COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Thurston v. Blondeau,***
2004 BCCA 505

Date: 20041004
Docket: CA32134

Between:

Josh Thurston

Appellant
(Plaintiff)

And

Andrew Blondeau

Respondent
(Defendant)

Before: The Honourable Mr. Justice Smith
(In Chambers)

J. Thurston — Appearing on own behalf

J. Gopaulsingh — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
7 & 8 September 2004

Place and Date of Judgment: Vancouver, British Columbia
4 October 2004

Reasons for Judgment of the Honourable Mr. Justice Smith:

[1] This is an application for leave to appeal the dismissal of an appeal from an interlocutory order made by a master pursuant to Rule 26(11) of the Rules of Court in an action for damages for personal injuries allegedly suffered by the appellant, Mr. Thurston, in a motor vehicle collision in March 1999.

[2] In the action, Mr. Thurston claims that he suffered injury to his neck and his back in the collision. As well, he claims damages for loss of income on the basis that his injuries have prevented him from working at his occupation as a carpenter.

[3] Mr. Thurston injured his neck and back in a fall at work in December 1998 and made a claim for Workers' Compensation benefits as a result. He claims that the injuries suffered in the automobile collision aggravated the injuries he sustained earlier at work. In May 2002, a chambers judge ordered that the Workers' Compensation Board deliver to the respondent's solicitors copies of all records in its possession or control relating to the back injury claim. Those records included documents indicating that Mr. Thurston had also suffered a knee injury at work in 1992, and that he took the position with the Workers' Compensation Board as of December 2001 that

the combined effects of his knee injury and his back injury made it impossible for him to continue working. As a result, the respondent applied for an order that the Workers' Compensation Board deliver to his solicitors copies of all records in its possession or control relating to Mr. Thurston's knee injury. Master Tokarek made that order. Mr. Thurston appealed and, on 29 June 2004, Mr. Justice Groberman dismissed his appeal.

[4] In brief reasons, the chambers judge noted that Mr. Thurston objected to the order because it was unduly prejudicial to his privacy. He summarized Mr. Thurston's position this way:

> [3] ...He does not object to documents being disclosed, but suggests that more stringent conditions ought to be placed on the documents, and, in particular, either that he be allowed to see the documents first and vet them for relevance, and perhaps for privilege, or that the orders be more narrowly defined so that his privacy would be subject to greater protection.

[5] The chambers judge noted that the form of order suggested in ***Halliday v. McCulloch*** (1986), 1 B.C.L.R. (2d) 194 (B.C.C.A.) might have been appropriate in the circumstances. However, he said:

> [5] With respect to the vetting, there is some history of concern over whether Mr. Thurston, who

> represents himself, has the ability to understand the legal concept of relevance and to properly vet documents.

[6] As I understand it, Mr. Thurston's position is that the master erred in failing to make a ***Halliday*** type order. Such an order would have directed the Workers' Compensation Board to deliver the documents in question to Mr. Thurston so that he might compile a list of documents in the usual way for delivery to the respondent's solicitors. Second, Mr. Thurston wishes to argue that the order directing delivery of all documents "relating to a knee injury suffered in 1992" is too broad. In particular, he wishes to argue that the order should be restricted to "all medical records and all wage loss payments for periods of disability from December 8, 1998 to present", and that the order should exclude disclosure of "information conveyed to Ministry of Human Resources by or for third parties in confidence on the basis it would not be disclosed", as well as "intimate details of counselling sessions". Third, he wishes to make three ***Charter*** arguments: that the refusal to make a ***Halliday*** type order was based on the fact that he is not a trained lawyer and therefore constitutes discrimination contrary to s. 15 of the ***Charter***; that the order contravenes his right to fundamental justice guaranteed by s. 7 of the ***Charter***; and that the order

constitutes an unreasonable search and seizure contrary to s. 8 of the ***Charter***. Finally, he wishes to argue that the test for relevance in relation to documentary discovery as laid down in the ***Peruvian Guano*** case, (1882), 11 Q.B.D. 55 (C.A.) is too broad and should no longer be followed in British Columbia. I will deal with these four points in reverse order.

[7] In support of his submissions on the ***Charter*** and the breadth of the relevance test in ***Peruvian Guano***, Mr. Thurston handed up a copy of the Intervenor's factum filed in ***Smith (Guardian ad litem of) v. Funk***, 2003 BCCA 449 in which these arguments were fully developed. The Intervenor argued that ***Halliday*** orders should be liberally granted in applications for disclosure of third party records as a means of balancing the need for full disclosure of relevant information with the protection of privacy and equality rights of the litigant. This Court dismissed the appeal in that case as moot, since the documents in question had already been delivered in compliance with the order. However, in doing so, Low J.A., speaking for a unanimous Court, said, after referring to ***Jones v. Nelson*** (1980), 24 B.C.L.R. 109 (C.A.), ***Halliday v. McCulloch*** (1986), 1 B.C.L.R. (2d) 194 (C.A.) and ***Dufault v. Stevens*** (1978), 6 B.C.L.R. 199 (C.A.):

> [4] Nor am I persuaded that there is any need for us to rule on the issues raised in order to settle the law for the guidance of litigants and the judiciary. The law is well settled by the three cases I have cited. The application of the law so settled depends upon the facts and circumstances in each case and the proper exercise of judicial discretion. Therefore, in the absence of this Court undertaking a review of the law in this area of procedure by convening a five-judge panel, which was requested and denied, we are not in a position to change the law, nor are we asked so to do. All we could do is determine whether there was a reviewable error in any of the three cases now before us. That exercise would have no practical purpose in the particular action and would not likely be of assistance in other cases.

[8] Those remarks are apt in the present circumstances in respect of Mr. Thurston's submissions on the ***Charter*** and the breadth of the relevance rule.

[9] Next, although the order made by the master was a broad one, as the chambers judge recognized, Rule 26(11) confers a broad discretion. Mr. Thurston put forward no valid basis for suggesting that records relating to his knee injury created before December 1998, when he suffered his employment-related neck and back injuries, are not relevant and should not be disclosed. In my view, such records, if they exist, would likely fall within the scope of the discovery rule. Further, he has not asserted solicitor-client privilege over any particular documents or class of documents that may be contained in the records in question. During oral submissions

he referred to correspondence by his solicitor on his behalf to the Board and its solicitors in relation to his compensation claims. However, such correspondence with third parties does not attract solicitor-client privilege. Moreover, while there may be documents in the records that Mr. Thurston would wish to keep confidential, he did not identify them, and, in any event, his wish is not a bar to their disclosure if they are relevant. Although the master could have ordered that the records be delivered to Mr. Thurston first so that he could determine whether any such confidential documents are included and, if so, whether he wished to amend his pleadings in such a way as to render them irrelevant, it was within his discretion not to make such an order. Accordingly, the prospect that a division of this Court could be persuaded that the chambers judge erred in refusing to substitute his discretion for that of the master is remote.

[10] Finally, the order granted in the ***Halliday*** case was not laid down as a precedent for all cases concerning discovery of third party documents. As Mr. Justice Lambert said in that decision, speaking for a unanimous Court, at page 200:

> I have put forward a set of mechanics rather than a draft of a form of order. But I make the same observation as Mr. Justice Seaton made in *Jones v. Nelson*. The mechanics are appropriate for this case

> and for like cases. In other cases where they are not appropriate, they should not be used.

[11] Thus the question for the master in this case was whether a ***Halliday****, supra* order was appropriate. One of the relevant factors, as Mr. Justice Groberman pointed out in his reasons, is the fact that Mr. Thurston does not appear by counsel, but rather in person. Mr. Thurston takes objection to that as a relevant factor on the basis that it discriminates against him because he is not a trained lawyer. He submits that he is intelligent and capable of understanding the concepts of relevance and privilege and that the fact that he is not legally trained should not disqualify him from the benefit of a ***Halliday*** order. However this submission misses the point.

[12] The relevance of Mr. Thurston's lay status is that he is not impressed with the professional obligations of lawyers to uphold the integrity of the judicial process. This notion was expressed by McEachern C.J.S.C. in ***Boxer v. Reesor*** (1983), 43 B.C.L.R. 352 (S.C.) at paragraph 21 as follows:

> The responsibility of a solicitor in connection with the preparation of a list of documents has often been stated. I regard the following extract from *The Conduct of Civil Litigation in British Columbia*, Fraser & Horn, 1978, vol. 1, pp. 276-277, to be an accurate statement of the law except that in this province we do not require an order for production and lists of documents are no longer verified by affidavit:

"Nowhere in civil procedure is the responsibility of the lawyer greater than in the area of discovery of documents.

This is partly because the lawyer's concept of relevancy is ordinarily more extensive than that of the client. It seems rarely to occur to a litigant that such things as cancelled cheques, receipts, birthday cards, telephone bills and the like might have a bearing on the case. A kind of documentation which a client notoriously fails to produce, unless specifically asked to do so by his lawyer, is the interoffice memo, sometimes a rich and critical source of information.

Additionally, the litigant, owing no special duty of loyalty to the integrity of the judicial system, may be unenthusiastic about disclosing the existence of documents harmful to his case. As an officer of the Court, the lawyer has the responsibility to police the conscience of his client in this area.

The process of discovery of documents tends to pinch most, as one might expect, where the party from whom discovery is sought has numerous records to go through. The task of persuading a client to undertake this duty faithfully can be considerable.

Careful attention should be paid to - and the client questioned about - documents which have, either innocently or corruptly, passed out of his possession, by destruction or otherwise.

The lawyer's duty was canvassed in the House of Lords, where Lord Wright put the matter as follows:

> 'The order of discovery requires the client to give information in writing and on oath of all documents which are to have been in his corporeal possession or power, whether he is bound to produce them or not. A client cannot be expected to realize the whole scope of that obligation without the aid and advice of his solicitor, who therefore has a peculiar

> duty in these matters as an officer of the court carefully to investigate the position and as far as possible see that the order is complied with. A client left to himself could not know what is relevant, nor is he likely to realize that it is his obligation to disclose every relevant document, even a document which would establish, or go far to establish, against him his opponent's case. The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information he is entitled to require or if he insists on swearing an affidavit which the solicitor knows to be imperfect or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case. He does not discharge his duty in such a case by requesting the client to make a proper affidavit and then filing whatever affidavit the client thinks fit to swear to.' (Myers v. Elman, [1940] A.C. 282, at 322)"

[13] Thus, I am not convinced that Mr. Thurston has any chance of persuading a division of this Court that his status as a lay litigant is not a relevant factor, and that it was discriminatory to deny him a ***Halliday*** type order on that basis.

[14] In my view, there is nothing in this proposed appeal that would justify placing it before a division of this Court. Accordingly, the application for leave to appeal is dismissed.

"The Honourable Mr. Justice Smith"