

## ICBC Injury Claims, Criminal Charges And Police Records

December 22nd, 2008

What kind of disclosure are you entitled to from the police if you are injured in a BC Car Accident that resulted from a criminal act? For example, say you were injured by a drunk driver or someone fleeing from the police. Are you entitled to the police departments records documenting their investigation in your ICBC claim or do you have to wait until criminal charges are finally dealt with? [Reasons for judgement were released today dealing with this issue.](#)

In this case the Plaintiff was killed in a motor vehicle accident. Charges were brought against the alleged operator of the vehicle alleging criminal negligence causing death. In the ICBC claim the identity of the Defendant driver was put in issue. The Plaintiff's estate brought a motion seeking production of the Vancouver Police Departments documents concerning this accident. The Attorney General, on behalf of the VPD, opposed this motion. Mr. Justice Pitfield ordered that the documents be disclosed finding that 'the accused' should not be in a better position with respect to the police evidence (such evidence typically gets disclosed to the accused as part of the criminal disclosure process) than the Plaintiff. His key analysis can be found at paragraphs 43-47 of the judgment which I reproduce below:

[43] *The issue in the present application then is whether the actual or implied undertaking to refrain from using Crown disclosure documentation for any purpose other than making full answer and defence should be modified to permit disclosure to a plaintiff in a related civil action in which the accused is a defendant. A number of factors must be considered:*

1. *As with any request for production, the requested documentation or the information that may be derived from it, must relate to an issue in the proceeding in which use of the documentation is intended.*
2. *The information likely to be obtained from the documentation must not be available from other sources, thereby necessitating production.*
3. *The public interest in ensuring the conduct of a prosecution in a manner that is fair from the perspective of both the Crown and the defence must be balanced against the private interest of ensuring the capacity of a plaintiff to advance a bona fide and meritorious claim in a civil action. In other words, the balance of convenience must favour disclosure. As the Ontario Court of Appeal said in D.P. v. Wagg (2004), 239 D.L.R. (4th) 501, 71 O.R. (3d) 229, [2004] O.J. No. 2053, at para. 53:*

53. *...Society has an interest in seeing that justice is done in civil cases as well as criminal cases, and generally speaking that will occur when the parties have the opportunity to put all relevant evidence before the court. The Crown disclosure may be helpful to the parties in ensuring that they secure all relevant evidence.*

[44] *The court may be required to engage in a screening process conducted with the participation of Crown, police and defence in order to identify the documentation that must be produced and to ensure that the preconditions to production have been satisfied. The screening process will only be avoided in the event that consent to production is forthcoming.*

[45] *I am persuaded by the affidavit evidence that documents in the VPD file that may afford evidence of, or point to the source of evidence regarding, the operator of the vehicle involved in Mr. Wong's death and its manner of operation, are relevant and material in so far as the family compensation action is concerned. I am also satisfied that the evidence cannot be obtained by the plaintiff from other sources available to him. The plaintiff does not possess any of the investigative tools that were likely employed by the VPD in its attempts to identify the driver.*

[46] *The remaining question is whether the balancing of the public and private interests should result in production of the relevant documents at this point in time. The Crown has tendered affidavit evidence suggesting that the criminal prosecution might be jeopardized by disclosure of any documents to the plaintiff because the material might find its way to potential witnesses, to the jury pool, or to persons who could seek to subvert the course of justice. While the affidavit evidence contains general statements of possible adverse effects resulting from premature disclosure, it does not identify any specific concerns in the context of the Antunes prosecution. Moreover, the possibility of any adverse effect can be materially reduced, or eliminated, by an appropriate undertaking from counsel and the plaintiff in the civil action.*

[47] *In sum, I can see no reason why, in the circumstances, the accused should be in a position to know of the police evidence or sources of evidence pertaining to the identity of the driver and the allegation of negligent operation of a motor vehicle, but the plaintiff who sues on behalf of the victim of the operator's negligence should not.*