More On BC Personal Injury Claims And Litigation Privilege

April 22nd, 2009

I've written previously on BC Personal Injury Claims and Litigation Privilege and today reasons for judgment were released by the BC Supreme Court further considering this topic.

In today's case (Semkiw v. Wilkosz) the Plaintiff was the widow of a person who was allegedly killed as a pedestrian in a serious motor vehicle collision in Vernon, BC in 2006.

The driver of the allegedly offending vehicle was operating a vehicle owned by U-Haul Co. (Canada) at the time of the crash. Following the crash the driver gave a statement to a a "U-Haul adjuster" and subsequent to this she showed a copy of this statement to a lawyer that she consulted with and to the RCMP in Calgary.

The Plaintiff's lawyer asked for a copy of this statement and the Defendants lawyer in the injury lawsuit refused to produce it claiming that it was subject to litigation privilege.

The Plaintiff also asked for a copy optometrists records relating to the eyesight of the alleged driver and lastly asked for photographs and measurements of the van allegedly involved in this collision taken by a professional engineer instructed by U-Haul. Production of these materials was also opposed on the basis of litigation privilege.

In rejecting the claim for privilege Mr. Justice Rogers of the BC Supreme Court summarize and applied the law as follows with respect to the statement to the insurance adjuster (so that the following excerpt makes sense Ms. Aisler is the 'U-Haul adjuster' and Ms. Wilkosz is the alleged driver):

[12] It is evident from this list that Ms. Aisler had several goals in mind when she asked Ms. Wilkosz to give her statement. The current litigation is not clearly dominant among them. In fact, it appears that Ms. Aisler was as concerned about whether Ms. Wilkosz would ask for payment of no-fault accident benefits as she was about instructing some lawyer that U-Haul might eventually retain or preparing for litigation being advanced by the third party to the accident. I cannot, on Ms. Aisler's evidence relating to the purposes for which the Wilkosz statement was obtained, conclude that this litigation was the dominant reason for getting it.

[13] Further, what a party actually does with a document and how it treats that document before its production is demanded can sometimes be as good an indicator of privilege as anything that the party may decide to assert after that demand is made. In this case, Ms. Wilkosz's interaction with the police officer in Calgary clearly demonstrates that U-Haul was quite content for her to have and keep and distribute a copy of her statement to whomever she chose. Ms. Wilkosz was not, apparently, under any instruction from U-Haul to not show the statement to other persons. If she was under such instruction, one would have thought that U-Haul would have adduced evidence of such in this application, but it did not. Furthermore, Ms. Wilkosz made it clear that she had shown her statement to her lawyer Mr. Yuzda. If Ms. Aisley had truly obtained that statement in order to protect U-Haul from, among other things, Ms. Wilkosz's claims for accident benefits it is unlikely in the extreme that Ms. Aisley would have allowed Ms. Wilkosz to take the statement off to show to a lawyer who might well advise her on how to successfully prosecute such a claim.

[14] In my opinion, the fact that U-Haul gave a copy of the statement to Ms. Wilkosz and that it did not restrict her use of that statement demonstrates that U-Haul's dominant purpose in obtaining the statement was not to instruct its own counsel with respect to the accident. If that had been U-Haul's dominant purpose, common sense dictates that U-Haul would have kept the statement to itself, or if it let Ms. Wilkosz have a copy it would have done so after giving her very strict instructions limiting her dissemination of it.

[15] The defendants' claim of litigation privilege over the Wilkosz statement must fail. Because the defendant has chosen to assert a single basis for its claim of privilege for all of its documents, the failure of its

claim with respect to that one document means that its claims for all of the documents must likewise fail. The defendants will be required to give production of all of the documents pre-dating September 21, 2007 and for which they claimed privilege in Part III of their supplemental list of documents. It follows that Ms. Wilkosz need not give evidence in her examination for discovery concerning the circumstances in which she gave her statement to U-Haul.

With respect to the optometrists records:

[16] Ms. Wilkosz's visual acuity is obviously an issue in this case. She has filed no material to suggest that records relating to her eyesight contain any embarrassing, sensitive, or confidential information that is not relevant to these proceedings. She has not, therefore, met the criteria for insisting that these records be sent first to her counsel for review. The plaintiff is, therefore, entitled to receive the records directly from the professionals involved in Ms. Wilkosz's eye care. Plaintiff's counsel has offered her undertaking to deliver those records to defence counsel immediately upon receipt. Defence counsel has, for no good reason I can discern, been reluctant to accept that undertaking. In the result there will be an order that defence counsel accept the undertaking. There will be an order that Ms. Wilkosz sign authorizations for release of her eye care records and delivery of those records to plaintiff's counsel. She must sign those authorizations and see that they are delivered to plaintiff's counsel within seven days of the release of these reasons. Defence counsel will deliver the signed authorizations to plaintiff's counsel immediately upon receipt.

and lastly with respect to the engineers materials:

[18] Ms. Aisley's affidavit does not describe Mr. Gough's involvement in the case beyond saying that she understood that he was to provide expert advice and that he took a look at the U-Haul van and tried to look at another vehicle involved but was rebuffed by its owner. Mr. Gough's affidavit describes his activities concerning the U-Haul van and the site, but does not illuminate his purpose. Specifically, Mr. Gough does not assert that he examined the van and the site for the purpose of preparing an expert report or for the purpose of assisting counsel in preparing for this or any other litigation. On Mr. Gough's evidence, the most that I can conclude is that U-Haul asked him to have a look at the van and the accident scene and to record his observations. There are no grounds on which U-Haul can claim that Mr. Gough's work is protected by privilege.

[19] Mr. Gough's observations are, of course, relevant to issues raised in the lawsuit. The plaintiff has asked Mr. Gough to produce the records of his observations but he has refused. This is a proper circumstance for an order under Rule 26(11) that Mr. Gough deliver to all parties of record a copy of all photographs and records in his possession relating to his examination of the U-Haul van and of the accident scene.