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Insurance Law Newsletter

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BCCA Rules on Disclosure of Privileged Documents

by Peter W. Lightbody

Civil trials never lack for surprise. A well-prepared witness may refuse to answer questions, or give answers nobody expected. A Judge may realize too late in a trial that he dated the Plaintiff during high school. Apparently jurors have been known to “liaise” with parties to the lawsuit. Somewhat sadly, most surprises at trial are less sensational, often involving late production of documents.

Background

In the case of *Stone v. Ellerman*, 2007 BCSC 969, 2009 BCCA 294, the frailty of witness memory collided with the law of “privilege” to create several issues for the Trial Judge, and later the Court of Appeal. *Stone* was an action for damages for whiplash-type injuries arising from a car accident. The surprise at trial was the revelation that the Plaintiff kept a “pain journal”. Counsel for the Defendant had not seen the journal until Plaintiff’s lawyer announced during his client’s evidence that he intended to re-refresh his client’s memory with it. Over the objections of defense counsel, the trial Judge permitted use of the journal for this purpose, and the young Plaintiff apparently referred to it extensively.

The Plaintiff had listed privileged documents in the oft used “boiler plate” or “bundle” method, which is really no listing at all. The description used in *Stone* was “notes and documents, correspondence, minutes of evidence, memoranda, being the work product of the Plaintiff’s legal advisors”. The trial Judge rejected the Plaintiff’s argument that this was sufficient. “It doesn’t specify anything” the Judge told the Plaintiff’s lawyer.

Nevertheless, the Court allowed the Plaintiff to refresh her memory through review of the journal on the stand. The Court also refused a request by counsel for the Defendant for a short adjournment to

allow time to prepare argument to oppose use of the journal. The Trial Judge was of the view that the keeping of a pain journal was commonplace in personal injury litigation, and the existence of this document ought to have been “assumed” by the Defendant.

The Ruling

Having allowed use of the journal, the trial Judge awarded the Plaintiff significant damages as follows: \$100,000 for pain and suffering, \$500,000 for loss of future earnings, \$40,000 for future care and \$50,000 for loss of housekeeping capacity. The Defendant appealed. The central issue on appeal was whether the Trial Judge erred in permitting any use of the journal. To decide this, the Court addressed the disclosure obligations that arise for privileged documents, and the consequences where these obligations are not met.

The Court ruled the pain journal was not adequately described by the Plaintiff in her List of Documents, but noted a discretion exists to permit the use of documents in such circumstances. The Court outlined certain factors a Trial Judge should be mindful of when exercising discretion in these circumstances:

- (a) would exclusion of the document prevent the case from being decided on its merits?
- (b) do the ends of justice require that the document be admitted?
- (c) what is the relative prejudice to the parties if the document is admitted vs. excluded? and
- (d) what is the explanation for the failure to properly disclose the document?

According to the Court of Appeal, the Trial Judge fell into error in giving “little or no consideration to the prejudice suffered by the defense”. The Appellate Court was also critical of the Trial Judge’s





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refusal of the request to prepare more substantial argument on the issue. The Court decided that the use of pain journal ought not to have been permitted by the Trial Judge and that its use at trial resulted in a “miscarriage of justice”. The case was returned to the trial list for another hearing.

There was a strong dissent from Mr. Justice Smith, who saw no miscarriage of justice. On the contrary, he reasoned that even if the pain journal had been adequately described on the List of Documents, because it was truly a privileged document defense counsel still would have had no access to it. Proper description on the Plaintiff’s List would have made no difference, he reasoned, and therefore how could prejudice arise? The dissenting Judge also flatly rejected that the Trial Judge should have adjourned for further argument on the issue. He wrote “judges must be allowed to manage the trials as they think fit” and lawyers must be prepared to argue these points of evidence “on the fly”. The dissent raises the possibility, albeit unlikely, of a further appeal to the Supreme Court of Canada.

Impact for Insurers

This case is not just about a pain journals and documents in the arsenal of the Plaintiff. It applies equally to documents generated by insurers in claims that wind up in litigation, whether they be first party claims, coverage disputes, subrogated actions or straight third party tort defences. It is invitingly simple to take the position that an entire claim file is privileged, and to bundle up the contents and label it something like “adjuster’s file”. But the risk is now quite clear. If that bundle contains the statement of a key witness who can remember nothing come trial, the statement will probably not be allowed to re-fresh the witness’s memory. After *Stone*, that should come as no surprise. If there are notes from a site visit that stand alone as a self-contained document, and the maker wishes to refer to them while on the stand, there may be a huge hurdle if the notes have been buried in a generically described “claims file”. Such risks could be particularly acute in a bad faith claim where there is need to refer to a document at trial because it will fully answer an accusation of wrongdoing. Conversely, insurers should consider whether vague disclosure on its own might support an accusation of wrongdoing, in the form of burying unfavourable documents.

At the end of the day, front line insurance staff should be aware that any portion of their file may end up in litigation, and when it does there is an obligation to list the contents of that file in enough detail to allow the opposing party to challenge any claim of privilege. This listing in turn may result in portions of insurers’ files finding their way into a court room, potentially to their chagrin. This risk should provide sufficient incentive to maintain the perfect file.

For more information on the content of this newsletter, or on other insurance law matters, please contact Peter W. Lightbody at 604.661.9284 or Alex L. Eged at 604.661.9203.

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