Claims Investigation
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Avoiding Prejudicing a Claim and Protecting Privilege

- You have received information that might give rise to a liability claim
- You wish to investigate promptly and thoroughly
- How do you protect your investigation work product and avoid inadvertently assisting the claimant

Litigation Privilege

- Communication between a party and legal counsel is always subject to privilege and cannot be required to be produced to the opposing side in litigation

- But what about communication between the party and third parties, such as employees or witnesses?

- Such communication will only be protected from production if it is made for the “dominant purpose” of gathering information to assist in the defence of actual or contemplated litigation

- This is commonly referred to as “the dominant purpose test”

The Dominant Purpose Test

- The leading case in Ontario is *General Accident Insurance Co. v. Chrusz* which clearly established the dominant purpose test as the measure of litigation privilege

- Prior to this decision the test applied in Ontario, was the "substantial purpose test", a considerably lower threshold for protection against production

- From a practical point of view, the issue generally only arises relating to documents which are created in an investigation before the Statement of Claim is issued

- But what if notice is received in some other fashion and an investigation is conducted? A number of factors then must be considered to determine if privilege is protected

What Initiated the Investigation

- Notice of a potential claim and the investigation is generally initiated through the defendant's own knowledge of the facts that might give rise to the claim, or by a lawyer's letter sent on behalf of the claimant

- If the investigation is initiated in response to a lawyer's letter, generally the test will be met. Litigation is anticipated, and it is easy to support that the dominant purpose of conducting the investigation is for defence purposes, even if counsel is not immediately retained

- Let's assume however the client is aware of the event that caused injury or damages and initiates the investigation before any notice of pending litigation is given and before counsel is retained

- A number of considerations will then be necessary to determine if the privilege is maintained

General Business Practice

- You are a large retailer and a slip and fall occurs on one of your locations
- It is your policy in such cases that an accident report be completed, witnesses, including employees be identified and interviewed if possible
- This policy is in place for general risk management purposes, not only because there may be litigation from the specific event
- It is highly unlikely privilege will be maintained in this case as neither element of the test will be met. There is neither anticipated litigation related to the specific event, nor can the investigation be characterized as for the dominant purpose of defending such litigation.

Discretionary Business Practice

- You are a Canadian Bank and a slip and fall occurs in one of your branches
- Your managers are instructed to prepare a report of the incident, including witness statements, if any injuries are noted or medical attention sought by the customer, or there is other reason to believe the incident was serious
- This policy is in place both for general risk management purposes and to document what may well become a claim arising from the specific incident
- In this case the outcome is not so clear. It is at least supportable that the specific incident involved injury, and thus litigation might be anticipated. But there are multiple reasons for the investigation, so supporting that the dominant purpose was to assist in defence of the specific incident is doubtful
- The likely outcome in such a case is that the privilege claim will fail

Who Conducts the Investigation

- You are a Canadian Bank and a slip and fall occurs in one of your branches
- Your managers are instructed to take photos of the area of the fall, complete a brief incident report without witness statements, and immediately report the incident to the risk management department where a file is opened relating to the specific event and independent adjusters retained to investigate the circumstances immediately
- The adjusters interview witnesses and employees and complete the investigation reporting to the risk managers on the file
- This policy is in place as best risk management practice designed to be prepared for any potential litigation that might arise
- In this case it is highly likely, although not certain, the test will be met and privilege maintained at least for the independent adjuster's work product

Why Does it Matter?

- If privilege is lost, all documents created, including reports, photos and witness statements must be produced and oral communication disclosed

- this includes employee statements or observations which can be particularly harmful if they amount to admissions of fault or negligence on the part of the employer

- At the very least you are forced to provide to the claimant in the eventual litigation crucial information that may well be determinative of how counsel views the case for the claimant, or provides definitive evidence on liability that would not otherwise be available to them

- The best advise is to devise your policies and practices to maintain your privilege claim in all cases where investigation is triggered, and in that regard the less investigation done in house, the better

Avoiding Prejudicing the Claim by Admissions Against Interest

- Statements made outside a courtroom are generally not admissible at trial because of the rules against hearsay evidence

- However there is a long established exception to that rule for admissions of a party to the litigation made outside the courtroom that are against the interests of that party

- An obvious example, the defendant in a car accident case rushes to the plaintiff's vehicle and says "Oh my god, I am so sorry, I just didn't see the stop sign"

- But what about statements of officers, directors or employees of a corporate or business party, or communication between adjusters retained on behalf of a party and claimants or their lawyers, and can conduct of a party after the incident be considered an admission? What about a simple apology?

Officers and Directors

- It is surprising the number of times this becomes an issue, particularly when the claimant is an important client or customer, or the executive feels there is a higher duty than protecting the insurer from liability claims

- A recent example is the Maple Leaf Foods listeriosis contamination where the CEO was quoted extensively in the media accepting responsibility for the contamination. Clearly his interest was in handling the negative publicity and saving his company survival

- There is no question that statements against interest made by senior executives of corporate parties bind the company and are admissible at trial against the company, but what about other employees?

Admissions by Employees

- Admissions made by employees of a corporate or business party can bind the company vicariously if the topic of the admission was within the scope of the employee's duties

- Thus a statement by the chief building inspector of a municipality who advises a home owner that the final inspections should never have been passed because of defective sewer connections can vicariously bind the municipality to that position

- However, the same statement made by a public works labourer called to the home to assist in clean up and repairs would likely not be binding since it is outside the parameters of his duties to make such assessments

Other Representatives

- There is no question admissions by adjusters and legal counsel bind a corporate party
- But what about other representatives such as brokers, members of municipal counsel, independent contractors or other agents
- in essence the rule is similar to that of employees, although with less certainty of the scope of the duties such parties are fulfilling when the statements are made
- The prudent course is for all such representatives to assume that if they are making admissions about a clients position on any issue in actual or potential litigation, it will bind the client. And no more motivation need be given than any such admission may well lead to an E & O claim against them

Apology by a Party

- Is an apology an admission of liability?
- The answer is it can be in some jurisdictions, but not now in Ontario since passage in 2009 of the Apology Act
- The Act makes any apology, as defined in the Act which is very broad, inadmissible in any civil proceeding and declares it shall not be considered an admission of fault or liability on the part of the person making it
- And in libel and slander cases an apology can have a positive impact on reducing the damage assessment for the party making it

Admissions by Conduct

- Remedial measures in response to an accident or claim were traditionally protected from admissibility at trial on the basis the court did not want to inhibit the public safety by discouraging such conduct

- However the case now is considerably uncertain since the decision in *Sandhu v. Wellington Place Apartments*

- Within days of a child falling out of an apartment window the building owner replaced screens and installed child locks on over 30 apartments at relatively low cost

- The Court of Appeal rejected the argument that evidence of the actions should be inadmissible based on the prior case law, and held the conduct could be considered by the jury as evidence of negligence on the part of the property owner. The Court did hold that the evidence was not definitive on liability, and the weight to be given such evidence is a matter for the trial judge to decide and instruct the jury

Explaining Admissions

- Although the admission against interest made outside the courtroom may be admissible at trial, it is open to the witness/party who made it to testify at trial to try to explain the statement or withdraw it

- This may mitigate the effect of the evidence but it is by no means a position any party wishes to be in at trial

Summary

- Design your investigation policies and practices to maintain your claim to privilege at early stages of the claim
- Advise employees and other company representatives to refrain from making statement to others regarding the company's conduct or fault in any situation
- Be aware that apologies and remedial measures can be considered admissions in some jurisdictions
- Understand that statements made to satisfy or mitigate other actual or perceived duties to clients, customers, officials or other stakeholders can be admitted at trial as admissions against interest