# The Implied Undertaking Of Confidentiality And ICBC Claims

*November 14th, 2008*

Interesting reasons for judgement were released today dealing with the issue of whether a plaintiff in an ICBC tort claim has to produce materials from previous legal proceedings.

In this case the Plaintiff alleged injury as a result of a 2005 BC motor vehicle accident. The Plaintiff was involved in previous legal proceedings. The defence lawyer asked the court for production of 3 documents which were contested, specifically

*(a) a copy of the medical report of Dr. Bloch requested by Ms. (the Plaintiff;s) counsel in a pervious proceeding unrelated to this motor vehicle accident (the "Great West proceeding");*

*(b) a copy of submissions prepared by the plaintiff, dated July 11, 2005 and September 23, 2005, regarding a claim which she brought against Mr. Murray in the Surrey Registry of the Provincial Court of British Columbia;*

*(c) a copy of the transcript of the plaintiff's examination for discovery in the Great West proceeding.*

The court first dealt with the issue of whether the current defendant was entitled to the plaintiff's examination for discovery transcript from a previous legal claim. The court reproduced paragraphs 51 and 53 of the leading Supreme Court of Canada Decision dealing with the 'implied undertaking' of confidentiality of examination for discovery transcripts, specifically:

*51. As mentioned earlier, the lawsuit against the appellant and others was settled in 2006. As a result the appellant was not required to give evidence at a civil trial; nor were her examination for discovery transcripts ever read into evidence. The transcripts remain in the hands of the parties and their lawyer. Nevertheless, the implied undertaking continues. The fact that the settlement has rendered the discovery moot does not mean the appellant's privacy interest is also moot. The undertaking continues to bind. When an adverse party incorporates the answers or documents obtained on discovery as part of the court record at trial the undertaking is spent, but not otherwise, except by consent or court order. See Lac d'Amiante, at paras. 70 and 76; Shaw Estate v. Oldroyd, at paras. 20-22. It follows that decisions to the contrary, such as the decision of the House of Lords in Home Office v. Harman (where a narrow majority held that the implied undertaking not to disclose documents obtained on discovery continued even after the documents in question had been read aloud in open court), should not be followed in this country. The effect of the Harman decision has been reversed by a rule change in its country of origin.*

*53. I would not preclude an application to vary an undertaking by a non-party on the basis of standing, although I agree with Livent Inc. v. Drabinsky that success on such an application would be unusual. What has already been said provides some illustrations of potential third party applicants. In this case the Attorney General of British Columbia, supported by the Vancouver Police, demonstrated a sufficient interest in the appellant's transcripts to be given standing to apply. Their objective was to obtain evidence that would help explain the events under investigation, and possibly to incriminate the appellant. I think it would be quite wrong for the police to be able to take advantage of statutorily compelled testimony in civil litigation to undermine the appellant's right to silence and the protection against self-incrimination afforded her by the criminal law. Accordingly, in my view, the present application was rightly dismissed by the chambers judge. On the other hand, a non-party engaged in other litigation with an examinee, who learns of potentially contradicting testimony by the examinee in a discovery to which that other person is not a party, would have standing to seek to obtain a modification of the implied undertaking and for the reasons given above may well succeed. Of course if the undertaking is respected by the parties to it, then non-parties will be unlikely to possess enough information to make an application for a variance in the first place that is other than a fishing expedition. But the possibility of third party applications exists,*

*and where duly made the competing interests will have to be weighed, keeping in mind that an undertaking too readily set aside sends the [page187] message that such undertakings are unsafe to be relied upon, and will therefore not achieve their broader purpose.*

The court in this case refused the defendants motion to produce the plaintiff's previous discovery transcript and the plaintiff's previously obtained medico-legal report holding that

*On balance, the plaintiff's privacy interest outweighs the defendants "fishing expedition" as referred to by Binnie J.A. I am also of the view that the same must be said of the medical report of Dr. Bloch. That report was a document created for the previous proceeding. There is no evidence before me to indicate that it was incorporated into the record of that proceeding, in fact I am advised that the action settled before trial. In the absence of evidence to the contrary, I would expect that such report would have been created and received subjected to a claim of privilege; there is no evidence before me as to the waiver of such privilege. The defendants' application for production of the discovery transcript and the medical/psychiatric report is dismissed.*

The court however, did order that the transcript of the plaintiff's previous submissions in a cmall claims court action be produced holding that:

*The defendants' application for a copy of the plaintiff's submissions in the provincial court proceeding is, however, a different matter. That action went to trial; the plaintiff apparently made various oral submissions and representations to the court and, I assume, gave evidence. In addition she is said to have provided written submissions dated July 11, 2005 and September 23, 2005. In my view, any undertaking regarding those submissions was spent by their use in that proceeding.*

Tags: ICBC claims, implied undertaking of confidentiality, joubarne v. Sandes, litigation privilege, privacy issues
Posted in Civil Procedure, ICBC Privacy Issues, Uncategorized | Direct Link | Edit | No Comments » | top ^