ONTARIO TRIAL LAWYERS ASSOCIATON

DOCUMENTARY PRODUCTION IN A BAD FAITH MATTER

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Today, I want to discuss what you can obtain in documentary production to support a bad faith action. To do that, I need to provide some background on a case named *Bingeman v. Kingsway General Insurance Company.*

In March of 1993, Mr. Gordon Bingeman's farmhouse in St. Agathe, Ontario burned down. He lost everything.

His home insurer, Kingsway General Insurance Company ("Kingsway") denied his claim on the basis of arson and in 1994, a lawsuit was commenced. I was retained in the month of August 2000. The case had been struck from the list and was going nowhere fast.

In order to move the matter along, a motion was brought to amend the statement of claim from $100,000.00 for punitive and aggravated damages to $2,000,000.00. In addition, the statement of claim and reply was amended to particularize in great detail, what my client perceived to be the incidents of bad faith by the insurer.

These particulars turned out to be crucial in our later motions where the court always went back to the pleadings to see if the productions we were seeking were relevant.

I have attached a copy of these particulars (pages 18 - 22) and I invite you to have reference to them when drafting your claims for bad faith. I cannot emphasize enough that if you want production of the insurer's file to show its bad faith, do not plead boilerplate. You must, as much as possible, describe in great detail how the

insurer deliberately acted in a "win at all costs" manner with no regard to the actual facts of the claim or its duty to its insured.

When we went before the courts to amend the pleading, we also requested production of the following:

1. The entire adjusting file of Kingsway including any outside agents used;

2. Copies of the entire Kingsway claims file.

Justice Reilly ordered that the adjusting file and the claims file be produced. The only restriction placed on his order was that the following documents were not to be produced:

1. Copies of all legal opinions sought by the insurer to make a determination of whether or not to deny coverage for arson and/or misrepresentation;

2. A copy of all written records in regard to Kingsway's lawyers' conversation with the broker in August of 1998;

3. To the extent that these communications were found in the claims file or the adjusting file, they were excluded from production as well.

The order and reasons of the Honourable Mr. Justice Reilly are attached at pages 23 - 30 of the material. Justice Reilly's order was not appealed.

The insurer did not produce the documentation they were ordered to produce. They ignored time deadlines by which they were ordered to produce the documents. The documents they did produce were so haphazardly thrown together that they were almost nonsensical.

As a result of threatening the insurer with a contempt motion, their counsel invited plaintiffs' counsel to attend at their premises to review the productions.

This resulted in an additional 1,200 pages of documentation being produced by the insurer. It did not include documents which were relevant and which had been reviewed in their counsel's office. In addition, the claims logs, which they had been ordered to produce, had portions "whited-out".

After three more motions and successfully opposing a leave to appeal motion brought by the insurer, the productions finally obtained included the following:

1. A forensic expert report commissioned by the insurer, the existence of which had never been made known. This report was supportive of the insured's claim.

2. A letter dated August 20, 1998 from a forensic expert hired by the insurer evidencing his report was incomplete and further work would be done.

3. The claims logs for the years of 1993, 1994, 1995 and the first five months of 1996 were "missing".

4. A note in the claims log made in 1997 that one of the insurer's defences (that Mr. Bingeman had misrepresented the use of his wood stove as being an auxiliary heat source) was "minimal and probably not worth introducing". This was significant having regard to the fact that the insurer maintained this defence vigorously right up to the date of trial notwithstanding their own internal claims logs' notes that it was not a valid defence.

5. The claims logs' revealed the insurer's attitude toward the matter in a notation made by the adjuster which stated, "We better win this claim. Expense is killing us." This was relevant to the issue of bad faith in that the insurer in first party coverage must assess the merits of a claim in a balanced and reasonable manner.

6. A further claims log notation which the court ordered produced stated that the insurer did:

> "...have concerns for exposure that could be up to $600,000.00. Regardless, our position is adamant that full defence is necessary."

Notwithstanding the insurer's knowledge that they had serious concerns for their exposure in this matter, they adamantly refused to consider payment of the claim regardless of their obligations to the insured.

7. One of the most damaging documents obtained by court order was a letter from the insurer's solicitor dated July 31, 1998. This letter was the subject of a motion first before Justice Spence and then before Justice Wilkins who

denied leave to appeal. The letter was relevant having regard to the order of Justice Reilly who ordered that with the exception of the lawyers' legal opinions sought by Kingsway, the lawyers' letters in the claims file had to be produced.

The lawyer's letter which was key to the bad faith action was a reporting letter from the lawyer to the insurer after a 5 hour meeting with his forensic experts who had opined the fire was of incendiary origin. In this letter, the insurer's counsel stated as follows:

> "In a private discussion following the extended meeting, Mr. [expert] has brought to my attention his concerns as to the viability of the evidence in support of the fire being of incendiary origin. It was his comment that in an overall perspective, he believes that the chances of successfully defending this action are in the area of approximately 25%."

The letter then continued on to detail the flaws in the defence expert's forensic findings.

The case of *Bullock v. Trafalgar Insurance Company of Canada* [1996] O.J. 2566 (Q.L.) (Gen. Div.) at p. 17 states:

> "Once the insurer has received information that renders the defence of arson as very improbable, the obligation to act in good faith imposes the duty on the insurer to settle the claim without continuing litigation. In attempting to settle, the insurer is required to consider the interest of the insured to the same extent as it considers its own interest."

The obvious inference is that 3 years before the trial was to commence, the insurer was notified by their experts, through their counsel, that the defence of arson was very improbable.

8. Notwithstanding this knowledge, the insurer made it absolutely clear in their claims log as late as May 2001 that they were "still adamant that arson should be tried".

The rationale behind Mr. Justice Spence's order that Kingsway's solicitor's letter be produced was as follows:

"With respect to Items 3 and 4, these items relate to the Order of Justice Reilly made March 12, 2001 and in particular to paragraph 6 of that order. Paragraph 6 excludes from the questions required to be answered, the following:

> "Copies of all legal opinions sought by Kingsway to make a determination of whether or not to deny coverage for arson and/or misrepresentation."

There is a dispute between the parties as to whether certain materials constitute legal opinions for purposes of that exclusion. These materials consist of a letter from Mr. McCormick, a solicitor, to Roy Cowell of Kingsway General Insurance Company dated July 31, 1998 and certain portions of the Kingsway General Claim Investigation Log, which have so far been "whited-out". All of these documents deal with one matter or another related to the litigation but that alone does not constitute them as legal opinions for the purpose of the exclusion in Justice Reilly's Order. For any of these documents or parts of the documents to be a legal opinion, it appears to me that there must be something more than simply the communication of factual information such as information and opinions expressed by other persons, and in

> particular, there must be some expression of opinion by the lawyer himself as to some matter relating to the litigation.
>
> I have reviewed and assessed the disputed materials with the foregoing test in mind. Based on this approach, I have determined that the letter of Mr. McCormick, dated July 31, 1998 to Mr. Cowell does not constitute a legal opinion for purposes of the exclusion and it should therefore be produced."

The insurer sought leave to appeal Justice Spence's order and this motion was dismissed by Justice Wilkins. Justice Wilkins reasons stated as follows:

> "In the motion before Spence, J., there were no issues of privilege – these had already been decided. Documents which might have been privileged, but which were not legal opinions, had been ordered produced. The letter of July 31, 1998 was shown to me...there is nothing in that letter to suggest to me that Spence, J., was in any way, not correct. This letter could never constitute a legal opinion sought by Kingsway."

A further issue in the case was the defendants' Schedule "B" productions in its Affidavit of Documents. Having regard to the difficulty with proper production that had already occurred in this case, a motion was brought to have the court review 28 letters from their counsel which the defendants had claimed privilege for.

The issue in this motion was whether the letters for which privilege was claimed contained the expression of "legal opinion" or if they contained further evidence of the insurer's bad faith.

This motion was heard by the Master who sealed all of the Schedule "B" documents and took them into his chambers to review. He then, in pencil, indicated what had to be produced and what could be "whited-out" as "legal opinion".

This was given back to defence counsel who then produced the portions from the 28 letters ordered by Master Hawkins These lawyers' reporting letters covered the period from 1994 to 2001.

The portions of the 28 letters reviewed by Master Hawkins, which were ordered produced, were extremely significant in the bad faith action. They showed that when this matter was initially to be tried, the insurer introduced a new defence shortly before the trial for the purpose of ensuring that the trial did not go before a certain judge.

This information was contained in two reporting letters from counsel for the insurer to its claims examiner. Obviously, any issue of judge shopping would be relevant to the issue of the insurer's bad faith.

PRESENT ISSUES ON OBTAINING THE NECESSARY PRODUCTIONS

On June 8, 2001, Justice Hill gave leave to appeal in *Davies v. American Home Assurance Company* [2001] O.J. No. 3050. This appeal concerns two orders of Justice Kitely dated February 27 and March 19, 2001.

Justice Kitely ordered all of the insurer's defence counsel's letters produced up to the date the Statement of Defence was filed. Justice Kitely appears to conclude that

privilege attaches after that time. The Court of Appeal heard this appeal on January 14, 2002 and judgment is presently reserved.

While I respect the longstanding traditions in our legal system for solicitor/client privilege and litigation privilege, I agree with Madam Justice Kitely's comment in *Davies v. American Home Assurance Company* that in regard to a claim for bad faith,

> "If legal opinions were protected by client/solicitor privilege where the investigation was "controlled by counsel" instead of by the insurer, whose duty it is to act in good faith toward the insured, then that would encourage insurers to delegate such responsibility to counsel.
>
> That would only serve to undermine the right of the insured to expect that the insurer would act in good faith. Simply because the insurer seeks an opinion does not mean, in this context that solicitor/client privilege is created. Furthermore, it is irrelevant that there is also a contract claim being asserted. Disclosure must be made based on the broader of two causes of action."

If litigation privilege or solicitor/client privilege had acted as a barrier to the productions obtained in the *Bingeman* case, the truth never would have come out. If privilege had prevented production of the documentary evidence in *Whiten*, the truth would never have come out in that case.

I am, however, afraid we may experience a judicial backlash. Some years ago, the legal community was shocked when the manager of the Hamilton Convention Centre received a punitive damages award arising from a wrongful dismissal case named *Pilato v. Hamilton Place Convention Centre Inc.* (1984) O.R. (2d) 652.

At that time, all wrongful dismissal actions included a claim for punitive damages and there was a great deal of concern about the proverbial "floodgates". The reality is that the law evolved where punitive damages arising from the employer/employee relationship is an exception in a wrongful dismissal case, not the rule.

I am confident this will be the result in insurance claims as well. Plaintiffs may be doing themselves a disservice by pleading generic bad faith as a simple "add on" to their substantive claims.

It may result in bringing the whole cause of action into disrepute before the bench. Such a concern may have something to do with several recent decisions which appear to be attempts by the bench to limit bad faith documentary productions.

Recently in the case of *Monks v. Zurich Insurance* (2002) 55 O.R. (3d) p. 198, Mr. Justice Cunningham stated that the fact that a plaintiff pleads bad faith does not entitle them to disclosure of the defendant's net worth. Justice Cunningham states:

> "If the plaintiff should succeed in its claim for bad faith, then such financial information might become relevant to the trial judge."

Of more interest is where the trial judge stated, what I believe are his real reason, which was:

> "The factual dispute in issue in the present case is whether or not the plaintiff is or is not entitled to accident benefits."

I believe the motions judge felt the bad faith claim was a "stink-bid" and was not going to facilitate the prosecution of same. This brings me back to my opening comments. If you want to obtain the productions necessary, you must be willing to move repeatedly before the motions court having already pleaded in great detail the reasons why your case is indeed an actual bad faith claim.

THE FUTURE

On February 22, 2002, the Supreme Court of Canada released its ruling in *Whiten v. Pilot Insurance Co.* [2002] S.C.J. No. 19. The court did not deal with the limits of documentary production in a bad faith case. However, it made it quite clear in affirming the jury's punitive award of one million dollars that it was relying on the following relevant documents from the claims file and the adjusting file:

a) A reporting letter from the insurer's adjuster to the insurer saying "no suspicion of arson";

b) A reporting letter from the insurer's adjuster to the insurer saying "little or no basis to deny this claim";

c) A reporting letter to the insurer from the Insurance Crime Bureau saying the insurer "wouldn't have a leg to stand on as far as denying this claim""

d) The report of a forensic expert hired by the insurer informing the insurer that in his opinion, the fire was not deliberately set;

e) A reporting letter from the insurer's lawyers making it clear that the insurer was going to deny the claim despite any evidence of arson;

f) A reporting letter from the insurer's lawyer to the insurer setting out the attitude of the insurer which gave priority to the insurer's interest at the expense of a dispassionate and fair approach to the Whitens.

In the *Whiten* case, none of these productions were known prior to the trial. They were only produced for the first time during the trial. No court ever dealt with the production vs. privilege issue in *Whiten*. However, it is clear that from trial to the Supreme Court of Canada, the Bench relied on documents in the claims file including letters from the insurer's own lawyer.

This should be emphasized to the Bench in attempting to obtain the insurers documents to support a bad faith claim.

Thank you for your time today and I have attached a brief Factum of some of the decisions along with the principles that they stand for in regard to bad faith and documentary production.

SUMMARY OF THE LAW OF DOCUMENTARY PRODUCTION IN BAD FAITH

1. The "dominant purpose test" is the law of Ontario in relation to claiming litigation privilege. If a document comes into being for a dual purpose, that is, to find out the cause of the fire and to furnish information to a solicitor, it should be disclosed. The claims manual and adjusters' notes were ordered produced.

   McCullogh v. Axa Insurance (unreported) July 21, 2000, Toronto File No. 99-CV-64703, Stinson, J. (O.C.G.D.) at p. 1.

2. A breach of the duty to act in good faith gives rise to a separate cause of action from the failure of an insurer to compensate for the loss covered by the policy.

   Samoila v. Prudential of America General Insurance Co. (Canada) (2000) 50 O.R. (3d) 65 (O.C.G.D.)

3. In an action for bad faith, the critical issue is whether the company had a good faith basis for its decision. This, in turn, requires a number of other inquiries, including the substance of any investigations conducted by the insurer, the information available to the company at the time its decision was made and the manner in which the company arrived at its decision, including reliance on advice of counsel. The insurance company's claims file constitutes the only source of this information. Clearly, it is relevant to the subject matter involved in the pending action and reasonably calculated to lead to the discovery of admissible evidence.

Samoila v. Prudential of America General Insurance Co. (Canada) (2000) 50 O.R. (3d) 65 (O.C.G.D.) at page 2.

4. Bad faith allegations against an insurer, like actions by client against attorney, patient against doctor, can only be proved by showing exactly how the company processed the claim, how thoroughly it was considered and why the company took the action it did. The claims' file is a unique contemporaneously prepared history of the company's handling of the claim; in an action such as this, the need for the information in the file is not only substantial, but overwhelming. The claims' file, the litigation file, the manuals and the claims' policies will be ordered produced.

Samoila v. Prudential of America General Insurance Co. (Canada) (2000) 50 O.R. (3d) 65 (O.C.G.D.) at page 2.

5. Where an insurer seeks a legal opinion prior to denying coverage for fraud, it is certainly relevant in a bad faith action whether that opinion was that there was a valid basis for denial and will be ordered produced.

Samoila v. Prudential of America General Insurance Co. (Canada) (2000) 50 O.R. (3d) 65 (O.C.G.D.) at page 4.

6. In a bad faith claim, the general net worth of the insurance company as well as the particulars of the reserve numbers and defence costs are all relevant in considering a possible punitive damage award.

Samoila v. Prudential of America General Insurance Co. (Canada) (2000) 50 O.R. (3d) 65 (O.C.G.D.) at page 4.

Whitten v. Pilot Insurance Co. et al. [1999] O.J. No. 237 (O.C.A.) at p. 647.

7. A claim against an insurer for bad faith has, as its constituent elements:

   a. The manner in which the insuer investigates the claim;

   b. The manner in which the insurer assess the claim; and

   c. The decision of the insurer whether or not to pay.

702535 Ontario Inc. et al. v. Non-marine Underwriters Members of Lloyd's of London, England (Lloyd's Open Market) et al. (2000) 184 D.L.R. (4th) 687 (O.C.A.)

8. The duty of good faith obliges the insurer to act with reasonable promptness during each step of the claims process. Included in this duty is the obligation to pay a claim in a timely manner when there is no reasonable basis to contest coverage or withhold payment.

Bullock v. Trafalgar Insurance Co. of Canada [1996] O.J. 2566 (Q.L.) (Gen. Div.) at page 16.

8. The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duly to act fairly applies both to the manner in which the insurer investigates and assesses the claim and the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement.

702535 Ontario Inc. et al. v. Non-Marine Underwriters Members of Lloyd's of London, England (Lloyd's Open Market) et al. (2000) 184 D.L.R. (4th) 687 (O.C.A.)

9. Our system of litigation requires disclosure of information about the existence of documents. It should not be a cat and mouse exercise.

McCullogh v. Axa Insurance (unreported) July 21, 2000, Toronto File No. 99-CV-64703, Stinson, J. (O.C.G.D.) at page 3.

10. An insured is entitled to correct information...The insurer may not treat the insured as an adversary whose interested may be disregarded.

Bullock v. Trafalgar Insurance Co. of Canada [1996] O.J. 2566 (Q.L.) (Gen. Div.) at page 14.

11. In making a decision whether to require payment of a claim from its insured, an insurer must assess the merits of the claim in a balance and reasonable manner. It must not delay payment in order to take advantage of the insured's economic vulnerability.

Clarfield v. Crown Life Insurance Co. (2000) 50 O.R. (3d) 696

12. Where an insurer and/or adjuster acts unreasonably by effectively presupposing arson as the cause of the fire and taking steps to fortify this conclusion, rather than objectively assessing the evidence in order to draw a reasonable conclusion therefrom, the label of bad faith will be justified and punitive damages should be awarded.

> *Kogan v. Chubb Insurance Co. of Canada* [2001] O.J. No. 1697 at page 14.