

CANADA / JUDGMENT

Buettner v. Gatto

2015 BCSC 1374

COURT

Supreme Court of British Columbia

DECIDED

6 August 2015

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2015 BCSC 1374 Buettner v. Gatto

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Buettner v. Gatto,

2015 BCSC 1374

Date: 20150806

Docket: M153042

Registry: New Westminster

Between:

Gregory Buettner

Plaintiff

And

Barry Gatto and Jody Gatto

Defendants

Before: Master Caldwell

Reasons for Judgment

Counsel for the Plaintiff:

V. Cheung

Counsel for the Defendants:

K. Yee

Place and Date of Hearing:

New Westminster, B.C.

June 23, 2015

Place and Date of Judgment:

New Westminster, B.C.

August 6, 2015

- [1] This is an application by the plaintiff for production of defence documents 4.7 - 4.12 inclusive. Those documents have been listed subject to claims of solicitor-client privilege, litigation privilege and solicitor's brief privilege.
- [2] No evidence or argument was presented in support of the claims of either solicitor-client or solicitor's brief privilege and therefore those claims must fail; I am left only with the claim of litigation privilege.
- [3] The matter began with a motor vehicle accident on March 12, 2012. By March 20, 2012 ICBC had made a determination and had assigned 100% liability against the defendant driver; this was communicated by ICBC to the defendants by Leslie Delaney. No evidence was provided by Leslie Delaney.
- [4] Shortly thereafter, the file was transferred to a second adjuster, Mandy Sandhu. Ms. Sandhu received correspondence from plaintiff's counsel on or about March 25, 2012 indicating that they had been retained to represent the plaintiff and requesting various information and documentation. No evidence was provided by Mandy Sandhu.
- [5] By April 23, 2012 the third adjuster, Brian Cuthbert took over conduct of the file. In his affidavit, Mr. Cuthbert acknowledges that an internal decision regarding fault had already been made and communicated by Leslie Delaney.
- [6] Mr. Cuthbert swears that his entire case load consisted of files with this same law firm, that the majority of those files "were being litigated" and that accordingly he "had litigation on my mind" during his assignment; he does not indicate how many of those files actually reach trial as opposed to how many resolve at various points of the investigation, negotiation or mediation stages.
- [7] He goes on to say that "I was charged with not simply determining fault for insurance purposes but with investigating liability, evaluating claims, and attempting to resolve them for litigation purposes."

- [8] It is hard to avoid the clear inconsistency in Mr. Cuthbert's evidence. First, all of his files involve this same law firm. Second, he is tasked with investigating, evaluating and attempting to resolve claims. Third, when assigned and because he knows that this law firm is involved, he does not think investigation, evaluation and resolution but rather simply litigation.
- [9] The only conclusion possible from these assertions is that the merits of any individual case mean nothing to Mr. Cuthbert, rather, since all of his files involve one law firm, he automatically abandons investigation, evaluation and resolution into or on the merits of any claim in his entire caseload and determines to litigate solely on the fact of this law firm's involvement.
- [10] Kate Hilliam is a senior claims examiner with ICBC; she was assigned conduct of this file effective October 26, 2012 and at that time was aware of the internal assessment of fault being entirely determined against the defendants.
- [11] Ms. Hilliam says in her evidence that she expected that the plaintiff would start a law suit, that as a senior claims examiner her caseload consisted mostly of litigation files and that she expected litigation because the plaintiff had retained counsel.
- [12] The filing of a law suit by way of a Notice of Civil Claim may in fact indicate an intention on the part of the plaintiff to actively embark on litigation; it may also simply serve to preserve the right to continue discussions and to pursue compensation in the face of an impending limitation deadline. In any event, no law suit had been filed by the plaintiff as of October 26, 2012 and ICBC had in fact determined that the plaintiff was not liable for the motor vehicle accident.
- [13] The allegation that most of her caseload is made up of litigation files, falls victim to the same type of analysis previously applied to Mr. Cuthbert's evidence. There is no evidence of any subjective, merit based reason to support the view of Ms. Hilliam or the person who assigned her this file that there was a reasonable prospect of litigation at the time she was assigned the file.
- [14] Ms. Hilliam's third assertion, that the plaintiff had retained counsel, cannot on its own support, either objectively or subjectively, the conclusion that there is a reasonable likelihood of litigation any more than the assignment of an adjuster to the file should lead to such conclusion.
- [15] Acting on behalf of the defendants in motor vehicle cases, ICBC is entitled, if not required, to investigate, evaluate and attempt to resolve claims for damages on their merits by way of trained adjusters and examiners who have access to legal counsel. Private individuals who have been involved in motor vehicle accidents are clearly entitled to seek out legal counsel in order to actively pursue investigation, evaluation and possible resolution before embarking on active litigation. The process must be aimed at encouraging even handed, fully informed discussion focussed on fair and equitable resolution; not a gun fight with one

side holding a loaded gun and the other a weapon filled with blanks. The suggestion that by the mere act of seeking legal advice and representation a person abandons his or her right to have their claim considered on the merits in any forum short of a trial is a suggestion that I reject.

[16] In the case of *Hamalainen (Committee of) v. Sippola* (1991), 62 BCLR (2d) 254 (B.C.C.A.) [Hamalainen]; Wood J.A. said at para. 22 that:

In my view, litigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it.

[17] In the present case, the pertinent information available to a reasonable person on the evidence is that there was a motor vehicle accident, the plaintiff alleged that he was injured as a result of the accident, ICBC investigated and determined that the defendants were fully liable for the accident, the plaintiff retained counsel who wrote to ICBC seeking basic disclosure and no law suit had been commenced as of October 26, 2012. Absent evidence as to some unknown or hidden agenda on the part of the plaintiff, his counsel or the adjusters acting on behalf of the defendants and ICBC, and thus assuming that all were acting in good faith and in the proper performance of their various duties, I am of the view that as of that date, no reasonable person would or could conclude that it was unlikely that the claim for loss would be resolved without litigation.

[18] That does not end the matter as the documents sought came into existence well after October 26, 2012. The question remains: When did litigation become a reasonable prospect?

[19] In this regard I turn to para. 6 of Ms. Hilliam's affidavit which reads as follows:

When I was assigned to this claim, I was aware of Ms. Delaney's decision on fault of the accident and did not agree with it. It was my intention from the beginning of my assignment to deny liability on behalf of the Defendants once the notice of civil claim was filed.

[20] No evidence is provided to show the basis upon which Ms. Delaney originally determined that the defendants were 100% liable for this accident. It is equally true that no evidence is provided to show the basis upon which Ms. Hilliam determined that, regardless of the earlier determination, she was going to deny liability. She simply states that that was her intention from the start.

[21] Her decision is thus wholly unilateral, arbitrary and lacking in any form of accountability; I have no idea whether it was based on her own investigation or knowledge of the event or on the colour or model of the vehicles involved, the colour of the drivers hair or their political affiliations or simply a policy that she never admits liability and never pays any claims without a judgment of the court.

- [22] It is likely that the reasonable person referred to in the above paragraphs, now possessed of the additional information that Ms. Hilliam, without any evident reason or cause, had determined to deny liability in the face of the earlier assessment and to drive the matter to trial without regard to the merits of the plaintiff's claim, would have to conclude that it was unlikely that the claim for loss would be resolved without litigation.
- [23] Having determined, as outlined above, to deny liability Ms. Hilliam retained the services of independent adjuster Ilona Kusic to locate and interview witnesses and provide reports to prepare for litigation and to build defences on the issue of liability. These interview statements and reports are the documents sought by the plaintiff in this application.
- [24] Sometime during the period when Ms. Hilliam says that she was preparing for litigation, which I interpret as being the period after her assignment onto the file on October 26, 2012 and June of 2013, she says that she viewed video footage of the accident and says that is why she was prompted to reverse the position on liability. Although no specific date of such viewing is given, she says "This decision was the subject of a standard form letter to the Plaintiff dated June 17, 2013". Absent evidence from Ms. Hilliam, who is providing the evidence in support of the claim of litigation privilege, I assume that the viewing of the video occurred contemporaneously with the letter of June 17, 2013.
- [25] One is left slightly confused as to how a decision which had been made as of October 26, 2012 could have been based on or "prompted" by a video viewing which didn't take place until Ms. Hilliam was already on the file and "preparing for litigation" sometime after October 26, 2012 and possibly as late as June of 2013.
- [26] This decision to deny liability was thus made known to the plaintiff by way of that letter dated June 17, 2013. No Notice of Civil Claim had been issued as of that date. I do not know if this change in position was communicated to the defendants who had previously been advised that they were being held 100% liable for the accident.
- [27] The procedure followed in this case are very similar to that found in the case of Hamalainen; a motor vehicle incident occurred, an adjuster was assigned to handle the file, that adjuster retained one or more private adjusters to investigate the incident, that was done and reports were produced following which the adjuster sent correspondence to the plaintiff denying liability. All reports created prior to the communication of the finding of liability against Mr. Hamalainen were ordered produced.
- [28] In Hamalainen, the Court found that the peculiar facts of the case and the extent of the injuries suffered by Mr. Hamalainen were such that litigation was likely in reasonable prospect from the moment of the event. In that case the plaintiff was riding in the back of a camper unit travelling at highway speed when, for some reason, he exited the vehicle out the rear door and was sent tumbling along the highway.
- [29] In the present case the vehicles were in collision at an intersection and a finding of liability fully favouring the plaintiff had been made and communicated.

- [30] The difference put forward by the defence, in support of their claim of litigation privilege, is that Ms. Hilliam determined as soon as she was assigned the file, albeit unilaterally, arbitrarily and without any reasons provided in the evidence, to deny liability and thus virtually ensure the prospect of litigation. They say that by this creation of a self-fulfilling prophesy she was free to commission investigations and reports while protecting them from disclosure.
- [31] If this argument is correct, all that any or all adjusters must do in any or all motor vehicle cases is determine, at the instant that the incident is reported, that he or she is going to deny liability and/or the presence of damages without the need to show any basis or accountability for such decision. Having done so, that will virtually ensure that litigation will be required to resolve any claim for loss. Thereafter, having created the virtual certainty of litigation, the defence will be able to reasonably argue that any and all investigations done from the instant that the incident is reported is for the dominant purpose of the conduct of the litigation which they ensured by the arbitrary denial of fault or damage.
- [32] In my respectful view this circular argument runs counter to the letter and spirit of the Hamalainen case, the numerous cases which were cited in and followed by Hamalainen and the numerous cases which have cited and have followed Hamalainen. It runs counter to the stated object of our Supreme Court Civil Rules, B.C. Reg. 168/2009, the securing of the just, speedy and inexpensive determination of every proceeding on its merits. It runs counter to the Supreme Court of Canada decision in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 and its findings at paras. 60 and 61 where it comments in affirming the dominant purpose test and the role of litigation privilege, that:

The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure.

And,

The modern trend is in the direction of complete discovery and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client

And finally,

While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process.

- [33] Inherent in the reasonable prospect/dominant purpose test must be the expectation or requirement that there be at least some evidence of bona fides, due diligence or accountability on the part of the party seeking to rely on the prospect of litigation, which was created by their own actions, to support their claim of litigation privilege. Absent such requirement the test itself becomes meaningless. This is particularly of concern where, as here, the same insurer provides coverage for both parties and, presumably, owes each a

duty of some form of meaningful investigation and determination of facts before reaching a decision on an issue as important as fault or liability for a motor vehicle accident.

- [34] I find that there is no evidentiary basis provided to support the decision of Ms. Hilliam to deny liability. Her unsupported decision cannot be used as justification for her to conduct a proper investigation into the facts of this motor vehicle accident while cloaking that investigation in a claim of litigation privilege. The time line and analysis of the court in Hamalainen is applicable to this case and to the evidence here, save as to the assertions of Ms. Hilliam which I reject. As in Hamalainen, the claim of litigation privilege regarding documents 4.7 to 4.12 inclusive, which documents were created prior to the June 17, 2013 form letter communicating the denial of liability, fails and all such documents are ordered produced forthwith and unredacted.
- [35] At the conclusion of submissions regarding this matter, counsel addressed the issue of costs regarding one of two other applications in this matter which were set for hearing at the same time as this matter. Counsel for the defendants sought leave to make further submissions on that issue at a later date however I have determined that that will not be necessary. Both counsel agreed that this matter would be removed from Rule 15-1 fast track and that the balance of the matters in those applications were to be adjourned generally. I make no costs order regarding either of those two applications.
- [36] The plaintiff is however entitled to his costs of this application in any event of the cause.

"Master Caldwell"

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