IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Ribeiro v. City of Vancouver et al***
2004 BCSC 105

Date: 20040617
Docket: C992466
Registry: Vancouver

Between:

JOSE AUGUSTO RIBEIRO

PLAINTIFF

And:

THE CITY OF VANCOUVER, POLICE SERGEANT LACON, POLICE SERGEANT BOUTIN, POLICE CONSTABLE DIMOCK, POLICE CONSTABLE BEZANSON, POLICE CONSTABLE GIBSON, POLICE CONSTABLE CHU, POLICE CONSTABLE STEWART, POLICE CONSTABLE SCALLY, POLICE CONSTABLE JACKSON, POLICE CONSTABLE ALFRED, POLICE INSPECTOR GREER and POLICE ACTING STAFF SERGEANT S. MILLER

DEFENDANTS

Before: The Honourable Mr. Justice Powers

Oral Reasons for Judgment

In Chambers
June 17, 2004

Counsel for Plaintiff	F. Potts, K. Leung
Counsel for Defendants	B. Parkin
Place of Trial/Hearing:	Vancouver, B.C.

[1] **THE COURT:** This matter is here today for decision on the plaintiff's application. The plaintiff has filed a Notice of Motion seeking an order that the plaintiff be permitted to videotape the examinations for discovery of the defendants, and that the defendants be compelled to attend such examinations for discovery, costs of the application in any event of the cause payable forthwith and costs thrown away by virtue of cancelled discoveries. The decision that I am giving today does not deal with whether or not any record, by video or otherwise, of an examination for discovery would be admissible at a trial.

[2] In this action the plaintiff is seeking damages against the defendants for injuries he suffered as a result of being shot in his home by members of the Vancouver Police Department. The plaintiff, I am told by counsel, is a paranoid schizophrenic, and at the time of the incident was affected by his mental illness. The plaintiff wishes to videotape the examinations for discovery of the defendants, and the defendants object.

[3] The plaintiff argues that the videotaping is something that should be allowed and relies on an earlier decision of the Supreme Court of British Columbia in ***Ramos v. Stace-Smith***, which I will refer to later. The plaintiff argues that it can be done unobtrusively and will not interfere with the normal process of examinations for discovery. The plaintiff intends to have portions of the examination for discovery that it wishes to rely upon synchronized with the transcript, and available for playback before the trier of fact, if necessary.

[4] As I said earlier, my decision does not deal with admissibility of any recording of the discovery process. The use of any recording would be subject to the directions of the trial judge. The plaintiff argues that a video production or recording of the examination for discovery would be a more complete and, therefore, more accurate record of the discovery process, because it will include a visual record on which a trier of fact might assess credibility.

[5] The plaintiff argues that the decision in ***Ramos v. Stace-Smith***, [2004] B.C.J. No. 133, B.C.S.C., permits videotaping, that there is no rule against it, and the onus should be on the defendant to demonstrate why the examination for discovery cannot be videotaped, or perhaps more accurately in this case, digitally recorded video rather than videotaping.

[6] The plaintiff argues that there is new and better technology that should not be ignored; that three provinces in Canada and the Federal Court in Canada allow it; that the police use videotaping to record statements of suspects or accused persons and witnesses; that the U.S. courts allow it for depositions; that it is a useful and more complete record of demeanour of the person giving the evidence if it is played at trial; that the video, as well as the written transcript, would allow the trier of fact to retain the information better and longer; that it

may improve settlement possibilities and it would be unobtrusive.

[7] The defendants take issue with almost all of those. The defendant says that ***Ramos v. Stace-Smith*** is distinguishable from the present case; that it was a motor vehicle accident that led to the ***Ramos*** case; that the defendant in that case was unlikely to testify. That credibility might be important in that present case.

[8] The defendant says that the issue is whether the use of force was justified and although unable to give any absolute assurance. Defendants' counsel believes that it is very likely that the defendants, or at least a good number of them, would testify at the trial, once the plaintiff's case was presented.

[9] Alternatively, the defendant argues that the plaintiff could subpoena any of the defendants they wish to have present at trial as adverse witnesses. The defendant argues that if ***Ramos v. Stace-Smith*** is not distinguishable, it was wrongly decided. It was not fully considered. It misconstrues the cases that were referred to and should not be followed.

[10] The defence points out that even in Canada where the rules allow videotaping, for instance Ontario, that it is only allowed in rare cases, and refers to a decision, ***K. v. Posluns***, [1989] O.J. No. 1914. In the ***K.*** decision that is the comment made by the court, but the rule in Ontario does not seem to refer to any limitation on the use of the videotaping of discoveries, and there is no discussion in the case about what is a rare case or in what circumstances videotaping may or may not be allowed.

[11] The defendant also referred to the decision, ***United Services Funds v. Ward***, [1986] B.C.J. No. 3138, a decision of the British Columbia Court of Appeal. In that case the Court of Appeal set aside an order of the Chambers judge that directed on an 18A application that parties be examined on their affidavits, and that that examination be videotaped. The Court of Appeal was discussing the summary trial proceedings and was concerned that such a major change in practice should not be effected without a change in the appropriate rules. They were concerned that this more elaborate procedure would be imposed on a summary trial procedure without all of the safeguards of a complete trial.

[12] The defendant also points out that in the rules, Rule 38 dealing with depositions allows videotaping, but Rule 27 dealing with examinations for discovery does not refer to it, and that that is a significant difference. The defendant says I should conclude, therefore, that it is not something that was contemplated by the rules nor should it be allowed. The defence also argues that the purpose of deposition and discovery is considerably different; deposition being for the purposes of creating evidence that will be used at trial; discovery, in order to determine facts and obtain admissions which may or may not be used at trial.

[13] The defence also argues that questions at discovery are not to relate solely to credibility and that, in any event, demeanour can better be assessed at trial when the witness is actually called. Defence argues that the imposition of a video recording would simply lead to a number of *voir dires* and further unwieldy processes being applied to the trial process itself.

[14] It is anticipated that the discoveries may take 12 days, and in submissions defence said something about the videotaping having to be played back. Certainly I did not take from that that they expected the 12 days of videotaping would be played back, any more than 12 days of examinations for discovery would be read back.

[15] Defence also says there may be a number of practical problems. Who does the videotaping or recording? How is the integrity of the record preserved? How will it be used at trial?

[16] In ***Ramos*** the court indicated that there was no need to give any advance warning to the person who was being video recorded during the examination, although that, in my view, is really a comment that was not necessary for the purposes of the decision. The court in that case was concerned that the party being examined, if they were given notice that they would also be video recorded, would have an opportunity to dress themselves up, to be more presentable. This is not really a concern. It would almost seem to me to be unfair for somebody to be video recorded without any advance notice. They anticipate coming to an examination for discovery, not in the presence of the court or the trier of fact. They and their counsel may both attend in much more casual attire than they would in court, and if they had no warning whatsoever that their appearance would be recorded as well as their words, that may well distort or lead to some conclusion that they were not taking the matter seriously or treating the trier of fact seriously because they attended in casual clothing.

[17] The defence argues that although video recordings are used in criminal proceedings, it is really a record of evidence which is being kept and presented as part of the trial, often in a *voir dire* and then subsequent admission. The defence also argues there is no evidence that the trier of fact would better recall something if they received it in video as well as written form, and that live impeachment may well be more effective.

[18] The defence argues that the fact that examination for discovery which is video recorded would not assist in settlement whatsoever. Counsel is present during examinations for discovery and will make their own assessment on how well a witness did without the necessity of seeing them on video.

[19] Defence also argues that the presence of the video camera could change the tenor of the process, and it may well be more intimidating. There is no evidence of that in this case either. That is mere speculation.

[20] I think plaintiff has it right, that the witnesses that are going to be examined in this case, at least the police officers, are probably reasonably experienced in giving evidence.

There is certainly no indication in the evidence that as individuals they would be intimidated in any way by the presence of a camera.

[21] The ***Ramos*** decision did involve a motor vehicle accident in which liability was denied. The court in that case said that they were satisfied that the video with the synchronization would take little or no more time than counsel reading the transcript, and that the video recording would be unobtrusive. The court indicated that in its opinion it did not matter whether it was a jury trial or a trial by judge alone, and also that the video would give the trier of fact a better opportunity to assess the credibility and observe the demeanour of the person being examined. The court did discuss the distinction between rules of deposition and discovery, and concluded at paragraph 13 that the court had the inherent jurisdiction to make the order sought. The court did discuss the ***United Services Funds v. Ward*** decision, and rather than trying to make what the court felt might be a fairly weak distinction between that case and the ***Ramos*** case, concluded that the improvement and technology since 1986 certainly supported the use of video recording at present, even if it did not in 1986. The court said that testing of credibility at trial is a legitimate collateral purpose of examinations for discovery, even though discovery questions may not be asked that go directly to or solely to credibility.

[22] In ***Ramos*** the court concluded that there was some benefit -- or assistance to the trier of fact on assessing credibility, that it was a legitimate benefit and that it was a benefit whether the person examined was testifying at trial or not. The court also concluded that it was not such a radical or innovative step that required change of the rules in order to be implemented, and that concerns about expense were merely speculative.

[23] The ***Ramos*** case does not say that video recording must be allowed in every case, nor that a party must submit to video recording of an examination for discovery without their agreement or without an order of the court.

[24] I find that the ***Ramos*** case is not distinguishable from the present case with regard to this application. The question then is whether or not it was a considered decision of the court, and if it was the plaintiff argues that ***Re Hansurd Spruce Mills Ltd***. (1954) 4 D.L.R. 590, a decision of the British Columbia Supreme Court, supports the proposition that it should be applied unless there were subsequent decisions which indicate that it was wrongly decided; that some binding authority or statute had not been considered, or that the decision itself was unconsidered, that is, made immediately without an opportunity to fully consult the authorities.

[25] In this case I am not aware of any subsequent decisions that would challenge ***Ramos***. I am not aware of any binding authority or statute which was not considered, and certainly it was a considered decision, being heard on December 15th, 2003, and judgment being registered on January 27th, 2004, and the decision consists of 37 paragraphs.

[26] ***Ramos*** stands for the proposition that video recording of an examination for discovery can be ordered. As I said earlier, I do not think it stands for the proposition that a person must submit to it without agreement or court order, although a person should not unreasonably refuse to allow video recording. If they do, there may be an argument about costs if an application is necessary.

[27] Should I exercise my discretion in this case to allow the video recording of examinations for discovery? The plaintiff is making the application. There is no rule to support it, although I do have the discretion to make the order.

[28] Where the plaintiff is making an application in that case, I think the plaintiff has the onus of establishing that the discretion should be exercised. In this case the video recording may be of some assistance. I am satisfied that it would be unobtrusive and it has not been demonstrated that it would be unreasonably expensive.

[29] The issue of the expense or the cost of it, in any event, can be dealt with by the trial judge or, alternatively, by the assessment officer on a review of costs ultimately, and at which point the assessing officer would determine whether the use of it was extravagant, over-cautious or overzealous, the factors considered in determining the reasonableness or appropriateness of any disbursement.

[30] There is no evidence in this case that it will interfere with the examination for discovery, or that there will be any negative impact on the discovery process.

[31] The defendants may or may not give evidence, but that again is not critical, and the use to which the video recording can be put is in the discretion of the trial judge.

[32] I think the plaintiff has a good argument when they say that if they don’t have the opportunity to video record the examination for discovery, they will never have the opportunity to argue whether such a recording will be useful or admissible.

[33] Following ***Ramos***, I am going to allow the video recording in this case. As I understand it, the trial is scheduled for approximately 30 days, and it is expected to be before a judge and jury. If it is a 30-day trial, generally they are case managed. Is there a case management judge in this case, Mr. Potts?

[34] MR. POTTS: Not yet. We’ve requested one to be appointed.

[35] THE COURT: One of the terms of the order is that the issue of the use of the video recording at trial and how it will be used be addressed before the trial judge, well in advance of the trial. I would suggest that that be dealt with at approximately 60 days before. Counsel may agree that some other period of time may be useful or appropriate. What I am concerned about is that the plaintiff does not simply have a portion of the examination for discovery

synchronized, without the defendant having any opportunity to argue that there are other portions, as well, that should be synchronized, and as long as the defendant is not being unreasonable, I think it would be the obligation of the plaintiff to have it synchronized. I do not think it is reasonable for the plaintiff simply to say, "There's your copy of the disk, synchronize whatever you want." There will be portions of it that the plaintiff may wish to have played in as a part of its case.

[36] Because of the time lag in having it synchronized, I think it is important that the defendant have an opportunity to review those portions and they, of course, will have the transcript, and discuss whether or not there are other portions, as well, which in fairness should be played in. If counsel are unable to agree, of course, how that is to be done, they would have to make an application to the trial judge.

[37] As I said earlier, I am not making any determination as to what use might be made of this video recording. That is in the discretion of the trial judge and may well depend on the purpose.

[38] It is important, as well, to remember that the video recording is not the official record of the examination for discovery. It is still the transcript prepared by the official recorder or reporter, that is the official record.

[39] Counsel may have some concerns about the practicalities, as it was referred to, how you ensure the integrity of the record. Based on their comments during submissions, I do not think that is a problem that these counsel are going to have. I am sure that you will be able to work out some process that satisfies both of you. I might suggest that there be the original and that each counsel have a copy of it. They are easy to make, as I understand, and that you simply agree as to who will retain possession of the original and how that will be done.

[40] With regard to the issue of costs, counsel wished to have an opportunity to address the issue of costs, depending on the outcome of the decision. Do you wish to do that today?

(SUBMISSIONS BY COUNSEL)

[41] THE COURT: I am not sure what the reasoning for the costs order in ***Ramos*** was. The case does not say much about costs. In this particular case I am going to order that the plaintiff have its costs in the cause, not in any event of the cause. It simply means that if they are successful, they will receive their costs; if they are unsuccessful ultimately in the trial, they will not have to pay the costs of this application.

[42] With regard to the cancellation of the discoveries, I do not know whether there was a cost or not or at what point they were cancelled or how much those costs were. I do not think they would be very much. Certainly the plaintiff knew that the defendants were not attending and ample time to take steps. If there was a cancellation fee, the plaintiff will have that as costs in the cause, as well. So it will be Scale 3.

[43] MR. POTTS: The remaining issue, My Lord, raised by defendant was it's their intention to seek leave and seek a stay and so on. We don't object to them being given any reasonable time to do that. All we're concerned about is there be a cap on it.

[44] MR. PARKIN: Yes, My Lord, I do have instructions to seek leave to appeal, and certainly we can bring that on quickly. I would imagine that we can file our application for leave to appeal next week, and it's my understanding we then have 30 days in which to prepare the motion, book and so on, which I'm sure we can do well within that time. I'm not sure at that point how long it would take us to actually get before a justice of the Court of Appeal to ask for a stay of the order. That, of course, depends on the Court of Appeal's schedule. So perhaps what I could ask for is a term of your order being that it not be exercised at least until the Court of Appeal has ruled on our application for a stay, and that our application be brought on within a reasonable time, in accordance with the rules.

[45] THE COURT: Mr. Potts.

[46] MR. POTTS: Well, this is not an unduly complex issue. I don't think my friend needs 30 days to prepare his argument. And, further, in respect of a stay, that's something I expect that my friend should be seeking in the Court of Appeal, because it may or may not be appropriate depending on the merits. I am content to agree that there be no discoveries for the next six weeks or perhaps eight, but not longer because that's going to adjourn -- I'm not certain of the number, but I think three or four, and if my friend can't -- if they can't get their act together in two months and get before the court, then they're never going to do it.

[47] THE COURT: Why don't we say eight weeks and liberty to apply if counsel can't agree. The two of you simply want an answer to this. You don't want a situation where the issue is still outstanding and that you prepared for and schedule discoveries and they're further delayed. As long as Mr. Parkin is moving expeditiously, I'm sure that Mr. Potts will go along with it. And if you think that you haven't done anything, Mr. Parkin, if you've gone on holidays, then he may not be quite so generous.

[48] MR. PARKIN: Yes, My Lord. The only concern I have is we don't know when the Court of Appeal will hear us.

[49] THE COURT: Yes, and Mr. Potts is certainly aware of that. If you've moved expeditiously and it's simply a delay of scheduling with the Court of Appeal, and there's an argument between you and Mr. Potts and you had to come back to court, then you would be arguing that Mr. Potts was acting unreasonably, and that you had to make an application, then he should bear the costs of it. So I don't think either of you will be doing that though. Thank you very much,

gentlemen.

“R.E. Powers, J.”
The Honourable Mr. Justice R.E. Powers