

CANADA / JUDGMENT

Chan v. Pham

2022 BCSC 2394

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 2394 Chan v. Pham

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chan v. Pham,

2022 BCSC 2394

Date: 20221205

Docket: M1710722

Registry: Vancouver

Between:

Weng Chan

Plaintiff

And

Van Tan Pham and Kim Pham

Defendants

Before: Master Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

B. Vickers

A. Aiello, Articling Student

Counsel for the Defendants:

N. Parsonage

Place and Date of Hearing:

Vancouver, B.C.

December 2, 2022

Place and Date of Judgment:

Vancouver, B.C.

December 5, 2022

- [1] THE COURT: When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.
- [2] The plaintiff brings this application for production of a door cam video presumed to have captured the motor vehicle accident which is the subject of this action. The defendant opposes the order, asserting a claim of litigation privilege.

Background

- [3] By way of background, the plaintiff was pedestrian when on May 15, 2017, she was struck by a vehicle being driven by one of the defendants. She is claiming damages for multiple injuries, including traumatic brain injury. The defendants have denied liability.
- [4] In or around September 2017, counsel for the plaintiff received a redacted copy of a police file which indicated that there was video footage of the accident which had been captured by a resident in the area. The police file specifically notes that the film was "to follow but was viewed by CIU at scene." The video was not included with the police file when it was produced.
- [5] Accordingly, plaintiff's counsel attempted to obtain a copy of the video by sending letters dated February 16, 2018, and April 30, 2019, both of which were addressed "to whom it may concern", and sent to the residence at which the door cam was believed to have been captured. On the defence side, its insurer, the Insurance Corporation of British Columbia ("ICBC") retained an independent adjuster (the "IA") who prepared and delivered a report on December 5, 2017. The court was not taken to that December 5, 2017 report in the course of this application.
- [6] In any event, on December 20, 2017, the notice of civil claim was filed, with a response then being filed February 16, 2018.

- [7] Defence counsel deposes that on May 16, 2018, he recommended to ICBC that it retain an IA to "conduct investigations to assist me in defending this action." A second report dated August 2, 2018, was then authored by the IA, which attached Google Maps and aerial photographs and other photos of the accident location. Both of the IA reports were disclosed by the defendants on their list of documents under part 4 as being privileged.
- [8] The defendant also disclosed under part 4 an email which purported to attach the video described as "IA email with video" under the following privilege claim:

The said documents are communications amongst the defendants, the defendants and police or agents or the defendant's insurer, its employees or agents or any of them, to enable the defendants or defendants insurers to discuss legal advice. The said documents consist of communications, statements, reports, memoranda, photographs or other material obtained by or prepared by or on behalf of the defendants or the defendant's insurer with reference to the litigation that at the time had been initiated or was in contemplation.

- [9] By letter dated October 22, 2021, the defendants advised counsel for the plaintiff that:

After further consideration, our clients agree to waive privilege over part 4 document 4.1 IA report dated December 4, 2017, with unsigned statement of the deceased and aerial maps/ photographs and thus they are available for your review. Kindly note that our client will be maintaining privilege over 4.2 and 4.3.

- [10] Communications were then exchanged between counsel for the parties as to the video and request for its disclosure with the defendants maintaining their position that the email and video are subject to litigation privilege.
- [11] The defendant driver has passed away since the accident meaning that no evidence can be obtained from him directly, including the name of witnesses such as the resident, so as to enable the plaintiff to obtain a third party document production order to compel the resident to disclose the video directly to them.
- [12] As to the plaintiff's recollections of the accident, at discovery the plaintiff was able to detail much of the events preceding the accident itself, however she does not remember the incident itself.
- [13] Therefore, the plaintiff argues that the video is not only relevant but will greatly assist the parties with necessary evidence that the parties are unable to give on their own. Given that the video was not included with the police file, and that the residents ignored the written inquiries of plaintiff's counsel, they are unable, they say, to obtain it other than by way of the defendant's disclosure.

Parties' Positions

- [14] Neither party disputes that the resident's original video on its own would be subject to production and would not be privileged. However, the defendants argue that by virtue of it being emailed to them as part of their investigation into their defence, it is now covered by litigation privilege.
- [15] The plaintiff argues that the claim for litigation privilege must fail for the following four reasons:
- a) The defendant's evidence is insufficient to support the claim. Among other things, the date the video was created is the date of the accident. It is that electronic file that was ordered by email, but it is the video itself, i.e. the one created on the date of the accident, not the copy that was so forwarded.
 - b) The defendants have not established that the video was obtained for the dominant purpose of litigation. While the email from the IA to counsel is dated shortly after litigation was commenced, nothing in the materials indicates when the video was provided to the IA. Notably, the IA was retained prior to litigation commencing. The plaintiff agrees that the email itself is subject to litigation privilege, but argues that absent evidence that the video was obtained by the IA for the dominant purpose of litigation, the defendant cannot establish its privilege claim. The plaintiff argues that just attaching the video to an email does not make it privileged if it was not privileged prior to that email. In such a case, the court has discretion to order the video and essentially redact it to exclude the cover email from production while ordering the production of the video itself.
 - c) The defendants have not established that the video is part of the solicitor's brief. The plaintiff argues that this is not a document obtained through skill or through their own investigations. Rather, it was created by a resident through them having a camera and then located by the police who noted its existence in their police file. The plaintiff tried to obtain a copy themselves but were not successful. As such, the plaintiff argues there is no mischief in the defendants providing it to the plaintiff even though they obtained it, even if they obtained it as part of their investigation. The plaintiff argues that there is no defence strategy that will be revealed by its disclosure given that these circumstances.
 - d) Finally, the plaintiff argues that the defendants have waived any claim for privilege by waiving it over the December 5, 2017 IA report. The plaintiff argues that the defendants cannot claim privilege over some of the IA file and not other parts. The plaintiff argues that to the extent it was expressly waived with respect to the December 5, 2017 report, it was implicitly waived with respect to the rest of the IA file.
- [16] The plaintiff also relies upon R. 1-3 of the Rules of Court, which was commented upon in *Benning v. The Trustees of the IWA*, 2010 BCSC 1422, at para. 30 as follows:

- [30] Mr. Benning's counsel points out that the rules of civil procedure in British Columbia provide that their object is to secure the just, speedy and inexpensive determination of every proceeding on its merits: See R. 1-3(1) of the Supreme Court Civil Rules. In addition, the major amendments of both the Civil Rules and Family Rules, effective July 1, 2010, evidence a trend that favours earlier disclosure of matters that may either promote settlement or allow for a more efficient resolution of issues at trial.

Legal Framework

- [17] The starting point for any production application is R. 7-1, pursuant to which the parties are required to disclose all relevant documents which are in their possession or control. The exception to that obligation is where it is privileged. See, for example, *Elms v. Laurentian Bank of Canada*, 2002 BCSC 1726, at para. 2.
- [18] In *Oates v. Burton*, 2016 BCSC 1428, starting at para. 16 the court reviewed the core propositions with respect to litigation privilege claims, namely that:
- a) Litigation privilege is a narrow exception to the principle of full disclosure, as noted in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 ("Blank"), at paras. 60 to 61.
 - b) The onus generally lies on the party asserting litigation privilege to establish that privilege: *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 835, at para. 54 to 56; and *Hodgkinson v. Simms*, 33 B.C.L.R. (2d) 129 ("Hodgkinson") at para. 23.
 - c) To establish the privilege, the applicants must meet the well known two-prong test:
 - i. was litigation a reasonable prospect at the time the document in dispute was created; and
 - ii. if so, was the dominant purpose for the document's creation for use in litigation? *Hamalainen v. Sippola*, 62 B.C.L.R. (2d) 254, at para. 18 to 20 and 27.
 - d) Each document must be assessed at the time it was created as noted in *Brayley v. Pappas*, 1991 64 B.C.L.R. (2d) 37 ("Brayley"), at para. 9.
 - e) If a document is created for dual purposes, where one of which is not for use in litigation, it must be produced: *Meyer v. Lahm*, 2015 BCSC 749, at para. 15. The exception to that being if it was produced for the dominant purpose for litigation: *Raj v. Khosravi*, 2015 BCCA 49, at para. 16 to 17.
- [19] In *Blank*, the Supreme Court of Canada considered the differences between solicitor/client privilege and litigation privilege and held that litigation privilege only attaches to documents created for the dominant purpose of litigation, noting as follows at para. 27:
- [27] Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and

not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

- [20] The Court of Appeal in Hodgkinson has stated that litigation privilege extends to documents gathered and copied, even when not created for the purpose of litigation. As noted in Blank, the appellate opinion on that issue is in conflict. However, Hodgkinson has been applied in various cases in British Columbia, including *Elms v. Laurentian Bank of Canada*, 2002 BCSC 1726, where the court stated as follows at para. 3 and 4:
- [3] The privilege which attaches to documents in a solicitor's brief is a very narrow one. It applies only to the copies of documents which the solicitor has obtained through his own skill and diligence. If any of the plaintiffs or their representatives (not the solicitor) is or was in the possession of a relevant document, it must be disclosed whether it is a copy or not.
- [4] All original documents in the possession of a party or a solicitor must be disclosed. There can be no privilege over an original document.
- [21] In opposing production of the email and video, the defendants described the mischief that litigation privilege is meant to prevent, which was set out in Hodgkinson at page 10:

In my view the purpose of the privilege is to ensure that a solicitor may, for the purpose of preparing himself to advise or conduct proceedings, proceed with complete confidence that the protected information or material he gathers from his client and others for this purpose, and what advice he gives, will not be disclosed to anyone except with the consent of his client.

Thus it appears to me that, while this privilege is usually subdivided for the purpose of explanation into two species, namely: (a) confidential communications with a client; and (b) the contents of the solicitor's brief, it is really one all-embracing privilege that permits the client to speak in confidence to the solicitor, for the solicitor to undertake such enquiries and collect such material as he may require properly to advise the client, and for the solicitor to furnish legal services, all free from any prying or dipping into this most confidential relationship by opposing interests or anyone.

- [22] And further at pages 22 to 23:

It is my conclusion that the law has always been, and in my view should continue to be, that in circumstances such as these, where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection and to refuse production.

I reach this conclusion because of the authorities cited which state the law accurately and authoritatively and because this does no violence to the dominant purpose rule established by *Waugh* and *Voth*, both *supra*. This conclusion merely extends the application of that rule to copies made for the dominant purpose of litigation. It follows that the copies are privileged if the

dominant purpose of their creation as copies satisfies the same test (Voth) as would be applied to the original documents of which they are copies. In some cases the copies may be privileged even though the originals are not.

I would not wish it thought that the foregoing applies only to collections of copies. It could apply also to a single copy-document, or to a number of unrelated copies if they meet the test of Voth as I have described it.

Mr. Walsh adds a further argument with which I respectfully agree. He says that what the Defendants seek is not just to look at these copy-documents but also to look into counsel's mind to learn what he knows, and what he does not know, and the direction in which he is proceeding in the preparation of his client's case. That, in my view, would be a mischief that should be avoided.

[23] The defendants also took the court to the comments in Benning at para. 33 regarding Hodgkinson and the Ontario appellate authority finding to the contrary, General Accident Assurance Company v. Chrusz, [1999] 180 D.L.R. (4th) 241, 45 O.R. (3d) 321 (C.A.).

Analysis

[24] In the case before the court today the video is disclosed on the list of documents as "IA email with video (copy of May 15th/17 video from third party residence)." The evidence from the defendants to support the claim of privilege over that document is within an affidavit sworn by the lawyer for the defendants and is as follows:

7. On May 16, 2018, I recommended by instructing my client at ICBC they retain an independent adjuster (IA) to conduct investigations to assist me in defending this action.
8. Document 4.2 under part 4 of the defendant's fifth amended list of document is an IA report dated August 2, 2018, that was provided by the independent adjuster to me following my May 16, 2018 recommendations. My review of document 4.2 reveals that the Google Maps aerial photographs available publicly online were printed and the accident scene photos were made following my May 16, 2018 recommendations.
10. Document 4.3 under part 4 of the defendant's fifth amended list of documents is an IA email dated July 30, 2018, that was provided by my independent adjuster to me in response to my May 16, 2018 recommendations. The video provided with the IA email dated July 30, 2018, is a copy of an original video according to document 4.2.
11. It is my belief as counsel for the defendants that revealing additional information about the video and document 4.2 beyond describing it as "video" would permit opposing counsel to peer into my solicitor's brief and defence strategy.

12. It is my further belief as counsel for the defendants that the investigations conducted by the independent adjuster, including the procurement of documents by the independent adjuster regarding documents 4.2 and 4.3 arose from my skill, knowledge and judgment in terms of providing recommendations and advising my instructing client on the defence of this action following commencement of litigation.

[25] As noted in Brayley at para. 7:

... it is not enough to simply recite the magic formula "dominant purpose", as a sort of charm that will fend off all evil. All the circumstances of the making of the statement have to be examined, and with respect, an affidavit as to the purpose cannot be relied upon if it entirely ignores the relevance of the statement to other potential uses, ...

[26] Thus, as is often the case in applications such as this, what is not in evidence may determine whether or not the defendants have met the burden on to establish that the video is subject to litigation privilege. In this respect, counsel's belief that they cannot disclose more without revealing defence strategy does not absolve them of the need to meet the onus upon them.

[27] For example, it is difficult to understand how it would reveal defence strategy to depose whether the IA obtained the video before or after defence counsel was retained. As a result of the failure to state that particular fact, I cannot determine if the video was obtained as part of the ICBC's usual course of investigation in the aftermath of the accident or once defence counsel was retained and pursuant to defence counsel's instructions.

[28] It is also notable that defence counsel does not depose that the video was in fact obtained further to his request. His wording is curious in this respect as he does specifically depose that the email was sent to him further to his instructions. The gap in that evidence is made more obvious by virtue of the fact that counsel was willing to provide a more significant level of detail about the Google Maps and aerial photos and specifically depose that those were printed and made following his recommendations. However, he is silent with respect to the video.

[29] The evidence of the solicitor is also unhelpful in that he largely provides those general legal conclusions in the form of evidence, which the court has noted in *Merz v. Earden et al.* (24 September 2018), Chilliwack S028745 (B.C.S.C.), an unreported decision of Master Keighley, where he noted as follows at para. 8:

In my experience, it is fairly common to see affidavits filed in opposition to applications for the production of documents over which privilege is claimed in which the deponent, who may not have direct knowledge of the circumstances, alleges, with certainty, that a document was created at a time when litigation was a reasonable prospect and that the document was created for the sole purpose of assisting the party in that litigation.

With respect, for a deponent to reach that conclusion essentially usurps the function of the court [indiscernible]. It is for the court to determine, on a review of the circumstances of each case and the law, whether privilege attaches to a particular document or not. Frankly, an assertion by a deponent, even one with knowledge of the circumstances under which the document was created, is not sufficient of itself.

[30] And later at para. 17:

It is not enough for a deponent to say that they understood that litigation was forthcoming without indicating some substantial basis why they had that understanding. Here, I have absolutely no information as to the basis of Ms. McGowan's understanding "... that litigation was forthcoming from the plaintiff ..." other than perhaps, her belief that the file would not have been referred to her had that not been the case. That is not sufficient. One might at least expect an affidavit from the party referring the file. The claim for litigation privilege with respect to items B, D, E, F, and G is not, as a result, made out, and I will order production of those materials as well.

[31] Similarly in the case at bar, I have no information as to when and why the video was obtained by the IA. The IA is an agent of the defendants' insurer, not of the solicitor necessarily. That the video was emailed to defence counsel after the litigation was commenced is not determinative of whether the video itself is privileged.

[32] The court in Hodgkinson, as noted in *No Limits Sportswear Inc. v. 0912139 B.C. Ltd.*, 2014 BCSC 999, at para. 29, did not go so far as to suggest that making a copy of a document that is otherwise not privileged and giving it to a solicitor turns the document into a privileged document. It needs more.

[33] I do, however, share some of the defendant's concerns that this may be an instance of the plaintiff getting through the back door what he should have got through the front sometime in the last five years, utilizing his own investigation and processes available through the Rules of Court. However, I note that the facts of this case are somewhat unusual in that the defendant is now deceased, such that he could not be examined to obtain the names of the witness who obtained the video and the occupants of the home, who appear unknown to the plaintiff, and who did not answer counsel's correspondence. It is certainly arguable that more could have been done by the plaintiff to get the information, and I pause to note there has been a recent change of plaintiff's counsel.

[34] As things now stand, there are hurdles to getting that information given the passing of the defendant, even assuming the occupant, whoever they may be, is still in possession of the video or even in residence at that location still.

[35] Regardless, I ultimately agree with the plaintiff that the defendants have failed to meet the onus upon them to establish that the video was obtained by them either for the dominant purpose of litigation or, if obtained under the solicitor's brief category referenced in Hodgkinson, was obtained through counsel's skill and diligence.

[36] In addition, although not a determining factor, the mischief that the court was concerned with in Hodgkinson does not appear to be a factor here in that the existence of the video was well known by all parties as a result of the disclosure of the police file and was clearly a document created by a third party in the ordinary course that had nothing to do with the motor vehicle accident itself. That both parties sought to obtain it with only one of them ultimately being successful does not give the plaintiff any insight into the defendant's strategy.

Conclusion and Order

[37] Having determined that the defendants failed to establish that the document falls within the categories outlined above, and relying upon the considerations set out by the Supreme Court of Canada in Blank, I need not consider the other arguments such as whether any privilege was waived by virtue of the disclosure of the first IA report, it being of the same character and class as the rest of the IA file, including the video. I also need not resolve the apparent conflict between Hodgkinson and other appellate authority or determine whether an electronic file containing the video becomes a copy or not, when it is forwarded by email.

[38] I exercise my discretion to segregate the video from the email to maintain any privilege that may exist in respect of that litigation privilege over the cover email in that it is communication between the IA and defence counsel, and the email may have information in it relating to the defence strategy: Krieg v. Shallon Marine Service, 2021 BCSC 670, at para. 43.

[39] I make the order as sought in para. 1 of the notice of application, and I will hear submissions on costs.

(SUBMISSIONS ON COSTS)

[40] THE COURT: Thank you. I appreciate the defence comments that they were acting in a prudent manner with respect to their positions on this, and that is reflected to some extent on the fact that they did, in fact, produce the December 2017 IA report, albeit after initially claiming privilege over it and then reconsidering it, which shows that they were deliberate in their approach to this file.

[41] However, I note that liability is denied, and the plaintiff was wholly successful. As such, I am going to order that the plaintiff have its costs of this application in any event of the cause. However, such costs are to be payable only upon conclusion of the whole of the action. Thank you.

"Master Robertson"

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