

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Gwendolyn Kavanagh v. Peel Mutual Insurance Company

**BEFORE:** Madam Justice J.E. Ferguson

**COUNSEL:** Ashu Ismail, for the Plaintiff

Sara Missaghie, for the Defendant

**ENDORSEMENT**

[1] The plaintiff brought a motion seeking, in part, the production of documents 37 to 69, listed in Schedule B of the defendant's supplementary affidavit of documents. The plaintiff initially sought production of documents 70 to 73 however at the hearing of the motion it was agreed that those documents are the subject of solicitor client privilege and as such are not being sought.

[2] Peel Mutual has produced document 37, the statement of Ian McDiarmid, but continues to claim litigation privilege over the remaining documents (38 to 69).

**Background**

[3] The action arises from a motor vehicle accident which took place on October 7, 2007 in which the plaintiff's vehicle ran a red light and struck another vehicle. The plaintiff's vehicle was driven away from the scene and it was found damaged in the plaintiff's driveway. The plaintiff and her son, Christopher Kavanagh, claim that neither of them was driving the car.

[4] On October 10, 2007, Peel Mutual contacted the plaintiff and was advised that on the night of the accident the vehicle had been locked and left in her driveway and that she had both sets of keys with her at home.

[5] On October 11, 2007, Peel Mutual spoke with Barrie City Police who informed them, in addition to other facts, that an independent witness had followed the plaintiff's vehicle where the witness observed the vehicle parked in the driveway of the plaintiff's home, that both airbags had

been deployed, and there was a red mark burn across Christopher Kavanagh's face which the police officer stated may be associated with deployment of an airbag.

[6] Peel Mutual was suspicious as to the circumstances surrounding the loss and hired Brian Polimeni, ("Polimeni") an independent adjuster from Cunningham Lindsey Canada Claims Services Ltd., to investigate the loss. Polimeni interviewed both the plaintiff and her son on October 23, 2007. Christopher Kavanagh attempted to pass off an expired driver's license to Polimeni as being valid. Polimeni informed Peel Mutual that he suspected the plaintiff and/or her son of being privy to the alleged theft. On October 28, 2007 a forensic locksmith reported that the vehicle had not been tampered with and was started with a proper key. Further, on October 30, 2007, Polimeni advised Peel Mutual that he learned that Christopher Kavanagh's driver's license had been suspended for driving under the influence. Polimeni continued his investigations and on November 12, 2007, he submitted a report of his findings to Peel Mutual.

[7] The plaintiff and her son were requested on December 24, 2007 to attend an examination under oath as required by the insurance policy. The plaintiff attended but her son did not. In a letter dated December 28, 2007, Peel Mutual denied coverage, stating that it was their position that Christopher Kavanagh might qualify as an insured person under the automobile policy and that his failure to submit to an examination under oath was considered a violation under the insurance policy.

[8] The plaintiff alleges that Peel Mutual's denial of coverage is a breach of the insurance policy and that Peel Mutual's interpretation of the insurance policy and statutory conditions are so unreasonable as to amount to bad faith. Peel Mutual alleges that Christopher Kavanagh drove the plaintiff's vehicle while intoxicated and was involved in the accident on October 7, 2007. The plaintiff, by allowing him to drive the vehicle, was in breach of her policy.

### **Issues**

[9] The issue on the motion is whether the documents 38 to 69 are protected by litigation privilege.

### **The Applicable Law**

#### **Litigation Privilege in General**

[10] Prof. R.J. Sharpe (now Sharpe J.A.) in "Claiming Privilege in the Discovery Process",<sup>1</sup> defining litigation privilege, quoted *Wheeler v. Le Marchant (1881)*, 17 Ch. D 675 at 681:

These cases, no doubt, establish that such documents are protected where they have come into existence after litigation commenced or in contemplation, and where they have been made with a view to such litigation, either for the purpose of obtaining advice as to such

---

<sup>1</sup> *Law in Transition: Evidence*, L.S.U.C. Special Lectures (Toronto: De Boo, 1984) at 163.

litigation, or of obtaining evidence to be used in such litigation, or of obtaining information which might lead to the obtaining of such evidence.

[11] The rationale behind litigation privilege has been outlined in Sopinka, Lederman and Bryant in *The Law of Evidence in Canada*:<sup>2</sup>

... it was founded upon our adversary system of litigation, by which counsel control fact presentation before the Court and decide for themselves which evidence and by what manner of proof they will adduce facts to establish their claim or defence, without any obligation to make prior disclosure of the material acquired in preparation of the case.

[12] The law of privilege in Ontario is set out in *General Accident Assurance Company et al v. Chrusz et al.*<sup>3</sup> In order to fall into the ambit of litigation privilege, litigation, actual or contemplated, must be the dominant purpose for which the document in question is created. Similarly, the Supreme Court of Canada in *Blank v. Canada (Minister of Justice)*, adopted the dominant purpose test.<sup>4</sup>

[13] Relying on *Mamaca (Litigation Guardian of) v. Coseco Insurance Co.*, Peel Mutual submitted that in a case where there are numerous issues in dispute with only one issue having a reasonable apprehension of litigation, the party asserting litigation privilege must use a two-step approach:

- (1) Whether litigation was a reasonable prospect at the time the document was produced, and
- (2) If so, whether the dominant purpose for the creation of the documents in question was to assist in the contemplated litigation<sup>5</sup>

[14] Peel Mutual asserts that in the case at hand there is only one issue in dispute between the parties, whether the plaintiff and/or Christopher Kavanagh were truthful about their involvement in the alleged theft of the plaintiff's vehicle. As a result they submit that only the first part of that test need be proven. However, in his reasons for dismissing leave to appeal *Mamaca* to Divisional Court, Justice Pitt reviewed the case law and found that the dominant purpose test was a requirement for litigation privilege.<sup>6</sup> Therefore, the dominant purpose test as laid out in *Chrusz* and affirmed in *Blank* will be the one used on this motion.

[15] The Supreme Court of Canada in *Blank* further limited the application of litigation privilege, stating that:

---

<sup>2</sup> A. Bryant, S.N. Lederman and M. Fuerst, Sopinka, Lederman and Bryant in *The Law of Evidence in Canada* 3<sup>rd</sup> ed., (Toronto: LexisNexis Canada Inc., 2009) at 975.

<sup>3</sup> (1999), 45 O.R. (3d) 321 (C.A.)

<sup>4</sup> *Blank v. Canada (Minister of Justice)*, [2006]2 S.C.R. 319, 2006 SCC 39 at para. 60

<sup>5</sup> *Mamaca (Litigation Guardian of) v. Coseco Insurance Co.*, [2007] O.J. No. 4899 at para. 21 (Sup.Ct.)

<sup>6</sup> *Mamaca (Litigation Guardian of) v. Coseco Insurance Co.*, [2008] O.J. No. 2508 (Div.Ct.)

Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a prima facie showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground.<sup>7</sup>

### Defining the Scope of Litigation Privilege

[16] Litigation privilege cannot be founded on a suspicion of the possibility of litigation.<sup>8</sup> However, as the Court stated in *Klair v. Security National Insurance Co.*, privilege will come into play at some point in between mere suspicion and a conclusion that litigation will result.<sup>9</sup> In *Chrusz*, it was when “something arises to give reality to litigation.”<sup>10</sup> In *Scopis Restaurant Ltd. v. Prudential Assurance Co. of England Property & Casualty (Canada)*, Justice Sanderson stated that:

The fact that the investigation continued after that time does not detract from this conclusion. An insurer is obliged to keep an open mind and to continue to investigate even after a reasonable prospect of litigation exists. The claim for privilege is not dependent on the date of the commencement of legal proceedings, or the communication of a denial of coverage to the insureds.<sup>11</sup>

[17] In *Sathiyapalan v. Citadel General Assurance Co.*, the Court determined that the defendant insurer had reason to anticipate denial of the claim and the possibility of litigation at the outset of the claim. Investigations took place to both quantify and adjust the claim and investigate possible arson.<sup>12</sup> Nevertheless, the Court stated that there cannot be a blanket assertion that all the documents were litigation privileged as their dominant purpose may not have been in contemplation of litigation but instead the purpose may have been the adjustment of the claim.<sup>13</sup> In *SNC-Lavalin Engineers & Constructors Inc. v. Citadel General Assurance Co.*, the Court stated that the party claiming the privilege must satisfy that each document thereafter was created for the dominant purpose of litigation.<sup>14</sup>

---

<sup>7</sup> *Blank*, *supra* Note 4 at para. 45

<sup>8</sup> *Buzzi v. Berger*, [1998] O.J. No. 4514 at para. 29 (Gen.Div.)

<sup>9</sup> *Klair v. Security National Insurance Co.*, [2006] O.J. No. 4016, 37 C.C.L.I. (4<sup>th</sup>) 306 (Sup.Ct.)

<sup>10</sup> *Chrusz*, *supra* Note 3 at 338

<sup>11</sup> *Scopis Restaurant Ltd. v. Prudential Assurance Co. of England Property & Casualty (Canada)*, [1999] O.J. No. 1319 at para. 12 (Gen.Div.)

<sup>12</sup> *Sathiyapalan v. Citadel General Assurance Co.*, [2004] O.J. No. 364, 10 C.C.L.I. (4<sup>th</sup>) 132 at para. 4 (Sup.Ct.)

<sup>13</sup> *Ibid.* at para. 7

<sup>14</sup> *SNC-Lavalin Engineers & Constructors Inc. v. Citadel General Assurance Co.*, [2003] O.J. No. 310 at para. 31 (Sup.Ct.)

[18] Litigation privilege also protects communications from a solicitor to a third party<sup>15</sup> and *vice versa*.<sup>16</sup>

### **Bad Faith Claims in Insurance and Litigation Privilege**

[19] An insurer has the good faith obligation to deal with its insured's claim fairly in investigating and assessing the claim and in the decision whether or not to pay the claim. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy.<sup>17</sup> In cases where the insurer has not dealt with in a balanced and reasonable manner, the insurer may be subject to a bad faith claim.

[20] In *Davies v. American Home Assurance Co.*, the Court contemplated bad faith claims, overturning a decision of a Motions Judge that disclosed the privileged contents of the insurer's file as the plaintiff would not be able to prove bad faith without these documents.<sup>18</sup> The Divisional Court stated that "litigation privilege, when properly asserted, trumps relevance in almost all circumstances... There is no "bad faith insurance claim" exception to either litigation privilege or solicitor-client privilege that creates a special rule for bad faith claims against insurers and consigns the normal rules respecting privilege to other claims. The same rules apply in all cases."<sup>19</sup>

### **Application**

[21] Peel Mutual submitted the documents over which it is claiming litigation privilege to the Court for review. The documents can be categorized as follows:

1. Communications between Polimeni and Peel Mutual from October 12, 2007 to December 18, 2007 [Documents 49-69];
2. The reports of Polimeni to Peel Mutual, dated November 12, 2007 to August 7, 2008 [Documents 38, 44-73]; and
3. Communications between Integra View and Polimeni from November 21 to 28, 2007 [Documents 39-43];

[22] I will address each of these in turn.

---

<sup>15</sup>

<sup>16</sup> *Davies v. American Home Assurance Co.*, [2002] O.J. No. 2696 at para. 34 (Div.Ct.)

<sup>17</sup> *702535 Ontario Inc. et al v. Non-Marine Underwriters Members of Lloyd's London* (2000), 184 D.L.R. (4<sup>th</sup>) 687 (Ont.C.A.); *Chrusz*, *supra* Note 3; *Ferris v. Shell Canada Ltd.*, [2000] O.J. No. 3058 at para. 14 (Sup.Ct.); *Sathiyapalan*, *supra* Note 12

<sup>18</sup> *Davies v. American Home Assurance Co.*, [2002] O.J. No. 2696 (Div.Ct.)

<sup>19</sup> *Ibid*, at para. 44

### **Communications between Polimeni and Peel Mutual from October 12, 2007 to December 18, 2007**

[23] Applying the dominant purpose test from *Chrusz*, I reviewed the communications to determine whether the dominant purpose behind the creation of the document was for investigation and claim determination or anticipated litigation. Peel Mutual argued that litigation was contemplated by October 11, 2007 or alternatively by October 23, 2007. They allege that on October 11, 2007, after they had spoken to the plaintiff and the Barrie City Police, they had suspicions regarding the plaintiff's claim. However, litigation privilege cannot be based on the mere suspicion of litigation. At this point, there was no reality to the litigation. Similarly, by October 23, 2007, although Polimeni had now spoken to the plaintiff and her son, there was no reality to the litigation. The insurer had the good faith obligation to investigate and adjust the claims and nothing suggests that the dominant purpose of the communications was in anticipation of litigation and not for the purpose of fulfilling this obligation.

[24] By November 12, 2007, the date that Polimeni submitted his report, reality of litigation had crystallized. Peel Mutual at that point was informed of the allegations of the Barrie City Police, the information of the plaintiff, a report from a forensic locksmith that the ignition of the car had not been tampered with and the information that Christopher Kavanaugh's driver's license had been suspended for driving under the influence. Further, they were informed of Polimeni's opinion that the plaintiff and her son had attempted to mislead him and so concluded that litigation would likely result. The dominant purpose of Polimeni's investigation shifted from its dual purpose to solely preparing for litigation.

[25] The plaintiff alleges that Peel Mutual's interpretation of the insurance policy and statutory conditions are so unreasonable as to amount to bad faith and she requires these documents to prove her allegations. As stated in *Davies*, litigation privilege trumps claims of bad faith, therefore the documents would likely be protected. Nevertheless, applying the judgment in *Blank*, if the plaintiff can show actionable misconduct *prima facie*, disclosure may be granted after the court reviews the documents. The plaintiff has not put any such evidence before the Court and therefore, such disclosure is not granted.

[26] Upon reviewing the documents, I conclude that the communications between Polimeni and Peel Mutual on and after November 12, 2007 are subject to litigation privilege.

### **Reports of Polimeni to Peel Mutual, dated November 12, 2007 to August 7, 2008**

[27] The above analysis applies to the reports of Polimeni to Peel Mutual. The reports dated November 12, 2007 and those after are subject to litigation privilege.

### **Communications between Integra View and Polimeni from November 21 to 28, 2007**

[28] These communications were reviewed and I conclude that the communications were made for the dominant purpose of litigation.

**Costs**

[29] If the parties cannot agree on costs Peel Mutual has 30 days to provide brief written submissions, the plaintiff 14 days thereafter to respond, and Peel Mutual 7 days thereafter for any reply. Counsel should send a copy of this endorsement along with their submissions and

check with my assistant in Whitby as to where they should be sent.

---

Justice J.E. Ferguson

**Released:** October 20, 2009

