Gordon v. Waite et al, 2002 YKSC 21

Date: 20020327
Docket: S.C. No. 00-A0246
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

KARLENE GORDON

PLAINTIFF

AND:

CAMERON ANDREW WAITE
G-P DISTRIBUTING INC. and
DAVID GORDON

DEFENDANTS

**REASONS FOR JUDGMENT OF
MR. JUSTICE HUDSON**

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[1] The plaintiff herein has made application under Rule 26(11).

[2] Specifically, the following is sought:

1. Within 5 days of receipt of a copy of the order sought, the Admin. N.C.O., R.C.M.P. Whitehorse Detachment (and whoever shall be acting in that capacity) is authorized to do as follows:

   (a) Find (and retrieve from archival storage, if so stored) any document, file, paper-writing, or photograph in his or her power, custody, or control relating to a motor vehicle accident that occurred on or about February 19th, 2000 at the intersection of the Alaska Highway and Two Mile Hill, Whitehorse, Yukon concerning the above-named Defendants and in particular Whitehorse Detachment File 00-808;

…

Other consequential orders are also sought.

[3] The action deals with a motor vehicle accident and personal injuries resulting therefrom. The plaintiff was a passenger in a vehicle driven by her husband, David Gordon, whose car collided with a vehicle driven by Mr. Waite. David Gordon has been lately joined as a defendant in this matter. I am informed that he is taking no position in opposition to this application.

[4] Counsel for the defendant Cameron Andrew Waite opposes the application, pleading that provisions of s. 94.(1) of the *Motor Vehicles Act*, R.S.Y. 1986, c. 118, prevent this order being made by reason of statutory privilege or statutory bar.

[5] Rule 26(11) reads as follows:

> Where a document is in the possession or control of a person who is not a party, the court, on notice to the person and all other parties, may order production and inspection of the document or preparation of a certified copy that may be used instead of the original. …

[6] The R.C.M.P. have been served and appeared by counsel at the hearing, who informed the court that the R.C.M.P. were taking no position except to assert that they would argue against any order for costs against them.

[7] Plaintiff's counsel indicated that no costs would be sought against the R.C.M.P.

[8] The respondents have raised the matter of s. 94(1) of the *Motor Vehicles Act* in opposition to the application, claiming that the order can go as requested but that there should be excepted from the order any statements made by the defendant Waite that were made pursuant to s. 91(1) of the *Act*, as amended. They assert in argument that statements made by Waite to the R.C.M.P. were made under the *Act* or pursuant to part

of the *Act* in question, although there is no specific evidence to that effect. There was also a statement made by one Mr. Doll, an officer of the defendant corporation.

[9] Section 91.(1) of the *Act*, as amended, reads:

> **Written report of accident**
>
> 91.(1) Subject to subsection (2), where an accident results in injury or death to a person or in property damage to an apparent extent of $1,000 or more, the driver shall forthwith make a written report in the prescribed form and containing such information as may be required thereby to a peace officer having jurisdiction where the accident occurred.

[10] Section 92 of the *Act* reads as follows:

> **Accident report by peace officer**
>
> 92. A peace officer who has witnessed or investigated an accident shall forthwith forward to the registrar a written report in the prescribed form setting forth full particulars of the accident including the names and addresses of the persons involved and the extent of the personal injuries or property damage.

[11] Section 94.(1) of the *Act* reads:

> **Inspection of accident report**
>
> 94.(1) Subject to subsection (2), a written report or statement made or furnished under this Part
>
> (a) is not open to public inspection, and
>
> (b) is not admissible in evidence for any purpose in a trial arising out of the accident except to prove
>
> (i) compliance with section 91, 92 or 93 of this Act,
>
> (ii) falsity in a prosecution for making a false statement in the report or statement, or

> (iii) the identity of the persons who were driving the vehicles involved in the accident.

[12] I am informed that there is no prescribed form in existence as described in s. 91.(1). There is therefore no evidence of the required information in a report under s. 91.(1).

[13] The plaintiff cites the case of *Dufault v. Stevens et al* (1978), 86 D.L.R. (3d) 671 (B.C.C.A.) (QL) for the proposition in determining pursuant to Rule 26(11) what can be ordered to be produced. The test is relevance, not admissibility.

> The comments of Brett, L.J., in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 at p. 63, as to what constitutes a document relating to a matter in question, have been quoted by this Court on several occasions:
>
> > It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words “either directly or indirectly,” because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences …
>
> It follows from this that an applicant need not show that a document is admissible in evidence at the trial as the condition of his obtaining an order under this Rule. If a party seeking the order is able to satisfy the Judge that the document, or information in a document, may relate to a matter in issue, the Judge should make the order unless there are compelling reasons why he should not make it, e.g., the document is privileged or – “grounds exist for refusing the application in the interest of persons, not parties

> to the action, who might be embarrassed or affected adversely by an order for production"…

[14] There is no claim here that the third party will become embarrassed or suffer an invasion of privacy upon the order being made. The response simply is that s. 94 of the *Motor Vehicles Act*, *supra*, bars the order being made with respect to statements made to police officers.

[15] In the case of *Amador v. Mo*, [2000] B.C.J. No. 2256 (S.C.) (QL), Hood J. rendered judgment from the bench on an application for production. This matter was before him on appeal from a Master who had made a production order which would require the documents to be placed firstly in the hands of the other party's counsel who would extract therefrom matters of embarrassment or a breach of privacy before being disclosed to the applicants. Justice Hood stated at para. 10:

> It is of the utmost importance in our adversarial system that the defendant be provided with all relevant documents which may advance his case and impinge on the defendant's case. Here there was, in my view, no evidence before the Master which would justify restricting this right in favour of some privacy or embarrassment notion which the plaintiff feels should be protected at the expense of those he has brought into court. …

Hood J. then went on to overrule the Master and ordered that the documents be produced directly to the defendant's solicitors.

[16] The applicant cites the case of *A.M. v. Ryan*, [1997] 1 S.C.R. 157. This is a case in which medical records were sought. The question of what gives rise to a privilege is therein discussed. Because it appears that the respondent is claiming privilege in general terms, the applicant cites this case for the passage in which it refers to the

applicable principles set out forth in *Wigmore on Evidence*, Vol. 8 (McNaughton rev. 1961), sec. 2285 as follows:

> First, the communication must originate in a confidence.

The communication here being communication passing from the defendant Waite to the R.C.M.P. officer.

> Second, the confidence must be essential to the relationship in which the communication arises.

The theory there being that if the person speaking to the police officer would require that what he said would not be repeated in court at a trial, then there is a relationship to which the confidentiality is essential.

> Third, the relationship must be one which should be "sedulously fostered" in the public good.

I take this to mean that in order that such statements will be freely made by the driving public in circumstances covered by the section, the disinclination to do so, motivated by the negative prospect of self-incrimination should be mitigated.

> Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.

This condition or pre-requisite or "applicable principle" is self-evident and refers to the balancing of the interests of the individual in avoiding self-incrimination or other negatives as opposed to the public interest in resolving disputes in a fair and just manner.

[17] It is the applicant's position that the *Wigmore* principles, as outlined above, are applicable here and that further, there has not been shown to be any satisfaction of these tests or any one of them. The applicant has filed an affidavit in which transcripts of discoveries of the defendant Waite and a person by the name of Mr. Doll had discussions with police officers at the scene of the accident. There has been no evidence brought forward that any conversations held in this manner or, indeed, any documents signed by either Mr. Waite or Mr. Doll were made pursuant to s. 91 of the *Motor Vehicles Act,* and are thereby caught by s. 94 of the *Act*.

[18] The case of *Nevills v. Greer*, [1985] B.C.J. No. 2745 (S.C.) (QL) is a judgment under Rule 26(11) of the Rules of Court (the same Rule as in the case at bar). In this case, Legg J. stated:

> The plaintiff seeks an order under R. 26(11) of the Rules of Court for the production of all statements, diagrams, plans, notes and memoranda in the possession or control of the service pertaining to a motor vehicle accident in which the plaintiff was injured. In particular the plaintiff seeks reports of witnesses obtained by the police.

[19] There are substantial differences in the wording of the sections on the British Columbia *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, but the relationship to Rule 26(11) makes the case relevant. Legg J. cites *R. v. Gujral* (1981), 31 B.C.L.R. 78, a judgment of Wong Prov. Ct. J. (as he then was). Referring to the case he stated:

> In that case Wong Prov. J. (as he then was) reviewed a number of authorities which had considered some of the sections found in motor vehicle or highway traffic statutes in Ontario, Saskatchewan and Alberta. He considered that subss. (6) and (7) were aimed at silencing the apprehension of persons from whom such information was obtained and that a privilege created by those subsections embraced both written and oral reports and statements made pursuant to

> the duty created by the section. He limited the privilege to statements made in order to comply with the sections however. He held that the section did not limit the duty of police officers to interrogate persons involved in an accident or make inadmissible a voluntary statement made to a police officer not made pursuant to the duty created by the section.
>
> I respectfully agree with that interpretation and apply it in the case at Bar. The privilege afforded by the section is limited to the statement made by the "person driving or in charge of the vehicle" involved in the accident reporting the incident to a police officer. Subsection (4) requires the police officer or other person receiving the report of the incident to secure from the person making the report particulars of the incident, the persons involved, the extent of the personal injury or property damage and other information necessary to complete a written report of the incident. The person receiving the report is required to forward a written report of the incident to the Superintendent.
>
> Subsections (6) and (7) afford privilege only to that report. The subsections do not state that information documents or notes made or obtained by police officers which are not included in or part of the report are privileged.

[20] In *Nevills v. Greer, supra*, it was the submission of the third party in possession of the documents that "the section prohibited statements of witnesses and other information being given although such statements and other information were not included in the report" the learned trial judge was unable to agree with the interpretation. In the result, the application for reports of witnesses obtained by the police, which were not shown to be made pursuant to the relevant section, should be produced. The plaintiff's application was allowed.

[21] This case and the *Gujral*, *supra*, case were followed by Master Doolan in *Bourassa v. Bhandal,* [2001] B.C.J. No. 2678 (S.C.) (QL) in finding that one statement must be produced, which was given to police at the time the defendant was seated in the police car, but that a statement given to the police later, having been proven to have

been made pursuant to s. 67 of the *Act*, and is without prejudice under s. 67(10) of the *Act* is not producible.

[22] The Supreme Court of Canada has dealt with the issue of compulsion, which would render a statement subject to exclusion pursuant to s. 24 of the *Charter of Rights and Freedoms* as a breach of s. 7. The court found, however, for this to happen there must be an honest belief, subjectively held, that the person speaking is compelled to speak. The judgment of *R. v. White,* [1999] 2 S.C.R. 417 (QL) states that::

> 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 statement. The declarant would then be speaking to police on the basis of motivating factors other than s. 61 of the *Motor Vehicle Act.*

The court indicates that the belief of compulsion is subjective but it must also be shown that the declarant's belief is reasonably held on an objective basis.

[23] In the *White, supra*, case there was reference to the *Charter of Rights and Freedoms* because it was held there that the provincial statute could not affect evidence to be given in a criminal matter and that, therefore, the statutory bar on the giving of this evidence at a trial was ineffective. However, the accused driver claimed privilege upon satisfying the burden of establishing compulsion.

[24] The case of *White*, *supra*, was referred to in the case of *Muller v. Workman*, [2001] B.C.J. No. 2744 (S.C.) (QL). This was an appeal from a decision of a Master in which the defendants had applied for any and all records contained in the police file opened with respect to the collision in which the plaintiff was involved.

[25] The learned judge in that case described the appeal as follows:

> 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?

[26] In this case, we could relate subsection 8 of s. 67 of the British Columbia *Act* to s. 92 of the Yukon *Act*, and subsection 1 of s. 67 of the British Columbia *Act* to s. 91(1) of the Yukon *Act*.

[27] The Master had made the order calling for production as requested.

[28] *Muller v. Workman*, *supra,* found that if a party resists an application under Rule 26(11) that the burden is on the party objecting to show why such an order would not be made, citing *Dufault v. Stevens*, *supra*. As in the *Nevills*, *supra*, case, there was no evidence from the plaintiff at all with respect to the basis for the statement made and whether there were any privileged documents in question.

[29] In holding that the order should be made and that the plaintiff had not made out a reason why the order should not be made, Downs J. stated in *Muller v. Workman*, *supra*:

> 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.

> 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.

[30] The respondent has cited several cases. The first is *Klassen v. Dachyshyn*, [1998] A.J. No. 159 (Q.B.) (QL). This case can be distinguished in that it is a case where evidence of the purpose of giving the statement was before the court.

> The statement by Dachyshyn to the police was taken by Constable Greg Murray of the Edmonton City Police, who swore an Affidavit on October 16th, 1997, that he took a statement from Dachyshyn on April 10th, 1991, pursuant to the driver's duty under s. 77 of the *Motor Vehicle Administration Act ….*
>
> …
>
> That Affidavit establishes that the statement was made pursuant to the requirements of the M.V.A.A. and thus takes on the statutory privilege provided in s. 81 of the M.V.A.A.

> Thus, Dachyshyn has satisfied the onus on him that the statement was made on a privileged occasion for the purpose of providing the required s. 77 statement under the M.V.A.A.

In this respect, the case is clearly distinguishable from the case at bar.

[31] In the case of *Lowe v. Larue*, [1996] A.J. No. 1102 (Q.B.) (QL) there was affidavit evidence from which the judge could find compulsion or that the statement or report was made pursuant to a statutory requirement.

[32] The case of *Cullen Estate v. Demers,* [1977] A.J. No. 431 (S.C.) (QL) is to be distinguished in that it deals with an application made at trial. In that case, the learned trial judge said:

> One must start with the proposition that the Appellant had the onus of showing that he comes within that privilege. Under Section 83:
>
> > … the driver shall forthwith make a written report in the form prescribed by the Minister and containing such information as may be required thereby to a peace officer. …
>
> The form prescribed is not in evidence, and we have no information as to what it was that was required, and this of itself would make it impossible to say that what was said by the Appellant to any peace officer was required information.

[33] Further, McGillivray C.J.A. stated:

> My view, as I have expressed it earlier in these Reasons, is that it is only the report which the witness knows he is to complete by reason of statutory compulsion which is privileged. The intention was not to render nugatory the result of investigations made by police officers. The report is for statutory statistical purposes, and when one signs such a report on a prescribed form, or gives officers information for the purposes of the form, there is a privilege; but to say in answer to a question such as:

> How did it happen?
>
> that the motorist is presumed to know that he is then being required to make his statement for statistical purposes seems to me to be artificial and unrealistic.

[34] It is one of the submissions of the respondent herein that notwithstanding the lack of a prescribed form and notwithstanding that the prohibition only applies to the use at a trial, a presumption based on the perceived purpose of the legislation mandates that the communications are not properly the subject of an order for production. I am, however, inclined to agree with the Chief Justice in this regard.

[35] The respondent cited the case of *Canada (Attorney General) v. Johnson (Guardian ad litem of),* [1998] B.C.J. No. 760 (C.A.) (QL). This case goes on a totally different concept, that of dominant purpose to prepare for litigation in order to attract privilege. In my view, this case is unrelated to the case at bar.

[36] An examination of these authorities cited by the applicant impels me to the conclusion that a person claiming the benefit of a section such as s. 94, has the burden of establishing that his utterances or statements come within the section. I hold that the respondent herein has failed to do so. I say this for several reasons, namely:

1. There is no prescribed form, which is called for under s. 91(1), which is necessary to know what information “may be required thereby”. Therefore, the utterances or statements cannot be said to have been made or furnished “under this Part.”

2. There is no evidence that Waite or Doll made the statements in order to meet a statutory obligation or any form of compulsion.

3. The application here is not to admit into evidence for any purpose at a trial, but rather an order for production for the purpose of inspection. The respondent cites the case of *Robinson v. MacWilliams*, [1997] A.J. No. 171 (Q.B.) (QL). Lefsrud J. says:

> As to the Appellants' position, it first of all occurs to me that they are able to argue that the words "not producible" do not equate to the statutory words " … not admissible in evidence for any purpose in a trial …". However, we are all aware that production of documents and examinations for discovery lead to, and portions thereof often form a substantial part of the evidence produced at trial. As a result it is clear that although under s. 81(3)(c) the Appellants may obtain the information contained in the report, they are precluded from using same at the trial by reason of the fact that s. 81(2)(b) is clearly directive and absolute.

[37] I do not agree that this case supports the respondent. This application is not for evidence to be admitted at a trial or any proceeding in the trial, but rather, is for production and inspection. Whatever use the receiving party may make of it, it will still be open to the respondent at trial to claim protection of s. 94 should it see fit to do so.

[38] I am also inclined to agree with Downs J. in *Muller v. Workman*, *supra*, that the reasoning of the Supreme Court of Canada in *R. v. White, supra*, is applicable. I find on that basis as well that the respondent has not established that any utterances by Waite or Doll were made pursuant to Part 6 of the *Motor Vehicle Act*.

[39] Section 94 would apply also to reports made under s. 92. There is in evidence an affidavit of the plaintiff, which exhibits a copy of a form which I am satisfied was prescribed. It seems to me, however, to be academic as to whether or not this document is protected since it is already in the possession of the defendant. Of course, it is not being sought for the purpose proscribed.

[40] In the result, the plaintiff's application is allowed without exception for witness' statements.

[41] In reaching this conclusion I also note the case of *Bourassa v. Bhandal*, *supra*, to the same effect.

[42] The plaintiff shall have its costs of this motion in any event of the cause against the defendant Waite. There shall be no costs with respect to the R.C.M.P.

_____
Hudson J.

Daniel S. Shier	Counsel for the Plaintiff
James A. Tucker	Counsel for the Defendants, Waite & G-P Distributing Inc.
Wayne Plenert	Counsel for the Defendant, Gordon
Mark Radke	Counsel or the R.C.M.P.