IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Flinn v. McFarland, 2002 NSSC 272

Date: 20030103
Docket: SH No 125545
Registry: Halifax

BETWEEN:

A. BRUCE FLINN

APPLICANT
(Plaintiff)

- and -

ROBERT McFARLAND and DAY & ROSS
With Head Office in Hartland, New Brunswick
and Carrying on Business in Nova Scotia

RESPONDENTS
(Defendants)

D E C I S I O N

BEFORE: The Honourable Justice A. David MacAdam, at Halifax, N.S., in Chambers on May 22, 2002, in Chambers

ORAL DECISION: November 21, 2002

WRITTEN RELEASE OF DECISION: January 3, 2003

COUNSEL: Gordon F. Proudfoot, Q.C., counsel for the Applicant
Robert G. Belliveau, Q.C., counsel for the Respondents

By the Court:

[1] The plaintiff was injured when his motor vehicle was struck by a vehicle operated by the individual defendant. He commences this proceeding for recovery of damages for the injuries and losses he sustained as a result of the accident.

[2] On May 22, 2002, a number of applications by the plaintiff and by the defendants were heard and adjudicated upon. At the conclusion of this hearing, three issues remained on which the court invited counsel to file additional submissions.

PRELIMINARY MATTERS

[3] A preliminary matter relates to certain affidavits filed by counsel for the plaintiff following the oral hearing and apparently without the consent of counsel for the defendant and without any application for leave to file additional evidence. I have not considered these affidavits, apparently one of which is sworn to by counsel for the plaintiff and the second by the mother of the plaintiff. It is open to counsel to apply for leave to file additional evidential material following the close of argument. However, it is not for counsel, unilaterally, to otherwise submit additional evidential material. Even with the consent of opposing counsel, which apparently was not given in this instance, it is for the court to determine whether it is prepared to receive such additional evidence. In the absence of a successful application for the admission of this additional evidence, the affidavits were not considered on this application.

[4] A further additional issue involves the extent to which defendants' counsel is permitted to disseminate medical information of the plaintiff which has already been disclosed or which may be disclosed pursuant to these reasons. During the course of oral submissions, counsel for the defendant stated, before distributing the disclosed medical information beyond his associates or medical experts, or discussing any relevant materials with his client, he would return to court. Effectively, he agreed to limit the dissemination of this material, with the proviso, if circumstances were to change and he would wish to disclose or review this medical information with others, he would return to court on notice to the plaintiff.

[5] In view of counsel's undertaking to both counsel for the plaintiff and the court as to the intended limited dissemination of the medical information received, whether as a result of disclosures already made or arising from these reasons, counsel is now bound by such undertaking and absent further application to the court, is limited to such distribution.

[6] Defendant's counsel in a post hearing submission says the material is for use by his expert or for cross-examination. This is in accordance with his oral undertaking, and for that reason there appears to be no present issue as to the defendant's intended use of these materials.

ISSUES

A. Is the plaintiff required to disclose to the defendant a copy of a letter written by counsel for the plaintiff to an accident re-constructionist retained by the plaintiff law firm in which counsel commented on an earlier draft report prepared by the accident re-constructionist?

[7] Having considered the authorities referenced by counsel, I am satisfied, in respect to this letter, the statement by Justice Hart in *Greenwood Shopping Plaza v. Neil J. Buchanan Ltd. et al* (1979), 31 N.S.R. (2d) 135, at para. 59, is applicable.

> It seems to me only logical that if the party wished to rely upon the testimony of its expert and was prepared to waive the privilege that he must also have intended to waive the privilege which extends to his discussions with the expert which form the basis of his report. Surely if a solicitor were called to testify as to an opinion given to his client he would have to reveal the facts related to him upon which the opinion was based. Similarly, in my opinion, an expert employed by the solicitor for the benefit of the party must, as an integral part of his evidence, be subject to cross- examination on the factual basis for his opinions, and this must be known to the party at the time the decision is made to waive the privilege and present the evidence.

[8] Counsel for the plaintiff references the decision of the Nova Scotia Supreme Court in ***Crocker v. MacDonald*** (1992) N.S.J. 410, where after noting the foregoing passage from *Greenwood Shopping Plaza v. Neil J. Buchanan Limited et al, supra*, the trial judge, at p. 3 continued:

> I agree with the logic of the statement, but in my view it does not extend the waiver of solicitor/client privilege to communications between counsel and the expert. While it may be necessary as stated by Hart, J. A. to require the expert to state what he was told of the facts upon which his opinion is based it is quite a different matter to require counsel to produce his correspondence to the retained expert.
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> The correspondence may contain all kinds of information which counsel properly would not wish disclosed to the opposite party and for which purpose the solicitor/client privilege exists. There are many ways in which counsel can determine the alleged facts upon which the expert's opinion is based without requiring counsel's so-called retention letters.

[9] At issue is the independence of the expert's report. The expert apparently prepared a draft report which he forwarded to counsel for the plaintiff for comments and upon receipt of comments prepared a final report which has been disclosed to the defendants. Clearly, the extent to which the final report of the expert may be the result of counsel's comments, is both relevant and entitled to be examined by counsel for the defendants. This, however, does not extend to any earlier drafts the expert may have prepared which he, himself, may have amended, altered or revised in the course of considering the issues and his opinions. It is the fact the expert submitted a draft report to counsel for the plaintiff and then prepared a final report ,that may or may not have been revised in accordance with suggestions by counsel for the plaintiff, that the defendants are entitled to pursue in examining the expert as to his opinions and the basis on which he reached his opinions, including to the extent the opinions offered are his or may be

the consequence of suggestions by plaintiff's counsel.

[10] To similar effect is the reasoning of Ferguson, J., in *Browne (Litigation Guardian of) v. Lavery* (2002) 58 O.R. (3d) 49. A plaintiff had applied for an order to require the defendant to produce an expert's report that had been provided to another expert retained by the defendant, who, in turn had prepared a report that had been provided to the plaintiff. At issue was the interpretation and application of the *Ontario Rules of Civil Procedure* R.R.O. 1990, Reg. 194, subrule 31.05(3), in respect to disclosure required of a party intending to call an expert witness at trial.

[11] The Rule in Ontario is, in its wording, broader and more specific as to the production required of a party who has signaled an intention to call an expert at trial. Nevertheless having regard to the authorities which have considered the relevant Nova Scotia Rules, it is clear, the principles reviewed and upheld by Justice Ferguson are no less applicable in Nova Scotia.

[12] Referring to the decision of the Supreme Court of Canada in *R. v. Stone,* [1999] 2 S.C.R. 290, Justice Ferguson in *Browne, supra,* at paras 57-60 stated:

> [57] The trial judge in Stone ordered production of the expert's report on the ground that opposing counsel 'ought to be in a position of being able to explore on cross-examination with accused whatever statements Dr. Janke may or may not have relied upon in his report': at para 20[my emphasis]. The fact that his ruling was upheld implies that opposing counsel is entitled to disclosure of what information was provided to the expert even if it is not relied on.
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> [58] The Supreme Court in Stone said that the purpose of the production is to permit opposing counsel to test the expert's opinions. It contemplated that the content of a report might contradict the opinion given in testimony. So might other information in the expert's possession. An opinion can obviously be tested in many ways: by comparing the conclusion to the data relied on, by comparing the opinion to data which was available but not relied on, by considering whether the expert's opinion was influenced by the nature of the request of counsel or by information provided by counsel which was not relied on, and by considering whether the opinion was altered at the request of counsel – for instance, by removing damaging content.
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> [59] It is difficult to understand how a determination could be made as

> to what was influential. Would counsel decide? Why should this decision not be open to scrutiny? The expert might not realize or acknowledge the extent to which information provided has influenced his or her opinion.
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> [60] It seems logical that if counsel sends the expert information counsel does so because he or she believes this information is relevant to the expert's task. If it is relevant to the task then it seems to me it should be available to counsel who must test the opinion.

[13] In *Stone*, a criminal case, defence counsel in its opening address to the Jury stated he would be calling an expert witness. The Crown successfully applied for an Order requiring the defence to deliver a copy of the expert's report. As noted by Justice Ferguson, the Court in *Stone* had not read the report, had not questioned the expert as to what he relied on and "yet clearly ruled that even information contradictory to the opinion given in testimony had to be disclosed."

[14] At paras 69-71, Justice Ferguson also held:

> [69] Any experienced counsel who has dealt with experts would appreciate how important it would be to know what the expert was instructed to do, what the expert was instructed not to do, what information was sent to the expert and the extent to which counsel instructed the expert as to what to say, include or omit in the report. McLeish and Smitiuch discuss in their article numerous cases which struggled with these issues. I would guess that every experienced litigation counsel knows such influential factors are not rare but commonplace. A recent and alarming example was discussed in the recent case of Whiten v. Pilot Insurance Co. (1999), 42 O.R. (3d) 641, 170 D.L.R. (4th) 280 (C.A.).
>
> [70] In my view, the disclosure of this information would best enable an opposing counsel and the court to assess whether the instructions and information provided affected the objectivity and reliability of the expert's opinion. I also note there is much contrary opinion on this subject: e.g. Mahon v. Standard Life Assurance Co., [2000] O.J. No. 2042 (S.C.J.).
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> [71] This area of the case law cries out for appellate review.

[15] Like Justice Ferguson, I believe this area of the law cries out for appellate review.

[16] Counsel for the defendant suggests the question of privilege relating to this correspondence should not be determined at this stage of the proceeding.

With this suggestion, I cannot concur. Disclosure has, of necessity, two components, namely, the aspect of confidentiality which involves to whom the information is required to be communicated and secondly, the possible admission of the documents into court during the course of a trial. At this stage the issue of whether the documents are admissible at trial is not to be determined since this is a matter for the trial judge to consider and rule upon, if required. However, in order to consider the disclosure of information sought to be retained on the basis of privilege, it is necessary for the court, at this interlocutory stage, to consider the issue of privilege as raised by counsel. Once the information or document is released to the other side, the confidential aspect of the privilege is lost and can never be recovered. It is only the admissibility of the document at trial that is not to be determined at this stage.

[17] Whatever information and materials were provided to the expert must be disclosed. If this involves discussions with the party, counsel for a party or with a third party, it is, may be, or perhaps should have been, part of the informational basis used by the expert in reaching his conclusion, and must be disclosed. The comments by counsel, on the draft report of the accident re-constructionist, must be disclosed to the defendants.

B. Is the plaintiff required to disclose to the defendants certain deletions from the file of the plaintiff's family doctor, created, apparently, in respect to the plaintiff's ability to practice law and involving a file of the Lawyer's Assistance Program of the Nova Scotia Barristers' Society?

[18] Counsel for the defendants, in reviewing the various deletions from the file materials maintained by the plaintiff's family doctor, as outlined by counsel for the plaintiff in his submission, notes privilege was asserted only in respect to one of the deletions, while others were being withheld on the basis they were either "irrelevant and non-disclosable" or "<u>irrelevant</u>". On the letter in which privilege is not being waived, counsel for the plaintiff says the document is "...a letter to physician on dealing with the management of my legal case seeking advice on management of the litigation file between lawyers and would be irrelevant and/or privileged per *Crocker v. MacDonald*." The document on which the plaintiff seeks non-disclosure as being "irrelevant and non-disclosable" is apparently an entry wherein the plaintiff critically comments on his relationship with a lawyer who was

handling his file at an earlier time. The document sought to be withheld on the basis it is "irrelevant" is summarized by counsel for the plaintiff as "...a comment on the method of/nature of communication with his lawyer and management of his legal case...".

[19] The plaintiff raises an issue as to the reliability of some of these records, given they were apparently often taken by "assistants and non-medial personnel in rehab centres" and are "quite unreliable based on the source, as a lot of this material comes from people suffering from the disease of alcoholism, who by the time they arrive in a rehab clinic, deception by the alcohol patient is the rule as opposed to the exception which typifies someone with that disease". The reliability as well as the weight and relevance to be accorded to such records are, of course, matters for the trial judge and the trier of fact to determine. Notwithstanding plaintiff's counsel plea that release of such documents may allow "highly prejudicial documents to be disclosed on discovery which reveal irrelevant but damaging information" and "can be used for other tactical advantages at trial that can negatively impact someone's reputation under the Court's protection of absolute privilege," these materials clearly fall within the rules for production and disclosure in Nova Scotia. Counsel in this case are experienced in litigation and are fully cognizant of their obligations and responsibilities in handling personal and otherwise confidential information required in the course of the litigation to be produced by the other parties. In addition, matters involving the public disclosure of any such produced materials, are issues that may, if necessary, be canvassed with the trial judge.

[20] In this latter regard, the concern by plaintiff's counsel that this is scheduled to be tried before a jury is also no basis to deny disclosure of materials otherwise required to be produced. Despite Counsel's assertion "the use of alcohol and drug rehab records would present 'rich ground' for a cross-examination for various reasons" and his further assertion "just the stigma attached to having been in an alcohol rehab centre damages the credibility of the witness" even if true, are not a basis to deny the disclosure of otherwise producible materials. Again, the control of the trial including the introduction and use of documents and other materials, as well as any cautions to be given to a jury, are matters for the trial judge.

[21] Counsel cites the comments of Justice Creaghan in *Lafrance v. Corney*, [1992] N.B.J. No. 232 a p. 3:

> "Although there is no privilege asserted, a court must exercise a discretion on a motion such as this by weighing the competing interests - those being the interests of justice that full disclosure of relevant facts be made available and the protection of the right against unjustified intrusion into a party's private life. This appears to be the direction taken from the recent decision of the Supreme Court of Canada in *Metropolitan Life Insurance Company v. Frenette et al., [1992] S.C.J. No. 24*." (Emphasis added by counsel)

[22] Counsel, in his brief then continues: "Justice Creaghan went on to say he was not satisfied the requested documents related to the matter in any material way and that to compel production of them would constitute an unjustified intrusion into the plaintiff's private life." He suggests these materials have no probative value in this case because his expert has reviewed the materials and picked out what was germane to her diagnosis and treatment and these materials have been disclosed. Counsel and his expert may be quite correct. However, the defendants are entitled to have their expert examine these materials to assess whether he does, or does not, agree with the diagnosis and treatment of the plaintiff, as it relates to the claims for loss and damage advanced by the plaintiff against the defendants, in this proceeding.

[23] Justice Ferguson, in *Browne*, *supra*, regarded the decision in *Stone*, *supra*, as overruling cases that previously restricted the requirement for production of materials provided to an expert. Justice Ferguson, at paras 31 and 32, referred to *Bell Canada v. Olympia & York Developments Ltd.* (1989), 68 O.R. (2d) 103 (H.C.J.) where the applicant had "... contended that he was entitled to anything which may have influenced the expert including information provided by counsel which the expert did not rely on." The order for production was refused, with the trial judge expressing '... concern that to establish such a broad rule would jeopardize solicitor and client privilege.' Justice Ferguson also referred to other authorities providing for limited or restricted production that he found to have been, in effect, overruled by *R. v. Stone*, *supra*.

[24] As to whether it is a necessary precondition to an obligation to disclose that the expert have relied on the materials in formulating their opinion, at paras 53 and 54 Justice Ferguson stated:

> [53] One of the issues ... is whether the information included in the 'findings' is restricted to that which the expert actually relied on. Many of the cases cited restricted the information in that way (see

> Bell Canada, supra; Beausoleil, supra)
> [54] In my view, that is no longer a proper restriction. The fundamental difficulty with that principle is that there is no practical and fair way to determine what documents (either in whole or in part) have been influential or relied upon. As stated by Mustill, J. in Nea Karteria Maritime Co. Ltd. v. Atlantic and Great Lakes Steamship Corp. (No. 2), [1981] Com. L.R. 138 (as cited by Hobhouse, J. in the case of General Accident Fire and Life Assurance Corp. Ltd. and others v. Tanter and others, the Zephyr, [1984] 1 All E.R. 35, [1984] 1 W.L. R. 100 (Q.B.) at 43):
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> > ... where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.

[25] In respect to a number of the documents sought to be withheld from disclosure, counsel for the plaintiff suggests some cases involve "discussion of tactics and strategy with expert". Counsel for the defendants references Sopinka et al in **The Law of Evidence in Canada**, (2nd ed., 1999) at p. 745:

> As the principle of solicitor-client privilege developed, the breadth of protection took on different dimensions. It expanded beyond communications passing between the client and solicitor and their respective agents, to encompass communications between the client or his or her solicitor and third parties, *if made for the solicitor's information for the purpose of pending or contemplated litigation.* (Emphasis added by counsel)

[26] Counsel then notes the privilege extends to documents of an informational nature, citing Jessel M.R. in *Anderson v. Bank of British Columbia*, [1876] 2 Ch. 644 at pp. 649-650:

> ...[The] solicitor's acts must be protected for the use of the client. The solicitor requires further information, and says, I will obtain it from a third person. That is confidential. It is obtained by him as solicitor for the purpose of the litigation, and it must be protected upon the same ground, otherwise it would be dangerous, if not impossible, to

> employ a solicitor. You cannot ask him what the information he obtained was. It may be information simply for the purpose of knowing whether he ought to defend or prosecute the action, but it may be also obtained in the shape of collecting evidence for the purpose of such prosecution or defence. All that, therefore, is privileged.

[27] Justice Ferguson in *Browne*, *supra*, at paras. 67 and 68 recognized some discussions between counsel and an expert should continue to be protected from disclosure:

> [67] I can appreciate that discussions between counsel and experts for educational purposes might generally best be ruled to be within the zone of privacy protected by litigation privilege. For instance, counsel might communicate with the expert to discuss what information the expert needed to prepare an opinion. Counsel might also want to communicate with the expert to discuss questions which might be put to the expert or to the opposing expert at trial.

[28] He, however, at para. 68, added:

> [68] If the communications took place before the preparation of the report, then I am inclined to think it would [be] best for our system of litigation if they were producible because they could influence the opinion and there would be no practical way of determining this without producing and examining the communications and hearing submissions on the issue.

[29] It is somewhat unclear as to what counsel for the plaintiff means by stating their communications to the expert involved a discussion of "tactics and strategy". Since the expert is presumably being proffered as an "independent expert" and intended to be qualified to give opinion evidence, I share the concern raised by counsel for the defendant as to the propriety of discussing with such an independent expert questions of "tactics and strategy". Nevertheless, depending on what is meant by the phrase "tactics and strategy", these may be matters counsel is entitled to discuss with an expert, although not information or facts on which the expert's opinion is founded or based. Such discussions may be useful to counsel in presenting their case and would therefore form part of the solicitor's brief and, as such, are not required to be disclosed to the other side.

[30] In *Greenwood Shopping Plaza v. Neil J. Buchanan Ltd. et al*, *supra*., at para. 51, Hart, J. A. on behalf of the Court stated:

> A party who intends his communication to be confidential may therefore speak to

> his solicitor or the expert engaged for the purpose of the legal advice or litigation with confidence that what he says to the expert or the solicitor, and what the expert says in his report to the solicitor, will be protected by privilege unless the party is prepared to waive that privilege

[31] After referencing *CPR 22.05,* precluding admission of a report of a medical practitioner into evidence unless the medical practitioner testifies and *CPR 31.08* which requires the advance delivery of a report of any expert who is expected to give evidence, Justice Hart at para. 58 observes:

> Under our rules the privilege relating to a medial report is only waived if the doctor is called to testify at the trial, but the privilege relating to other reports is waived if the party employing the expert intends to use his evidence at the trial and is thereby forced to reveal his report in advance. The decision by the party to make use of the expert evidence at the trial is tantamount to a waiver of the privilege against its use which previously existed.

[32] At para 61, Justice Hart concludes:

> When a party elects to waive a privilege to withhold specific evidence he must also intend to waive the privilege to withhold the facts and circumstances surrounding that evidence. In deciding to take advantage of the evidence for his own purposes he must be prepared to accept the side effects of that decision, and if, as in the case at bar, some declarations against his interest may be revealed he must take that chance. No one is forcing him to waive his privilege which may be maintained by reserving the expert's evidence for the personal use of his solicitor in conducting the litigation.

[33] The resolution of the question as to whether these otherwise confidential documents are to be disclosed depends on whether in any way, they formed part of the foundation or basis of the expert's opinion and report, or were, at least, considered by or provided to, the expert prior to the preparation of her report. If they did, then they must be disclosed. To the extent any of the materials only relate to the views of the plaintiff's expert on any report or opinion of defendant's expert, these are matters involved in the solicitor's brief and therefore protected from production.

[34] I would, however, particularly reference the entry which involves the plaintiff critically commenting on his relationship with an earlier counsel. These confidential comments should not be disclosed unless, and only to the extent, they contain information or facts or suggested facts that were considered by the expert in reaching her opinion. If the entry does not, then any comments by the plaintiff of his then counsel may be deleted. No purpose is served by requiring disclosure of commentary by a party to a proceeding about his lawyer.

C. Is the plaintiff required to disclose certain "will say" statements of third party witnesses prepared by counsel for the plaintiff, which

were delivered to the mother of the plaintiff who, by a "confidential letter", forwarded them to an independent medical expert retained by the plaintiff to prepare a report for use in this litigation ?

[35] The defendants, as is the plaintiff in respect to information provided to any expert intended to be called by the defendants, are entitled to know the information provided to the plaintiff's expert in formulating her opinion. Any advices or opinions given to counsel in respect to the defendant's report are privileged and confidential, unless the plaintiff intends to have the expert testify as to these opinions and advices. In such circumstances the obligation to produce the information used, as the foundation for such opinions must be produced. In Nova Scotia, each party is entitled to know, in advance of trial, matters of opinion on which expert evidence is being tendered, and the information and materials used as the basis or foundation for such opinions. Where this information and materials are matters of privilege, the privilege is waived by the decision to tender into court the expert's report and opinions.

[36] One issue raised by counsel for the plaintiff is the circumstance that the " will say" statements were disclosed by the mother of the plaintiff, rather than by the plaintiff himself. In the unusual circumstances of this case, where it is the plaintiff's mother who has filed the affidavits in support of the application and has indicated she is the "primary contact" between counsel and her son in respect to this litigation, I am satisfied for all intents and purposes, Ms. Flinn, in respect to her relationship with counsel for the plaintiff, is as much the client as is her son. It may be the son who suffered the injury and damage in the accident, but apparently his mother is assisting him in pursuing this claim for compensation and damage. I therefore make no distinction between the circumstance it was Ms. Flinn who provided the "will-say" statements to the retained medical expert and not her son.

[37] The will-say statements were prepared by members of the plaintiff's law firm after interviewing potential witnesses on behalf of the plaintiff and were provided to Ms. Flinn for her confidential information. Apparently, unbeknownst to counsel for the plaintiff, she provided them in a confidential letter addressed and delivered to the medical expert retained on behalf of her son. The defendant says any privilege relating to these will-say statements has therefore been waived and since they form part of the file of the expert, they are subject to disclosure.

[38] In respect to the issue of waiver, counsel for the plaintiff references Justice

Hart in *Nova Scotia Power Corp. v. Surveyer et al* (1987), 78 N.S.R. (2d) 217, at para.8, where he stated:

> A document protected by privilege cannot be required to be produced before the court unless the privilege is expressly or impliedly waived. Those who seek the document must establish an intention to waive the privilege on the part of the client entitled thereto.

[39] Counsel also notes Manes and Silver, **Solicitor/Client Privilege in Canadian Law** (Butterworths, 1993) at p. 187:

> Waiver of privilege is established where it is shown that the possessor of the privilege:
>
> (i) knows of the existence of the privilege and
>
> (ii) demonstrates a clear intention to forego the privilege.

[40] In response, counsel for the defendants references the decision of Saunders, J. (as he then was), in *Maritime Steel and Foundries Ltd. v. Whitman & Associates Ltd.*, [1994] N.S.J. No. 181, at para. 39:

> Legal professional privilege is that of the client and not the solicitor. Where, as here, competing claims are made, one must look to the intention of the parties and how the communication came to be produced and received. While intention is not the only consideration, it will be significant. The content, the way in which the communication was prepared or delivered and to whom, may help in determining who is entitled to assert the privilege.

[41] Counsel's brief continues:

> In **Monahan v. Foote**, (1999) 180 N.S.R. (2d) 306 the Court considered an application for the production of a report (in the form of a letter from a psychologist to the Plaintiff's solicitor), otherwise privileged, which was sent by the Plaintiff's counsel to the Plaintiff's treating psychiatrist. Ordering disclosure of the letter, Saunders, J. stated at pages 309-310 that:
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> > Today requesting counsel take the position that whatever solicitor/client privilege once attached to the letter from Dr. Hayes, was waived when her counsel mailed it to Dr. Allison. Mrs. Monahan's counsel resists the application. If I understand their position correctly, it is that they obviously consciously and conscientiously forwarded Dr. Hayes' letter to Dr. Allison because it is referenced in their cover letter as among the material for his review. However, plaintiff's counsel argue that it should still be protected because or both:
> >
> > > they did not really turn their mind to the character of what was being sent and that they had so in

> hindsight they never would have, and based on their subsequent conversation with Dr. Allison last evening they are satisfied that Dr. Allison did not use the letter in his work with Mrs. Monahan nor his treatment of her nor in constructing his opinion.
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> With respect I find neither reason compelling...
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> The burden is upon the defendants...to establish waiver. I am satisfied that they have done so. Once this letter was disseminated to Dr. Allison its status changed dramatically. It was no longer shielded by a cloak of privilege.

[42] It appears from the evidence presented on this application the communication by Ms. Flinn to the medical doctor was intended to be confidential and not for further disclosure. However, at issue, is whether in law the privilege relating to the solicitor's work product or solicitor's brief which, although not lost by communication to the client, or in this case to Ms. Flinn, was lost by the further communication by the client to the third expert. The nature of the work product or lawyer's brief rule is summarized

in Manes and Silver, **Solicitor/Client Privilege in Canadian Law**, op. cit. at p. 107:

> While it is clear that there is a work product/lawyer's brief category of confidential information, it is unclear whether as a branch of privilege it is an exception to the requirement of confidentiality or an altogether different head of non-disclosure. The nature and extent of the work product/lawyer's brief rule in Canada in undecided, except to say that it does exist in Canada. A lawyer's work product represents all that the lawyer assembles in the brief, which brief constitutes the fruit of the lawyer's labour and the sum total of the lawyer's knowledge, research and skill. Communications which come to the lawyer and become part of the lawyer's brief, such as witness statements, are privileged - if one accepts that the lawyer's intention to keep them confidential is material. If one does not accept the materiality of the lawyer's intention, these communications are not privileged, unless the maker of them intended the communication to be kept confidential.

[43] The authors then, at p. 108, continue:

> Obviously the judicial need to preserve this category of confidential information has stood the test of time in our jurisprudence, for it was showcased in *Hodgkinson v. Simms* (1989) where the plaintiff's solicitor had conducted investigations and copied numerous documents relevant to the issues in the action. The defendants (who had not been able to find the documents) sought production of the documents and the plaintiff resisted on the ground that they had been ingathered for the solicitor's brief. The majority of the British Columbia Court of Appeal held that there is no distinction between the solicitor-client privilege and the lawyer's work product. The court observed that it is "highly desirable to maintain the sanctity of the solicitor's brief which has historically been inviolate.
>
>> In my view the purpose of the privilege is to ensure that a solicitor may, for the purpose of preparing himself to advise or conduct proceedings, proceed with complete confidence that the protected information or material he gathers from his client and others for this purpose, and what advice he gives, will not be disclosed to anyone except with the consent of his client.

The privilege attaching to the lawyer's brief was said to:

> ...(permit) the client to speak in confidence to the solicitor, for the solicitor to undertake such inquiries and collect such material as he may require properly to advise the client, and for the solicitor to furnish legal services, all free from any prying or dipping into this most confidential relationship by opposing interests or anyone.

[44] Clearly there never was an intention to waive any privilege either by counsel or by Ms. Flinn. In Manes and Silver, **Solicitor/Client Privilege in Canadian Law**, *supra,* the authors, at p. 207, discuss waiver of privilege by disclosure to a third party. If the client instructs the lawyer to divulge the privileged communication to the third party, the intention to keep the communication confidential is thereby negated and this can constitute a form of waiver. However, in the present instance it is clear that both counsel and Ms. Flinn intended to retain the confidential nature of the will-say statements and to the extent confidentiality was lost by the communication to the medical expert by Ms. Flinn, it was apparently without the knowledge or consent of the counsel who had prepared the statements. It was also without the realization by Ms. Flinn, that the communication to third parties

could constitute a waiver of the privilege.

[45] In reviewing the issue of waiver by disclosure to third party the authors of **Solicitor/Client Privilege in Canada Law**, *supra*, at p. 207, refer to the decision of the Nova Scotia Supreme Court in *Nova Scotia Pharmaceutical Society v. R.* (1988), 88 N.S.R. (2d) 70 at 72-75 as authority for the proposition:

> In essence, where the client authorizes the solicitor to reveal a solicitor-client communication, either it was never made with the intention of confidentiality or the client has waived the right to confidentiality. In either case, there is no intention of confidentiality and no privilege attaches. For example, it has been held that documents prepared with the intention that they would be communicated to a third party, or where on their face they are addressed to a third party, are not privileged.

[46] Clearly that is not the situation in respect to the will-say statements which

were not prepared with the intention of being communicated to third parties, nor were they, on their face, addressed to third parties. Normally "will say" or "Solcitior's notes on witness interviews are part of the solicitor's "work product" and are privileged from disclosure or production. Accidental disclosure will often not cause the loss of the privilege, to the extent the confidentiality associated with the privilege can still be maintained.

[47] In respect to implied waiver by virtue of communication of information to third parties, Manes and Silver, **Solicitor/Client Privilege in Canadian Law**, *supra*, at p. 191, says:

> Generally, waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.

One of the best expressions on implied waiver of solicitor-client privilege is that of McLachlin J. (as she then was) in *S & K Processors* (1983) where she said:

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost: *Hunter v. Rogers*, [1982] 2 W.W.R. 189, 34

> B.C.L.R. 206 (S.C.).
>
> *****
>
> In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. In *Hunger v. Rogers, supra*, the intention to partially waive was inferred from the defendant's act of pleading reliance on legal advice. In *Harich v. Stamp* (1979), 27 O.R. (2d) 395, 14 C.P.C. 246, 11 C.C.L.T. 49, 106 D.L.R. (3d) 340, 59 C.C.C. (2d) 87 [Leave to appeal to Supreme Court of Canada refused 106 D.L.R. (3d) 340n, 59 C.C.C. (2d) 87 (S.C.C.)], it was inferred from the accused's reliance on alleged inadequate legal advice in seeking to explain why he had pleaded guilty to a charge of dangerous driving. In both cases, the plaintiff chose to raise the issue. Having raised it, he could not in fairness be permitted to use privilege to prevent his opponent exploring its validity.

[48] Here the statements were deliberately delivered to the plaintiff's solicitor and by her to the expert. This latter disclosure was, however, not anticipated by the plaintiff's counsel. I am satisfied, therefore, there was, in these circumstances, no waiver of any privilege of confidentiality by the communication of these will-say statements to the medical expert.

[49] However, to the extent the information in the will-say statements was used

by or formed the basis of the expert's opinion they must be disclosed. The disclosure is not required because the plaintiff waived any privilege by forwarding, apparently in confidence, the statements to the retained expert. Rather, it is required to the extent the expert used or relied, or should have used or relied, or may have used or relied, on any of the information in forming her opinion and in drafting her report.

[50] Counsel for the plaintiff, in his submissions, notes the statements were communicated by letter dated January 18, 1999, whereas the final report by the medical expert was dated August 10, 1998. He acknowledges, however, the final update report was dated July 20, 1999, and therefore some six months after the statements were communicated. Counsel continues by noting that neither report makes any reference to these "will-say" statements. The fact there is no reference in the reports, and in this case in the final updated report, to the will-say statements, does not answer or respond to the question whether any of the information was used by or relied upon or should have been used by or relied upon by the medical expert in relation to the updated report. It is not necessary they be specifically referred to in the report, if in fact, they are part of the information that was available to the expert when preparing her final updated report. These are matters

defendants' counsel is entitled to canvass with the author of the updated report.

[51] In finding the plaintiff must disclose these statements, I am not holding there has been, express or implied, a general waiver of the litigation privilege. The privilege is only waived to the extent necessary to provide the opposing party with all the information and materials provided or made available to the expert intended to be called by the plaintiff at trial. Like in Ontario, absent the intention to call the expert, the communication of this information and materials to the expert may have largely been within the litigation privilege and therefore not required to be disclosed.

[52] Subject to any ruling by the trial judge, it is open to counsel for the defendants to canvass with the expert, provided she testifies, the basis of the updated report, and whether the "will say" statements were relied on by her and, if not, perhaps why not. Eliciting of information from an expert as to the foundation of their report is a matter for counsel to address and not for this Court to speculate. The statements preceded the final updated report, and as such, they are to be disclosed as part of the information provided to the expert.

FURTHER DISCLOSURE ISSUES

[53] Defendants' counsel, in his submission, says the plaintiff has raised as issues a number of additional items that were not reviewed or discussed during the course of the oral submission. Without reviewing in detail each specific document, disclosure of each of these letters, notes or documents is to be made on the same basis as earlier reviewed, namely, if, and to the extent they were relied on, or may have been relied on, by any expert in the preparation of their report, they must be disclosed. In effect, if information or materials are made available to an expert retained by a party and where the expert is intended to be called to testify on behalf of such party, then the information and materials must be disclosed to the other party.

[54] At paras. 62-63, Justice Stone in *Browne*, *supra*, also said:

> [62] In Stone, the court did not require the trial judge to consider the content of the report before ordering its production. In my view, this indicates that the court need not conduct a voir dire in this regard. The Stone decision also implies that there is no need to rely on counsel's vetting the material or rely on the expert doing so because the court did not suggest that either instructing counsel or the expert

> should be involved in the decision. The judge simply ordered production.
>
> [63] Stone makes clear that production should be ordered even if it involves the disclosure of information, such as statements of the client, which would otherwise be subject to solicitor and client privilege.

[55] To the extent they only relate to "tactics" they need not be disclosed, subject, however, to the discretion of a trial judge, in determining the scope of any cross examination of the expert, to decide if they are relevant to any issue at trial and then to require further disclosure of such communications. They are, however, not now required to be disclosed.

J.