IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Huntley v. Larkin, 2007 NSSC 298

Date: 20071016
Docket: SH 140333
Registry: Halifax

Between:

Joellan Lynn Huntley by her Litigation Guardian, Byron Huntley, Byron Huntley and Louise Huntley

Plaintiffs

v.

Andrew Larkin, Karen Larkin and Theodore Hogeterp

Defendants

Judge:	The Honourable Justice Arthur W.D. Pickup.
Heard:	May 2 and 29th and September 11, 2007, in Halifax, Nova Scotia **Decision on Litigation Privilege (Canadian Security and Investigations Limited)**
Written Decision:	October 16, 2007
Counsel:	Raymond F. Wagner, Anna Marie Butler and Michael Dull for the plaintiffs Michael E. Dunphy, Q.C. and Michelle M. Kelly for the defendant Theordore Hogeterp Nancy Rubin and Andrea F. Baldwin, for the defendants Andrew and Karen Larkin

By the Court:

[1] This is an application by the defendant, Theodore Hogeterp, seeking the notes, reports and videotapes of Trish Dehmel of Canadian Security and Investigations Limited, who conducted videotape surveillance on his dog, Tasha.

[2] This matter arose out of a motor vehicle accident that resulted in severe injuries to the plaintiff, Joellan Huntley who was a passenger in an automobile driven by Andrew Larkin. The accident occurred on April 18, 1996 in Centreville, Nova Scotia. At the time of the accident the defendant Hogeterp operated a farm adjacent to the scene of the accident and was the owner of a Redbone Coonhound named Tasha.

[3] The plaintiffs allege that the crash occurred when the defendant, Andrew Larkin, who was driving the vehicle, swerved to avoid a dog that had run onto the highway. The plaintiffs claims that this was Mr. Hogeterp's dog. Mr. Hogeterp denies that it was his dog.

[4] Canadian Security and Investigations Limited was retained by the plaintiffs' solicitor. As part of the investigation Trish Dehmel, an employee of CSI, obtained video surveillance of Mr. Hogeterp's dog, Tasha.

[5] On March 30, 2007 the plaintiffs forwarded to the defendant Hogeterp copies of surveillance videotapes taken at his former farm property in Centreville, Nova Scotia. The forwarded material was described in the plaintiffs' counsel's letter of March 30, 2007 as follows:

> 1. A copy of a video taken by Trish Dehmel on November 30, 1999 along with a written summary of her observations;
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> 2. A copy of a second video taken by Trish Dehmel on July 27, 1999.

[6] Mr. Hogeterp, through his counsel, subsequently requested a copy of Ms. Dehmel's entire file relating to the investigation. On April 4, 2007 plaintiffs' counsel forwarded a copy of a report prepared by Ms. Dehmel with the following comment:

> I have redacted all work product that Ms. Dehmel did on our behalf. I have included all references to the video and the video surveillance.

[7] The plaintiffs maintain that the redacted information remains privileged and need not be disclosed.

[8] The defendant Hogeterp does not challenge the claim of privilege but takes the position that there has been a waiver of privilege and that the remaining file material must be released.

[9] The issues to be determined are:

> 1. Have the plaintiffs waived the privilege that attaches to the remainder of Ms. Dehmel's file?
>
> 2. The extent of the waiver.

Have the plaintiffs waived the privilege that attaches to the remainder of Ms. Dehmel's file?

[10] The defendant Hogeterp's position is that since the plaintiff has disclosed a portion of Ms. Dehmel's file, the entire file must be disclosed pursuant to *Rule* 20.06.

[11] In *Walsh v. Smith,* (1999), 180 N.S.R. (2d) 173, Justice Davison reviewed the law on waiver of privilege, in the context of an application for production of an independent adjuster's investigation file. The defendant provided some materials from an investigation relating to the plaintiff's employment and his loss of income claim, but claimed privilege over a portion of the documents. The plaintiff brought an application for production, arguing that by waiving privilege over some of the materials, the defendant had effectively waived any and all privilege that attached to all documents relating to the investigation and, in particular, the withheld documents.

[12] Justice Davison reviewed the law of waiver at paras. 8 - 13:

> Particular reference is made to the following words of Justice Nathanson:

> ... I hold that the communications and reports are privileged, except where the privilege has been waived. By disclosing some of the communications to the other side upon discovery, both aspects of the solicitor-client privilege covering those communications was waived. The waiver extends to all other relevant documents dealing with the very same particular subject matter.
>
> The extent of the scope of waiver has never been defined with exactitude. However, I am persuaded by *George Doland Ltd. v. Blackburn Robson Coates & Co. et al, supra*, and by *Great Atlantic Insurance Co. v. Home Insurance Co. et al,* [1981] 2 All E.R. 485 (C.A.), dealing with analogous situation of different parts of a single document rather than distinct documents, that privilege is waived with respect to a document where the same particular subject matter was previously disclosed to the other side.

Accordingly, the argument is developed that waiver extends to "relevant documents only" and documents "dealing with the same particular subject matter."

...

In my view, once privilege has been waived, then resort must be had to the terms of *Civil Procedure Rule* 20.01(1) and those documents in the possession, custody or control of a party "relating to every matter in question in the proceeding" must be delivered to the other parties.

With respect to the second argument of the defendant, it is my view that, in the interest of full and proper disclosure, there should not be too narrow an interpretation placed on the words "very same particular subject matter". I agree with the position taken by Justice Tidman in the *Harris* case that delivery of some documents on the medical condition of a plaintiff does not waive the privilege for all documents dealing with medical conditions. But, in this case we are dealing with a particular claim - one for loss of earnings, and delivery of some documents on which a doctor may base his testimony, on an issue of earning loss, must imply an intention to waive privilege on all documents pertaining to that same issue.

[13] The defendant Hogeterp argues that it would be misleading and unjust to allow the plaintiffs to disclose only portions of videotaped surveillance that are beneficial to their position.

[14] The plaintiffs submit that there was no intention to waive the privilege attached to the videotaped evidence, claiming that the release of the videotape was done to meet obligatory disclosure requirements under *Rule* 31.07. *Rule* 31.07 provides:

> Unless an opposite party, at least ten (10) days before the commencement of trial, has been given an opportunity to inspect any plan, photograph or model and to agree to its admission without further proof, the plan, photograph, or model shall not be admissible in evidence at the trial without the approval of the court, which may be granted on such terms as are just.

[15] *Rule* 31.15(1) is also relevant:

> Unless the court orders, no document shall be admissible in evidence on behalf of a party unless,
>
> ...
>
> (d) it is a plan, photograph, or model in respect of which the requirement of rule 31.07 has been satisfied.

[16] I infer from the evidence before me that the plaintiffs' original intention was to use the videotape for impeachment purposes, and as a result its existence was not brought to the defendant Hogeterp's attention.

[17] Upon the plaintiffs electing to use the videotaped material as factual evidence, in the plaintiffs' view, they had no other alternative but to produce the document under *Rule* 31.07. It was because of this mandatory disclosure that the plaintiffs argue there was no waiver of privilege.

[18] The plaintiffs provided a number of authorities to support their position.

[19] In *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, et al. [1983] B.C.J. No. 1499, Justice McLachlin (as she then was) dealt with a situation where a plaintiff brought an application in a pre-trial conference seeking an order for production of certain documents. British Columbia's *Evidence Act* demanded the disclosure of the otherwise privileged evidence, if the party wished to use this evidence at trial. Before the start of the trial, the defendants disclosed an accountant's report. The plaintiffs argued that by producing the report, the

defendants waived privilege, not only with respect to that report, but to all the documents and communications which were involved in its preparation.

[20] McLachlin J. set out the appropriate test for waiver of privilege at para. 6:

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. ...

[21] McLachin J. held, at para. 11, that since the pre-trial production of the evidence was mandated by statute, privilege was not waived. She made the following comments:

> In the case of production of an expert's report under the *Evidence Act*, s. 11, it can be contended that the pre-trial production of the report and the attendant loss of privilege at that stage is involuntary, being compelled by statute. Being involuntary, it cannot constitute waiver, although it is clear that under s. 11 privilege will be lost as to the opinion and the facts upon which it is based. Moreover, even if production of the report pursuant to the Act could be said to constitute waiver, in these circumstances it cannot be said to be unfair or inconsistent that the party producing it retain such privilege as is left to him by the Act.
>
> In the result, I conclude that the privilege attaching to these documents has not been waived. The plaintiffs are not entitled to production. ...

[22] In *Blank v. Canada (Minister of Justice)*, 2005 FC 1551, Mosley J. cites *S & K, supra*, at paras. 41 and 42:

> *In S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, [1983] 4 W.W.R. 762 (B.C.S.C.), McLachlin J. (as she then was) observed, at pages 765-766 that:
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> > In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent.
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> Thus, "where a statute requires disclosure, e.g., of a report, no voluntariness is said to be present and no implied waiver occurs" (see: Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, above, at page 191).

> Where the disclosure of a document is compulsory, implied waiver does not occur. Disclosure is compulsory in the case of the criminal proceedings based on the principles developed in *R. v. Stinchcombe*, [1991] 3. S.C.R. 326. Therefore disclosure of a document based on the Crown's obligations to a defendant in a criminal proceeding should not be considered voluntary for the purposes of implied disclosure.

[23] The plaintiffs' position is that because it was necessary to bring the existence of the videotapes to the attention of the defendant Hogeterp under *Rule* 31.07 there was no voluntary waiver of privilege.

[24] With respect, I disagree. On a close reading of *Rule* 31.07, I am satisfied that the intent of the Rule requires the disclosure of the videotapes. However, on the facts of this case, the plaintiffs released other material in addition to videotapes.

[25] The original disclosure by plaintiffs' counsel consisted of two videos taken by Trish Dehmel and, in respect of one of those videos ,"a written summarization of her observations". Subsequently, counsel for the defendant Hogeterp e-mailed plaintiffs' counsel requesting Ms. Dehmel's complete file. On April 4, 2007 plaintiffs' counsel wrote to counsel for Mr. Hogeterp supplying additional materials which referred to the video and the video surveillance. These materials, in my view, are in excess of the disclosure required under *Rule* 31.07 and their production amounts to a waiver of privilege.

[26] Moreover, a careful reading of *Rule* 31.07 would suggest that this provision is not a mandatory provision requiring disclosure or production of the videotape in the nature of the requirement in the *S & K Processors Ltd., supra.* *Rule* 31.07 does not require production of the videotape, but requires that the other party be given an opportunity to examine the document.

[27] I am satisfied that there has been a waiver of privilege by the plaintiffs by providing the additional materials in addition to the videos to the defendant Hogeterp.

What is the Extent of the Waiver?

[28] The next issue is the extent of the waiver.

[29] As noted in *Walsh v. Smith , supra*, where privilege is waived by disclosure, the waiver only extends to relevant documents dealing with "the very same particular subject matter". The question of what is "the very same particular subject matter" is not to be interpreted too narrowly.

[30] The issue to be determined is whether there are materials that relate to "the very same particular subject matter" which have not been disclosed.

[31] The position of the defendant Hogeterp is that the subject matter of the videotape is whether the dog, Tasha, was left unsecured and her movements on and off the Hogeterp property. The disclosure would extend to materials other than the videotapes and released reports and, would include other file information or documentation. To not release this material, according to the defendant Hogeterp, would be misleading and unjust. If there are other notes, statements by other persons or other documents dealing with whether Tasha was left on her own on the Hogeterp property or how she was secured, or documenting her movements, then this material should be produced. The defendant Hogeterp suggests that the video may have been just one form of the investigation on that particular subject matter and Ms. Dehmel could have received information that was not on videotape that should be released, that is of "the very same particular subject matter".

[32] The plaintiffs, on the other hand, argue that the particular subject matter is surveillance evidence of the defendant Hogeterp's dog, Tasha, taken on what was then Mr. Hogeterp's property. The plaintiffs state that all the material has been released dealing with this subject matter.

[33] A review of the report that has been provided by Canadian Security and Investigations Limited, to plaintiffs' counsel on August 4, 2000 refers throughout to video surveillance as the subject matter of the materials released.

[34] The Larkin defendants take the position that the subject matter is the videos and the surrounding notes and observations of Ms. Dehmel which accompany the videos.

[35] Counsel for the Larkin defendants points out that the evidence being brought forth by Ms. Dehmel is not an opinion on whether or not the dog on the highway, at the time of the accident, was Mr. Hogeterp's. Rather, her evidence will be

introduced as that of a non-expert witness who will be called to testify as to what she observed, recorded and reported in relation to her surveillance of Mr. Hogeterp's handling of Tasha.

[36] I am satisfied that the subject matter of the video surveillance is what was being observed by Ms. Dehmel on the days and times when the video was taken, and that what should be disclosed are those videotapes, and the relevant portions of the report specifically dealing with the surveillance on those days. I am satisfied that these materials are severable from the remaining file documents.

[37] I am satisfied that the instructions given to Ms. Dehmel were to take surveillance videos of the dog, Tasha, on the Hogeterp property. The videotapes and surrounding reports deal with the dog, Tasha and observations caught on video of the dog on the Hogeterp property. Presumably, this will be the nature of the evidence given by Ms. Dehmel at trial. I have reviewed the disclosed video and reports and will order no further disclosure.

[38] I have reached my conclusions for the following reasons:

1. I am satisfied that the materials that have been released are all of the materials of "the very same particular subject matter".

2. I see no unfairness in allowing the plaintiffs to withhold the materials that have been redacted in Ms. Dehmel's report. I am satisfied that the remaining information not released does not relate to the same subject matter as the released material.

3. I am satisfied that Ms. Dehmel's investigation extended beyond surveillance videotaping. The report lists a number of other contacts that are severable and, in my view, privileged. More importantly, the non-disclosure of the redacted material will not be unfair or prejudicial to the defendants, given that the plaintiffs have stated that this undisclosed privileged evidence will not be relied on as part of the trial material. So far as any of this information would relate to other persons views of whether or not the dog, Tasha, was restrained on the property or not, and Mr. Hogeterp's habit, with respect to the dog, would all be within the particular knowledge of the applicant, Mr. Hogeterp. Mr. Hogeterp had care of the dog. He would know whether the dog was historically restrained and what his habits were with respect to the

dog and, in particular, whether it was let loose around the property or not. Therefore, what others say would not cause any surprise to the defendant Hogerterp.

4. I am satisfied that the materials that have been not been disclosed are separate from the subject matter of the videotape evidence that has been disclosed.

Pickup, J.