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Insurance Law Newsletter

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B.C. Court Chastises Insurer for Unauthorized Disclosure of Jurors' Claims Histories

by Mark R. Hamilton

In late May 2009 a British Columbia Supreme Court Justice advised a trial jury that he had good news and bad news. The good news: that after four days of hearing the case had settled and the jury was dismissed. The bad news: the insurer for the defendant had disclosed private and personal information about individual members of the jury to defence counsel. The trial judge advised that in his view such disclosure had serious implications for the proper administration of justice and that had the case not settled he likely would have declared a mistrial.

Background

The case of *Norsworthy v. Greene* involved a claim for bodily injury arising from a motor vehicle accident. Trial was well underway when the judge was advised that after the jury had been selected defence counsel's office sent the names of the jurors to the instructing claims examiner and asked if the insurer had any potentially useful information about any of the jury members, including their claims histories. The examiner promptly responded with information that one of the jurors had an open claim and that another had a previous claim. This conduct was disclosed during the course of trial and the matter was brought to the attention of the trial judge.

The Ruling

The Court found that the unauthorized disclosure of the jurors' claims histories impacted the administration of justice, and more specifically, trial fairness.

An unfairness arose because only the defendant had or could have obtained the particular information provided by the examiner and the jurors did not know about the disclosure. Further, the information had the potential to assist the defendant in securing a favourable trial result. By example, such information might reflect that a juror had a specific claims history or injury pattern that might make him or her sensitive, partial or biased to a certain result in the action.

While privacy issues in addition to trial fairness issues were clearly at play, the Court commented that it was not its responsibility to investigate potential breaches of applicable privacy legislation.

Practical Impact

Norsworthy serves as a stark reminder that individuals representing or acting on behalf of insurers should be extremely wary of committing any act that could impact on trial fairness or result in unfair advantage. Investigating the claims histories of jurors is just one example. Certain insurers, especially those of substantial size and resources, may be in a position to access sensitive or confidential information that could assist in securing a favourable trial result for their insured. For example, there may be a temptation to draw on stores of information to determine whether jurors, witnesses or court personnel had previous disputes with insurers such as claims denials based on fraud or misrepresentation or have been the subject of other instances of claims problems or litigation histories. From a trial fairness perspective alone such temptations must be scrupulously resisted. ►



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In addition to affecting trial fairness, disclosing private information such as a juror's claim history could constitute a breach of applicable privacy laws. It is notable that following the ruling in *Norsworthy*, the British Columbia Information and Privacy Commissioner has commenced an audit into the subject insurer's past access, use and disclosure of private information. Such an investigation could lead to charges, hearings, fines, claims for damages and even contempt of court orders.

Insurers are well advised to avoid the improper disclosure of private information even if such information is sought by their counsel.

For more information on the content of this newsletter, or on other insurance law matters, please contact Mark R. Hamilton at 604.661.9274 or Alex L. Eged at 604.661.9203.

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