
CANADA / JUDGMENT

Stevanovic v. Petrovic

2007 BCSC 1392

COURT

Supreme Court of British Columbia

DECIDED

19 September 2007

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2007 BCSC 1392 Stevanovic v. Petrovic

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stevanovic v. Petrovic,

2007 BCSC 1392

Date: 20070919

Docket: M054338

Registry: Vancouver

Between:

Ratomir Stevanovic

Plaintiff

And:

Stevan Petrovic

Defendant

Before: The Honourable Mr. Justice S.R. Romilly

Reasons for Judgment

Counsel for the Plaintiff

Stephen E. Gibson

Counsel for the Defendant

Kevin A. Cantelon

Date and Place of Hearing:

August 28 and 30, 2007

Vancouver, B.C.

Nature of the Application

[1] This is an application by the plaintiff to obtain the following:

- (1) Within 7 days of entry of this order the defendant produce a List of Documents providing the appropriate particulars for Part III of Form 93 of the Rules of Court;
- (2) Within 14 days of entry of this order the defendant produce to the plaintiff's solicitors copies of the following from May 28, 2005 to April 7, 2006:
 - (a) the complete records, writings, communications, daily logs, interoffice correspondence, computer notes and memorandum that relate, refer, pertain or memorialize by written, oral or electronic means any communication amongst the staff of the Insurance Corporation of British Columbia ("ICBC"), relating to the plaintiff and defendant;
 - (b) a complete copy of all billing, payment and accounting documentation relating to the plaintiff's claim;
 - (c) all independent adjuster reports, notes and photographs;
 - (d) all internal corporate accident report documentation;
 - (e) all material damage information (including laser colour copies of all material damage to the defendant's vehicle);
 - (f) all statements and/or interview notes relating to the plaintiff, and any potential witnesses in this action;
 - (g) all billings statements, receipts and payments for investigations, background checks, surveillance, credit card checks, special investigations;
 - (h) unedited CL-75 reports for both the plaintiff and defendant; and
 - (i) all expert reports, expert opinions, clinical notes, photographs and/or notes from experts and investigation reports.

[2] The plaintiff has now received most of this material either from the defendant or through the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165. Some of the requested materials have been edited to remove portions of the documents for which the defendant claims litigation privilege. The plaintiff claims that he is entitled to those edited portions except for the portions of the documents relating to the reserves set for this matter.

- [3] For the reasons stated below, I order that the defendant supply to the plaintiff within seven days of the entry of this order a number of the edited portions from various dates as listed below, a chronological itemization of all expenses paid on behalf of or to the plaintiff, the material damage documents and photographs relating to the defendant's motor vehicle, and the unedited CL-75 reports.

Background

- [4] The plaintiff was standing on a residential roadway waiting for his friend, the defendant, to stop and pick him up. It is alleged that the defendant drove toward the plaintiff in jest at a high rate of speed. In an attempt to avoid the oncoming vehicle, the plaintiff unfortunately stepped into the path of the defendant's vehicle as it tried to go around him. The plaintiff was seriously injured in the accident. It is further alleged that the defendant panicked initially, and as a result, gave a false statement to ICBC and the police. The defendant claimed that he feared he would lose his pilot's licence and job if he told the truth. Despite this, the defendant later changed his story to both the police and ICBC to reflect the agreed upon version of events.
- [5] The chronology of events is as follows:
- (1) On May 28, 2005, the plaintiff was allegedly struck by the defendant while he stood in a roadway waiting to be picked up. The defendant is a friend of the plaintiff.
 - (2) On June 6, 2005, the defendant provided a statement to ICBC explaining how the accident occurred.
 - (3) The defendant subsequently provided an undated supplemental statement that changed the defendant's account of how the accident took place. The defendant claimed that at the time of making his initial statement, which partially blamed the plaintiff, he feared the repercussions of the accident on his career as a pilot. ICBC has not supplied information to indicate when this statement was obtained.
 - (4) On September 14, 2005, ICBC was first advised of counsel involvement.
 - (5) On September 27, 2005, a writ of summons and statement of claim were filed.
 - (6) On November 25, 2005, defence counsel was appointed and advised the plaintiff of their involvement.
 - (7) An appearance was not filed until almost five months later on April 7, 2006.

[6] There were several liability and coverage issues pertaining to this matter that were investigated by Lance Chong on behalf of ICBC. Mr. Chong was investigating the plaintiff's benefits under Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 212/2007 ("Part 7 benefits"), coverage issues, and the cause of the accident on behalf of ICBC. The fundamentally contradictory statements provided by the defendant raised the potential for a breach of his insurance.

The Law

1. Production of Documents

[7] In *Grewal v. Hospedales*, 2003 BCSC 1624, 26 B.C.L.R. (4th) 70 ("Grewal"), Smith J. summarized the law on the production of documents. At paras. 8-9, the court stated:

Rule 26(11) of the Rules of Court provides as follows:

Where a document is in the possession or control of a person who is not a party, the court, on notice to the person and all other parties, may order production and inspection of the document of a certified copy that may be used instead of the original.

This rule has been interpreted as conferring a discretion on the court to order production of documents in the possession of third parties that are relevant to the litigation and that are not subject to privilege: *Dufault v. Stevens* (1978), 6 B.C.L.R. 199 at 204 (C.A.); *The Compagnie Financière du Pacifique v. The Peruvian Guano Company* (1882), 11 Q.B.D. 55 at 63 (C.A.); *Rhoades v. Occidental Life Ins. Co. of California*, [1973] 3 W.W.R. 625 (B.C.C.A.); and, *Bates v. Stubbs* (1979), 15 B.C.L.R. 65 (C.A.).

[8] Smith J. then set out the test in respect of the scope of disclosure of documents at para. 10:

In *Dufault v. Stevens*, *supra*, the court defined relevance within the meaning ascribed to that term in the *Peruvian Guano* case. In the latter decision the court defined relevancy as that which may be relevant to advancing the defendant's case or to damaging the plaintiff's claims. At p. 63, the court stated:

It seems to me that every document relates to the matters in question, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.

[9] The court in *Grewal* went on to discuss relevance at paras. 12-14:

The policy behind the Halliday format [from *Halliday v. McCulloch* (1986), 1 B.C.L.R. (2d) 194 (C.A.)] is to avoid disclosure of embarrassing or confidential material that may not be relevant to the litigation or that may become irrelevant if the plaintiff agrees to amend her pleadings before the time set for delivery of the documents to adverse parties. At the same time, the court noted at p. 200 that the proposed format was intended to ensure "all parties should have access to all the relevant medical records on as equal and as prompt a basis as is possible, having regard to the

need to protect the patient-litigant's litigation privilege."

In Halliday, Lambert J.A. noted at p. 196 that the court in *Dufault v. Stevens* made it clear: (i) a production order should not override the litigation privilege; and, (ii) embarrassment to a party to the litigation ought not to be a relevant consideration for the chambers judge.

The determination of what documents may be relevant and not subject to litigation privilege is the responsibility of counsel and not the litigant. This task was described by Lowry J. (now J.A.) in *G.W.L. Properties Ltd. v. W.R. Grace & Co.*, [1992] B.C.J. No. 2387 (S.C.) in regard to the preparation by counsel of a List of Documents. At p. 5 Lowry J. reviewed the following instructive comments in regards to determining what should be included in a List of Documents:

The decision of what is and what is not relevant must lie initially upon counsel preparing the list. Our rules depend upon his or her diligence in searching out from the client what documents are or have been in its possession and upon his or her integrity in listing those which are relevant. The decision of relevance must not be left to the client even if the client includes upon its staff a member of the bar of this or any other country. The decision must be counsel's: *Visa International* at 308. See also *Boxer v. Reesor* (1983), 43 B.C.L.R. 352 at 357 (S.C.).

2. Litigation Privilege

[10] Where production of a document is sought for which privilege is claimed, the party from whom production is sought has the onus of establishing privilege over such documents: *Hamalainen (Committee of) v. Sippola* (1991), 62 B.C.L.R. (2d) 254, [1992] 2 W.W.R. 132 (C.A.) ("*Hamalainen*") at p. 261.

[11] The test for privilege in circumstances such as in this application, as articulated in *Hamalainen* at p. 261, is two-fold:

- (i) Was litigation in reasonable prospect at the time the document in dispute was created?
- (ii) If so, was the dominant purpose for the document's creation for use in litigation?

i. The First Branch of the Test: Litigation in Reasonable Prospect at Time of Document Creation

[12] The first requirement of the test set out in *Hamalainen* is that litigation be in reasonable prospect at the time that the document was created. The test of whether litigation was in reasonable prospect is stated in *Hamalainen* at p. 261:

Common sense suggests that it must mean something more than a mere possibility, for such possibility must necessarily exist in every claim for loss due to injury whether that claim be advanced in tort or in contract. On the other hand, a reasonable prospect clearly does not mean a certainty, which could hardly ever be established unless a writ had actually issued. In my view, litigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all pertinent information including that particular to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it.

[Emphasis added]

ii. The Second Branch of the Test: Dominant Purpose of Document Use for Litigation

[13] In Hamalainen, the Court of Appeal stated at p. 262:

Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry will shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation. In other words, there is a continuum which begins with the incident giving rise to the claim and during which the focus of the inquiry changes. At what point the dominant purpose becomes that of furthering the course of litigation will necessarily fall to be determined by the facts peculiar to each case.

[14] Mr. Justice Wood went on to reason:

In that sense there is obviously no absolute rule that the decision to deny liability does not necessarily mark the point in which the conduct of litigation becomes the dominant purpose underlying the production of each and every document of the sort for which privilege was claimed

iii. Distinguishing Between Privileged Documents

[15] Where the defence fails to draw any distinction between the purpose underlying the production of individual documents, they run the risk that they have not established privilege over any of the documents (see Hamalainen at p. 263).

[16] In *Shaughnessy Golf & Country Club v. Drake International Inc.* (1986), 1 B.C.L.R. (2d) 309, [1986] 3 W.W.R. 681 (C.A.) ("*Shaughnessy Golf & Country Club*"), a unanimous decision written by Esson J.A. reasoned as follows at p. 319:

The plaintiff has not established that the reports all owe their genesis to the dominant purpose of being used for the purpose of obtaining legal advice or to conduct or aid in the conduct of litigation which, at the time of its production, was in reasonable prospect. What it did prove is that, if the reports are taken as a whole and treated as one document, the dominant purpose of the whole was to aid in the conduct of litigation. But that is not the proper way for the matter to be approached. Privilege was claimed for a large number of documents. The grounds for it had to be established in respect of each one. By trying to extend to the whole list the considerations which confer privilege on most of the documents, the plaintiff has confused the issue and created the risk that, because it did not make in its evidence the distinctions that could have been made, it must be held not to have established privilege for any.

That analysis, in my respectful view, gives insufficient weight to the essential question of the dominant purpose for the document coming into being and, in the context of adjusters' reports, gives virtually no weight to the considerations in favour of open discovery which lie at the root of the change in the law brought about by *Voth* and the authorities upon which it is based. The

emphasis on policy caused sight to be lost of the necessity for distinguishing among the reports in a case where the party claiming privilege, on its own evidence, ultimately conceded that some of the reports were not for the dominant purpose of assisting in litigation.

[17] Recently, the Supreme Court of Canada took the opportunity to reaffirm the application of the dominant purpose test to litigation privilege. In *Blank v. Canada (Department of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319 at paras. 60-61, Fish J. stated:

I see no reason to depart from the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure.

While 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.

[18] In *Shantz (Guardian ad litem of) v. British Columbia Children's Hospital*, 2005 BCSC 1747, [2006] B.C.W.L.D. 1280 at para. 9, Madame Justice Loo cited with approval the reasons of the master who ordered the production of documents at issue:

Many of the authorities relating to *Hamalainen*, supra, deal with a situation that ICBC adjusters find themselves in where there is frequently a situation that there is, if you will, an investigative stage prior to the stage at which one is able to appropriately conclude that the dominant purpose would be for litigation.

Numbers of those authorities in essence create a requirement that other possible uses of the document be explained away prior to the court being satisfied that the document is prepared for the dominant purpose of litigation.

[Emphasis added]

[19] With respect to the issue of what a deponent might say in support of a claim of privilege by commenting on the dominant purpose, Wood J.A. reasoned in *Hamalainen* at p. 259:

First of all, it was not incumbent upon the Master to accept without question the opinion of either deponent on one of the very issues he was bound to decide. Whether or not litigation was in reasonable prospect was a matter for him to decide on all the evidence before him....

Secondly, and more importantly, both affidavits appear to be based on what I view as a significant error of law, namely, the assumption that because litigation seemed likely the reports must necessarily have been prepared for the "principal purpose of assisting in the preparation for and the conduct of" such litigation.

[20] Mr. Justice Wood quotes from the decision of Shaughnessy Golf & Country Club further at p. 260 of Hamalainen:

The fact that litigation is a reasonable prospect after a casualty, and the fact that that prospect is one of the predominant reasons for the creation of the reports is now not enough. Unless such purpose is, in respect of the particular document, the dominant purpose for creating the document, it is not privileged.

[21] In *Krusel v. Firth*, [1995] B.C.W.L.D. 1537, [1992] B.C.J. No. 2926 (S.C.), Master Bishop reasoned that in most cases involving serious physical injury or death, litigation is a reasonable prospect from the time of the accident and the first test is one which is reasonably easy for a party opposing production of documents to meet. At para. 5, Master Bishop stated:

There are no facts alleged in this case that allow me to determine the dominant purpose was preparation for litigation at the time the statements were taken. In my view in order to establish a dominant purpose that falls within the privilege exclusion, counsel must show at least that,

1. Litigation has in fact commenced .
2. Secondly, liability and/or quantum of damages or disputed or the steps taken during the investigative stage and the factors that led the investigator to change the dominant purpose of investigation and when that change occurred.

[22] Counsel for the defence did, however, draw my attention to the decision in *McMillan v. Weaver* (1994), 96 B.C.L.R. (2d) 10, [1994] B.C.J. No. 1805 (S.C.). In this case, Master Horn held that internal memorandum created by the adjuster in the course of his duties that contained information received and opinions expressed as to the plaintiff's injuries and the manner in which the accident occurred were privileged. This decision does not refer to the test laid out in Hamalainen.

iv. Procedure Adopted in this Case for Determining Litigation Privilege

[23] In order to determine whether there is litigation privilege with respect to the edited portions of the materials that were provided by the defendant to the plaintiff, I requested to be supplied with the unexpurgated copies of the adjuster's notes ("CWMS notes") concerning this matter. After examining the CWMS notes to determine if litigation privilege applied, they were placed into a sealed envelope and filed in the event that the Court of Appeal reviews my decision.

Analysis

[24] There are several purposes for investigating a general liability insurance claim. The following considerations apply to all insurance claims related to tortious conduct, whether they are for car accidents, home, or business insurance.

- [25] First, when an insurer receives notice of a claim, it must determine whether there is coverage for the incident in question. The insurer must enquire as to whether the insured has fulfilled his or her obligations under the insurance contract. In other words, there must be a determination as to whether there is a breach.
- [26] Second, the insurer must establish whether the incident is an insurable risk. This is another coverage question. In order to determine this, the insurer must investigate the circumstances of the matter to determine whether the insurance policy covers the factual scenario, and then decide whether there is any risk at all to the insurer.
- [27] Third, the insurer then decides whether it should consider funding interim payments to an injured party. These payments can include wage loss, special damages, or other out of pocket expenses. Many adjusters will deal directly with a claimant or counsel and reimburse expenses incurred during a claim.
- [28] Fourth, the insurer may consider whether to offer compensation to resolve the matter, whether a lawyer is involved or not. For example, if a layperson made an offer which was well within the reserve to resolve the file, the insurer cannot claim that litigation was the dominant purpose since the layperson had every intention of resolving the matter without litigation.
- [29] The defendant claims that there was no other purpose for the creation of the documents in question than for litigation. In my view, this bare assertion is not enough. In Hamalainen, the adjusters failed in their attempt to claim the same reasons for the creation of the documents in that case.
- [30] The defendant failed to offer any explanation as to what occurred between the time that the writ was served and the time that the appearance was filed. The onus rests on the defendant. If the defendant was determining whether to provide a defence in light of his initial false statement, then it was coverage and not litigation that was the dominant purpose.
- [31] Mr. Chong does not comment on anything beyond the possibility of litigation, which exists in every case. He fails to explain why litigation became the dominant purpose at all. This was a critical aspect of the adjusting phase and had nothing to do with the tort claim at all.
- [32] Mr. Soo fails to explain why he hired Mr. Chong to handle the administration of the Part 7 benefits and to acquire statements from other witnesses. Mr. Soo has also failed to comment on an investigation of coverage regarding the defendant's false statement to ICBC.
- [33] The only logical explanation for defence counsel's delay in taking five months to enter an appearance was that ICBC was either investigating coverage issues or the cause of the accident. This is obviously in the investigation phase of the file because ICBC did not yet seem to know at that stage how the accident happened.
- [34] It is clear to me that this is a case where it would be unwise to hold that all of the documents created after the filing of the writ were for the dominant purpose of litigation.

[35] After reviewing the adjuster's CWMS notes, I order that the following edited portions of those notes be released to the plaintiff's solicitor:

- (a) The edited portion from the notes dated July 5th, 2005;
- (b) The edited portion from the notes dated July 25th, 2005;
- (c) Over two pages of notes dated July 27th, 2005;
- (d) The edited portions of the notes dated August 10th, 2005, except for the discussion of policy reserves;
- (e) The edited portions of the notes dated September 1st, 2005;
- (f) The edited portion of the notes dated September 6th and 7th, 2005; and
- (g) The edited portions of notes dated October 5th, 6th, 7th, 25th and 28th, 2005, except for any reference to policy reserves.

[36] In addition to the foregoing, I order that the defendant deliver to the plaintiff a chronological itemization of all expenses paid on behalf of or to the plaintiff. I further order that the defendant provide the plaintiff with the material damage documents and photographs relating to the defendant's motor vehicle and the unedited CL-75 reports. In view of the fact that Mr. Chong was not served with notice of these proceedings, I am unable to order that his adjuster's file be produced to the plaintiff.

[37] The plaintiff is entitled to his costs for this application.

"Romilly J."

The Honourable Mr. Justice S.R. Romilly

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