THE LAWYERS WEEKLY

Court curbs insurer's litigation privilege

By Julio Menezes

August 08 2008 issue

An Ontario court has clarified the limits of an insurer's right to withhold full disclosure to the insured in circumstances where documents have been generated with a dominant purpose of litigation.

Julio Menezes

In *Mamaca v. Coseco Insurance Co*, [2008] O.J. No. 2508 (Ont. S.C.D.C), Ozcam Mamaca was involved in a serious automobile accident. Several contentious issues arose between him and his insurer Coseco.

The master ordered production of certain documents asked for by the plaintiff. Coseco's claim that the documents were privileged was rejected ([2007] O.J. 1190). Coseco appealed, but Justice MacDonald upheld the master's order ([2007] O.J. No. 4899). Coseco sought leave to appeal that decision, but leave was denied.

Justice Pitt agreed that a motions judge or master could adopt the one-step approach or the two-step test according to the circumstances of the case. In the one-step approach, if there is only one outstanding matter between the insurer and insured, all documents generated after the point at which a reasonable apprehension of litigation exists are considered to be for the purposes of litigation, and therefore privileged.

Typically, in serious automobile cases, insurer and insured have several parallel issues being processed, calling for the application of the two-step test.

In *Mamaca*, Coseco was defending a claim by Mamaca against the unidentified driver. There were also other statutory accident benefits for which Mamaca was covered. The asserted litigation privilege was with respect to Mamaca's claim for income replacement.

The documents for which the insurer was claiming privilege would exist for virtually all disputed claims.

Justice Pitt agreed that the circumstances permitted a two-step approach – first, to determine if there was a reasonable anticipation of litigation, and second, whether each document generated after that date had in fact been generated for the "dominant purpose" of advancing that litigation.

The two-step approach was adopted in Ontario in *General Accident Assurance Co. v. Chrusz* [1999] O.J. No. 3291 (Ont. C.A.). Justice Carthy described the essence of the litigation privilege in the following terms: "In effect litigation privilege is the area of privacy left to a solicitor after the current demands of discoverability have been met."

The court found that to balance the dominant trend towards discoverability and early disclosure on the one hand versus the tactical interests of solicitor's privacy on the other, a combination of both elements — the imminence of litigation and the dominant purpose test — best met the public interest.

Coseco had repeatedly argued that after the date litigation was reasonably contemplated, all new documents were prima facie privileged. This argument was rejected. The Divisional Court accepted that the party claiming privilege had to prove that the dominant purpose for the generation of a document

was litigation. No error by the master or the appeal judge was found in examining or weighing the evidence submitted by the insurer to meet the dominant purpose test. This evidence appears to have been an affidavit by a law clerk to the insurer's counsel, and transcripts of the supposedly privileged documents.

Chrusz has provided admirable conceptual clarity in treating solicitor-client privilege as a distinct doctrine from litigation document privilege. In *Privacy Commissioner of Canada v. Blood River Department of Health* [2008] S.C.J. No. 45, the Supreme Court of Canada appears to have elevated solicitor-client privilege to a free-standing substantive right that is supposedly near absolute. The ripples of that decision are obviously intended to go far. But, in addition to the fact that the context of Privacy Commission had nothing to do with insurance, we can be assured that the decision will not leap from the virtues of the adversarial process and solicitor-client privilege to the much narrower litigation document privilege.

Both *Chrusz* and *Mamaca* make an important point about the claims settlement process. The express commitment in an insurance contract is for prompt and fair settlement. As always, good faith in reaching that goal is required equally of insurers as it is of the insured. The high-level assertions about the relationship of legal advice and access to justice are not in the least jeopardized by the demand that insurance companies process claims without being immediately adversarial.

Serious automobile accidents and their aftermath lead invariably to multiple issues between insured victims and their insurers, in part due to the complex burden of welfare and insurance objectives that the victim compensation regime has to meet. Mamaca ensures that the complexity is not compounded by procedural manoeuvres.

Julio Menezes teaches at the University of Windsor, Faculty of Law. His areas of interest are insurance, trusts and regulation of financial institutions.