

2004 CarswellOnt 153  
Ontario Superior Court of Justice

Kinsmen Club of Kingston v. Walker

2004 CarswellOnt 153, [2004] O.J. No. 137, [2004] O.T.C. 41,  
128 A.C.W.S. (3d) 249, 3 C.P.C. (6th) 227, 69 O.R. (3d) 453

**Kinsmen Club of Kingston, c.o.b. as The Summerhill Apartment, Dorothy Kean and Elizabeth Sanchez (Plaintiffs) and Mary Walker (Defendant)**

Kinsmen Club of Kingston, c.o.b. as The Summerhill Apartment, Dorothy Kean and Elizabeth Sanchez (Plaintiffs) and Donald S. Walker (Defendant) and The Personal Insurance Company of Canada and Mary Walker (Third Party)

Smith J.

Heard: October 24, 2003

Judgment: January 16, 2004

Docket: 00-CV-14540, 02-CV-21421

Counsel: J. Stephen Cavanagh, Heather J. Williams for Plaintiffs

John P. Lundrigan for Defendant / Third Party, Mary Walker

Michael Van Dusen for Defendant, Donald S. Walker

Lawrence Elliott for Personal Insurance Company of Canada

Subject: Civil Practice and Procedure

**Headnote**

Civil practice and procedure --- Discovery — Introductory — Deemed or implied undertaking

Tenant was elderly woman whose son had been appointed power of attorney — Tenant's apartment was damaged by fire — Landlord brought action against tenant alleging that fire was caused by careless smoking — Son acted as litigation guardian — Tenant pleaded that she had mental disability at time of fire that prevented her from forming intention to act or to appreciate duty to take care — Landlord examined son for discovery and intentionally obtained information for use in action against son — Landlord brought separate action against son — Son brought motion for judicial stay of proceedings due to abuse of process — Motion granted — Use of evidence against son was precluded by deemed undertaking rule in Rules of Civil Procedure — Rule clearly provided that evidence in one proceeding could not be used in any other proceeding without leave of court — Son had standing to bring motion even though his role in other proceeding was litigation guardian who gave evidence on behalf of tenant — Litigation guardian was party to proceeding and was personally liable for costs — Allowing landlord to use evidence against son would not be just — Landlord did not give any notice to son that he might be potential party — Interests of justice did not outweigh prejudice to son — Using discovery process in this manner should not be condoned.

MOTION by defendant for judicial stay of proceedings on basis of abuse of process relating to breach of deemed undertaking rule.

***R.J. Smith J.:***

**Overview**

1 The Kinsmen Club of Kingston ("Kinsmen") claim that Mary Walker ("Mary"), an 86 years old resident of their apartment building, caused a fire by careless smoking and is responsible for the damages incurred. In her defence, Mary pleaded that she suffered from a mental disability, which prevented her from forming the required intent or appreciating a duty of care.

2 Mary's son Donald Walker ("Donald") had previously been appointed as his mother's power of attorney and, as a result, Donald was asked and agreed to act as his mother's Litigation Guardian.

3 Donald was examined, as the Litigation Guardian for his mother, by counsel for the Kinsmen. Donald gave answers to questions during the examination for discovery, which the Kinsmen seek to rely on as the basis for a separate claim against Donald personally. The Kinsmen claim that if Mary lacked the necessary mental capacity, then Donald is personally responsible for the damages caused by his mother's careless smoking.

4 The court must decide if the Kinsmen can use the evidence given by Donald in discovery, when he was examined as the Litigation Guardian for his mother, as the basis for a separate claim against Donald personally or does the deemed undertaking rule prevent the Kinsmen from using the evidence obtained at discovery in a separate proceeding?

***Issue Number 1: Can the Kinsmen Club use the answers given by Donald during his discovery, in his capacity as Litigation Guardian for his mother, as the basis for a separate claim against him personally, or does this breach the deemed undertaking rule as set out in Rule 30.1.01(3)?***

5 Both actions arise out of a fire that occurred on July 25, 1999 at the Summerhill Apartments located in Kingston, Ontario, which are owned by the Kinsmen Club of Kingston, who are the Plaintiffs in this action. The apartment was occupied by the late Mary Walker ("Mary"), who was 86 years old, at the time of the loss.

6 On July 24, 2000, the Plaintiffs commenced the first action against Mary, claiming that she caused the fire in her apartment by careless smoking. In her Statement of Defence, Mary pleaded that, at the time of the fire, she suffered from a mental disability, which prevented her from forming the intention to act or from appreciating any duty to take care.

7 Donald Walker ("Donald") had previously been appointed as power of attorney for his mother and due to her mental disability at the time the claim was made, Donald agreed to act as the Litigation Guardian for his mother. In support of that appointment, Donald swore an affidavit, in which he deposed that he had no interest in the proceeding, which was adverse to that of his mother.

8 On May 13, 2002, Donald was examined by counsel for the Kinsmen, as the Litigation Guardian on behalf of his mother.

9 Counsel for the Kinsmen, who conducted the examination for discovery of Donald, as Litigation Guardian, confirmed the following:

(a) That prior to the examination of Donald, he had formed the following opinions:

(i) Mary's defence of mental disability was one that was tenable at law, if the evidence supported it.

(ii) That if Mary was not responsible, that someone else must be responsible for her actions.

(iii) That Donald Walker himself may have been one of the persons that might be responsible for Mary's actions.

(b) No steps had been taken to initiate a claim against Donald, prior to his examination as Litigation Guardian for his mother.

(c) The information obtained from the examination of Donald, as Litigation Guardian for his mother, formed a good part of the information on which he relied in advancing the claim against Donald personally.

(d) All of the information obtained in the first action by the Kinsmen is the information upon which the Plaintiffs made the decision to issue the second action against Donald.

(e) At no time prior to examining Donald, as Litigation Guardian for his mother, did counsel for the Kinsmen give notice to Donald or counsel for Mary of his view that Donald might be personally responsible for the fire in the event that Mary's defence of mental instability was upheld.

(f) Some of the questions put to Donald, as a Litigation Guardian, also shed light on Donald's personal role in Mary's case. Examining Donald's personal role was part of the purpose counsel for the Kinsmen had in asking Donald some of the questions in discovery.

10 On July 31, 2002, after the examination of Donald was completed, the Kinsmen issued a second Statement of Claim, naming Donald as the sole Defendant and claiming that he was responsible for the damages caused by his mother. In the Statement of Claim, the Plaintiffs allege that Donald had assumed responsibility for his mother's care and, that if Mary was not liable for her own actions, then Donald was personally liable for his mother's negligent acts.

### Analysis

11 The deemed undertaking rule is set out in Rule 30.1.01(3), which states as follows:

(3) All parties and their counsel are deemed to undertake not to use the evidence or information to which this rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

12 Rule 30.1.01(1) of the *Rules of Civil Procedures* states that the deemed undertaking rule applies to evidence obtained on examinations for discovery (Rule 31) and also to documentary discovery, (Rule 30) and to information obtained from evidence therefrom.

### Purpose of Proceeding

13 The Plaintiffs' first argument is that the second action, against Donald in his personal capacity, was commenced "for the purposes of the proceeding" against Mary and, therefore, the deemed undertaking rule does not apply.

14 Rule 30.1.01(3) prevents parties to an action or their counsel, in this case the Kinsmen and their counsel, from using evidence or information obtained through examinations for discovery or documentary discovery, for purposes other than those of the proceeding in which the evidence was obtained. The Plaintiffs seek to use the evidence given in discovery by Donald, as Litigation Guardian, in the proceeding commenced by the Plaintiffs against Mary (Action no. 00-CV-14540) for the purpose of supporting a claim against Donald personally (Action no. 02-CV-21421).

15 The proceeding against Donald personally, in action number 02-CV-21421, is a separate proceeding from the action commenced by the Plaintiffs against Mary, in action number 00-CV-14540. The deemed undertaking rule is quite clear that a party cannot use evidence given during discovery for purposes other than those of the proceeding in which the evidence was obtained. In this case, the evidence obtained from the discovery of Donald, in his capacity as Litigation Guardian for Mary, can only be used in action number 00-CV-14540, the proceeding in which the discovery was conducted, unless leave of the court is obtained.

16 The Plaintiffs' purpose for commencing a second action against Donald personally is not the factor that the court must consider. The court must decide whether "evidence obtained at a discovery in one proceeding may be used in another proceeding." The rule clearly states that evidence given at discovery in one proceeding may not be used for purposes other than the proceeding in which the evidence was given and therefore cannot be used in other proceedings, without leave of the court.

17 The leading case on the deemed undertaking rule is *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (Ont. C.A.) where the Court of Appeal for Ontario recognized the deemed undertaking rule in Ontario. Ms. Goodman was employed as a real estate agent by NRS Royal Realty Inc. and Mr. Rossi was the President of NRS Royal Realty Inc. Ms. Goodman's employment was terminated and she sued for wrongful dismissal. In the course of discoveries, NRS Royal Realty produced a report prepared by Mr. Rossi, which was sent to the Minister of Consumer and Commercial Relations. The report contained critical comments about Ms. Goodman's ethical behaviour. Ms. Goodman then commenced an action for defamation based on the report.

18 The rationale for the rule was stated at p. 13 of the *Goodman* decision as follows:

The rational basis for the rule is that where one party compels another, either by the enforcement of a rule of court or a specific order of the court, to disclose documents or information whether that other wishes to or not, the party obtaining the disclosure is given this power because the invasion of the other party's rights has to give way to the need to do justice between those parties in the pending litigation between them; it follows from this that the results of such compulsion should likewise be limited to the purpose for which the order was made, namely, the purposes of that litigation then before the court between those parties and not for any other litigation or matter or any collateral purposes: see, for example, per Lord Keith of Kinkel in *Home Office v. Harman*, 919830 1 A.C. 280, 308.

19 The party obtaining disclosure of documents or information in a discovery is limited to using the information obtained for the purposes of the proceeding between those parties and may not use the information for any other litigation or matter or any collateral purpose. In this case, the Plaintiffs seek to use information obtained on discovery in the first proceeding against Mary, in other litigation, namely the subsequent action commenced against Donald. This is prohibited by the deemed undertaking rule.

### No Status

20 The second argument raised by the Plaintiffs is that the moving party, Donald Walker, has no status to complain about the breach of the deemed undertaking rule, as he was not the party who was examined.

21 Donald is the Defendant in the second proceeding commenced by the Plaintiffs. The deemed undertaking rule prevents a party from using evidence given at discovery for any other purpose other than the proceeding in which the discovery was conducted. The Plaintiffs seek to rely on the evidence given by Donald, as Litigation Guardian for his mother in the first proceeding, as evidence to justify their claim against him personally in the second proceeding.

22 The *Rules of Civil Procedure* do not contain a definition of the word "party". The Rules do not define a party as being limited to a plaintiff or defendant. In this case, Donald was a party to the first action, as his mother's Litigation Guardian. Donald became potentially liable for costs personally when he agreed to act as Litigation Guardian. Donald was named as a party in the first action by being named in the style of cause, as well as by becoming possibly liable for costs of the proceeding. Donald was a party to the first action against Mary in his capacity, as her Litigation Guardian.

23 The deemed undertaking rule applies to the Kinsmen and their counsel, who are deemed to have undertaken not to use information obtained for any purpose other than that proceeding in which the discovery was conducted. The undertaking is deemed to be given by the party obtaining the information on discovery. In this case, the Kinsmen are clearly a party in the first action against Mary, who have received information from the discovery in the first action, and are bound by the deemed undertaking rule.

24 Therefore, I find that Donald has status to move for a stay or a dismissal of the action commenced against him, as the Plaintiffs have breached the deemed undertaking rule and seek to use evidence given in the discovery in the first proceeding, as the basis for a claim against Donald in a separate proceeding.

### ***Issue Number 2: Do the interests of justice outweigh the prejudice that may be caused to the party disclosing evidence in this case?***

25 The Plaintiffs' final argument is to seek relief from the provisions of the deemed undertaking rule. Rule 30.1.01(8) of the *Rules of Civil Procedure* states as follows:

If satisfied that the interests of justice outweigh any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such direction as are just.

26 The Kinsmen chose not to give Donald notice that they considered that he was potentially personally responsible for Mary's actions before they examined him, as the Litigation Guardian for his mother. Counsel for the Kinsmen admitted that

he had formed an opinion that Donald may have been one of the persons responsible for Mary's actions, prior to examining him for discovery.

27 In order to be appointed as Litigation Guardian, Rule 7.03(10)(i)(iii) requires Donald to swear an affidavit stating that he had no interest in the proceeding, adverse to that of the party under disability, namely his mother. The evidence is clear that Donald did not appreciate that he potentially had an adverse interest to that of his mother, before he was examined, as the Litigation Guardian for his mother. The evidence is also clear that counsel for the Plaintiffs was aware that Donald potentially had an interest adverse to his mother. Notwithstanding such knowledge, counsel for the Kinsmen proceeded to use the opportunity of examining Donald in his capacity, as Litigation Guardian in the first proceeding, to obtain information concerning Donald's possible personal liability for the negligent actions of his mother. Counsel's examination of Donald served two purposes; (1) to determine the extent of Mary's actions and her mental state and; (2) to discover the degree of responsibility that Donald had for his mother's actions.

28 Counsel for the Kinsmen had other alternatives available to him. He could have advised Donald that his interest was potentially adverse to that of his mother and suggested he obtain independent legal advice. He could have issued the separate claim against Donald before examining him, however the Plaintiffs lacked the required evidence. Counsel for the Plaintiffs was aware that Donald's interest was potentially adverse to his mother and, therefore, he could have advised Donald that he was not an appropriate Litigation Guardian. Counsel for the Plaintiffs chose not to advise Donald of his potential adverse interest and proceeded to question Donald to explore the possibility of his personal responsibility without giving notice.

29 I do not find that the interests of justice in this case outweigh the prejudice to the party who disclosed evidence; namely, Donald Walker. The actions of the Plaintiffs, who chose to use the discovery process in the first proceeding as a means of obtaining information on which to commence a second proceeding against the party being examined, without giving prior notice to that party, is a practice which is not fair and just and should not be condoned by the courts.

30 If a party intends to use the evidence to be given by a Litigation Guardian in examinations for discovery, as the basis for a separate action against the Litigation Guardian personally then, fairness requires that notice should be provided to the Litigation Guardian before he or she is examined.

31 In the case of *Disher v. Kowal* (2001), 56 O.R. (3d) 329 (Ont. S.C.J.), the defendant sought to dismiss the plaintiffs' action as an abuse of process because of non-compliance with the deemed undertaking rule in Rule 30.1.01.(3). Ms. Disher was a nurse at the North York General Hospital who was dismissed in 1992. In her wrongful dismissal action against the North York General Hospital, the hospital produced two copies of a memorandum from Ms. Kowal, another nurse at the hospital, expressing concerns about Ms. Disher's behaviour. Ms. Disher subsequently commenced an action against Ms. Kowal alleging injurious falsehood and intentional interference with economic relations. The plaintiff, Ms. Disher, sought relief from the deemed undertaking rule and the hospital opposed this motion. The court found that the *Disher* case was very similar to the *Goodman* case, where information was obtained during the wrongful dismissal action and used to initiate an action against an individual who was not a party to that action.

32 The prejudice to Donald is that he was questioned in a manner where one of the objectives was to obtain self-incriminating statements from him. Donald agreed to act as his mother's Litigation Guardian because he had been named as his mother's power of attorney and because he was unaware that his interest could be adverse to that of his mother in the claim made by the Kinsmen against his mother. The Kinsmen argued that Donald could have refused to act as his mother's Litigation Guardian and therefore he was not compelled to give information, which might be prejudicial. Donald was unaware that his interest was adverse. If the Plaintiffs had given him notice that he was possibly potentially responsible for his mother's actions then, this argument would have some merit.

33 In the *Disher* case, the court stated that special circumstances were required before the court should depart from the deemed undertaking rule. I do not find that the interests of justice outweigh the prejudice to Donald in the circumstances of this case, where no notice was given to Donald that the information provided by him in discovery, as Litigation Guardian in the first proceeding could be used as the basis for a subsequent claim against him personally.

### **Consequence of Breach and Timeliness**

34 If the Kinsmen have breached the deemed undertaking rule and relief from the deemed undertaking rule is not granted pursuant to Rule 30.1.01(3), then it would constitute an abuse of process to allow the use of the Plaintiffs' evidence or information obtained therefrom in a separate proceeding. In the *Disher v. Kowal*, supra, and *Goodman v. Rossi*, supra, decisions, the court granted a stay of the second action as a result of the breach of the implied undertaking rule.

35 While there was some delay in bringing this motion, the factual situation was complex and no evidence has been produced to show that the delay has caused any prejudice to any party.

### **Disposition**

36 I therefore find that the action number 02-CV-21421 commenced against Donald Walker personally is in breach of the implied undertaking rule set out in Rule 30.1.01(3). I also find that relief from the deemed undertaking rule should not be granted, as the interests of justice do not outweigh the prejudice to Donald Walker for the reasons set out above.

37 Action number 02-CV-21421 is therefore permanently stayed, as an abuse of the court's process due to the breach of the implied undertaking rule by the Plaintiffs.

38 It is not necessary to deal with the Plaintiffs' motion to consolidate the actions in view of my decision on the deemed undertaking rule.

### **Costs**

39 In addition to the costs envelopes I have received and which should be provided to each party; the Defendant shall have ten (10) business days to make submissions on costs and the Plaintiffs shall have ten (10) business days to respond and the Defendant shall have five (5) business days to reply.

*Motion granted.*