IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Huntley v. Larkin, 2007 NSSC 297

Date: 20071016
Docket: SH 140333
Registry: Halifax

Between:

Joellan Lynn Huntley by her Litigation Guardian, Byron Huntley, Byron Huntley and Louise Huntley

Plaintiffs

v.

Andrew Larkin, Karen Larkin and Theodore Hogeterp

Defendants

Judge:	The Honourable Justice Arthur W.D. Pickup
Heard:	May 2 and 29th and September 11, 2007, in Halifax, Nova Scotia **Decision on Litigation Privilege (Lombard Insurance File)**
Written Decision:	October 16, 2007
Counsel:	Raymond F. Wagner, Anna Marie Butler and Michael Dull for the plaintiffs Michael E. Dunphy, Q.C., and Michelle M. Kelly for the defendant Theodore Hogeterp Nancy Rubin, and Andrea F. Baldwin for the defendants Andrew and Karen Larkin

By the Court:

[1] This is an application by the plaintiffs for an order for disclosure of the investigative file of Lombard Insurance, the insurers of the defendant Theodore Hogeterp, under *Rule* 20.06. This Rule gives the court the authority to order the production of any document relating to any matter in question in a proceeding.

[2] On April 18, 1996 the plaintiff was a passenger in a motor vehicle driven by Andrew Larkin. As the vehicle travelled on highway 359 in Centreville, Nova Scotia, a dog crossed the road directly in front of it causing Mr. Larkin to swerve to avoid the dog. The vehicle veered off the road and collided head on with a power pole. The plaintiff, Joellan Lynn Huntley, suffered a severe brain injury in addition to other permanent injuries.

[3] The plaintiffs, Ms. Huntley and her parents, Byron and Louise Huntley commenced an action against the defendants Mr. Larkin and his mother Karen Larkin, owner of the vehicle. The plaintiffs also brought action against the defendant Hogeterp on August 5, 1997 claiming it was his dog that ran in front of the vehicle. On August 26, 1997 Lombard Insurance retained Cox Hanson to defend the claim. On the same date, the solicitor for Lombard Insurance instructed one of Lombard's adjusters, Peter Flett, to investigate several matters.

[4] From August 26, 1997 through to June of 1998 Mr. Flett and Dalton Purdy, another adjuster, carried out an investigation of the accident on behalf of Lombard Insurance.

[5] They obtained two statements from the defendant Andrew Larkin. On August 22, 1999 these statements were disclosed to counsel for the plaintiffs and to counsel for the Larkin defendants. The disclosed statements were part of the larger investigative file assembled by Lombard Canada.

[6] The plaintiffs seek the remainder of the investigative file of Lombard Canada. The defendant Hogeterp has asserted a claim of privilege over this material. Hogeterp also argues that the plaintiffs are barred from bringing this interlocutory application unless they obtain leave pursuant to *Rules* 28.05(2) and (3).

[7] The plaintiffs submit that the intentional and voluntary disclosure to them, of the statements of Mr. Larkin, amount to a waiver of privilege with respect to the entire investigative file. They say there are exceptional circumstances such that leave to bring the application should be granted pursuant to *Rules* 28.05(2) and (3).

Issues:

[8] The issues are:

1. Should leave be granted pursuant to *Rules* 28.05(2) and 28.05(3)?

2. Is the Lombard investigation file subject to litigation privilege?

3. If so, has there been a waiver of privilege through disclosure of the statements taken from Andrew Larkin to counsel for Andrew Larkin and Karen Larkin and to counsel for the plaintiffs?

4. If there has been a waiver of privilege does it extend to the entirety of the Lombard investigation file?

1. Should leave be granted pursuant to *Rules* 28.05(2) and 28.05(3)?

[9] The plaintiffs' filed their notice of trial on March 8, 2004. Pursuant to the *Civil Procedure Rules* they require leave of this court to bring this application for disclosure. *Rules* 28.05(2) and (3) provide as follows:

> (2) Any party who has filed a notice of trial without a jury and certificate of readiness pursuant to subsection (1) of this Rule, or who has consented to the filing of such a notice, shall not, after the filing of the notice, initiate or continue any interlocutory proceeding or form of discovery without leave of the court except discovery of expert witnesses within sixty (60) days of the issuance of the notice.
>
> (3) Leave of the court pursuant to subsection (2) of this Rule shall be granted only in exceptional circumstances.

[10] The onus is on the plaintiffs to establish these "exceptional circumstances" mentioned in 28.05(3) before leave is granted.

[11] In considering whether exceptional circumstances exist which justify granting leave, I must look at all the relevant circumstances in this case viewed in the context of the underlying purpose of *Rule*s 28.05, (2) and (3).

[12] In *Bressmer v. M & F Handel Developments Ltd.*, [2007] N.S.J. No. 279, the Nova Scotia Court of Appeal commented on a variety of circumstances a judge must examine in determining "exceptional circumstances". At paras. 4 and 5, Cromwell J.A. writes:

> 4 We are all of the view that the judge erred in principle in denying leave. In considering whether exceptional circumstances exist which justify granting leave, all relevant circumstances, viewed in the context of the underlying purpose of the Rule, must be considered. These include (and I am not attempting to be exhaustive) the likely impact of the proposed interlocutory proceedings on the trial date and the orderly and timely conduct of the litigation as well as whether the interlocutory proceedings are necessary to do justice between the parties. Respectfully, the judge considered none of these factors. In doing so we respectfully conclude that he erred.
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> 5 There was here no suggestion that the proposed application for a Mareva injunction would place the trial date in jeopardy or that the appellants had in any other respect failed to prosecute the litigation appropriately and with dispatch. While we make no assessment of the ultimate merits of the Mareva application, it is clear that failure to grant such relief in an appropriate case could lead to a failure of justice and that the appellants placed before the judge an arguable case for the granting of such relief.

[13] The defendant Hogeterp argues that this application is not timely. Andrew Larkin's statements were disclosed in October 1999, approximately eight years prior to this application. Both the solicitors for the Huntleys and the Larkin defendants have had this information since that time. Counsel says that the solicitor for the plaintiffs did not apply for disclosure of further documents when he made an application with respect to two statements of an independent witness, Dennis Wilson, that had been obtained by the adjusters for Lombard. This application was made in May of 2001.

[14] The defendant Hogerterp argues that this application could have been made by the plaintiffs during the preceding eight years. Hogeterp implies that the plaintiffs have not conducted the proceedings with due dispatch. As a result, there are no exceptional circumstances such that would allow this application to proceed.

In addition to suggesting that the plaintiffs have not conducted the litigation in a timely manner, the defendant Hogerterp argues that because this is a unique factual situation, which has significant implications for the law relating to litigation privilege, there is a high likelihood that an adverse finding would be appealed and the trial would be in jeopardy.

[15] With respect to the delay issue, I am not satisfied that an adverse finding and a subsequent appeal of that finding will necessarily result in a delay of the trial. We are approximately three months from the date of the trial.

[16] The trial was adjourned from its April 2007 start date to January 2008 on the motion of the defendant Hogeterp on the basis that the parties were not ready for trial. The discussion at the time of the adjournment was to the effect that there were several outstanding matters that needed to be dealt with, and that the parties would attempt to resolve these issues prior to the new trial date of January 2008. Failing agreement on these various issues, it was agreed that I would hear these matters on an interlocutory basis. I have heard several.

[17] Significantly, there have been a number of discoveries since April 2007, despite the notice of trial, having been given on March 8, 2004. There have been a number of other interlocutory proceedings with the consent of all of the parties, including counsel for Mr. Hogeterp.

[18] I am satisfied that there are exceptional circumstances. On the motion of the defendant Hogeterp's counsel, the trial was adjourned. Discoveries have been held and a number of issues have been brought before this court since that adjournment. I am persuaded that in order to do justice between the parties, this application should proceed. Leave is granted.

2. Is the Lombard investigation file, including the statements of Andrew Rankin, subject to litigation privilege?

[19] All communications between a lawyer and third persons are privileged if, at the time of the making of the communications, litigation was commenced or anticipated and it is shown that the dominant purpose for the communication was for use in, or advice on, the litigation.

[20] The defendant Hogeterp's position is that all of the materials contained in the Lombard file were generated after counsel was retained on August 26, 1997 to defend the claims advanced by the plaintiffs and is, therefore, privileged.

[21] Information sought to be protected by litigation privilege must have been created for the dominant purpose of use in actual, anticipated or contemplated litigation.

[22] The "dominant purpose" test for litigation privilege set out in *Waugh v. British Railways Board*, [1980] A.C. 521 (H.L.) has been adopted in Nova Scotia and provides:

> ... a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

[23] The Supreme Court of Canada in *Blank v. Canada (Minister of Justice)*, 2006 S.C.C. 39 (CanLII) has recently defined the characteristics of litigation privilege and determined its lifespan. Fish, J. delivering the reasons for the court explained as follows:

> 27. Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.
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> 28. R. J. Sharpe (now Sharpe J.A.) has explained particularly well the differences between litigation privilege and solicitor-client privilege:
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> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more

> particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client)
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> R.J. Sharpe, "Claiming Privilege in the Discovery Process", in Law in Transition: Evidence, [1984] Special Lect. L.S.U.C. 163, at pp. 164-65.

[24] Adjusters' files, as here, create particular difficulty.

[25] Justice Davison in *Ford Motor Co. of Canada v. Laconia Holdings Limited* (1991), 108 N.S.R. (2d) 416, spoke to the difficulty in applying the test for litigation privilege in cases when the documents of insurance adjusters are involved. He stated at para. 9:

> The most difficult cases in which to ascertain that point where policy demands otherwise relevant evidence should not be produced on grounds of privilege involve insurance adjusters' files. The duties of an adjuster are complex. Invariably, he gathers information for many purposes. When there has been a casualty, information is necessary to determine the cause of the loss with a view to ascertaining if the policy provides cover. Information is required to determine if any conditions of the policy have been breached. Information is required to determine the size or quantum of the loss. Information is required to determine whether the assured or others are at fault for the loss. Adjusters seek information, prepare reports and assess the information in order to make recommendations to their principals. In all of these roles, there can be situations which arise at some point where litigation becomes a definite prospect in order to assert a subrogation claim, defend a liability claim or maintain a denial to the insured. The court must examine the whole background and be alert not to be misled by transparent attempts to protect the documents from disclosure by using lawyers as conduits only, or even by well-meaning but generalized statements that litigation was "probable".

[26] It appears that the defendant Hogeterp only reported the incident to Lombard at the time he was served with a statement of claim. I must be cognizant that Lombard had taken no steps to investigate nor reach any conclusion respecting the loss, or whether there was coverage prior to being advised by Mr. Hogeterp that he had been served with a statement of claim.

[27] Bearing in mind, the unique role of adjusters in these circumstances, it is necessary for me to review the entire file and determine which documents were prepared with the dominant purpose of use in contemplation of litigation.

[28] Counsel has directed me to the Court of Appeal decision in *Economical Mutual Insurance Co. v. Italian Village Limited*, 1981 CarswellNS 289 (C.A.) at para. 6, where the court discusses this analysis:

> By the *Civil Procedure Rules*, a party to a proceeding is required to reveal to his opponent all of the documents in his possession relating to the issues and make them available to the other side unless he claims privilege for any of them. If he should claim privilege the burden is on him to establish the nature of that privilege. In this case the claim of privilege covered 'correspondence, reports, sketches, estimates, photos and other material prepared by and for advice of counsel for the plaintiff'. It is on the basis of this claim of privilege that the whole file of the adjuster was withheld, and, in my opinion, the claim of privilege is too vague to be able to apply to the totality of the adjuster's file. The adjuster was appointed by the insurance companies and in the normal course of business has certain functions to perform in relation to the determination of the loss. Furthermore, the adjuster was to do certain work specifically for the insurers' solicitor in connection with the settlement of the claim and the preparation of contemplated subrogation litigation. The adjuster would therefore be wearing at least two hats and it is possible that his file would contain some documents subject to privilege and others not. There may also be documents which do not relate directly to the issues involved in the liability litigation and would therefore not be required to be revealed. It would have been better had the solicitor claimed privilege only for specifically identified relevant documents in the file so that the legal test of "dominant purpose" could be readily applied and a proper ruling made with regard to each. This was not done, however, and this Court must therefore review the file and determine what documents are subject to the solicitor-client privilege and what other documents, if relevant, are not and should therefore be delivered to the other side. There are also other documents in the file which have been already been delivered pursuant to a waiver of solicitor-client privilege.

[29] After a review of the materials, I have determined that the documents at pgs. 119 -120 are not subject to litigation privilege and should be released. The remaining documents are, in my view, subject to litigation privilege.

3. <u>Has there been a waiver of privilege through disclosure of the statements taken from Andrew Larkin to counsel for Mr. Larkin and Karen Larkin and to counsel for the plaintiffs</u>:

[30] The plaintiffs' position is that through the disclosure to them of Mr. Larkin's statements, the defendant Hogeterp waived privilege over the remainder of the investigative file.

[31] The test for waiver of privilege has been enunciated by Manes and Silver in *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993) at pg. 187, as follows:

> Waiver of privilege is established where it is shown that the possessor of the privilege:
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> (i) knows of the existence of the privilege and
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> (ii) demonstrates a clear intention to forgo the privilege.

[32] The defendant Hogeterp's position is that there was no waiver of privilege in providing the Larkin statements to the defendant Larkin's lawyer and to the plaintiffs' lawyer.

[33] The statements of Andrew Larkin were released to the plaintiffs, Andrew Larkin, the maker and Karen Larkin, who was one of the defendants. The defendant Hogeterp says that with respect to the release of the statement to Andrew Larkin, as Mr. Larkin was the maker of the statement he was entitled to a copy of the statement and, therefore, there was no waiver of privilege. Hogeterp relies on *Hanna v. Maritime Life Assurance Co.* (1995), 137 N.S.R. (2d) 339 (S.C.). on this point. I agree that there was no waiver of privilege as a result of providing to Mr. Larkin copies of his statements given to Lombard.

[34] As to the giving of the statements to the plaintiffs' counsel, Hogeterp claims that the plaintiffs were not adverse on the issue of liability with the Larkin defendants and, therefore, there was no waiver resulting from disclosure to the plaintiffs. While I agree that there was no waiver of privilege triggered by the release of the Larkin statements to Mr. Larkin, I believe the disclosure to the plaintiffs changes the situation. I am not persuaded that the plaintiffs and Larkin

defendants were not adverse on the issue of liability as the defendant Hogeterp argues. As counsel for the plaintiffs have pointed out, at the time the statements were released in 1999, there had been no agreement or settlement between the plaintiffs and the Larkin defendants. The plaintiffs and the Larkin defendants would have been adverse in interest at the time the statements were released to the plaintiff. There is no evidence before me to suggest otherwise.

[35] I am satisfied that the litigation privilege attached to the file materials was waived by the giving of the statement to the plaintiffs' solicitor. Counsel for Mr. Hogeterp suggests that for this court to find waiver of privilege on these facts and release some or all of the privileged material will have negative implications for the practice of litigation and for insurers in these circumstances. The precipitating event which led to the issue of waiver of privilege being raised was the giving of Mr. Larkin's statements to the plaintiffs by the defendant Hogeterp's counsel. As the other parties point out, counsel for Mr. Hogeterp should have known that these statements were privileged and that their release could lead to a waiver of privilege. Counsel for the Larkin defendants points out that counsel for Mr. Hogeterp had the choice not to produce the statements during his discovery of Mr. Larkin, as on discovery he could have elicited Mr. Larkin's evidence regarding the accident and his recollection of the dog on the highway, and then cross-examined at trial using the prior statements. This could have been done without waiving any privilege which attached to the Lombard investigation file.

[36] The defendant Hogeterp chose to provide the Larkin statements to the plaintiffs. The plaintiffs say that these statements are self-serving, and it would be unfair and unjust to not release the remainder of the file materials relevant to this issue.

[37] For all of the foregoing reasons and, in the interest of fairness, and so that these statements themselves are not misleading, it is appropriate that privilege be waived over "all other relevant documents dealing with the very same particular subject matter" (see *Walsh v. Smith* (1999), 180 N.S.R. (2d) 173).

[38] The question is the extent of the waiver.

4. <u>If there has been a waiver of privilege does it extend to the entirety of the Lombard investigation file</u>?

[39] In *Walsh v. Smith*, supra, Davison J. concluded that partial disclosure of communications constitutes a waiver of privilege which extends to "all other relevant documents dealing with the very same particular subject matter".

[40] The defendant Hogeterp argues that the particular subject matter of Andrew Larkin's statements was his recollection and perception from the day of the accident. Hogeterp emphasizes that while Mr. Larkin commented on a dog running out in front of him, the "particular subject matter" of both his statements was the accident itself and how it came about, and says there is nothing else contained in the Lombard investigative file that relates to this particular subject matter (that being the circumstances of the accident). The remainder of the material it is submitted, relates to investigations undertaken relating to the defendant Hogeterp's dog and other dogs in the Centreville area and there has been no waiver of privilege over this subject matter.

[41] The plaintiffs and Larkin defendants argue for a wider interpretation of "the subject matter" and argue that any statements or investigations relating to the defendant Hogeterp's dog, or other dogs in the area of the accident, must be disclosed.

[42] I am satisfied that the particular subject matter is the statements of Andrew Larkin and Mr. Larkin's recollection and perception of the circumstances of the accident.

[43] What should be disclosed would be any references in the privileged file materials to these statements and the circumstances under which they were obtained. I am satisfied that these statements and the additional disclosure that I will order are severable from the remaining file documents. I am satisfied that the two statements given by Andrew Larkin and the additional disclosure that I will order, constitute all of the materials in the Lombard file dealing with "the very same particular subject matter". I am satisfied that the remaining file materials do not relate to this particular subject matter, and the non-disclosure of this material will not be unfair or prejudicial to the plaintiffs.

[44] I direct that additional disclosure be made. I refer to the booklet of privileged materials forwarded by the defendant Hogeterp and direct that para. 2 at pg. 97 should be released as well as the paragraphs referring to Andrew Larkin on pg. 103 and pgs. 105, 106, 107, 128 and 129 in their entirety.

Pickup, J.