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Monier v. Chamberlain: Work Product - Further Erosion of the Work Product Sanctuary, 1 J. Marshall J. of Prac. & Proc. 146 (1967)

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CASE NOTES

MONIER v. CHAMBERLAIN: WORK PRODUCT— FURTHER EROSION OF THE WORK PRODUCT SANCTUARY

The Supreme Court of Illinois, in the recent decision of *Monier v. Chamberlain*,¹ allowed discovery of material previously protected as the work product of an attorney. This was an action for damages for personal injury, including loss of memory and mental impairment, arising out of an automobile accident. Both parties were insured by Country Mutual Insurance Company which investigated the accident. Plaintiff's attorney, who was employed nearly two years after the accident, filed a motion requesting that defendant and the insurance company produce the following documents: 1) a copy of the insurance policy; 2) all medical reports, correspondence and hospital records concerning the health of the plaintiff up to the time of employment of counsel for defendant; 3) all statements by plaintiff or members of his family relative to the subject of litigation; 4) all memoranda of conversations with plaintiff and members of his family made to personnel of the insurance company pertaining to the matter in litigation; 5) all written statements of witnesses obtained prior to employment of counsel for defendant; 6) all reports, photographs and statements pertaining to the accident prior to the employment of counsel for defendant; and 7) all medical reports or memoranda concerning the health of plaintiff as it existed prior to the accident. The trial court entered an order requiring the common insurer and defendant's attorney to produce for inspection all of the documents sought by plaintiff. Both were fined for contempt of court upon their refusal to produce any of the documents except the insurance policy, and appealed on the grounds that the order violated the state and federal constitutional guaranties against unreasonable search and seizure and of due process of law. The Supreme Court of Illinois declined jurisdiction,² holding that no substantial constitutional questions were presented, and transferred the cause to the Appellate Court of Illinois, Third District.

The appellate court³ rejected defendants' contention that the material sought was either privileged or the work product

¹ 35 Ill. 2d 351, 221 N.E. 2d 410 (1966).

² 31 Ill. 2d 400, 202 N.E. 2d 15 (1964).

³ 66 Ill. App. 2d 472, 213 N.E. 2d 425 (1966).

of an attorney. It ordered the production of all documents except the "written statements of witnesses" as requested in number five, holding that plaintiff's fifth request was not specific enough. On appeal, the supreme court affirmed the appellate court's decision.⁴ In doing so, the court stretched the scope of discovery to the literal limits of the accepted rationale of discovery. The United States Supreme Court sets forth that rationale:

No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.⁵

Discovery procedure is designed to complement pleading in its function of giving notice to the other party. It supersedes pleading in accomplishing the functions of both issue formulation and of giving notice of the relevant facts.⁶ As a result of the availability of these facts, groundless claims and defenses are weeded out, the real issues are clarified, and the presentation of evidence at trial is facilitated.⁷ Once the law suit has commenced, discovery allows a party to obtain the facts when they are relatively unfaded by the passage of time, avoids surprise, minimizes concealment of relevant evidence, encourages pre-trial settlements⁸ and makes the evidence more equally available to

⁴ 35 Ill. 2d 351, 221 N.E. 2d 410 (1966).

⁵ Hickman v. Taylor, 329 U.S. 495, 507 (1947).

⁶ The functions of pleading are to frame the issues, to notify the other party of the suit and the facts relied upon, and to give the court jurisdiction. At common law, the emphasis was placed on issue formulation; in the 19th century, the emphasis shifted to a statement of the facts; today, the primary function of pleading is that of giving notice. For a general discussion, see CLARK, CODE PLEADING (2nd Ed. 1947). Illinois still requires fact pleading; "The allegations of a complaint must state all essential information together with the elements necessary to constitute the cause of action." Jorgensen v. Baker, 21 Ill. App. 2d 196, 200; 157 N.E. 2d 773, 776 (1959). See ILL. REV. STAT., ch. 110, §33 (1965).

⁷ "Under the prior Federal Practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial." Hickman v. Taylor, 329 U.S. 495, 500 (1947).

⁸ "The purpose of the deposition-discovery procedure is not only for the ascertainment of facts, but also to determine what the adverse party contends they are, and what purpose they will serve, so that the issues may be narrowed, the trial simplified, and time and expense saved." Baim & Blank, Inc. v. Philco Distributors, Inc., 25 F.R.D. 86, 87 (E.D.N.Y. 1957). Due to the extensive motion practice relating to discovery, it is questionable if time and expense of litigation are reduced, at least as pertains to the more complex case.

both parties.⁹ Increased accessibility to all the facts by the parties insures maximum presentation of all the evidence at trial, thereby increasing the probability that a case will be decided on its merits.¹⁰

Broad discovery practices were initially subject to criticism, which has substantially subsided. One argument was that it is unfair to require a party to give up material that he has perhaps worked hard to attain; he should be able to use the fruits of his labor to the maximum advantage. Trial under this view is a trial of wits, not a trial on the merits. This sporting theory of justice is no longer a serious argument.¹¹

A second argument was that surprise at trial reduces perjury.¹² The rationale behind this argument is that one is more hesitant about testifying falsely if he does not know what evidence will be brought against him. Also, a party who knows in advance the evidence to be used against him can better attempt to overcome it by perjury. However, the converse is also true; an honest party can better defend against false evidence to be used against him if he is forewarned. Moreover, some authorities feel that discovery in the long run reduces the incidence of

⁹ Lafrance, *Work Product Discovery: A Critique*, 68 DICK. L. REV. 351 (1963-64). "... [I]ts purpose is to enable the plaintiff to obtain information and prepare his cause for trial on the ultimate issues." *Shaw v. Weisz*, 339 Ill. App. 630, 642; 91 N.E. 2d 81, 87 (1950). The material sought upon discovery must be relevant, but under both the federal and state practice the relevancy standard is broader for discovery purposes than for trial. "'Relevant' as used in Section 26(b) of the Federal Rules . . . is not to be equated with 'relevant' as ordinarily used in determining admissibility of evidence upon a trial." *Kaiser-Frazer Corp. v. Otis & Co.*, 11 F.R.D. 50, 53 (S.D. N.Y. 1951). "'Discovery before trial' presupposes a range of relevance and materiality which includes not only what is admissible at trial but also that which leads to what is admissible at trial." *Krupp v. Chicago Transit Authority*, 8 Ill. 2d 37, 41; 132 N.E. 2d 532, 535. One limitation on the scope of discovery is good cause, which is not required under Illinois law. (ILLINOIS SUPREME COURT RULES 201 and 214). Other limitations are the various evidentiary privileges and work product. The good cause requirement of Rules 34 and 35 (FEDERAL RULES OF CIVIL PROCEDURE) serves a different purpose than, and is not to be equated with, the necessity doctrine pertaining to discovery of work product. Three positions with respect to good cause have been adopted: good cause is something more than relevancy and is required for all discovery. [*United Air Lines v. United States*, 26 F.R.D. 213 (Del. 1960)], good cause is synonymous with relevancy. [*Connecticut Mutual Life Insurance Co. v. Shields*, 17 F.R.D. 273 (S.D. N.Y. 1955)]; good cause connotes more than relevancy, but is only required for tangible things. [*Guilford National Bank of Greensboro v. Southern R. Co.*, 297 F. 2d 921 (4th Cir. 1962).]

¹⁰ *Developments in the Law-Discovery*, 74 HARV. L. REV. 945 (1960-61); Speck, *The Use of Discovery in United States District Courts*, 60 YALE L. J. 1132, 1155 (1951).

¹¹ "... Pre-trial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).

¹² Hawkins, *Discovery and Rule 34: What's So Wrong About Surprise?* 39 A. B. A. J. 1075 (1953).

perjury because:¹³ 1) witnesses may be examined while their memory is still fresh; 2) testimony upon discovery tends to be more spontaneous because there is less opportunity for coaching; 3) witnesses will have difficulty later in changing their stories; and 4) testimony is preserved.¹⁴

The concept of work product, as an independent basis of exemption was first propounded in *Hickman v. Taylor*.¹⁵ This involved an action for the wrongful death of a crew member of a tugboat who drowned when the boat sank. One of plaintiff's interrogatories requested that the defendant produce all written and oral statements he had obtained from witnesses in preparation for trial. Plaintiff's attorney admitted that the purpose of requesting these statements was only to make certain that he had overlooked nothing in preparation for trial.¹⁶ The defendant refused to comply, and was held in contempt of court.¹⁷ The United States Court of Appeals for the Third Circuit reversed, reasoning that such statements fall within the attorney-client privilege, and are, as such, not subject to discovery under the Federal Rules of Civil Procedure.¹⁸ The United States Supreme Court affirmed this decision, but on different grounds. It held that the material sought was not within the attorney-client privilege, but was qualifiedly exempt from disclosure because it was an attorney's "work product". "... [I]nterviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs . . ." ¹⁹ obtained in preparation for trial are all included within work product. This protection is necessary because "... a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients . . ." ²⁰ and therefore has a right to prepare his case without undue and needless interference. Furthermore, if work product were freely available, "[i]nefficiency, unfairness and sharp practices would inevitably develop in giving of legal advice and in the preparation of cases for trial."²¹

¹³ 4 MOORE, FEDERAL PRACTICE, §26.02 (2nd ed. 1963).

¹⁴ Illinois distinguishes between discovery and evidentiary depositions. The former are used for limited purposes at trial; the latter, for any purpose. See Ill. Sup. Ct. Rules 202 and 212 [ILL. REV. STAT., ch. 110, §101 (1965)].

¹⁵ 329 U.S. 495 (1947). In England the work product concept was present as early as 1876; see Gardner, *Privilege and Discovery*, 53 GEO. L. J. 585 (1965).

¹⁶ 329 U.S. 495, 516 (1947).

¹⁷ 4 F.R.D. 479 (E.D.Pa. 1945).

¹⁸ 153 F. 2d 212 (3d Cir. 1945).

¹⁹ 329 U.S. 495, 511 (1947).

²⁰ 329 U.S. 495, 510 (1947).

²¹ *Id.* at 511.

However, under *Hickman*, the work product exemption is not absolute. "Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery properly may be had."²² Thus even if the matter sought is work product, it may still be discovered upon a proper showing of necessity.²³ But what constitutes a proper showing of necessity is still subject to considerable division and case by case determination.²⁴ Where a witness is no longer available, sufficient necessity exists for discovery of his statement.²⁵ The hostility of a witness has been held to be sufficient for the production of his statement.²⁶ Some courts have ordered production of a witness's statement for the purpose of impeachment,²⁷ but it is generally held that more than this must be shown. The courts are split as to whether a lapse of time between the occurrence and the litigation is enough to require production of the statement.²⁸ A sufficient showing of necessity, however, cannot be made where production of an oral conversation between the witness and the attorney is sought.²⁹

The approach taken by Illinois courts prior to *Monier* to the work product of an attorney was somewhat different than that of the federal courts. The Civil Practice Act granted the supreme court broad powers in implementing discovery.³⁰ The former Supreme Court Rule 19-5 provided that "Disclosure of memoranda, reports or documents made by or for a party in preparation for trial . . . shall not be required through any discovery procedure."³¹ Generally, this rule has been held to create a broad, absolute exemption for work product. However, the extent of this exemption has been considerably narrowed and qualified in a series of recent decisions.

Illinois courts have held that statements made by non-party

²² *Id.* at 511.

²³ Good cause is a requirement for all discovery, or at least that related to tangible things. Necessity must only be considered when the matter sought is work product, whether tangible or intangible.

²⁴ F. JAMES, JR., CIVIL PROCEDURE 211 (1965).

²⁵ *Goldner v. Chicago & N.W.R. System*, 13 F.R.D. 326 (N.D. Ill. 1952).

²⁶ *Martin v. Capital Transit Co.*, 170 F. 2d 811 (D.C. Cir. 1948).

²⁷ *Compare* *Durkin v. Pet Milk Co.*, 14 F.R.D. 385 (W.D. Ark. 1953), with *Lester v. Istrandtson Co.*, 10 F.R.D. 338 (S.D. Tex. 1950).

²⁸ *Compare* *Sachse v. W. T. Grant Co.*, 27 F.R.D. 392 (D. Conn. 1961), with *Parla v. Matson Navigation Co.*, 28 F.R.D. 348 (S.D. N.Y. 1961).

²⁹ " . . . [W]e do not believe that any showing of necessity can be made . . . to justify production of such statements." *Hickman v. Taylor*, 329 U.S. 495, 512 (1947).

³⁰ Section 58 provides that "Discovery . . . shall be in accordance with Rules." ILL. REV. STAT., ch. 110, §58 (1965).

³¹ ILL. REV. STAT., ch. 110, §101.19-5 (1965). See note 39, *infra* for new rule.

witnesses to insurance agents were not discoverable,³² and that expert opinions were not discoverable.³³ On the other hand, where an insurance company obtains witness statements for the purpose of ascertaining its liability, and where such statements have independent evidentiary value as admissions against one's pecuniary interest, they have been held discoverable.³⁴ In *Stimpert v. Abdnour*, the Supreme Court of Illinois permitted discovery of a party's statement which was obtained by the adversary and contained admissions which were material and relevant evidentiary facts.³⁵ In *Day v. Illinois Power Co.*,³⁶ the appellate court apparently adopted the doctrine of necessity as a qualification of the work product exemption. Since the defendant had exclusive control of the facts and information surrounding the event, and the relevant evidence no longer existed, the court held that sufficient necessity had been shown to require defendant to produce such information. In effect, the court in *Day* appears to have superimposed the federal work product doctrine as propounded in *Hickman v. Taylor* upon the absolute exemption provided under Rule 19-5.

The supreme court in deciding *Monier* first concerned itself with the specificity required in a motion to produce.³⁷ The court reasoned that since the purpose of the requirement is to enable the party from whom discovery is sought and the judge to ascertain whether the matter being demanded is relevant, privileged or exempt as work product, the description of documents by category was sufficient.

The court next considered the defendant's contention that this matter was protected by the attorney-client privilege. The request for "all reports, photographs and statements" obtained by the carrier prior to employment of counsel for the defendant would clearly include a statement by defendant to his insurance

³² *Jost v. Hill*, 51 Ill. App. 2d 430, 201 N.E. 2d 468 (1964), erroneously reasoning that such statements are within the attorney-client privilege.

³³ *Kemeny v. Skorch*, 22 Ill. App. 2d 160, 159 N.E. 2d 489 (1959).

³⁴ *Haskell v. Siegmund*, 28 Ill. App. 2d 1, 170 N.E. 2d 393 (1960).

³⁵ "As sympathetic as we are to the desirability of protecting lawyers from unnecessary intrusion upon their privacy in preparation of a lawsuit, this protection cannot extend to the suppression of material evidentiary facts." *Stimpert v. Abdnour*, 24 Ill. 2d 26, 32; 179 N.E. 2d 602, 605 (1962). In *Oberkircher v. Chicago Transit Authority*, 41 Ill. App. 2d 68, 190 N.E. 2d 170 (1963), the court allowed discovery of plaintiff's statement even though defendant stipulated that he would not use it as evidence.

³⁶ "Where it appears as here that one party has exclusive control over the circumstances surrounding an event and has exclusive and superior opportunity to know or ascertain the facts, we believe that good cause [necessity] exists to require the party to disclose . . ." *Day v. Illinois Power Co.*, 50 Ill. App. 2d 52, 199 N.E. 2d 802, 807 (1964).

³⁷ "A party may at any time move for an order directing any other party . . . to produce specified documents . . ." ILL. REV. STAT., ch. 110, §101.17 (1965). Present SUPREME COURT RULE 214 (1967) provides substantially the same thing.

company. Because of the common insurer factor, the attorney-client relationship did not exist during the insurance company's investigation and the case was an inappropriate one for the application of the rule of *People v. Ryan*,³⁸ wherein the court held that a statement taken by an insurer from its insured was protected by the attorney-client privilege.

The court, in considering defendant's principal contention that the matter sought was work product and therefore exempt from discovery, defined work product as:

. . . [O]nly those memoranda, reports or documents which reflect the employment of the attorney's legal expertise. . . . Thus, memoranda made by counsel of his impression of a prospective witness (as distinguished from verbatim statements of such witnesses), trial briefs, documents revealing a particular marshalling of the evidentiary facts for presentation at the trial, and similar documents which reveal the attorney's 'mental processes' in shaping his theory of his client's cause, are documents 'made in preparation for trial' and exempt from discovery under Rule 19-5(1). Other material, not disclosing such conceptual data but containing relevant and material evidentiary details must, under our discovery rules, remain subject to the truth-seeking processes thereof.³⁹

The court thus rejected the necessity doctrine adopted from *Hickman* in the *Day*⁴⁰ case, and extended and clarified the reasoning used in the *Stimpert* case.⁴¹ It narrowly defined work product, clothed it with an absolute exemption within the narrow area still allotted to it, and made all other relevant and non-privileged material freely subject to discovery procedure.⁴² Statements of occurrence and non-occurrence witnesses obtained by the adversary are now fully discoverable.⁴³

³⁸ 30 Ill. 2d 456, 197 N.E. 2d 15 (1964). The court overruled *McKnight v. Dennis*, 51 Ill. App. 2d 403, 201 N.E. 2d 461 (1964), which held under similar circumstances that the material was privileged.

³⁹ 35 Ill. 2d 351, 359; 221 N.E. 2d 410, 416 (1966). The decision in *Monier* has now been codified by new SUPREME COURT RULE 201(b) (2) (1967) which provides that "Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney."

⁴⁰ Note 36, *supra*.

⁴¹ Note 35, *supra*.

⁴² Supreme Court Rule 201(b) (2) (1967) provides that "The court may apportion the cost involved . . . in such manner as is just."

⁴³ The Circuit Court of Cook County has printed a form order which requires that the parties produce: "(a) The statement of any party which is in the possession or control of some person or entity other than himself or his attorney or insurer. (b) The statement of any other witness, except parties to this motion, non-treating experts and drivers . . . (c) All photographs, . . . taken subsequently to the alleged occurrence . . . (d) All data as to the physical or mental condition of the plaintiff prior to the alleged occurrence, . . . (e) A list giving the names, addresses and specialties of all expert witnesses (other than non-treating, purely consultant experts who are not to testify at trial), omitting all persons already listed above." The distinction between non-treating experts and other witnesses with respect to the production of statements seems unfounded because a) the *Monier* decision and the Supreme Court Rules make no such distinction; b) they may be relevant and material as evidence; and c) they generally reveal no more of an attorney's legal theory and strategy than do statements of other non-occurrence witnesses. See *Kemeny v. Skorch*, 22 Ill. App. 2d 160, 159 N.E. 2d 489 (1959).

The court thus "concluded that the attendant problems which arise under the . . . [necessity] doctrine render adoption of that theory undesirable."⁴⁴ This approach is appealingly simple. It eliminates the difficult task of defining necessity and work product. In contrast to the federal approach, *Monier* drastically limits a trial court in any exercise of discretion other than in apportioning the costs of discovery between the parties.⁴⁵

The redefinition of work product in *Monier* allows unqualified access to relevant facts which a party under prior Illinois law would have had difficulty obtaining (e.g., statements from hostile witnesses, or witnesses whose memories have failed because of passage of time).⁴⁶ This result under *Monier* is salutary and most consistent with the general purposes of discovery to the extent that a party is thereby allowed to obtain relevant facts which are in the other party's exclusive possession.

On the other hand, *Monier* also allows discovery of material easily obtainable by other means and from other sources. To compel such disclosure of facts otherwise accessible does little to enhance the purposes of the adversary system. Allowing discovery in such cases may discourage the diligent lawyer from complete preparation for trial, despite apportionment of costs. He may hesitate to follow all the avenues which may lead him to uncover additional evidence in fear that if the evidence produced would prove to be harmful to his party's cause, he would nevertheless be compelled to disclose. A resultant "wait and see" attitude may develop, each party waiting in turn for the other to complete its investigation. The attorney may in effect be forced to become a witness against his client's interest,⁴⁷ leading ultimately to the disclosure of the legal theories and trial

⁴⁴ 35 Ill. 2d 351, 360; 221 N.E. 2d 410, 417 (1966). Note that the court uses the term "good cause," in place of the term "necessity."

⁴⁵ See note 42, *supra*. The test used for allowing discovery of alleged work product is the same for all the discovery devices. There is no good reason why this similarity of treatment should not be extended so that the parties need not get a court order for the production of documents. See SUPREME COURT RULE 214. Other state courts have dealt with work product in a manner inconsistent with either the federal or Illinois approach. See *Greyhound Corp. v. Superior Court of Merced County*, 15 Cal. Rptr. 90, 364 P. 2d 266 (1961), which was an action for damages arising out of an accident involving a Greyhound bus. Plaintiff's attorney retained a detective agency and advertised in the local newspaper for the purpose of locating occurrence witnesses, but there was no response to his efforts. He moved for an order to produce the statements defendant had taken from witnesses after the occurrence. The court entered the order and defendant appealed. The supreme court affirmed. It rejected the federal work product doctrine and stated that discovery depends upon the policies involved and the facts of each case. Whether to allow discovery was held to be wholly discretionary with the trial court. However, the California legislature subsequently adopted the federal work product doctrine. CAL STAT., ch. 1744 (1963).

⁴⁶ Note 35, *supra*.

⁴⁷ *Developments in the Law — Discovery*, 74 HARV. L. REV. 940, 1028 (1960-61).

tactics which even under *Monier* are intended to be sacrosanct.⁴⁸

Seemingly the court in deciding *Monier* failed to realize fully that the underlying purpose of discovery is consistent with and implements the basic values of the adversary system.⁴⁹ Both are intended to bring the maximum relevant facts before the court so that the case may be decided on its merits.⁵⁰ The "common law trial is and always should be an adversary proceeding. Discovery was not intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."⁵¹ ". . . [T]he common law's hard-headed conception of litigation as adversary and competitive, . . . a struggle — warfare, if you will — between vitally interested partisans, is most apt to expose the truth."⁵² If the efficacy of the adversary system is admitted, it must be protected.

The *Monier* decision, by allowing discovery of material otherwise freely available, will inhibit the realization of the objectives of the adversary system, and therefore will indirectly defeat the broad purposes of discovery. All parties will have the facts equally known and distributed among them, but the total evidence presented before the court will tend to diminish, so that society's interest in a trial on the merits will be impaired. Certainty in the field of discovery may be a mixed blessing. It is true that haggling and delay is avoided to a large extent, but an application of simplicity in this area shows a certain insensitivity to the complexity of the facts and issues involved.

Andrew J. Kleczek

⁴⁸ This may be the real reason for using discovery devices in this situation.

⁴⁹ However, it did concede ". . . that application of the rules as here construed may occasionally penalize diligent counsel and reward his slothful adversary." 35 Ill. 2d 351, 361; 221 N.E. 2d 410, 417 (1966).

⁵⁰ See F. JAMES, JR., CIVIL PROCEDURE 5 (1965).

⁵¹ *Hickman v. Taylor*, 329 U.S. 495, 516 (1947).

⁵² *Greyhound Corp. v. Superior Court of Merced County*, 15 Cal. Rptr. 90, 99; 364 P. 2d 266, 275 (1961).