

CANADA / JUDGMENT

Muller v. Workman

2001 BCSC 1747

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CONNIE MULLER

PLAINTIFF

AND:

RUSSELL WORKMAN, DECEASED, AND DOUGLAS WORKMAN

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE DOWNS

Counsel for the plaintiff: J.A. Vanstone

Counsel for the defendants: K. Bhandar

Date and Place of Hearing: November 5, 2001

Nanaimo, BC

- [1] The plaintiff appeals a decision of a master of this court pronounced August 23, 2001. The plaintiff commenced this action claiming damages for injuries which she sustained in a motor vehicle accident on May 14, 1998. The defendants had applied for an order that the police produce to them directly "any and all records" contained in the police file, which was opened with respect to the collision in which the plaintiff was involved.

- [2] The learned Master made the order sought with certain exceptions requested by the Royal Canadian Mounted Police by way of a letter.
- [3] The learned master also excluded from the production requirement a written report that was prepared in accordance with section 67(8) of the Motor Vehicle Act R.S.B.C. 1996 c. 318 as amended (the Act).
- [4] The plaintiff took the position that she would consent to a "Halliday" form of order. That is to say, she said this was a proper case in which to follow the procedure set out in Halliday and McCullough (1986), B.C.J. No. 223, a decision of the British Columbia Court of Appeal. That form of order would allow the plaintiff to review the police file in order to "extract any privileged materials" prior to forwarding the balance of the police file to the solicitor for the defendants.
- [5] The plaintiff submits that this appeal relates to an issue of pure law. Learned counsel for the plaintiff frames the issue as follows:

Does the Motor vehicle Act . . . create privilege over only the specific written report submitted pursuant to subsection 8 [of s.67] or does it extend to every report made pursuant to subsection 1 [of s. 67] by the person driving or in charge of the vehicle?

- [6] I agree that this appeal does relate to an issue of pure law and that, therefore, on appeal this issue may be argued and decided on the merits: Kuntz v. British Columbia (Workers' Compensation Board, [2001] B.C.J. No. 162.

- [7] Section 67 of the Motor Vehicle Act provides:

67(1) If a vehicle driven or operated on a highway, either directly or indirectly causes death or injury to a person or damage to property causing aggregate damage apparently exceeding the amount set out in subsection (2), the person driving or in charge of the vehicle must

- (a) report the accident to a police officer or to a person designated by the Insurance Corporation of British Columbia to receive those reports, and
 - (b) furnish the information respecting the accident required by the police officer or designated person.
- (2) The amount referred to in subsection (1) is
- (a) \$1,000, in the case of a vehicle other than a motorcycle, and
 - (b) \$600, in the case of a motorcycle.
- (3) If the accident occurred in a city or city municipality, the report must be made to a police officer of the city or city municipality, or to the designated person, as soon as possible and in every case within 24 hours after the accident.

- (4) If the accident occurred in a municipality other than a city or city municipality, the report must be made to a police officer of the municipality, or to the designated person, as soon as possible and in every case within 24 hours after the accident.
- (5) If the accident occurred elsewhere than in a city, city municipality or municipality, the report must be made to the officer or constable of the Royal Canadian Mounted Police stationed nearest to the place where the accident occurred within 48 hours after the accident.
- (6) If a person required to make a report under subsection (1) is incapable of making the report, and there was another occupant of the vehicle at the time of the accident capable of making the report, that occupant must make the report.
- (7) If a person required to make a report under subsection (1) is incapable of making the report, and there was no other occupant capable of making the report, the investigating officer must make the report.
- (8) The person receiving a report under this section must secure from the person making it, or by other inquiries if necessary, the particulars of the accident, the persons involved, the extent of the personal injury or property damage and other information necessary to complete a written report of the accident, and must forward the written report to the Insurance Corporation of British Columbia within 10 days after being advised of the accident.
- (9) The written report referred to in subsection (8) must be in a form established by the Insurance Corporation of British Columbia.
- (10) Every report made under this section is without prejudice and for the information of the Insurance Corporation of British Columbia and the municipal or Royal Canadian Mounted Police, and must not be open to public inspection, except that a person involved in an accident, or that person's authorized representative, is entitled to obtain on request the names of any drivers involved, the licence number, the name of the registered owner of any motor vehicle involved and the name of any witness.
- (11) The fact a report has been made under this section is admissible in evidence solely to prove compliance with this section, and the report is admissible in evidence on the prosecution of any person for the offence of making a false statement in that report, but neither the report nor any statement contained in it is admissible in evidence for any other purpose in a trial or proceeding arising out of the accident referred to in the report.
- (12) Despite subsections (10) and (11), a peace officer may, if giving evidence in a proceeding, refer to a report prepared by him or her under this section to refresh his or her memory.

[Emphasis added]

- [8] The defendants objected that the plaintiff did not argue "statutory privilege" before the learned Master. I do not agree. Although the words "litigation privilege" were used before the Master, clearly the issue argued before and decided by him was the question of what material is protected from public inspection by virtue of s.67(10).
- [9] I am in complete agreement with the summary of principles set out by the Honourable Judge Wong (as he then was) at p. 81 in paragraphs numbered 1,2, and 3 in *R. v. Gujral* (1981), 31 B.C.L.R. 78, which reviewed the authorities under the section which is now s. 67 of the Act. As he noted, "the privilege created . . . embraces both written and oral reports or statements made in pursuance of the duty created by the section." Read in its entirety the decision of Legg, J. (as he then was) in *Nevills v. Greer*, [1985] B.C.J. No. 2745 upholds Judge Wong's decision.
- [10] The plain meaning of s.67(10) is that every report made in compliance with s.67, whether it is the written report referred to in s.67(8) or an oral or written statement made to or given to a police officer or a person designated by I.C.B.C. is without prejudice and not to be open to public inspection. When a litigant provides evidence that he or she made a s.67 report because he or she knew, believed or was told there was a requirement to do so then, upon an application such as was before the learned Master in this case, a "Halliday order" should be made.
- [11] However, in this case, learned counsel for the defendants correctly pointed out that there was no evidence from the plaintiff at all. Learned counsel for the plaintiff submitted that it should be presumed that the plaintiff made a s.67 report because it was her statutory duty to do so. In support of his argument he submitted that the decision of Master Horn in *Hope v. Brown* [1990] B.C.J. No. 2586 was of application. In that case the defendant sought production of the medical records of a plaintiff who was injured in a motor vehicle accident. The plaintiff had a pre-existing medical condition and the learned Master found it reasonable to suggest that his doctors may be in possession of documents relating to his state of health before the collision "and to the bearing which that state of health might have on his injuries" At pages 3 and 4 Master Horn made these very helpful comments.

No material was filed by the plaintiffs to establish that there were or might be documents to which privilege attached amongst the materials sought by the defendants. Counsel for the defendants asserts that it is for the plaintiffs to establish that possibility as a fact before a order will be made. Counsel for the plaintiffs asserts that she ought to be granted a Halliday order upon bare application for it and without the necessity of filing materials in support. In effect, she says that a order is the usual order in these cases and should always be granted if asked for.

The particular issue in Halliday was how to safeguard the interest of a patient - litigant in preserving the privilege attached to documents which might otherwise be discovered under the order. There is, however, more to the argument in this case that the question of how best to preserve privilege. What the plaintiffs' solicitor wants is the chance to see the materials first and to determine not only what is privileged but what is material. She wants the chance to cull the

documents before they are delivered to the defendants and a Halliday order would give her that right.

The very breadth of the order sought in this case raises the possibility that there may be among the documents sought some which disclose private matters about the patient's health which have no bearing on the issues in this action.

Upon whom then does the onus lie, and how can it be discharged, to show that a Halliday order is appropriate or inappropriate?

Upon the Chambers application in Halliday, a claim of litigation privilege was made with respect to some of the hospital records sought, but upon what material is not stated in the reports. The Court of Appeal held (at 1 B.C.L.R. (2d) p. 198) that the type of order formulated in that case should be made where, on the application, the patient-litigant whose records are sought asserts a claim of litigation privilege. But the court did not deal with the mechanics of making such assertion. Nor did it deal with the question of onus where the patient-litigant asserts that some of the documents may be irrelevant.

The previous decision of the Court of Appeal in Dufault v. Stevens (1978) 6 B.C.L.R. 199; 86 D.L.R. (3d) 671 had, apparently, disposed of the question of onus. The court there held that if the party seeking the order satisfies the court that the document, or information in the document, may relate to a matter in issue, then the order should be made unless there are compelling reasons against doing so. That would put the onus on the applicant, but an onus which clearly, would not be difficult to discharge. If an applicant has shown that the documents sought may be relevant it would certainly not be sufficient for the respondent in reply to show that the might not be. To meet the case the respondent would, presumably, have to show that the documents could not be relevant.

But, in fact, Dufault v. Stevens was primarily concerned with the question whether the court, having made an order for discovery of a non-party in favour of the applicant, should at the same time make a similar order in favour of the defendant. The court was not asked to consider the mechanics of production or the question of onus where privilege was raised or where relevancy was raised.

In Halliday the issue before the Court of Appeal was privilege and not relevancy. But in designing the mechanics for production the court ensured that the patient litigant retained control of the process so that questions both of privilege and of relevancy could be raised after the documents were produced to the patient-litigant. I do not believe that the control thus given to the patient-litigant over what should be disclosed was an incidental and accidental byproduct of an order designed to safeguard his litigation privilege. I believe that control was of the essence of the order. The machinery was devised so that both issues could, if necessary, be brought before a court in an orderly fashion, as close as possible to the methods established for trying the same two issues where production of documents between parties was sought. The order devised in Halliday recognizes that a respondent may not always be in a position to assert, as a fact, that there may be privileged documents or irrelevant documents amongst those sought by the

applicant. It recognizes that by channelling all such documents through the patient-litigant such contentions can be more appropriately advanced at a later stage. Once in possession of the documents the litigant's conscience will be engaged, just as if the documents were his own.

In a case like the present, one would think, that the patient-litigant or her solicitor would have some idea whether there might be privileged documents amongst those sought. But that may not be so. A solicitor who has obtained a medical legal report for his own purposes does not always know whether a copy has found its way into hospital files or into the files of another physician from whom discovery is sought.

A Halliday order protects all three interests which are at stake here, namely, discovery, privacy, and privilege. A Jones v. Nelson order only protects the first interest. It should not take much to persuade a court that all three interests should be protected. If there is an onus on the patient-litigant, then it cannot be a heavy one.

I conclude that a Halliday order is not one to which a patient-litigant is entitled as of right, but that it is an order which should be granted in preference to a Jones v. Nelson order whenever it is apparent that some right of privacy might be invaded by the order, and whenever it is apparent that a privileged document might be included in the material sought, and whenever it is apparent that irrelevant documents might be included in the materials sought.

In this case I conclude that the respondent has a privacy interest to protect; that the materials sought might contain privileged documents and that some of the materials sought might be irrelevant.

[12] The Supreme Court of Canada considered the provisions of what is now s.67 with respect to a person charged with a criminal offence and that persons right to be protected against self incrimination under the Charter of Rights and Freedoms in R. v. White, [1999] S.C.J. No. 28. Iacobucci, J. speaking for the majority of the court said at paragraphs 75 and 76:

I would like to elaborate briefly on the legal definition of a compelled statement under s.61. In my view, the test for compulsion under s.61(1) of the Motor Vehicle Act is whether, at the time that the accident was reported by the driver, the driver gave the report on the basis of an honest and reasonably held belief that he or she was required by law to report the accident to the person to whom the report was given.

The requirement that the accident report be given on the basis of subjective belief exists because compulsion, by definition, implies an absence of consent. If a declarant gives an accident report freely, without believing or being influenced by the fact that he or she is required by law to do so, then it cannot be said that the statute is the cause of the declarant's statements. The declarant would then be speaking to the police on the basis of motivating factors other than s.61 of the Motor Vehicle Act.

[13] I am of the view that similar considerations to those expressed in White apply in the civil context and that there must be some evidence, rather than a mere presumption, that a report was made pursuant to s. 67 and not otherwise. Therefore, the appeal is dismissed.

"K.K. Downs, J."

The Honourable Madam Justice K.K. Downs

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