

## ICBC Injury Claims, Video Surveillance And Disclosure

June 11th, 2009

It is not uncommon for insurance companies such as ICBC to conduct video surveillance of plaintiffs involved in injury litigation. Normally such video evidence is protected by privilege and ICBC does not need to disclose it unless they want to rely on it at trial. In these circumstances the BC Supreme Court Rules don't require disclosure until shortly before trial.

What if ICBC shares the evidence with their expert witnesses? Does this result in a waiver of privilege? The BC Supreme Court dealt with this issue in 2006 and today reasons for judgement delivered by Mr. Justice Johnston were transcribed and published by the BC Courts website addressing these facts.

In the decision released today ([Lanthier v. Volk](#)) the Plaintiff was injured in a motor vehicle collision and was prepared to proceed to trial. The defence lawyer delivered expert medical reports which relied in part on the facts depicted in video surveillance conducted on behalf of the Defendant. The Plaintiff asked for disclosure of these films and Defendant refused claiming privilege over the films.

On application of the Plaintiff for disclosure Mr. Justice Johnston held that disclosure of the films to the defendants expert physicians resulted in a waiver of privilege such that the films needed to be disclosed to the Plaintiff. The courts key reasoning is reproduced below:

*[16] The competing consideration is that the tendency given the rules, such as the **Evidence Act**, ss. 10 and 11, Rule 40A and the rules relating to production, has been over the last number of years away from what used to be a trial by ambush style of advocacy toward pre-trial disclosure, forced or otherwise, in order to prevent two things: One, impediments to settlement that keeping all one's cards close to the vest tends to foster, but more to the point, what I indicated was a concern during argument, and that is the possibility, likelihood or probability that late disclosure, as Mr. Turnham would have it when counsel decides to call the witness or tender the written opinion, might lead to an adjournment of the trial, or, at minimum, an argument in the middle of a jury trial whether it should be adjourned.*

*[17] I conclude that privilege over the video has been waived by the delivery of reports of experts who have stated, each of them, that they have relied upon, in part, what they saw on the video. I conclude that waiver is more logical, more defensible when what truly is disclosed in the reports ostensibly as the facts upon which the expert — and I refer now particularly to Dr. Warren who most helpfully listed what he observed — the facts upon which the expert relied, is, when really that expert's interpretation of what the expert saw on the videotape. It is not possible, in my view, for the opposing party to adequately prepare, either to cross-examine the expert if the expert is called, or to brief the parties' own witnesses, on the strength of a description in writing of a witness's interpretation of what is shown on the video. To adequately prepare for trial the plaintiff must have the videotape to show to his witnesses and to review himself. Trial fairness, as well as the promotion of efficiency in the courts and the trial process, dictates disclosure, so I order the videotape disclosed forthwith.*