# *Tiller (Litigation guardian of) v. St. Andrew's College, [2009] O.J. No. 2634*

Ontario Judgments

Ontario Superior Court of Justice

P.H. Howden J.

June 23, 2009.

Court File No. CV-08-89489

**[2009] O.J. No. 2634** | 2009 CarswellOnt 3653 | 178 A.C.W.S. (3d) 330 | 2009 CanLII 32274

RE: Veronica Tiller by her litigation guardian, Stephen Tiller, Stephen Tiller, Karen Tiller and Wesley Tiller, and St. Andrew's College

(15 paras.)

## Case Summary

**Civil litigation — Civil procedure — Discovery — Production and inspection of documents — Privileged documents — Documents prepared in contemplation of litigation — Motion by plaintiff for order of production allowed — The plaintiff was injured by a metal rod that fell from the ceiling at the defendant school — The defendant's chief engineer stated at discovery that he had given a statement after the incident — The plaintiff acknowledged that the statement itself was protected by litigation privilege, but sought production of a summary of the relevant facts contained therein — The court ordered production on the basis that the plaintiff was entitled to know of facts known to the defendant in respect of matters put in issue by the defendants.**

**Tort law — Practice and procedure — Discovery — Inspection of documents — Privileged documents — Motion by plaintiff for order of production allowed — The plaintiff was injured by a metal rod that fell from the ceiling at the defendant school — The defendant's chief engineer stated at discovery that he had given a statement after the incident — The plaintiff acknowledged that the statement itself was protected by litigation privilege, but sought production of a summary of the relevant facts contained therein — The court ordered production on the basis that the plaintiff was entitled to know of facts known to the defendant in respect of matters put in issue by the defendants.**

Motion by the plaintiff, Tiller, for an order of production. The plaintiff attended a high school dance hosted by the defendant, St. Andrew's College. A metal rod fell from the ceiling and pierced her head, necessitating surgical removal. In the course of examination for discovery, plaintiff's counsel asked whether any statements were obtained from witnesses. The only statement was from the director's chief engineer and director of property and facilities. He stated that he reviewed his statement to refresh his memory for the purposes of the examination. Counsel for the plaintiff sought production of the facts relevant to the issues that were revealed in the statement. The defendant submitted that the statement of the engineer and the facts contained therein were protected by litigation privilege, as the statement was obtained to defend a contemplated litigation action. The plaintiff submitted that, assuming the statement was subject to litigation privilege, the disclosure of the relevant facts therein was not barred from disclosure. The defendant argued that there was no evidence regarding relevance of the statement and a reasonable alternative existed in the form of the engineer's evidence on the examination for discovery.

HELD: Motion allowed.

The engineer's statement was given relatively close to the incident and was taken from a person in charge of the physical plant at the defendant school. Relevance of the statement was conceded by its inclusion in the defendant's affidavit of documents. The defendant had put in issue safety of the premises, assumption of risk, causation, contributory negligence by the plaintiff, and damages. The plaintiff was entitled to know all of the facts known to the defendant relating to the condition of the premises at the material time, the role of the plaintiff, causation, and whether or not, and to what extent, she suffered damage. The plaintiffs were also entitled to know the names of any persons with relevant knowledge and their addresses. To the extent that there were relevant facts or witness particulars in the engineer's statement, they were discoverable. The statement itself was neither sought, nor was it producible.

## Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 30.02, Rule 30.03

## Counsel

***A. Sciacca***, for the Plaintiffs.

K. DiTomaso, for the Defendant.

**ENDORSEMENT**

## P.H. HOWDEN J.

**1** On April 29, 2007, Veronica Tiller attended a high school dance. A metal rod from the ceiling fell, piercing Ms. Tiller's head. It was surgically removed subsequently. Ms. Tiller and her parents have brought an action for damages against the defendant College.

**2** The plaintiffs move for an order arising from the examination for discovery of Klaus Griese, the defendant's Chief Engineer and Director of Property and Facilities at the time of the incident. At the examination, the following exchange occurred:

Q. 113. Counsel, with respect to schedule B of the unsworn Affidavit of Documents, .. are there any statements obtained from any witnesses with respect to relevant matters in issue?

R. (Mr. Csathy) The only statement is a statement from Mr. Griese.

S. 114. Mr. Griese, did you have an opportunity to review that statement and refresh your memory for the purposes of today?

A. I did.

Q. 115. Counsel, may I have a copy of that statement?

A. (Counsel). No.

Q. 116. Can you please summarize for me what facts relevant to the issues are revealed in the statement?

A. No.

**3** The plaintiffs are not asking for production of the statement in this motion. They are seeking "a summary of the facts relevant to the issues revealed in Mr. Griese's statement". (Motion Record, tab A). It is submitted on the plaintiff's behalf that, assuming the statement of Mr. Griese is subject to litigation privilege, disclosure of the relevant facts from a litigation-privileged document is not barred. Mr. Sciacca cited a pre-reform decision of Pennell, J. in *April Investments Limited v. Menal Construction Limited et al* [1975] O.J. No. 2578 (H.C.J.); and post-1985 decisions in *Sacrey v. Berdan* [1986] O.J. No. 2575 (Borins, D.C.J., Ont. Dist. Ct.); and *Pearson v. Inco Limited* [2008] O.J. No. 3589 (Cullity J., S.C.J.).

**4** For the defendant, counsel submits that the statement of Mr. Griese and the facts contained therein are protected by litigation privilege and should not properly be ordered disclosed. The dominant purpose for the statement was to defend a contemplated legal action. In view of the horrendous nature of the incident and the damage to the plaintiff, anticipation of litigation was clear virtually from the time the incident occurred. Ms. DiTomaso cited the decision of T. Ducharme J. in *Kennedy v. McKenzie* [2005] O.J. No. 2060 for the proposition that a challenge to litigation privilege must show relevance of the material sought to an issue important to the outcome of the case and that there is no reasonable alternative form of evidence that can serve the same purpose. The authorities cited in *Kennedy* for this statement were *Metcalfe v. Metcalfe* [2001] M.J. No. 115 (Man. C.A.) and, by analogy, *R. v. McClure* [2001] 1 S.C.R. 445 and *R. v. Brown* [2002] 2 S.C.R. 185, cases of solicitor/client privilege in the criminal context. *Kennedy*, (supra) at para 46. It was argued, that applying this test, there is no evidence of relevance of the statement of May 14, 2007 by Mr. Griese and there is a reasonable alternative in the form of Mr. Griese's evidence on the examination for discovery. In *Kennedy*, T. Ducharme, J. stated at para 47:

> Thus, the respondent will be able to obtain the appellant's own account of the events which can be elicited at his examination for discovery. While this is not contemporaneous with the collision, neither is the statement the respondent wants produced.

**5** The statement in issue in *Kennedy* was one taken from Kennedy by a lawyer with the law firm retained by Kennedy's insurer to defend an action by a passenger in his boat. It was later inadvertently sent to the defendant's counsel in a second action brought by Kennedy.

**6** In dealing with this motion, it is important to note that there is no challenge to the status of Mr. Griese's statement as a litigation-privileged document. The moving parties' position accepts that status but asserts that the interest in complete discovery requires production of relevant facts from the document.

**7** The competing interests of full discovery and protection afforded by litigation privilege were well expressed by Carthy J.A. in an authority cited in the respondent party's case book, *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321, concurred with on this aspect by Rosenberg and Doherty J.J.A.:

> 23. [Citing first R.J. Sharpe's lecture "Claiming Privilege in the Discovery Process" in Law and Transition; Evidence L.S.U.C. (Toronto: DeBoo, 1984) at 164-5]
>
> There are, then, competing interests to be considered when a claim of litigation privilege is asserted: there is a need for a zone of privacy to facilitate adversarial preparation; there is also the need for disclosure to foster fair trial.
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> 24. It can be seen from these excerpts ... that there is nothing sacrosanct about this form of privilege. It is not rooted, as is solicitor-client privilege, in the necessity of a confidential relationship. It is the practicable means of assuring counsel what Sharpe calls a "zone of privacy ... ".
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> 25. The "zone of privacy" is an attractive description but does not define the outer reaches of protection or the legitimate intrusion of discovery to assure a trial on all of the relevant facts. The modern trend is in

> the direction of complete discovery and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client. In effect, litigation privilege is the area of privacy left to a solicitor after the current demands of discoverability have been met. There is a tension between them to the extent that where discovery is widened, the reasonable requirements of counsel to conduct litigation must be recognized.

**8** In prior cases from this court and its predecessors, the solution to this tension has been to protect from production the privileged document or surveillance tape but to require the party in whose possession it is to produce a summary of facts from the document or recording relevant to the issues in the case. [See *April Investments Ltd. v. Menal Construction Limited*, supra, at para 18; *Sacrey v. Berdan*, supra, at paras 12 and 20; *Llewellyn v. Carter* *(2008) 64 C.C.L.I. (4th) 194* (P.E.I.S.C., C.A.]

**9** In *Kennedy*, the material sought was the privileged document itself, not a summary of facts from it. That was a case where an errant statement made by Kennedy to assist his defence in one action had found its way into the hands of opposing counsel in a second action where Kennedy was the plaintiff. At para 47, the motion judge (on appeal from the Master in Toronto) recognized the distinction between protection of a privileged document and discoverability of "factual circumstances discussed in the statement", in his words. He cited *Susan Hosiery Ltd. v. Canada (MNR)*, *[1969] 2 Ex.C.R. 27*, on this very point, where Jackett P. stated:

> What is important to note about both of these rules (i.e. solicitor-client privilege and litigation privilege) is that they do not afford a privilege against the discovery of facts that are or may be relevant to the determination of the facts in issue.

**10** From this, T. Ducharme J. stated, at para 47 of *Kennedy*:

> It must be remembered that the fact that the statement itself is protected by litigation privilege only precludes questions about the contents of the statement, it does not preclude questions about the factual circumstances discussed in the statement.

He went on to find that, as the prior statement was not contemporaneous and the person who gave it was the plaintiff himself, discovery of the plaintiff could fulfil the factual production requirement.

**11** In this case, the prior statement was given relatively close to the incident and it was taken from the person in charge of the physical plant at the high school at the time in question. The relevance of the document is conceded by its inclusion in the defendant's own affidavit of documents. R. 30.02 and R. 30.03 require disclosure only of documents relevant to matters in issue. It is also established by the following question and answer at the examination for discovery:

> Q. 113 ... are there any statements obtained from any witnesses with respect to relevant matters in issue?
>
> A. The only statement is a statement from Mr. Griese.

**12** As to the requirement in *Kennedy* of no reasonable alternative, it should not be extended beyond its own facts, in my view. In this case the source of the statement is not a participant or party who was present at the originating incident and it is not sought solely to impugn Mr. Griese's credibility. What is sought here is a summary from a relatively contemporary statement of facts from the person responsible for the condition of the premises where the school's pleading asserts the safety of the premises, assumption of risk by the plaintiff, contributory negligence and no causal relation to the injuries to the plaintiff Ms. Tiller. As Borins, D.C.J. (as he then was) stated in *Sacrey*, at para 12:

> It is important to distinguish between discovery of documents, provided by R. 30, and discovery of information, provided by R. 31. It was submitted by the defendant that the plaintiff was not entitled to discovery of the information which it seeks on the ground that it is privileged. This, in my view, is incorrect

and results from an attempt to apply the provisions of subrule 30.03(2)(b) and, perhaps, R. 30.09 to R. 31.06. As indicated earlier, in her affidavit of documents, the defendant objects to the production of the report of Equifax Services Ltd. on the ground that it is privileged as it was prepared in contemplation of litigation. However, the plaintiff does not seek discovery of the report. Subrules 31.06(1) to (3) enable a party to obtain on examination for discovery much of the information contained in a document which is protected from production or discovery on the ground of privilege.

**13** The purposes of discovery are set out at para 13 of *Sacrey*, supra, and include the following:

(a) to enable the examining party to know the case (s)he has to meet; (b) and (c) to procure admissions; (d) to facilitate settlement; (e) to eliminate or narrow issues; and (f) to avoid surprise.

See *Ontario Bean Producers Marketing Board v. W.G. Thompson and Sons Ltd.* *(1981), 32 O.R. (2d) 69*, at p.72; adopted by the Divisional Court in *Malofy v. Andrew Merrilees Ltd.* *(1982), 37 O.R. (2d) 711*.

**14** The defendant in this case has put in issue safety of the premises, assumption of risk, causation, contributory negligence by the plaintiff, and damages. The plaintiff is entitled to know all of the facts known to the defendant relating to the condition of the premises at the material time, the role of the plaintiff, causation, and whether or not, and to what extent, she suffered damage. The plaintiffs are also entitled to know the names of any persons with relevant knowledge and their addresses. To the extent that there are relevant facts or witness particulars in the statement of the defendant's Chief Engineer and Director of Property and Facilities at the relevant time relating to these issues, they are discoverable. The statement itself is neither sought nor is it producible, assuming that it is subject to litigation privilege as this motion assumes.

**15** Accordingly it is ordered that the defendant must produce a summary of the facts relevant to the issues in this action as revealed in the statement of Klaus Griese. The defendant will pay costs of the plaintiffs fixed in the sum of $855.70. Both of these orders are to be carried out within ten days of this order.

P.H. HOWDEN J.

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