May Co-Plaintiffs Attend Each Others' Discoveries?

A Commentary on *Keasley v. Labelle*
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The recent decision of R. Smith, J. in *Keasley v. Labelle* highlights the seldom raised issue of whether co-plaintiffs may attend each others' discoveries.

Keasley was a personal injury case in which the plaintiffs were an 89 year old grandmother, her daughter and granddaughter. The plaintiffs wished to be present at each others' discoveries to give each other emotional support. The defence objected on the grounds that there were credibility issues and the plaintiffs should be examined separately.

R. Smith, J. reviewed the law and noted that, while there was a line of cases which followed a British Columbia Court of Appeal decision which would have likely allowed exclusion under these circumstances, the Ontario case law was to the contrary.

At paragraphs [9] and [10] of his judgement, R. Smith, J. stated:

> [9] In *Lesniowski v. H.B. Group Insurance Management Ltd.* (2003), 57 C.P.C. (6th) 374 (Ont. Sup. Ct.), R.S. Echlin J. set out the following criteria which could lead to an exclusion order from co-parties discovery:
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> - where evidence as likely to be tailored: *Parro v. Mullock* (1982), 35 O.R. (2d) 168 (H.C.);
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> - where evidence is likely to be parroted: *Blomme v. Eastview Racquet & Fitness Club* (1995), 26 O.R. (3d) 496 (Ont. Ct. (Gen. Div.));
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> - where a party is likely to be intimated: *Changoo v. Changoo* (1999), 45 R.F.L. (4th) 194 (Ont. Ct. (Gen. Div.));
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> - where the proceedings are likely to be distributed or disrupted: *Caputo et al. v. Imperial Tobacco Ltd. et al.* (1999), 44 O.R. (3d) 554 (Sup. Ct.);
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> - where the ends of justice require exclusion: *ICC International Computer Consulting and Leasing Ltd. v. ICC Internationale Computer and Consulting GinlH* (1988), 66 O.R. (2d) 187 (H.C.).
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> [10] At para. 20 of *Lesniowski*, supra, R.S. Echlin J. continued as follows:
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> The nature of one party's potential evidence or relationship to another

> party, by itself, is not enough to constitute cause to order exclusion. There must be more than just a possibility of cause:...

R. Smith, J. dismissed the defence motion to exclude the co-plaintiffs from each others' discoveries and stated in summary at para. [18]:

> [18] I agree with the reasons of both Master Roger in *Besner*, supra, and Master MacLeod in *Faraz-Uddin Mirza et al v. Omar Ali Ghadbane* et al., March 22, 2012 unreported which followed the Ontario Court of Appeal decision in *Liu Estate, supra*. Master MacLeod stated as follows:
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> > In summary a party may only be excluded from participation in a particular phase of the litigation if there is evidence to demonstrate a real risk of tailoring or intimidation or other conduct that might lead to unfairness to the other party and that such removal will not prejudice the party against whom the order is made.

This reason applies, not only to cases of co-plaintiffs attending each others' discoveries, but to any party attending another party's discovery.

This is an issue which I have run across only a few times in my 30 odd years of practice. While it is more common in complex commercial litigation for parties to attend each others' discoveries (presumably in order to instruct and assist counsel during the discoveries), it is exceedingly rare in insurance litigation. Perhaps the reason is that counsel are concerned that by having their clients sit in on other parties' discoveries, they would be providing ammunition to opposing counsel to cross-examine at trial and suggest that the party's evidence is not independent.