

Indexed as:
R. v. Naces

Between
Her Majesty the Queen, and
Virginia Naces

[2001] O.J. No. 3854

**Ontario Court of Justice
College Park - Toronto, Ontario
Horkins J.**

September 7, 2001.
(24 paras.)

Counsel:

H. Craig, for the Crown.
C. Hynes, for the accused.

¶ 1 **HORKINS J.**— An application is made in this case to exclude certain roadside statements made by the accused to the investigating officer on the basis that they were statutorily induced and thereby inadmissible against the accused.

¶ 2 This is an otherwise unremarkable drinking and driving case. The issue is therefore raised in a very common fact situation that has passed in this jurisdiction for years without a great deal of serious comment. Does the Supreme Courts' judgement in *R. v. White* [See Note 1 below] now generally mandate the exclusion of such evidence?

Note 1: *R. v. White* (1999), 135 C.C.C. (3d) 257, affirming (1998), 122 C.C.C. (3d) 167 (B.C.C.A.).

The Facts;

¶ 3 The investigating officer, P.C. Roach, is an experienced Toronto police officer. At approximately 8:30p.m. on March the 5th, 2000 he received a radio call to attend at the intersection of Jarvis St. and Mount Pleasant Blvd. with respect to a property damage motor vehicle accident. The officer arrived at that intersection almost immediately and observed that the traffic light standard had been knocked down and was lying across the

road. The officer observed debris scattered on the roadway and followed its trail north around the block to a side street a few hundred metres away. Upon his arrival on Huntley Street Officer Roach observed an ambulance, a tow truck and a grey B.M.W. automobile. The car had extensive damage to the front end and roof as well as four flat tires. Gathered near the car were two ambulance attendants, a tow truck driver and a woman, Ms. Naces, the accused.

¶ 4 The officer approached the assembled group and simply asked "what happened here?" Ms. Naces responded to the effect that the B.M.W. was her car and that she had been driving it on Jarvis near Isabella and had hit a pole. Upon receiving this information the officer asked Ms. Naces to step away from the car and the other individuals to a distance of about ten feet where he then asked her a series of questions and answers. The officer asked Ms. Naces why she didn't stay at the scene of the accident, she responded that she didn't know why. He asked her if she was injured and she indicated that she was not. He asked her if she was the only person in the car and she indicated that she was. The officer then elicited through a series of questions and answers that Ms. Naces had been drinking beer about an hour previously at a bar in the Isabella and Yonge area, a few blocks from the accident scene.

¶ 5 During his initial contact with the accused officer Roach observed classic indicia of alcohol impairment; she was unsteady on her feet, her eyes were glassy, she had an odour of alcohol on her breath. On the basis of his investigation the officer formed the opinion that Ms. Naces' ability to operate the motor vehicle had been impaired by alcohol at the time of driving and at 8:50 he placed her under arrest for impaired driving. At that point he cautioned her about making further statements, advised her of her rights to counsel and made a breath testing demand.

¶ 6 Ms. Naces was then transported to the nearest testing facility. Breath testing was conducted and resulted in evidence of a blood-alcohol level in the range of 120 mg. of alcohol per 100 ml. of blood.

¶ 7 Ms. Naces gave evidence on the voir dire into the admissibility of her roadside statement. She took no serious issue with officer Roach's account of the events. In addition however, she gave evidence that she felt compelled to answer the investigating officer's questions because he was a uniformed police officer. She also indicated that he didn't tell her not to answer. Although Ms. Naces made no reference to any particular statutory compulsion, she did indicate that she felt an obligation to respond to the questions of a police officer and articulated at least a vague notion that such compulsion flowed from her general responsibilities as a driver having been involved in an accident. Ms. Naces also provided evidence that she had in fact been driving the vehicle within approximately twenty-five to thirty-five minutes of the arrival of officer Roach. This evidence of course is only admissible on the voir dire with respect to the admissibility of her statements and not admissible on the trial proper with respect to establishing a time of driving.

THE ISSUE

¶ 8 The accused seeks to have her road side statements excluded on the basis that they were given as a result of statutory compulsion. This argument is inspired by the Supreme Court of Canada judgment in *Regina v. White* which held that the principle of protection from self incrimination guaranteed by section 7 of the Charter is triggered where the Crown seeks to tender a statement which was given under compulsion of provincial statute.

THE LAW

¶ 9 Section 7 of The Charter provides;

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

¶ 10 Section 24 of the Charter provides;

- 24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy, as the court considers appropriate and just in the circumstances.
- (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

¶ 11 The issue before me has been dealt with by the Supreme Court of Canada in *White* and in a similar context in *Fitzpatrick* [See Note 2 below]. In addition, this issue has been considered recently in a similar fact situation to the case before me by Justice Wein in *DaCosta* [See Note 3 below].

Note 2: 1995 102 C.C.C. (3d) 144.

Note 3: *Regina v. DaCosta* [2001] O.J. 2392 S.C.O.

¶ 12 To appreciate the development that these cases represent it is interesting to note that in 1996 Mr. Justice Doherty of the Ontario Court of Appeal, writing for the court in *Smith* [See Note 4 below], stated the law on this issue as it was then understood;

"where Section 10(b) rights do not exist, then the Section 7 right to make an informed choice as to whether to speak to the police requires only that the police not engage in conduct that effectively and unfairly deprives the detainee of the right to choose whether to speak to the police."

Note 4: Regina v. Smith 1996 105 C.C.C. (3d) 58.

¶ 13 Justice Doherty went on to observe that the police in investigating driving offences are usually engaged in an effort to avoid ongoing activity as opposed to the more common context of gathering evidence after the fact of the offence. The goal of the police is to catch the drinking driver at the roadside rather than at the scene of the accident.

"Drivers are required when detained at the road side to provide the police with certain information (e.g.: licence and proof of insurance), which is directly relevant to their entitlement to drive in a public place: R. v. Ladouceur, [1990] 1 S.C.R. 1257, supra. The information that driver's provide or fail to provide may lead to directly to penal consequences. I am unaware of any case law suggesting that questions aimed at eliciting that information infringed on the driver's right to silence even though the driver is required to disclose the information in response to those questions."

¶ 14 Of course we now have White.

¶ 15 In Dacosta Justice Wein nicely summarizes the law as set out in White and Fitzpatrick;

para. 25 In Regina v. White, the Supreme Court of Canada analyzed the scope of the protections provided by the principle against self-incrimination as contained in Section 7 of the Charter in the context of the admissibility of statements given as a result of statutory compulsion. The Court held that while use immunity provisions created by provincial motor vehicle legislation cannot extend directly to proceedings under the Criminal Code, as it would be ultra vires the province to restrict the admissibility of evidence in criminal matters, the principle of self-incrimination guaranteed by Section 7 did provide a protection against uses of information compelled by statute or otherwise. The majority held that while Section 7 does not provide absolute protection against all such uses of information, in the context of that particular case, involving a pure criminal offence, the protections did lead to the conclusion that the use of the statements would violate the Charter. Accordingly, the evidence was properly ruled inadmissible under s. 24(1) of the Charter.

para. 26 In analyzing the scope of the principle in the context of Section 7 as opposed to other enumerated expressions of the principle, the Court held that the protections of the principle against self-incrimination contained in s. 7 are "specific and contextually sensitive".

para. 27 The principle enunciated in R. v. Fitzpatrick (1995), 102 C.C.C. (3d) 144, S.C.C., where use immunity was analyzed in the regulatory

context was therefore distinguishable because of the context in which it arose.

para. 28 In the context of statements made under compulsion of motor vehicle legislation, the Court noted that the statements are taken under pronounced psychological and emotional pressure, that the use of such statements for incrimination in a criminal matter was not a purpose of the regulatory regime, that there will be a significant fear of prejudice if the person does not speak, and that permitting accident reports to apply in criminal proceedings would give the driver an incentive to lie and might increase the possibility of abusive conduct by state officials.

para. 29 It is important to note that in *White* the Court was assessing a situation where the statement had been volunteered by a "hit and run" driver the day after the incident. When the statement was taken, she was advised that although she was not required to provide a written statement she could be required to provide a statement under the Motor Vehicle Act. Importantly, she was also advised that any statement she gave under the Motor Vehicle Act could not be used against her in court because of the specific provisions of the legislation in that province. As well, the Court had clearly found that the statement was given in the context of a discussion of the motor vehicle legislation.

¶ 16 In *White* the accused's attention had specifically been directed to the obligations under the Motor Vehicle legislation compelling a statement. In *DaCosta* the accused was merely responding to general questions but was quickly told that the conversation was not privileged. Justice Wein referred to *Dacosta's* state of mind as feeling as though he had to give a statement because of a "generalized non-specific understanding of a driver's responsibilities under the Motor Vehicle Act." In this respect the case before me is indistinguishable from *DaCosta*.

¶ 17 This is an appropriate point in the analysis of the issue to reference comments of Justice Iacobucci in *White* at paragraph 66;

"The spontaneous utterances of a driver, occurring very shortly after an accident, are exactly the type of communication that the principle against self-incrimination is designed to protect. They are a personal narrative of events, emotions, and decisions that are extremely revealing of the declarant's personality, opinions, thoughts, and state of mind. The dignity of the declarant is clearly affected by the use of this narrative to incriminate."

¶ 18 When officer Roach arrived at the scene of the accident and then followed the debris trail to find both a wreck and Ms. Naces he had an investigative obligation to ask the very question he did "what happened here?" The position taken by Ms. Naces at trial implies no criticism of the officer, he was perfectly entitled, and probably duty bound, to ask the question he asked and to proceed in the manner in which he did. The difficulty arises at the stage at which it is sought to put the statement to use as incriminating

evidence at trial. There is, as Justice Wein referred to it, a "logistical difficulty" created by the statutory compulsion; the need to question persons suspected of driving offences impacting upon the accused's subsequent right to be protected from self incrimination. This practical difficulty was canvassed in *White* at paragraph 65:

"If police wish to use in criminal proceedings information acquired from the driver through questioning, the information must not be provided pursuant to the duty (in the motor vehicle legislation). There are several ways in which police might organize their investigation in order to prevent any information acquired independently of s. 61 from becoming tainted, as it were, by the accident report that is subject to use immunity. One possibility which appears to be contemplated by (the B.C. legislation) is for police to inform the driver that they intend to secure the details of the accident report not from the driver himself or herself, but "by other inquiries", thus terminating the driver's statutory duty to report the accident and permitting police to begin their investigation immediately."

¶ 19 In *White* (at paragraph 76) it is made clear that the statutory compulsion must be operative in the mind of the declarant at the time in order to be protected.

"If a declarant gives an accident report freely, without believing they will be influenced by the fact that he or she is required by law to do so, then it cannot be said that the statute is the cause of the declarant's statements. The declarant would then be speaking to the police on the basis of motivating factors other than ... the legislation."

¶ 20 Having reviewed the evidence before me I am persuaded that Ms. Naces provided information to the investigating officer on the basis of an honest and reasonably held belief that she was required by law to report the details of her car accident to the officer. This meets the test articulated in *White*.

¶ 21 As observed by Justice Wein in *Dacosta* at paragraph 37

"it is quite clear that most drivers are aware of their duty to provide information including their documentation and a report of what occurred to the police after an accident. This necessarily involves an admission of being the driver. In *White* itself, the exclusion of that acknowledgement resulted in the case being dismissed as there is no additional evidence to prove identity."

¶ 22 The declarant's belief that she is compelled to speak must be both honest and reasonable. This is an essential component of the balancing that occurs under Section 7 of the Charter. The fact that driving is a licensed activity supports the assumption that most drivers have been educated as to their duties and responsibilities and therefore will have at least a vague notion that they are subject to a statutory duty to report the details of an accident. Therefore as indicated by Iacobucci at paragraph 80 of *White*.

"as a practical matter it will be very important for the police officer who takes an accident report while simultaneously investigating a crime to delineate clearly for the declarant the start and end points of the accident report. For example, it may be useful for police to tell the driver that they will postpone the taking of an accident report until after they have questioned, or attempted to question the driver. Alternatively, as discussed above, police may wish to tell the driver that they intended to secure the details of the accident report from sources other than the driver, thus terminating the statutory duty to report."

¶ 23 It is the accused who seeks the exclusion of this evidence and therefore the accused who bears the onus establishing an infringement of her Charter rights. In *White Iacobucci* makes the interesting point at paragraph 89 that statutorily compelled evidence can be excluded either pursuant to Section 24(1) of the Charter or pursuant to a common law duty to exclude evidence whose admission would render the trial unfair. In either case an accused is entitled under Section 7 to use immunity in relation to compelled statements in subsequent criminal proceedings, exclusion of the evidence is required.

¶ 24 In conclusion I find that the accused Ms. Naces spoke to the officer under the honest and reasonable belief that she was compelled by statute to do so and that in the circumstances of this case she is entitled to immunity from her incriminatory statements being used against her in this prosecution. They will therefore be excluded from evidence.

HORKINS J.

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