action, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation.

(2) An order under subrule (1) shall not be made unless the court is satisfied that,

(a) the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person the party seeks to examine;

(b) it would be unfair to require the moving party to proceed to trial without having the opportunity of examining the person; and

(c) the examination will not,

(i) unduly delay the commencement of the trial of the action,

(ii) entail unreasonable expense for other parties, or

(iii) result in unfairness to the person the moving party seeks to examine.

(3) A party who examines a person orally under this rule shall serve every party who attended or was represented on the examination with the transcript free of charge, unless the court orders otherwise.

(4) The examining party is not entitled to recover the costs of the examination from another party unless the court expressly orders otherwise.

(5) The evidence of a person examined under this rule may not be read into evidence at trial under subrule 31.11 (1).

Hopkins v. Robert Green Equipment Sales Ltd.
2018 ONSC 998 (Ont. S.C.J. - Master)

Master Muir:

[after reviewing a number of decisions respecting third party examination for discovery]

[6] The principles set out in these decisions can be summarized as follows:

- **the requirements of Rule 31.10 are cumulative and a party seeking such relief must satisfy both Rule 31.10(1) as well as each of the requirements in Rule 31.10(2);**

- **there must be good reason to believe that the non-party has information relevant to a material issue;**

- **before being entitled to an examination of a non-party, the moving party must establish that he has been unable to obtain the information he seeks from the other parties to the action as well as from the non-party he wishes to examine;**

- **there must be a refusal, actual or constructive, to obtain the information from the other parties to the action, and the non-party, before the moving party will be able to meet the onus under Rule 31.10(2)(a); and,**

- **if that onus is met the court may then look to Rule 1.04 to determine whether the court's discretion, as set out in Rule 31.10(1), should be exercised on the facts of each particular case.**

Ontario (Attorney General) v. Ballard Estate
(1995), 1995 CanLII 3509 (Ont. C.A.)

This is a case involving a demand by beneficiaries for documents from the estate trustees; the trustees sought to resist.

Per Curiam:

> In making the fairness assessment required by rule 30.10(1) (b), the motion judge must be guided by the policy underlying the discovery régime presently operating in Ontario. That régime provides for full discovery of, and production from parties to the litigation. It also imposes ongoing disclosure obligations on those parties. Save in the circumstances specifically addressed by the Rules, non-parties are immune from the potentially intrusive, costly and time-consuming process of discovery and production. By its terms, rule 30.10 assumes that requiring a party to go to trial without the forced production of relevant documents in the hands of non- parties is not per se unfair.
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> **The discovery process must also be kept within reasonable bounds. Lengthy, some might say interminable, discoveries are far from rare in the present litigation environment. We are told that discovery of these defendants has already occupied some 18 days and is not yet complete. Unless production from and discovery of non-parties is subject to firm controls and recognized as the exception rather than the rule, the discovery process, like Topsy, will just grow and grow. The effective and efficient resolution of civil lawsuits is not served if the discovery process takes on dimensions more akin to a public inquiry than a specific lawsuit.**
>
> The motion judge was properly concerned about the ramifications of a production order in this case. Many litigants, especially those involved in complex commercial cases, find themselves in the position where non-party financial institutions are in possession of documents which are relevant to material issues in the litigation, and which those institutions cannot, or will not, voluntarily produce prior to trial. If this situation alone is enough to compel production during the discovery stage of the process, then production from and discovery of non-parties would become a routine part of the discovery process in complex commercial cases. It may be that it should be part of that process, but that is not the policy reflected in the rules as presently drafted.

In deciding whether to order production in the circumstances of this case, the factors to be considered by the motion judge should include:

-- the importance of the documents in the litigation;

-- whether production at the discovery stage of the process as opposed to production at trial is necessary to avoid unfairness to the appellant;

-- whether the discovery of the defendants with respect to the issues to which the documents are relevant is adequate and if not, whether responsibility for that inadequacy rests with the defendants;

-- the position of the non-parties with respect to production;

-- the availability of the documents or their informational equivalent from some other source which is accessible to the moving parties;

-- the relationship of the non-parties from whom production is sought, to the litigation and the parties to the litigation. Non-parties who have an interest in the subject-matter of the litigation and whose interests are allied with the party opposing production should be more susceptible to a production order than a true "stranger" to the litigation.

In addressing these and any other relevant factors (some of which were identified by the motion judge in his reasons), the motion judge will bear in mind that the appellants bear the burden of showing that it would be unfair to make them proceed to trial without production of the documents.

In our opinion, a consideration of some of these factors will require an examination of the documents as contemplated by rule 30.10(3). That rule provides in part:

30.10(3) . . . where the court is uncertain of the relevance of or necessity for discovery of the document, the court may inspect the document to determine the issue.

For example, in considering whether it would be unfair to require the appellants to wait until trial to obtain the documents, the number, content and authorship of the documents may be very important. Those facts could be ascertained only from an examination of the documents or perhaps from an examination of an appropriate summary prepared by those in possession of

> **the documents. Similarly, the importance or unimportance of the documents in the litigation may best be determined by an examination of them.**
>
> **We recognize that this process will be time consuming and will place an additional burden on the motion judge. We are satisfied, however, that in the circumstances of this case and considering the material filed on the motions, that an informed decision requires an examination of the documents. A decision made without reference to the documents runs the very real risk of being either over- or under-inclusive. No doubt, as the case management judge, the motion judge will have a familiarity with the case which will facilitate his review of the documents.**
>
> In the result, the appeal is allowed, the order made by the motion judge is set aside, and the matter is remitted to the motion judge for further consideration in accordance with the principles outlined above. The costs of this appeal and of the motion below are left to the motion judge.

EXPERT EVIDENCE

Singer v. LZW LLP
2014 ONSC 4521 (Ont. S.C.J.)

Justice Carole J. Brown:

> [100] An expert's report must be seen to be the independent product of the expert, and not influenced as to form or content by either party to the litigation. An expert is to provide independent assistance to the court by way of a fair, objective and unbiased opinion in relation to matters within his or her expertise.

[Read this case for the independence and neutrality expected of an expert. Discovery is the time to seek whether this is in fact the case.]

Bakalenikov v. Semkiw
2010 ONSC 4928 (Master)

This is one of three judgments delivered by Master Short in respect of the changes to the Rules respecting expert's reports and the question of whether recordings of medical examinations of a plaintiff by an insurer's experts should be made and provided to the plaintiff; see also *Aherne v. Chang*, 2011 ONSC 2067 (Master); appeal dismissed, 2011 ONSC 3846 (Ont. S.C.J.), and, *Girao v. Cunningham*, 2010 ONSC 4607 (Master). The issue requires balancing a number of interests: privilege that would otherwise arise in favour of the party ordering the examination, discovery at an early stage, access to health records, efficiency, and duties owed directly to the Court. Master Short held that audiotaping an examination would not intrusive and would serve a number of other interests. The problem arose that a particular expert objected – he would not agree to be taped. What to do?

Master Short:

> [70] Rule 53.03 has been amended. Now it tries to bridge the chasm between Plaintiffs and Defendant's expert witness reports. It makes both terms now at least somewhat misleading. It requires experts to give the following specific Undertaking:
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> 3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:
>
> (a) to provide opinion evidence that is fair, objective and non-partisan;
>
> (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and
>
> (c) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.
>
> 4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.
>
> [71] This Undertaking requires experts, counsel retaining them, and the Court to reconsider their respective roles and practices. This Undertaking must be read as seeking to i*mprove* the way expert evidence is procured. Now, by her or his Undertaking accompanying any report, the Expert is the Court's expert. She or he must not be an advocate for either side.

[72] Whether retained by Plaintiff or Defendant, experts are called upon to assist the Court to understand technical issues from an independent perspective. In the matter now before me the extent of the plaintiff's injuries and her future prognosis are at issue.

[73] It needs to be clearly stated that each of the Plaintiff and the Defendant is entitled to select an expert in whose credentials and reputation they have confidence. They must choose and pay that expert, and provide her or him with all relevant material. The expert must state what she or he has been given, and by whom. Counsel must update the expert they have retained with fresh evidence or reports as they come in, and seek updated and other opinions as matters develop as necessary.

[74] But beyond such proper contact, the Expert's Undertaking requires that she or he be seen to be independent of those who retained the expert. Counsel and those ultimately responsible for funding the payment of any judgment must restrain their contact. In my view, under this new structure, the expert must be and must be seen to be detached and independent.

[75] I leave open the issue as whether that independence means that consultation between the expert and the Party, counsel, insurer or other defender or indemnifier, must be restricted to the proper and demonstrably transparent passage of information, the asking of questions and receipt of reports answering the questions asked.

[76] The Court expects and relies upon frank and unbiased opinions from its Experts. This is a major sea change which requires practical improvements to past opaque processes. How are long time plaintiffs' and defendants' experts to be "trusted" to change their stripes? At the initial stages skilled, licenced professionals clearly must be taken at their word that on principal they take their Form 53 Undertaking to Court seriously. They are clearly promising to bring a new, transparent and objective mind set to the drafting of their reports and to their subsequent testimony.

[77] In this case I am obliged to consider a proposed expert who has on at least 3 occasions had his opinions disregarded by the Court for bias and advocacy for the Defence. He has been criticized by a judge of this Court for delivering his evidence as "an advocate for the party calling him as a witness."

[78] As noted in paragraph 58 above Dr. PD in his affidavit states, "I have not in the past and *would not in the future conduct an assessment while being taped*. [my emphasis]

[79] The Plaintiff before me seeks to record this expert's interview. The Defence has given no evidence that this would be impractical, intrusive or an obstacle to their chosen expert conducting his interview and examination. Rather, this Doctor has deposed that if ordered to allow a recording, he will not conduct his examination. That is of course his prerogative.

[80] On the facts before me in this motion however, I find that this expert's objectivity needs to be demonstrated. The Court now implicitly holds out to jurors that experts testifying are the Court's experts, independent of the plaintiff or of the defendant.

[81] At least at the outset of this new system, the Court's positive duty encompasses the power to allow a non-intrusive form of audit of the experts paid by the those ultimately liable to fund the payment of any liability determined at the trial.

[82] On the peculiar facts before me in this matter, I am required to fashion appropriate procedural safeguards to ensure the Trial Court has proper independent and reliable evidence and reports available. I am satisfied that it is appropriate for this plaintiff to have an audio recording of the entire examination. This recording must be copied to all counsel and the examining doctor.

[83] In the future, in other actions, it would seem fair that if counsel for the plaintiff wishes the examination arranged by the defence to be taped, then there ought to be recordings made of the corresponding examinations, with both recordings, being fully circulated, forthwith, unedited and in full. Whether the expert's interview was apt or adequate is then objectively assessable. This may well, in some cases, assist the Defence. On the basis of my analysis in these reasons this appears to be an inherently neutral step.

[84] I believe the national trend is clearly towards allowing such recordings as a quality control "check" on the process. I can see much benefit to the parties and the court. The court and ultimately the public have a right to be confident in the independence and competence of experts reporting on matters before the court.

[85] If the Defendant's proposed doctor is unwilling to reconsider his position, the Defence will have to select a different expert.

Bruff-Murphy v. Gunawardena
2017 ONCA 502 (Ont. C.A.)

This case examines the role of the judge in ensuring that expert evidence is just that, and that the evidence of the expert will not mislead the jury.

Hourigan J.A.:

A. INTRODUCTION

[1] The law regarding expert witnesses has evolved considerably over the last 20 years. Gone are the days when an expert served as a hired gun or advocate for the party that retained her. Today, expert witnesses are required to be independent, and their function is to provide the trier of fact with expert opinion evidence that is fair, objective and non-partisan.

[2] The role of the trial judge in relation to expert witnesses has also evolved. Appellate courts have repeatedly instructed trial judges that they serve as gatekeepers when it comes to the admissibility of expert opinion evidence. They are required to carefully scrutinize, among other things, an expert witness's training and professional experience, along with the necessity of their testimony in assisting the trier of fact, before the expert is qualified to give evidence in our courts. This gatekeeper role is especially important in cases, such as this one, where there is a jury who may inappropriately defer to the expert's opinion rather than evaluate the expert evidence on their own.

[3] In the present case, the trial judge qualified an expert to testify on behalf of the defence despite some very serious reservations about the expert's methodology and independence. It became apparent to the trial judge during the expert's testimony that he crossed the line from an objective witness to an advocate for the defence. Despite his concerns, the trial judge did nothing to exclude the opinion evidence or alert the jury about the problems with the expert's testimony.

[4] On appeal, the appellants advance several arguments to the effect that trial fairness was breached, such that a new trial is necessitated. All of these arguments focus on the impugned expert.

[5] In my view, the appeal must be allowed and a new trial ordered. I reach this conclusion because the trial judge failed to

properly discharge his gatekeeper duty at the qualification stage. Had he done so, he would have concluded that the risks of permitting the expert to testify far outweighed any potential benefit from the proposed testimony.

[6] In addition, the trial judge's concerns about the expert's testimony were substantially correct; the witness crossed the boundary of acceptable conduct and descended into the fray as a partisan advocate. In these circumstances, the trial judge was required to fulfill his ongoing gatekeeper function and exclude in whole or in part the expert's unacceptable testimony. Instead, the trial judge did nothing, resulting in trial fairness being irreparably compromised.

...

(2) The Trial Judge's Gatekeeper Role with Respect to Expert Opinion Evidence

(1) Qualification Stage

…

[35] The first component requires the court to consider the four traditional "threshold requirements" for the admissibility of the evidence established in R. v. Mohan, 1994 CanLII 80 (SCC), [1994] 2 SCR 9: (i) relevance; (ii) necessity in assisting the trier of fact; (iii) absence of an exclusionary rule; and (iv) the need for the expert to be properly qualified.

[36] The second component is a "discretionary gatekeeping step" where "the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks": para. 24. It is a cost-benefit analysis under which the court must determine whether the expert evidence should be admitted because its probative value outweighs its prejudicial effect.

…

[40] In the present case, the trial judge cited White Burgess and appears to have relied upon Cromwell J.'s statement that in the threshold inquiry it would be quite rare for a proposed expert's evidence to be ruled inadmissible. As Cromwell J. noted at para. 49, all that needs to be established at that stage is whether the expert is "able and willing to carry out his or her primary duty to the court." The trial judge concluded that Dr. Bail met this rather low threshold requirement.

[41] That was a discretionary decision, which is entitled to deference from this court: R. v. Shafia, 2016 ONCA 812 (CanLII), 341 C.C.C. (3d) 354, at para. 248. Another judge might well have concluded that Dr. Bail failed to meet even this low threshold test. I do not need to decide whether the trial judge erred on this point, however, because he clearly erred in principle in failing to proceed to the next step of the analysis – consideration of the cost-benefit analysis in Dr. Bail's testimony. The trial judge did not reference this second component of his discretionary gatekeeper role. To the contrary, he appears to have believed that he was obliged to qualify Dr. Bail once he concluded that the witness met the initial Mohan threshold. There is, therefore, no decision to defer to and it falls to this court to conduct the second part of the analysis.

[42] In my view, on a proper balancing, the potential risks of admitting Dr. Bail's evidence far outweighed the potential benefit of the testimony. It was evident from a review of Dr. Bail's report that there was a high probability that he would prove to be a troublesome expert witness, one who was intent on advocating for the defence and unwilling to properly fulfill his duties to the court.

[43] The first red flag was Dr. Bail's methodology. There is a real risk of unfairness in engaging in a hunt for discrepancies between what a plaintiff says during a short interview and what medical records dating back several years reveal. This unfairness is exacerbated when the expert denies the plaintiff the opportunity to explain the apparent discrepancies. As anyone with the slightest experience with litigation would attest to, oftentimes what appears to be an inconsistency in witness's evidence is not an inconsistency at all. Oftentimes all that is required is a simple explanation to resolve what appears to be a conflict in what a witness said on two different occasions. Ms. Bruff-McArthur was not given an opportunity to offer such an explanation.

[44] A related concern is that the vast bulk of the content in Dr. Bail's report was the recitation of perceived inconsistencies between what Ms. Bruff-McArthur said in the independent medical examination and what the medical records revealed. In conducting that analysis, Dr. Bail was not bringing to bear any medical expertise. This was work that is routinely done by trial lawyers and law students or clerks in preparation for a cross-examination. Thus, the benefit of the evidence was very low, while the potential mischief was very high, especially given that none of these inconsistencies were put to Ms. Bruff-McArthur.

[45] It was also clear from the report that Dr. Bail was coming dangerously close to usurping the role of the jury in assessing Ms. Bruff-McArthur's credibility. In the "Summary and Conclusions" section of his report he opines:

It is my opinion that if Ms. Bruff-McArthur was being forthright, this pattern of discrepancies and inconsistencies should not exist. I am therefore of the opinion that Ms. Bruff-McArthur has not been forthright with respect to her accident related claims and her provided medical and psychological history, and that the history which she has been providing over time since the accident cannot be relied upon. It is evident that Ms. Bruff-McArthur has serious credibility issues regarding her accident related claims.

In the penultimate paragraph of his report, he states: "lack of reliability, credibility and validity are factors in this case."

[46] Next, the whole tone of the report was a reliable predictor of Dr. Bail's testimony. He goes out of his way to make points that are meant to damage Ms. Bruff-McArthur's case. For example, he opines on the views of several physicians who examined Ms. Bruff-McArthur, concluding that she misled them. Dr. Bail speculates that one of her therapists may have been improperly holding herself out as a qualified psychologist. He criticizes a psychiatrist who treated Ms. Bruff-McArthur, Dr. Arora, because they discussed "personal family things, such as her daughters' potty training and her son's school problems" when "psychotherapy was requested and paid solely in relation to treating accident related claims." Dr. Bail notes that Ms. Bruff-McArthur and Dr. Arora discussed the notions of karma and reincarnation. He chastises Dr. Arora for introducing personal religious beliefs in a therapy session. I note that there is no evidence that these topics reflect Dr. Arora's personal beliefs.

[47] I could go on with further examples, but the point is that in his report Dr. Bail goes beyond a mere lack of independence and appears to have adopted the role of advocate for the defence. Given the paucity of psychiatric analysis in the report versus the high degree of potential prejudice in wrongly swaying the jury, a cost-benefit analysis would have invariably lead to the conclusion that Dr. Bail should have been excluded from testifying.

[48] To be fair to the trial judge, he attempted to ameliorate these concerns by specifically instructing the witness not to testify regarding certain issues, such as his criticism of other doctors. However, as the trial judge essentially acknowledged in his Threshold Motion ruling, had he undertaken the cost-benefit analysis he would not have permitted Dr. Bail to testify.

MEDICAL EXAMINATION

Obviously a court-ordered medical examination is a very intrusive investigatory obligation. Usually the medical examination if of the plaintiff in tort actions on the question of damages; sometimes the examination may relate to cause of injuries or even the need for a litigation guardian if a party lacks mental capacity. In most cases the arrangements are made on consent. Where a subsequent examination is sought, often there is a dispute requiring the party seeking discovery to bring a motion.

Courts of Justice Act

105.(2) Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners.

(3) Where the question of a party's physical or mental condition is first raised by another party, an order under this section shall not be made unless the allegation is relevant to a material issue in the proceeding and there is good reason to believe that there is substance to the allegation.

(4) The court may, on motion, order further physical or mental examinations.

(5) Where an order is made under this section, the party examined shall answer the questions of the examining health practitioner relevant to the examination and the answers given are admissible in evidence.

Rule 33

33.01 A motion by an adverse party for an order under section 105 of the Courts of Justice Act for the physical or mental examination of a party whose physical or mental condition is in question in a proceeding shall be made on notice to every other party.

33.02 (1) An order under section 105 of the Courts of Justice Act may specify the time, place and purpose of the examination and shall name the health practitioner or practitioners by whom it is to be conducted.
...

33.04 (2) The party to be examined shall, unless the court orders otherwise, provide to the party obtaining the order, at least seven days before the examination, a copy of,

(a) any report made by a health practitioner who has treated or examined the party to be examined in respect of the mental or physical condition in question, other than a practitioner whose report was made in preparation for contemplated or pending litigation and for no other purpose, and whom the party to be examined undertakes not to call as a witness at the hearing; and

(b) any hospital record or other medical document relating to the mental or physical condition in question that is in the possession, control or power of the party other than a document made in preparation for contemplated or pending litigation and for no other purpose, and in respect of which the party to be examined undertakes not to call evidence at the hearing.

...

33.06 (1) After conducting an examination, the examining health practitioner shall prepare a written report setting out his or her observations, the results of any tests made and his or her conclusions, diagnosis and prognosis and shall forthwith provide the report to the party who obtained the order.

...

Lovegrove v Rosenthal
[1997] O.J. No. 5408 (Ont. Gen. Div.)

The plaintiff sued for damages arising from a car accident. The nature of the harm was, inter alia, to her gastrointestinal system. The defendants sought an extremely intrusive independent medical examination of the plaintiff (seemingly to put pressure on the plaintiff to settle):

(1) **Documentation of the frequency and volume of diarrhea under controlled conditions.** The confounding effects of prescribed drugs, non prescribed substances such as laxatives, food and drink which may induce or worsen diarrhea in this patient need to be eliminated by observation and laboratory testing. It is also important **to observe the stool output while the patient is fasted for 24 hours**, which can provide causes to the cause of the diarrhea. **These observations must be done with the patient's consent in an in-hospital, supervised setting.**

(2) **Tests to determine the cause of the diarrhea. As described above, biochemical testing of stool to rule out laxative use is mandatory. The patient would also require a SeCHAT test, which involves the ingestion of a radiolabelled bile salt analog, and measurement of its retention by the body three days afterwards.** A normal study would rule out significant bile malabsorption as a cause of the diarrhea. If preliminary tests on the stool shows evidence of stool fact, a 72 hour quantitative stool collection for fat content with a test meal would be done to rule out fat malabsorption. These would also be done in a supervised setting, over 3-5 days. A possible structural lesion such as a small bowel stricture would mandate a barium X ray (small bowel follow through) for detection. The patient would also require a colonoscopy to rule out mucosal disease (structuring or inflammation). These are best done as an outpatient, as the requisite bowel preparation would interfere with the other inpatient studies described above.

(3) **An assessment of the anorectal region for incontinence with a manometry study. If abnormal, further studies could be done to rule out structural damage to the anal sphincter.** This could be done as an outpatient or inpatient without disrupting the testing described above.

Kennedy J.:

25 The uses for which the purported IME in Hamilton postulated by the defendants in this case in my view are suspect.

26 I have some difficulty accepting the position that the defendants would like to assist the plaintiff in providing her with the benefit of definitive investigation.

27 The tests themselves are duplicitous in nature. A colonoscopy has already been performed and the results are available to the defendants.

28 Dr. Bovell's conclusion is that he suggested investigations which include the anorectal motility study are not vital to making the diagnosis.

29 The problem that the plaintiff is having with respect to bile re-absorption relates to the loss of the last two feet of the ileum which was removed with surgery following the accident. There is no doubt that the plaintiff is having a problem with re-absorption. The SECHAT test involves the ingestior of a radioactive material to which the

plaintiff protests. The results of the tests can only establish the obvious. There is no good reason to expose the plaintiff to this procedure. The test is inappropriate in the circumstances. This case is distinguishable on the facts from the ruling in Carroll v. Wagg (1996), 6 C.P.C. (4th) 351 (Ont. Master), released August 16, 1996.

30 The court should not permit invasive tests to confirm what is obvious as part of an IME.

31 The hospital confinement would appear to be a form of forced confinement also in the guise of cross-examination. I cannot understand why the defence medical experts would not be satisfied with the plaintiff's report on the frequency of her bowel movement along with the reports to others offered in the extensive medical brief and future care reports which have been served by the plaintiff on the defendants. In my view the concerns of the plaintiff offered in opposition to the defendants' proposal are real and genuine. The proposed tests are indeed humiliating, painful and embarrassing. Travel and confinement associated with such an endeavour is tremendously inconvenient, unnecessary and unlikely to reveal any relevant information to the defence which is not already available.