Case Name:

R. v. Visuvalingam

IN THE MATTER OF the Highway Traffic Act, R.S.O. 1990, c. H.8

Between
Corporation of City of Toronto, and
Ahilan Visuvalingam, defendant

[2002] O.J. No. 3515

Ontario Court of Justice
Provincial Offences Court - Toronto, Ontario
Quon J.P.

Heard: June 10 and September 16, 2002.
Judgment: September 16, 2002.
(65 paras.)

Charge: S. 154(1)(a) Highway Traffic Act - unsafe lane change

Cases considered or referred to:

R. v. Bjellebo, [1999] O.J. No. 965 (Ont. Ct. (Gen. Div.)) per Chapnik J. at Toronto.
R. v. Collins (1987), 33 C.C.C. (3d) 1 (S.C.C.).
R. v. Colquhoun, [2002] O.J. No. 349 (O.C.J.) per Quon J.P. at St. Thomas.
R. v. Fitzpatrick (1999), 102 C.C.C. (3d) 144 (S.C.C.).
R. v. Hodgson (1998), 127 C.C.C. (3d) 449 (S.C.C.).
R. v. Jones (1994), 89 C.C.C. (3d) 353, 114 D.L.R. (4th) 645, [1994] 2 S.C.R. 229 (S.C.C.).
R. v. Oickle, [2000] S.C.J. No. 38, 2 S.C.R. 3 (S.C.C.).
R. v. Taylor, [2001] B.C.J. No. 801 (B.C. Prov. Ct.) per Brecknell J.
Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425 (S.C.C.).
R. v. White, [1999] S.C.J. No. 28 (S.C.C.).
R. v. Wholesale Travel Group Inc. (1991), 67 C.C.C. (3d) 193 (S.C.C.).

Statutes, Regulations and Rules cited:

Canadian Charter of Rights and Freedoms, Part 2 of the Constitution Act, 1982, Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, R.S.C. 1985, App. II, s. 7.
Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 154(1)(a), 199(1), 199(3), 200(1).

Authorities Referred to:

Paciocco and Stuesser, The Law of Evidence (Toronto, Canada: Irwin Law Inc., 1996), pp. 85-86.

Counsel:

E. Fernandez, prosecutor.
D. Jones, agent, for the defendant.

Ruling on the voluntariness and
admissibility of inculpatory statements

QUON J.P.: —

I. BACKGROUND

¶ 1 The defendant was involved in an accident with another motor vehicle in the northbound lanes of Toronto's Don Valley Parkway on November 10, 2001 at 10:21 a.m. After a police officer attended at the scene of the accident, written statements were obtained from both the defendant and the other motorist involved. The defendant subsequently gave an oral statement. A charge of making an unsafe lane charge contrary to s. 154(1)(a) of the Highway Traffic Act, R.S.O. 1990, c. H.8, was then laid against the defendant. The officer had based his decision to lay the charge from the positioning of the vehicles, the other driver's statement and the defendant's written and oral inculpatory statements.

¶ 2 The defendant's vehicle had struck a vehicle driven by Grace Swayze that had been stopped just ahead of his vehicle in the centre lane while the defendant's vehicle had moved from the right lane to the centre lane. Swayze did not see what had occurred prior to the accident nor did she see the positioning of the defendant's vehicle before it hit her. She only recalled that she had heard a loud screeching noise behind her just before she felt the impact of a vehicle colliding into the rear of her vehicle. Swayze had also testified that it was heavy, stop and go traffic at the time of the accident. In fact, her vehicle had been stopped for a few seconds before it was struck by the defendant's vehicle. She also suffered an injury to her back when her head struck the headrest.

¶ 3 The investigating officer testified that the front left corner of the defendant's vehicle showed fresh damage. Its hood was buckled, its bumper damaged, its lights destroyed, and its engine apparently damaged. The Swayze vehicle, correspondingly, had sustained damage to its right rear corner. Its bumper had been dislodged. He also testified that the roads were in good condition and dry. And that it was sunny, mild, and hazy. The officer stated he did not see any skid marks on the road near where the two vehicles had collided in the centre lane.

¶ 4 The officer also described the circumstances that led to written statements being obtained from the parties involved in the accident. He testified that when he had arrived at the accident scene, he called out for the drivers of the vehicles involved in the accident. The defendant then approached and identified himself as the driver of one of the vehicles involved in the accident. Swayze also approached and identified herself as the other driver. The officer then had the two vehicles removed from the accident site. The Swayze vehicle was driven off but the defendant's vehicle had to be towed because it was not driveable. The officer and the two drivers then went to a nearby parking lot. There, the officer gave to each the defendant and Swayze a blank form entitled "Collision Field Notes for Involved Persons", and requested that both write out in their own words what had transpired in the space after the word "Statement" printed on the form. The officer then left them alone to write out their statements.

¶ 5 On the form, the defendant had written out in his own words what had happened and returned it to the officer. Swayze did the same. The officer also read back to the defendant the statement that he had written down, but did not ask the defendant to sign the form. After reading both Swayze's and the defendant's written statement, the officer asked both of them only one question. For the question posed to the defendant, the defendant gave only one response. The defendant was asked: "What lane were you initially travelling in?" The defendant had responded: "I was in the right lane." The officer testified that he had written the question and response down verbatim in his notes. At no time during the officer's involvement with the defendant did the officer caution him about his right to counsel and his right to remain silent.

¶ 6 In the voir dire held to determine the admissibility and voluntariness of the defendant's incriminating statements, the officer read out to the court the statement portion of what the defendant had written on the form. The officer also stated that there had been some parts of the statement that had been scratched out. The defendant had written: "I was going on the northbound. Due to traffic, the car in front of me puts brakes on. I had no time to react, so I turned into other lane and hit the car. I couldn't control; finally hit the other vehicle." This writing along with the subsequent oral response to the officer's question that he had been initially in the right lane were the incriminating statements given by the defendant to the officer. The prosecution seeks to have these statements entered into the trial proper as proof of the offence. It is not actually attempting to enter the document containing the defendant's written statement as an exhibit, but is seeking to have the contents of that statement admitted as evidence through the officer reading it out in court.

¶ 7 The decision on the admissibility and voluntariness of the statements was reserved, and the prosecution was then allowed to finish presenting its case. After the prosecution closed its case, it submitted that it had made a prime facie case independent of the defendant's incriminating statements. It submitted that the court could rely on Swayze's testimony of being struck after her vehicle had been stopped, the damage sustained by both vehicles, the location of damage on each vehicle, and the position of the two vehicles involved in the collision, as proof that the defendant had made an unsafe lane change.

¶ 8 The defence did not call any evidence and argued that the prosecution would be unable to make a prime facie case without the defendant's incriminating statements. The matter was then adjourned to consider the voluntariness and admissibility of the defendant's statements given to the investigating police officer at the accident scene. I agree with the defence that without these incriminating statements, the prosecution would not have the evidence to prove that the defendant had made an unsafe lane change or that he had been driving in another lane just before the collision. If the inculpatory statements were to be excluded, the prosecution's remaining evidence would fall short of proving beyond a reasonable doubt that the defendant was guilty of the offence.

¶ 9 In challenging the admissibility of the incriminating statements, the defence proffered three grounds: the failure to caution the defendant before the statements were made, the absence of the defendant's signature on the written statement, and the use of statutorily compelled statements against the defendant would infringe his Charter right against self-incrimination (otherwise known as the "R. v. White defence").

¶ 10 The trial began on June 10, 2002 and later adjourned to September 16, 2002 for my ruling on the admissibility and voluntariness of the defendant's inculpatory statements. These are my reasons for judgment and my ruling on the inculpatory statements.

II. ISSUES

¶ 11 Was the absence of the defendant's signature on the written statement an indication the defendant had not been the author of that statement?

¶ 12 Would the defendant's right against self-incrimination protected under the Charter be infringed by the admission of the statutorily compelled statements?

¶ 13 Was the investigating officer required to caution or inform the defendant of his right to remain silent or his right to counsel, before the defendant had given the officer any written or oral statements?

III. ANALYSIS

¶ 14 First of all, the defendant chose not to appear in court for the trial. He hired a traffic paralegal to represent him and act on his behalf at the trial. Again, I note the folly in this strategy or action. It is not the representation that I question but the defendant's failure to be present during the trial. Although the defendant is entitled to be represented or to act though an agent, there is an obvious disadvantage to the defendant in not being present. The defendant's absence handcuffs the agent and limits the strategy or options available to the

defence. Obviously, the defence would have a difficult time in introducing evidence to the contrary or evidence to contradict the officer's testimony.

¶ 15 The burden is on the prosecution to prove its case beyond a reasonable doubt, with the defendant having no obligation to present evidence or to make a defence (unless arguing an exception to the offence). Even with the defendant having no onus to present evidence or be present for his trial, his absence creates a vacuum in any defence strategy. The agent in representing the defendant cannot testify for the defendant and has no personal knowledge of any events related to the offence, nor is he able to anticipate all legal or factual issues that may arise during the trial. Without the defendant present to advise or give instruction, or to inform the agent of the implausibility or correctness of any testimony or evidence given by the officer, the defence is at a serious disadvantage. The agent in proceeding with the trial may in fact be doing a disservice to the defendant. Again, the defendant has the right not to be present but must be prepared to live with the consequences of not being able to furnish evidence to the contrary at an opportune time or to give in-court instruction to his representative during the trial. Ultimately, the instant case may be an example of this erroneous strategy of the defendant not personally attending and gambling on the possibility of the officer leaving out a crucial element during his testimony.

¶ 16 Returning to the issues at hand, the defence submits there are three arguments against admitting the inculpatory statements. First, the defence submits the defendant's signature is absent on the form received by the officer. The signature is required, it argues, to prove the defendant made the written statement. Secondly, the defendant's right to remain silent under the Charter has been prejudiced by provincial legislation that compels him to give particulars about an accident to a person in authority. The prosecution is seeking to use incriminating statements statutorily compelled to be given by the defendant as proof he had made the unsafe lane change. Finally, it is argued that the officer's failure to caution the defendant or to inform him of his right to remain silent or his right to counsel is a fatal defect. Therefore, on these grounds, the defence contends the defendant's written and oral statements should not be admitted as evidence.

¶ 17 In the voir dire, the investigating officer testified that he was in uniform when he spoke with the defendant at the accident scene. The officer further stated that he had made neither promises nor threats to the defendant; that the defendant understood the questions and did not need an interpreter; that the defendant's answers were consistent to the questions asked; that the defendant was not under the influence of alcohol or drugs; that the defendant was not injured; that the defendant did not indicate any desire to speak to counsel; and that the defendant was not under arrest at the time of the making of the statements. The officer also testified that he had not yet decided to charge the defendant before the inculpatory statements were actually made. Also, there were no other persons of authority in the vicinity.

¶ 18 However, under cross-examination, the officer revealed that he did not caution the defendant nor did he inform the defendant of his right to counsel and his right to remain silent before the defendant had made the incriminating statements. On this contention, the prosecution submits that the defendant did not need to be cautioned and given his right to counsel because he was not under arrest. If this had been a criminal matter, the prosecution submits, then the defendant should have been informed of his right to counsel or be cautioned about his right to remain silent. However, the prosecution contends that since this is only a Highway Traffic Act matter, the standard of protection given to persons charged for criminal matters should not be strictly applied in provincial offences matters. Therefore, it was argued the statements should be admissible in the trial proper.

1. ABSENCE OF DEFENDANT'S SIGNATURE ON WRITTEN STATEMENT

¶ 19 To reiterate, the evidence that proves the defendant had made a lane change comes directly from the defendant's written and oral statements. However, the actual document containing the written statement is not being submitted as an exhibit by the prosecution. Rather, it is the information written by the defendant on the form that is being sought to be admitted. To accomplish this, the officer acknowledges that what he is reading out in court is what the defendant had written on the form. In showing continuity, he had testified that he handed the form to the defendant and the defendant had written down information in his own handwriting on the form. The document was then returned to the officer. The officer indicated that he did not ask either Swayze or the defendant to sign the forms containing their respective statements.

¶ 20 The defence has not attacked the method by which the prosecution wishes to enter the information contained in that document as evidence, but instead argues the document was not signed by the defendant, and therefore questions whether it is a writing made by the defendant. Well, the officer did testify that the defendant had made that statement in his own handwriting and that he then personally read that statement back to the defendant. It is what the officer read in the defendant's written statement that is being proffered as evidence. Specifically, that writing made by the defendant was physically seen and read by the officer. The information is not inadmissible simply because the defendant's signature is not on the document. No suspicion has been raised that the writing the officer had received from the defendant was made by someone other than the defendant. Moreover, there is no evidence that the writing was not made by the defendant.

¶ 21 Therefore, I am satisfied that the information written on the form obtained by the investigating officer was written or made by the defendant, and then subsequently read by that officer before he had decided to charge the defendant. However, the contents of the defendant's written statement still have to be voluntarily made to be admissible. The burden lies with the prosecution to prove that the writing was made in such a manner beyond a reasonable doubt.

2. VOLUNTARINESS AND ADMISSIBILITY OF THE INCULPATORY STATEMENTS

(a) The Confessions Rule and The Charter

¶ 22 Briefly, the confessions rule applies to any out of court statement of the defendant given to a person in authority conducting "an investigation of a suspected offence". Cory J. for the majority in R. v. Hodgson (1998), 127 C.C.C. (3d) 449 (S.C.C.) at page 459 referred to the confessions rule:

> It "can now be taken to be clearly established in Canada that no statement made out of court by an accused to a person in authority can be admitted into evidence against him unless the prosecution shows, to the satisfaction of the trial judge, that the statement was made freely and voluntarily". See Erven v. The Queen, [1979] 1 S.C.R. 926 at p. 931, 44 C.C.C. (2d) 76, 92 D.L.R. (3d) 507, per Dickson J., as he then was. This, of course, is the confessions rule.

¶ 23 There is no difference in analysis between an oral or written statement given to a police officer by a person charged with an offence. In Paciocco and Stuesser's tome, The Law of Evidence, the authors discuss at pp. 85-86, the use of adverse admissions against the person who had made those admissions and that a written statement made by him or her may be admitted for its truth [emphasis is mine below]:

> A party may introduce into evidence against an opposing party any relevant: statement made by the opposing party; ...
> Admissions are acts or words of a party offered as evidence against that party. Professor Younger provides this rule of thumb: "Anything the other side ever said or did will be admissible as long as it has something to do with the case." ...
> ... Wigmore was of the view that admissions were not hearsay at all, in that they passed the gauntlet of the hearsay rule because the party against whom the evidence is being admitted has no need to cross-examine himself. However, the prevailing rule, and one accepted by the Supreme Court of Canada in Evans, is that an admission is an exception to the hearsay rule. "Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements". [see R. v. Evans (1993), 25 C.R. (4th) 46 (S.C.C.) at p. 54] ...
> Most admissions take the form of statements - written or oral. These statements may be used to impeach the party by way of showing a prior inconsistent statement, and they are admissible for their truth.

¶ 24 In deciding the voluntariness of confessions or inculpatory statements given to a police officer, the Supreme Court of Canada in R. v. Oickle, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, has provided lower courts with guidance. That case addressed the issue of the common law confessions rule and its relation to the

Charter. Iacobucci J., writing for the majority held that the trial judge should strive to understand the circumstances surrounding the confession or inculpatory statement and ask if it gives rise to a reasonable doubt as to the confession's voluntariness, taking into account all the aspects of the confessions rule. The relevant factors include threats or promises, oppression, the operating mind requirement and police trickery. At paras. of 68, 69 and 71 of S.C.J. No. 38, his Lordship summarized the modern confessions rule:

> a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness. Both the traditional, narrow Ibrahim rule and the oppression doctrine recognize this danger. If the police interrogators subject the suspect to utterly intolerable conditions, or if they offer inducements strong enough to produce an unreliable confession, the trial judge should exclude it. Between these two extremes, oppressive conditions and inducements can operate together to exclude confessions. Trial judges must be alert to the entire circumstances surrounding a confession in making this decision.
> The doctrines of oppression and inducements are primarily concerned with reliability. However, as the operating mind doctrine and Lamer J.'s concurrence in Rothman, supra, both demonstrate, the confessions rule also extends to protect a broader conception of voluntariness "that focuses on the protection of the accused's rights and fairness in the criminal process": J. Sopinka, S.N. Lederman and A.W. Bryant, The Law of Evidence in Canada (2nd ed. 1999), at p. 339. Voluntariness is the touchstone of the confessions rule. Whether the concern is threats or promises, the lack of an operating mind, or police trickery that unfairly denies the accused's right to silence, this Court's jurisprudence has consistently protected the accused from having involuntary confessions introduced into evidence. If a confession is involuntary for any of these reasons, it is inadmissible.
> ...
> the analysis under the confessions rule must be a contextual one. In the past, courts have excluded confessions made as a result of relatively minor inducements. At the same time, the law ignored intolerable police conduct if it did not give rise to an "inducement" as it was understood by the narrow Ibrahim formulation. Both results are incorrect. Instead, a court should strive to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession's voluntariness, taking into account all the aspects of the rule.

¶ 25 Furthermore, Iacobucci J., at paras. 24-27 of S.C.J. No. 38 discussed the two main approaches used by the Supreme Court in applying the confessions rule. First, there is the narrow approach, which excluded statements where a person in authority made explicit threats or promises to the accused. In the second and broader approach, the Supreme Court looked for the absence of the necessary mental element of deciding between alternatives in order to exclude confessions:

> there are two main strands to this Court's jurisprudence under the confessions rule. One approach is narrow, excluding statements only where the police held out explicit threats or promises to the accused. The definitive statement of this approach came in Ibrahim v. The King, [1914] A.C. 599 (P.C.), at p. 609:
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> > It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.
> > ...
>
> The Ibrahim rule gives the accused only "a negative right -- the right not to be tortured or coerced into making a statement by threats or promises held out by a person who is and whom he subjectively believes to be a person in authority": Hebert, supra, at p. 165. However, Hebert also recognized a second, "much broader" approach, according to which "[t]he absence

of violence, threats and promises by the authorities does not necessarily mean that the resulting statement is voluntary, if the necessary mental element of deciding between alternatives is absent" (p. 166).

While not always followed, McLachlin J. noted at p. 166 that this aspect of the confessions rule "persists as part of our fundamental notion of procedural fairness". This approach is most evident in the so-called "operating mind" doctrine, developed by this Court in Ward, [1979] 2 S.C.R. 30, supra, Horvath v. The Queen, [1979] 2 S.C.R. 376, and R. v. Whittle, [1994] 2 S.C.R. 914. In those cases the Court made "a further investigation of whether the statements were freely and voluntarily made even if no hope of advantage or fear of prejudice could be found": Ward, supra, at p. 40. The "operating mind" doctrine dispelled once and for all the notion that the confessions rule is concerned solely with whether or not the confession was induced by any threats or promises.

These cases focused not just on reliability, but on voluntariness conceived more broadly. None of the reasons in Ward or Horvath ever expressed any doubts about the reliability of the confessions in issue. Instead, they focused on the lack of voluntariness, whether the cause was shock (Ward), hypnosis (Horvath, per Beetz J.), or "complete emotional disintegration" (Horvath, supra, at p. 400, per Spence J.). Similarly, in Hobbins v. The Queen, [1982] 1 S.C.R. 553, at pp. 556-57, Laskin C.J. noted that in determining the voluntariness of a confession, courts should be alert to the coercive effect of an "atmosphere of oppression", even though there was "no inducement held out of hope of advantage or fear of prejudice, and absent any threats of violence or actual violence"; see also R. v. Liew, [1999] 3 S.C.R. 227, at para. 37. Clearly, the confessions rule embraces more than the narrow Ibrahim formulation; instead, it is concerned with voluntariness, broadly understood.

¶ 26 Iacobucci J. then considered the confessions rule under the Charter at paras. 30 to 33 of S.C.J. No. 38:

the confessions rule has a broader scope than the Charter. For example, the protections of s. 10 only apply "on arrest or detention". By contrast, the confessions rule applies whenever a person in authority questions a suspect. Second, the Charter applies a different burden and standard of proof from that under the confessions rule. Under the former, the burden is on the accused to show, on a balance of probabilities, a violation of constitutional rights. Under the latter, the burden is on the prosecution to show beyond a reasonable doubt that the confession was voluntary. Finally, the remedies are different. The Charter excludes evidence obtained in violation of its provisions under s. 24(2) only if admitting the evidence would bring the administration of justice into disrepute: see R. v. Stillman, [1997] 1 S.C.R. 607, R. v. Collins, [1987] 1 S.C.R. 265, and the [page 25] related jurisprudence. By contrast, a violation of the confessions rule always warrants exclusion.

These various differences illustrate that the Charter is not an exhaustive catalogue of rights. Instead, it represents a bare minimum below which the law must not fall. A necessary corollary of this statement is that the law, whether by statute or common law, can offer protections beyond those guaranteed by the Charter. The common law confessions rule is one such doctrine, and it would be a mistake to confuse it with the protections given by the Charter. While obviously it may be appropriate, as in Hebert, supra, to interpret one in light of the other, it would be a mistake to assume one subsumes the other entirely.

...

the confessions rule is concerned with voluntariness, broadly defined. One of the predominant reasons for this concern is that involuntary confessions are more likely to be unreliable. The confessions rule should recognize which interrogation techniques commonly produce false confessions so as to avoid miscarriages of justice.

In defining the confessions rule, it is important to keep in mind its twin goals of protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes.

¶ 27 I find in this case, because of the manner in which the inculpatory information was obtained by the police officer from the defendant, there are three factors outlined in R. v. Oickle that need to be considered in

deciding whether the defendant's incriminating written and oral statements were voluntarily made. They are the operating mind requirement, the presence of police trickery, and the existence of inducements or promises.

¶ 28 To begin, there is no evidence that the defendant had been offered promises or inducements, or that he had been threatened or coerced to make those incriminating statements. Therefore, under the "Ibrahim rule" for confessions, there is no evidence that would render the defendant's inculpatory statements involuntary.

¶ 29 Next, have the police used trickery to obtain those inculpatory statements from the defendant? If there is evidence of trickery in obtaining those statements, then they may not be voluntarily given. This trickery doctrine is a distinct inquiry. While it is still related to voluntariness, its more specific objective is maintaining the integrity of the criminal justice system. There may be situations in which police trickery, though neither violating the right to silence nor undermining voluntariness per se, is so appalling as to shock the community. In such cases, an accused's confession should be excluded. At paras. 65 to 67 of S.C.J. No. 38, Iacobucci J. stated that:

> this doctrine is a distinct inquiry. While it is still related to voluntariness, its more specific objective is maintaining the integrity of the criminal justice system. Lamer J.'s concurrence in Rothman, supra, introduced this inquiry. In that case, the Court admitted a suspect's statement to an undercover police officer who had been placed in a cell with the accused. In concurring reasons, Lamer J. emphasized that reliability was not the only concern of the confessions rule; otherwise the rule would not be concerned with whether the inducement was given by a person in authority. He summarized the correct approach at p. 691:
>
> > [A] statement before being left to the trier of fact for consideration of its probative value should be the object of a voir dire in order to determine, not whether the statement is or is not reliable, but whether the authorities have done or said anything that could have induced the accused to make a statement which was or might be untrue. It is of the utmost importance to keep in mind that the inquiry is not concerned with reliability but with the authorities' conduct as regards reliability.
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> Lamer J. was also quick to point out that courts should be wary not to unduly limit police discretion (at p. 697):
>
> > [T]he investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community. [Emphasis added.]
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> As examples of what might "shock the community", Lamer J. suggested a police officer pretending to be a chaplain or a legal aid lawyer, or injecting truth serum into a diabetic under the pretense that it was insulin. Lamer J.'s discussion on this point was adopted by the Court in Collins, supra, at pp. 286-87; see also R. v. Clot (1982), 69 C.C.C. (2d) 349 (Que. Sup. Ct.). In Hebert, supra, this Court overruled the result in Rothman based on the Charter's right to silence. However, I do not believe that this renders the "shocks the community" rule redundant. There may be situations in which police trickery, though neither violating the right to silence nor undermining voluntariness per se, is so appalling as to shock the community. I therefore believe that the test enunciated by Lamer J. in Rothman, and adopted by the Court in Collins, is still an important part of the confessions rule.

¶ 30 In the instant case, the investigating officer is directed under s. 199(3) of the Highway Traffic Act to investigate a traffic accident and obtain its circumstances and the names of the people involved. Asking people milling about the vehicles involved in a traffic accident who drives which vehicle is not unreasonable and is

necessary for determining injuries and the parties involved in the accident. Thus, it is not the result of police trickery when the defendant identified himself as the driver of one of the vehicles involved in the accident.

¶ 31 I also find that when the officer requested the parties involved in the accident write down their version of what had occurred does not fall into the realm of police trickery. However, there may be situations under certain conditions where a police officer's actions in investigating a traffic accident may bring it into the realm of police trickery. There is no evidence of it in this case. That is, there is no evidence that the officer misled the defendant about the purpose of the form nor had there been any promise that the information would not be used against him. The police are nevertheless statutorily required to obtain information and details about the accident from the parties involved. Moreover, drivers involved in accidents are statutorily compelled to furnish the details of the accident to the investigating officer. This is found in s. 199(1) of the Highway Traffic Act. The Highway Traffic Act in Ontario does not provide a protection shield or a "use immunity" over conscripted information subsequently being used in regulatory prosecutions. (see my decision in R. v. Colquhoun, [2002] O.J. No. 349 (O.C.J.)). However, statutorily compelled statements are generally barred from being used in criminal prosecutions: R. v. White, [1999] S.C.J. No. 28.

¶ 32 Finally, the operating mind doctrine needs to be considered. This only requires that the defendant know what he is saying and that it may be used to his detriment. Like oppression, the operating mind doctrine should not be understood as a discrete inquiry completely divorced from the rest of the confessions rule. The operating mind doctrine is just one application of the general rule that involuntary confessions are inadmissible. Iacobucci J. in Oickle addressed the operating mind doctrine at paras. 63 and 64 of S.C.J. No. 38:

> the operating mind requirement "does not imply a higher degree of awareness than knowledge of what the accused is saying and that he is saying it to police officers who can use it to his detriment" (p. 936). I agree, and would simply add that, like oppression, the operating mind doctrine should not be understood as a discrete inquiry completely divorced from the rest of the confessions rule. Indeed, in his reasons in Horvath, supra, at p. 408, Spence J. perceived the operating mind doctrine as but one application of the broader principle of voluntariness: statements are inadmissible if they are "not voluntary in the ordinary English sense of the word because they were induced by other circumstances such as existed in the present case".
> Similarly, in concluding that the confessions rule cannot be limited to the negative inquiry of whether there were any explicit threats or promises, Beetz J. offered the following explanation of the rule, at pp. 424-25:
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> > Furthermore, the principle which inspires the rule remains a positive one; it is the principle of voluntariness. The principle always governs and may justify an extension of the rule to situations where involuntariness has been caused otherwise than by promises, threats, hope or fear, if it is felt that other causes are as coercive as promises or threats, hope or fear and serious enough to bring the principle into play.
>
> As these passages make clear, the operating mind doctrine is just one application of the general rule that involuntary confessions are inadmissible.

¶ 33 In the present case, there is no evidence of the defendant's state of mind at the time the written or oral statements were made. Nor is there any evidence of an oppressive atmosphere leading up to the statements being made. Ergo, the only evidence on deciding the issue of voluntariness comes from the oral testimony of the officer. Furthermore, from the defendant's own writing it appears in the words he selected that he was attempting to ameliorate his own situation or negate his fault in the accident. Thus, his words can be interpreted as an expression or evidence of his knowledge that his written statement could be used against his interest. Even on the form, there is some warning or indication to anyone completing the form that the writing may be used for some purpose. The title of the form was "Collision Field Notes of Parties Involved" and the defendant was informed to write out what happened in the space after the word "Statement" printed on the form. Thus, for the written inculpatory statement, I conclude it was made voluntarily. As for the oral inculpatory statement, I am going to consider its voluntariness and admissibility under the failure to caution section of this decision.

¶ 34 In sum, there is no evidence that the defendant's written inculpatory statement was made involuntarily from coercion, promises, police trickery, or the lack of an operating mind. Therefore, the written statement was voluntarily made by the defendant and is admissible in this trial.

(b) Right To Remain Silent Under The Charter

¶ 35 The defendant argues that the defendant's rights under the Charter have been prejudiced because of the statutory compulsion under provincial legislation to give particulars about the accident to a police officer.

¶ 36 In R. v. Bjellebo, [1999] O.J. No. 965 (Ont. Ct. (Gen. Div.)), Chapnik J. discussed the right to remain silent under the Charter at paras. 208 and 209 in the context of a criminal investigation:

> The principles of fundamental justice under s. 7 of the Charter include the right to remain silent at both the investigation and trial stages of the criminal process. Like the right to counsel, the right to silence has been interpreted as a right to chose whether to speak or remain silent in the face of a criminal investigation. Individuals must, therefore, be afforded reasonable opportunity to exercise this choice; R. v. Rothman (1981), 59 C.C.C. (2d) 30 (S.C.C.); R. v. Hebert (1990), 57 C.C.C. (3d) 1 (S.C.C.); R. v. R.J.S. (1995), 96 C.C.C. (3d) 1 (S.C.C.).
> As to when the right to silence is triggered, it was held by Sopinka J., writing a concurrent judgment in Hebert, at p. 354:
>
> > The right to silence, viewed purposively, must arise when the coercive power of the state is brought to bear against the individual - either formally (by arrest or charge) or informally (by detention or accusation) - on the basis that an adversarial relationship comes to exist between the state and the individual. The right, from its earliest recognition, was designed to shield an accused from the unequal power of the prosecution, and it is only once the accused is pitted against the prosecution that the right can serve its purpose.

¶ 37 This, after all, is a trial of a regulatory offence. Under this regime, the prosecution's argument is not incorrect, that rules developed under the criminal law should not be strictly applied to regulatory matters. As for remaining silent, the defendant is inevitably compelled under the Highway Traffic Act to report and furnish particulars of an accident to a police officer. Thus, the right against self-incrimination in certain circumstances must yield to the public interest in the regulatory sphere.

¶ 38 La Forest J. in R. v. Fitzpatrick, [1995] 4 S.C.R. 154, referred to Cory J.'s comments in R. v. Wholesale Travel Group Inc. (1991), 67 C.C.C. (3d) 193, 84 D.L.R. (4th) 161 (S.C.C.), that constitutional standards developed in the criminal context cannot be automatically applied to regulatory offences and that the courts must be careful not to automatically apply rules respecting self-incrimination developed in the criminal sphere. His Lordship's reference is found at p. 157 in Fitzpatrick [emphasis is mine below]:

> In particular, in Wholesale Travel, supra, at p. 243 C.C.C., p. 211 D.L.R., Cory J. held that "a Charter right may have different scope and implications in a regulatory context than in a truly criminal one", and that "constitutional standards developed in the criminal context cannot be applied automatically to regulatory offences". These comments must be borne in mind in approaching the appellant's claims, for it is made in the context of a detailed regulatory regime that governs state conservation and management of the fishery. In this regulatory environment, we must be careful to avoid automatically applying rules that have been developed respecting self-incrimination in the criminal sphere.

¶ 39 Moreover, the Supreme Court of Canada has held there is no blanket prohibition against the use of statutorily compelled statements in prosecutions. That is, each case has to be determined individually and any claim for a Charter infringement has to be considered in the context of the circumstances of the alleged breach and in the context of the breach in relation to the purpose of the Charter right. La Forest J. at p. 154 of

Fitzpatrick reviewed Iacobucci's holding in R. v. Jones (1994), 89 C.C.C. (3d) 353, 114 D.L.R. (4th) 645, [1994] 2 S.C.R. 229 (S.C.C.), and wrote that Iacobucci J. did not conclude that the principle against self-incrimination is absolute. Inevitably, La Forest J. held that the compulsory reports in Fitzpatrick could be used to prosecute the maker of the reports.

> Iacobucci J. accepted that there is a "principle against self-incrimination" that exists as a principle of fundamental justice under s. 7 of the Charter. Nowhere, however, did he suggest that this principle is absolute.

3. THE VOLUNTARINESS OF STATUTORILY COMPELLED STATEMENTS AND THE RIGHT AGAINST SELF-INCRIMINATION

¶ 40 I previously considered this issue of whether a person makes a statement voluntarily when statutorily compelled to do so, in a Highway Traffic Act prosecution for failing to report an accident in R. v. Colquhoun, [2002] O.J. No. 349 (O.C.J.). In pre-Charter cases, it had been decided that a statement made under the compulsion of a statute was not involuntary since the term voluntary is based on whether the statement was made under compulsion or inducement. I held in Colquhoun that the compelled statements were voluntary in the context of the obligation to report accidents, the public interest in the search for truth and the goal of road safety, since s. 7 did not provide absolute protection against all uses of statements compelled by statute. At paras. 161-163 of Colquhoun I wrote:

> On the second part of the issue of whether the statement was involuntary because of statutory compulsion to furnish accident information to the police, I had preliminarily ruled it was voluntary. This was based on two pre-Charter decisions. The Court of Appeal of Ontario held in R. v. Slopek (1974), 21 C.C.C. (2d) 362, that a statement made under the compulsion of a statute does not render the statement involuntary since the term "voluntary" in relation to statements made by an accused to the police is based on whether the statement had been obtained by promises or threats. The Supreme Court also made the same finding in R. v. Marshall, [1961] S.C.R. 123. Since there was no existence of police misconduct in the defendant's case, then the statement was voluntarily made under both parts of the voluntariness issue.
> However, the issue of voluntariness has to be reconsidered with the Charter in mind, since the Slopek and Marshall decisions had preceded the advent of the Charter. That is, would a statutorily compelled statement be conceptually a freely made statement under the Charter's umbra? This was indirectly canvassed by the Supreme Court in R. v. Fitzpatrick, [1995] 4 S.C.R. 154 and R. v. White, [1999] S.C.J. No. 28, where it considered the public interest in compulsory reporting with the individual interest in privacy, personal autonomy and human dignity. The Court in White determined that the principle against self-incrimination protected by s. 7, did not provide absolute protection against all uses of information that had been compelled by statute. In Fitzpatrick, the Court found a partnership between the state and the individual, which contributed to the absence of true state coercion. It also found the necessity of acquiring statements in order to maintain the integrity of an entire regulatory regime. The compulsory reporting or obligation to furnish information in the present case was mandated by ss. 199(1) and 200(1) of the Highway Traffic Act, a regulatory statute. The Supreme Court in White also considered the reporting requirement in the regulated activity of driving in which all drivers are required to have a license in order to drive. In order to obtain this license and the privilege to drive, the Court found that these drivers had given free and informed consent to all of the rules of the road, including the requirement to report an accident. In that context, it cannot be said that a driver is coerced to provide an accident report when the obligation arises. The Supreme Court did note however that the restriction of human freedom was not completely absent in the regulated activity of driving.
> Furthermore, I find that the compulsory reporting of accidents is required to fulfill the important regulatory objective of road safety. To achieve that goal, there is a partnership between the state and the individual driver in accident reporting. These reports are essential to maintain the aim of safe highways. Thus, the public interest in road safety overrides the

> individual interest against self-incrimination, in the context of having the report admitted in a proceeding for failing to report an accident. My conclusion is predicated on Iacobucci J.'s comments in R. v. White in which he stressed the importance of balancing societal interests with individual interests under s. 7 and that in some contexts, the factors that favour the importance of the search for truth will outweigh the factors that favour protecting the individual against undue compulsion by the state. Therefore, statutorily compelled statements made under the Highway Traffic Act for the purpose of compiling accident reports are not involuntary when examined under the Charter.

¶ 41 The written statement made by the defendant was conscripted by statute. It was made during the investigation stage of the traffic accident. As such, when it is used in a regulatory prosecution it does not violate the principles of fundamental justice protected by s. 7 of the Charter. The defendant was not under arrest nor had the officer formed the opinion that the defendant had committed an offence. The officer was required by s. 199(3) of the Highway Traffic Act to investigate the accident and to obtain certain information. Correspondingly, the defendant was also compelled by the same statute to report the accident and to give the particulars of the traffic accident to the police officer. Therefore, the public interest in road safety, the defendant's participation in the regulated activity of driving which he voluntarily entered by obtaining a driver's license, the implicit consent of all drivers to obey the rules of the regulated activity including reporting an accident, tips the balance and subverts the defendant's individual interest against self-incrimination. See R. v. Colquhoun for an extensive discussion of the issue of statutorily compelled statements and the right against self-incrimination in a Highway Traffic Act prosecution.

4. OFFICER'S FAILURE TO CAUTION THE DEFENDANT BEFORE THE STATEMENTS WERE MADE

¶ 42 Was it necessary for the investigating police officer conducting a regulatory investigation to caution or warn the defendant about making statements adverse to his interest? The defence argues that the defendant had not been properly cautioned before he began writing out his statement of what had occurred or orally answering a question from the officer. The officer confirmed this. Specifically, there had been no caution or warning given to the defendant that he had the right to remain silent or that his written or subsequent oral statement may be used against him in future prosecutions, or that he had a right to speak to counsel. The officer had not yet determined that an offence had occurred at the time the defendant had identified himself to the officer or when he handed the forms to the parties involved in the accident. It was only after the defendant had made the written statement and after the officer had a chance to read that statement, did the officer have the reasonable grounds that an offence had occurred.

¶ 43 Chapnik J. in Bjellebo, at para. 211 considered the scope of the s. 7 protection against self-incrimination for regulatory and criminal investigations. He referred to the Supreme Court's decision in Thomson Newspapers, [1990] 1 S.C.R. 425, in which it was held that there should be an appropriate balance between the interest of the individual and the state for regulatory investigations by retaining the power to compel testimony and the right to object to the use of compelled testimony as self-incrimination:

> The Supreme Court has drawn a clear distinction between the scope of the right against self-incrimination in the context of regulatory investigations and criminal investigations. In Thomson Newspapers at p. 542, a case dealing with investigations under the Combines Investigation Act, LaForest expressly stated:
>
> > [t]he lower probability of prejudice [regulatory investigations represent] to any particular individual who comes within its reach, together with the important role such investigation play in the effective enforcement of anti-combines and possible other regulatory legislation, suggests that a more appropriate balance between the interest of the individual and the state can be achieved by retention of the power to compel testimony and the recognition of the right to object to the subsequent use of so much of the compelled testimony as is self-incriminatory.

¶ 44 Furthermore, Chapnik J. in Bjellebo, at paras. 213 and 215 referred to the R. v. Fitzpatrick decision and wrote that the principle against self-incrimination in a regulatory regime is engaged when an individual is in an adversarial or inquisitorial relationship with the state at the time they provide information:

> Further, in order to engage the principle against self-incrimination in a regulatory regime, individuals must be in an adversarial or inquisitorial relationship with the state at the time they provide the information: Fitzpatrick at para. 36.
> ...
> The underlying concern is that the authorities not hide behind the veneer of an administrative proceeding in order to conscript an individual who is the target of a criminal investigation into giving self-incriminating testimony.

¶ 45 At para. 221 and 223, Chapnik J. held that there is a lower expectation of privacy in regulatory matters but where there are reasonable grounds of an offence then it is necessary for an investigator to caution a person:

> Evidence furnished after that date was clearly adduced as a result of state coercion in an overall "inquisitorial" situation promulgated by the undercover nature of the S.I. investigation and its prosecutorial aims. Lengthy questionnaires were provided to OCGC's representatives and Bellfield for response. Answers were given based on the assumption of compellability. The respondent intends to use those answers and his own statements against Bellfield at trial. The failure to caution him of his entrenched right to silence under s. 7 of the Charter, after January 1988, prevented him from exercising a meaningful choice as to whether to speak or remain silent in the face of a serious criminal investigation.
> ...
> Notwithstanding the lower expectation of privacy in regulatory matters, the imposition of sanctions including the threat of imprisonment, along with the state use of statutorily compelled information in these circumstances engages the Charter rights subsumed in s. 7 in respect of both Bellfield and Minchella. ... Any information purportedly given by the applicants in response to a bona fide civil audit after the existence of reasonable grounds cannot serve to override their constitutionally entrenched rights. The applicants had a right once reasonable grounds were established to be cautioned that they were not obliged to say anything, what they did say could be used against them and they had a right to retain and instruct counsel without delay along with the usual warnings surrounding this. The principles of fundamental justice embodied in s. 7 demand no less, subject of course, to a 24(2) analysis of admissibility.

¶ 46 In assessing whether a caution should be given in a regulatory investigation, I am persuaded by the reasoning of a British Columbia court trying a regulatory offence that had similar facts to the case at bar. In R. v. Taylor, [2001] B.C.J. No. 801 (B.C. Prov. Ct.), three hunters were charged under the provincial legislation for illegally possessing a moose. One of the hunters was not cautioned before a statement was given by that hunter. Prior to that hunter making the statement, the Conservation Officer did not consider him to be a suspect with regard to any illegal activity, and did not caution him as had been done with another of the hunters. However, about a third of the way through the questioning it appeared to the Officer that the hunter was a party to the offence of unlawful possession of the moose. The Officer did not stop his questioning, even though incriminating information of an offence had been revealed, nor did he provide a subsequent caution and warning to that hunter. Conservation officers under that provincial legislation have the power to stop vehicles to determine whether or not its occupants have been hunting, trapping or angling, and to obtain information about wildlife or game fish possessed by them. A person could be charged if he or she refuses to give information respecting hunting or fishing. Thus, it appears that this regulatory legislation compels hunters to answer all the questions of a conservation officer.

¶ 47 Brecknell J. in Taylor concluded that conservation officers were allowed to seek basic information concerning hunting in a general sense, but once they were undertaking a specific investigation of specific offences on which they received prior information, they were taking statements as investigatory tools used for the purposes of preferring charges and not as compelled statements under the legislation. Thus, he concluded

that the hunters had not been giving statements compelled by the statute since the officers had detained the hunters for a lengthy period and were not gathering general information about hunting, but rather for a specific offence.

¶ 48 In determining the issues of voluntariness and admissibility, Brecknell J. canvassed the cases of R. v. White, [1999] S.C.J. No. 28 (S.C.C.), R. v. Fitzpatrick (1999), 102 C.C.C. (3d) 144 (S.C.C.), R. v. Wholesale Travel Group Inc. (1991), 67 C.C.C. (3d) 193 (S.C.C.), and R. v. Collins (1987), 33 C.C.C. (3d) 1 (S.C.C.). In deciding whether the hunter's incriminating statements were admissible, Brecknell J. found there was no bad faith on the conservation officer nor did the surrounding circumstances amount to oppression, but that the officer was not as careful as he should have been once the incriminating information was disclosed. However, Brecknell J. was not convinced beyond a reasonable doubt that the statement was voluntary in a legal sense because it was obtained in a manner that infringed or denied the hunter's right to counsel and protection against self-incrimination. He further held that the admission of such evidence would prima facie discredit the administration of justice. He held at paras. 84 to 88 of Taylor:

> I am satisfied that Defendant Atkinson was not given the appropriate opportunity by way of a caution and warning to decide whether he wished to exercise his right to counsel when his statement disclosed a possible involvement in an offence.
> It is clear that the onus in proving voluntariness lies with the Crown, and that the standard of proof is beyond a reasonable doubt.
> In my view, the statement obtained from Defendant Atkinson was obtained in a manner that infringed or denied his right to counsel and protection against self-incrimination, and as such, was not voluntary. In such circumstances, the admission of such evidence would prima facie discredit the administration of justice.
> There is nothing in the evidence called by the Crown that would rebut this presumption by explaining in an adequate manner why a caution and warning was not given. I am not convinced beyond a reasonable doubt that the statement was voluntary in a legal sense.
> As such, I find the Defendant Atkinson's statement to be inadmissible against him.

¶ 49 In essence, a similar situation to the Taylor case occurred in the present matter. Although initially the defendant was compelled to report the particulars of an accident, and the investigating officer was required to obtain details about that accident, I conclude that once the investigating officer had reasonable grounds to believe that an offence has occurred and commences to secure evidence for a specific offence, he must stop obtaining information from the potential wrongdoer until the appropriate cautions are given. To continue without that caution, would allow the defendant to wrongfully believe that he was still obligated by statute to speak to the officer. At the point the officer begins gathering evidence of a specific offence involving the defendant, the defendant is certainly placed into the perilous position of self-incrimination. The query on the failure to caution now merges with the issue concerning the existence of an operating mind as part of the confessions rule. By virtue of the defendant in this case not receiving the appropriate caution to remain silent, the defendant would be unable to properly decide whether he should continue to speak and inculpate himself, or to remain silent. In that sense, the statement would not have been given voluntarily. The operating mind aspect of voluntariness would be absent.

IV. CONCLUSION

¶ 50 The defendant has been charged for making an unsafe lane change under the Highway Traffic Act. The evidence that proves he committed this offence comes from the defendant's own incriminating statements made to the investigating police officer. Before these statements can be admitted, the prosecution must prove the defendant made them voluntarily beyond a reasonable doubt. There are two distinct inculpatory statements that this court has to consider for their admissibility and voluntariness. One relates to the inculpatory statement of the defendant making a lane change, which he had, in his own words, written on a blank form received from and returned to the investigating officer. The other inculpatory statement was orally made by the defendant in response to the officer's question about which lane he had initially been driving in, shortly after the officer had read the defendant's inculpatory written statement.

¶ 51 Aside from the voluntariness issue, the defence argues against the admissibility of these statements on three grounds: the absence of the defendant's signature on the written statement, the use of statutorily compelled statements that infringe the right against self-incrimination protected by the Charter, and the failure of the officer to caution the defendant before the statements were given.

¶ 52 In the first place, the absence of the defendant's signature on the written statement does not automatically bring into question whether the defendant had been the author of that statement. The officer testified that it was the defendant who had made the statement in his own words and in his own handwriting. There is no evidence to the contrary. Therefore, the defendant made the written statement.

¶ 53 The two remaining defence arguments of failure to caution and the improper use of statutorily compelled statements can be considered together, as these two issues can be jointly resolved. For its absence of a caution argument, the defense established that the officer during his involvement with the defendant never warned or cautioned the defendant about his right to remain silent or his right to counsel.

¶ 54 The defendant's written statement was compelled to be made under the accident-reporting requirement of s. 199(1) of the Highway Traffic Act, R.S.O. 1990, c. H.8. At the time the written statement was made, the investigating officer had not been investigating a crime nor did he suspect the defendant of committing any offence. He had been only investigating a traffic accident. The evidence also shows that the officer did not induce or coerce the defendant into making the written statement. As well, there was the absence of police trickery or an oppressive atmosphere surrounding the making of the written statement to render it involuntary. Hence, the written inculpatory statement made by the defendant is admissible and voluntary.

¶ 55 At the moment the officer gave the form to the defendant to prepare the written statement, the officer was not obligated to caution the defendant about his rights to counsel or his right to remain silent, since the officer was only gathering information about the traffic accident in a general sense. As for the argument that the compelled statement infringed the defendant's right to remain silent, the protection of the R. v. White "use immunity shield" does not cover the defendant's written statement. Essentially, statutorily compelled statements are, as a general rule, barred from being used in criminal prosecutions, as long as they would infringe the right against self-incrimination protected under the Charter. In any event, the written statement at issue is being engaged for a regulatory prosecution and not for a criminal one. As such, it comes under the aegis of the R. v. Fitzpatrick decision, that permits the prosecution to use conscripted statements in regulatory matters, for the reason that individuals who freely enter the regulated activity of driving motor vehicles in Ontario agree to be bound by the rules of this regulated activity, including reporting the particulars of an accident, when they secure a driver's licence. See also R. v. Colquhoun, [2002] O.J. No. 349 (O.C.J.).

¶ 56 Regardless, after the officer had the opportunity to read what the defendant had written, I conclude on an objective basis that the officer would have had reasonable grounds to believe that a specific Highway Traffic Act offence had been committed. At that juncture, the officer would no longer be gathering information for a traffic accident report, but would have been securing evidence to be used in the prosecution of a specific offence committed by the defendant. The officer's investigation of a traffic accident had been transformed from general information gathering to the act of obtaining evidence for a specific offence. It is this transition that triggers the defendant's right to remain silent and the obligation of the officer to give the appropriate caution to the defendant, before the officer can continue with his questioning about the specific offence. Prior to making the oral statement, the defendant had made a written admission about his involvement in the offence of making an unsafe lane change. Once the officer has become aware or had reasonable grounds to believe the defendant had been involved in committing a particular offence, the officer must caution the defendant about his right to remain silent or his right to obtain counsel: R. v. Taylor, [2001] B.C.J. No. 801 (B.C. Prov. Ct.).

¶ 57 Therefore, the defendant's oral inculpatory statement that he was initially driving in the right hand lane is not admissible, in the legal sense, as a voluntary statement. It is not voluntary since the defendant could not be said to have had an operating mind. That is, at the time he made his oral inculpatory statement, the officer had just read the defendant's written statement and would have had reasonable grounds that the defendant had committed an offence. The defendant should have then been cautioned. Without being informed of his right to counsel and about his right to remain silent, and that any subsequent statement then given could be used against

him, the defendant could not have made an informed choice about whether to continue speaking and incriminate himself, or to stop speaking to the police officer. This unawareness by the defendant that the officer was now consciously securing incriminating evidence from him, caused by the officer's failure to caution, unfairly denies or nullifies the opportunity for the defendant to choose between giving or not giving the incriminating information. The failure to caution would then make the oral statement involuntary, as there would have been the lack of an operating mind.

¶ 58 The modern confessions rule as considered in R. v. Oickle, [2000] S.C.J. No. 38 (S.C.C.), covers a broad conception of voluntariness that also includes the protection of the defendant's rights and fairness during the pre-charge stage of the investigation of an offence. In the instant case, the right to remain silent is not engaged or become pertinent until the officer's investigative activity has left the accident investigation stage and enters the offence investigation stage.

¶ 59 In order to resolve and integrate the various rules, principles and legal issues at play in the present matter and in the regulatory universe that this matter is found in, a comprehensive test has to be established for determining when the right to remain silent and the obligation to caution an individual are engaged, when statutorily compelled statements infringe the right against self-incrimination and when it does not, and finally when an individual is compelled to furnish information to the state and when that compulsion ends.

¶ 60 In a nutshell, this judicial inquiry can be simply explained by dividing the officer's investigation into two stages - one being the "accident investigation stage" and the other being the "offence inquiry or investigation stage". The defendant's obligation under s. 199(1) of the Highway Traffic Act to give particulars of the accident to a police officer only exist when the officer is still in the accident investigation stage. The defendant's obligation under s. 199(1) ends once the officer enters the offence inquiry stage. The need to caution the defendant and inform him of his right to remain silent occurs when the officer enters the offence inquiry stage. If an individual supplies a police officer with an uncautioned statement in the offence inquiry stage, the courts may be reluctant to consider it a statutorily compelled statement. Cautions are not required in the accident investigation stage since motorists involved in accidents are compelled to furnish information about a traffic accident to a police officer. Ergo, inculpatory statements given by the defendant during the accident investigation stage are admissible and considered voluntary in the legal sense, if they pass the criteria enunciated by the Supreme Court of Canada in R. v. Oickle. The statutorily compelled statements made during the accident investigation stage fall into the R. v. Fitzpatrick public interest umbra, which permits conscripted information to be used in regulatory prosecutions, for reasons of road safety and the implicit consent of individuals who drive motor vehicles. Conversely, the protection of the R. v. White "use immunity shield" over conscripted statements taken during the accident investigation stage is not available to the defendant.

¶ 61 At this point in the development of the law concerning the use of statutorily compelled statements in regulatory prosecutions, it is not certain whether the R. v. White "use immunity shield" can be employed to prevent the admissibility of inculpatory statements taken during the "offence inquiry stage". This is because it has not been decided by an appellate court that the principle in R. v. White should apply to regulatory matters. Moreover, in this developing analysis an individual is not obligated to give statutorily compelled statements to an officer in the "offence inquiry stage". The individual can exercise his right to remain silent in the offence inquiry stage and is no longer compelled under s. 199(1) to speak to a police officer. Furthermore, if the officer fails to caution that individual about his or her right to remain silent and an inculpatory statement is furnished by that individual in the offence inquiry stage, that statement is not admissible. It is not admissible as it is considered to be legally involuntary. It had not come from an operating mind. If the defendant in the instant case would have been properly cautioned, when the oral inculpatory statement had been made during the "offence inquiry stage", that statement would then be legally admissible and deemed to be given voluntarily by an operating mind. He would also not be able to claim that the statement had been compelled by statute, as long as he would have been warned about the possibility of incriminating himself and that the investigation had turned into an offence inquiry.

¶ 62 Therefore because the defendant's oral inculpatory statement is inadmissible for being involuntarily made, in the legal sense, it was not necessary to determine whether the oral statement given during the offence

inquiry stage is a statutorily compelled statement that would infringe the defendant's right against self-incrimination protected under the Charter. That question will have to be left for another day.

¶ 63 Nevertheless, even without the defendant's oral statement that he was initially in the right hand lane, the prosecution still has met its burden with the remaining admissible evidence and has proven beyond a reasonable doubt that the defendant had made an unsafe lane change. Specifically, there is evidence of the position of the vehicles involved in the accident, the amount of the damage, the location of the damage done to the individual vehicles being consistent with the theory that the defendant's vehicle had come from a different lane, that the Swayze car had been stopped for several seconds before being struck by the defendant's vehicle, and that the defendant had admitted moving from one lane to another to avoid one accident only to collide with the Swayze vehicle. The evidence that the defendant had been in another lane and moved into the same lane as the Swayze vehicle comes from the defendant's own written admission.

V. DISPOSITION

¶ 64 Therefore, it is the finding of this Court that the prosecution has proven beyond a reasonable doubt that the defendant, Ahilan Visuvalingam, is guilty of making an unsafe lane change contrary to s. 154(1)(a) of the Highway Traffic Act. A conviction will be entered against the defendant.

* * * * *

Appendix

Cases considered or referred to:

¶ 65

R. v. Bjellebo, [1999] O.J. No. 965 (Ont. Ct. (Gen. Div.)) per Chapnik J. at Toronto.
R. v. Collins (1987), 33 C.C.C. (3d) 1 (S.C.C.).
R. v. Colquhoun, [2002] O.J. No. 349 (O.C.J.) per Quon J.P. at St. Thomas.
R. v. Fitzpatrick (1999), 102 C.C.C. (3d) 144 (S.C.C.).
R. v. Hodgson (1998), 127 C.C.C. (3d) 449 (S.C.C.).
R. v. Jones (1994), 89 C.C.C. (3d) 353, 114 D.L.R. (4th) 645, [1994] 2 S.C.R. 229 (S.C.C.).
R. v. Oickle, [2000] S.C.J. No. 38, 2 S.C.R. 3 (S.C.C.).
R. v. Taylor, [2001] B.C.J. No. 801 (B.C. Prov. Ct.) per Brecknell J.
Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425 (S.C.C.).
R. v. White, [1999] S.C.J. No. 28 (S.C.C.).
R. v. Wholesale Travel Group Inc. (1991), 67 C.C.C. (3d) 193 (S.C.C.).

Statutes, Regulations and Rules cited:

Canadian Charter of Rights and Freedoms, Part 2 of the Constitution Act, 1982, Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, R.S.C. 1985, App. II, s. 7.
Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 154(1)(a), 199(1), 199(3), 200(1).

Authorities Referred to:

Paciocco and Stuesser, The Law of Evidence (Toronto, Canada: Irwin Law Inc., 1996), pp. 85-86.

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