TAB 2

varied to remove reference to equitable easements by estoppel and para. 5 of the judgment is struck out. With respect to the pier, para. 10 of the judgment is varied to remove reference to an equitable easement by estoppel and para. 11 is struck out. I would allow the appeal with respect to costs and award the appellants their costs of the trial on a partial indemnity basis to be assessed.

[37] The appellants are entitled to their costs of the appeal and the cross-appeal on a partial indemnity basis. At the hearing of the appeal, Ms. Bachmann provided the court with a draft bill of costs. I have reviewed the bill of costs in light of the issues raised on the appeal. I would fix the costs of the appeal at $16,000 inclusive of disbursements and GST.

Order accordingly.

Davies v. American Home Assurance Co.

Superior Court of Justice, Divisional Court, Blair R.S.J., Kruzick and Linhares de Sousa JJ. July 9, 2002

Evidence — Privilege — Solicitor and client — Mere assertion of bad faith claim against insurer not sufficient to destroy solicitor-client privilege attaching to communications of legal opinions from insurer's counsel to insurer.

The plaintiff, a dentist, was injured in a woodworking accident at home, as a result of which his right index finger was amputated and he could no longer practise dentistry. He asserted a claim for a dismemberment benefit under a policy issued by the defendant insurer. The insurer investigated the claim and retained counsel, but neither accepted nor denied the claim until after the plaintiff had commenced an action for exemplary and punitive damages for the defendant's failure to comply with its duty of good faith to its insured. In the statement of defence, the defendant denied the claim. On a motion by the plaintiff, the motions judge directed that the defendant's solicitor produce to the plaintiff any and all legal opinions prepared for the defendant in relation to the plaintiff's claim between the date of the accident and the date of the filing of the statement of defence. She concluded that solicitor-client privilege is an exception to the general rule requiring disclosure, that the information available to the insurer upon which it decided whether or not to pay the claim was critical and therefore relevant, and that the evidentiary basis to establish solicitor-client privilege in relation to the legal opinions had not been established by the defendant. In a subsequent order, the motions judge required the defendant to produce its complete claims file, including all documents relating to the investigation details from the initial report to the defendant by the plaintiff up to the date of the order, and also imposed a continuing obligation to produce such documents up to the commencement of the trial. The defendant appealed.

Held, the appeal should be allowed.

The motions judge erred in concluding that the mere assertion of a bad faith claim against an insurer is sufficient to destroy the solicitor-client privilege attaching to communications of legal opinions from the insurer's counsel to the insurer. The assertion of a bad faith claim for punitive and exemplary damages for breach of the insurer's obligation of good faith may affect the scope of what is relevant and what is not relevant in the proceedings. However, the nature of the claim should not, and does not, change the analysis as to what is or is not protected by solicitor-client privilege and/or litigation privilege. The principles that the courts have enunciated for determining the existence or non-existence of those privileges, and the evidentiary basis necessary to establish them, remain the same. Moreover, the motions judge's blanket disposition requiring the production of all of the contents of the defendant's claims file, including all additional contents created or acquired prior to trial, on the ground that litigation privilege had not been established — thus pre-judging any solicitor-client or litigation privilege issues that might pertain to those new documents — went too far and was not justified. The motions judge was correct in stating that the burden of proof is on the party claiming the privilege to establish entitlement, and that the defendant could have put forward better evidence in this regard. However, the prospective ordering of the production of all future documents in the claims file that were relevant, without regard to their potential privileged character, was clearly wrong in law. Keeping in mind that the motion was initially brought as a motion to compel delivery of a further affidavit of documents, the preferable disposition would have been to make such an order and compel delivery of an affidavit in which the documents in respect of which privilege was claimed were individually listed and the grounds for the privilege articulated and particularized. This would apply to documents which became part of the claims file at a later date as well. Once such an affidavit of documents, or supplementary affidavit, was produced, any necessary decision about the privileged nature of documents in the claims file could more properly be determined.

General Accident Assurance Co. v. Chrusz (1999), 45 O.R. (3d) 321, 180 D.L.R. (4th) 241, 38 C.P.C. (4th) 203 (C.A.), revg (1998), 37 O.R. (3d) 790 (Div. Ct.), revg in part (1997), 34 O.R. (3d) 354, 12 C.P.C. (4th) 150 (Gen. Div.), **consd**

Other cases referred to

702535 Ontario Inc. v. Lloyd's London (2000), 184 D.L.R. (4th) 687, [2000] I.L.R. ¶1-3826 (Ont. C.A.); *Ansell Canada Inc. v. Ions World Corp.*, [1998] O.J. No. 5034 (Gen. Div.); *Bank Leu Ag v. Gaming Lottery Corp.*, [1999] O.J. No. 3949 (S.C.J.); *Jones v. Smith*, [1999] 1 S.C.R. 455, 62 B.C.L.R. (3d) 209, 169 D.L.R. (4th) 385, 236 N.R. 201, [1999] 8 W.W.R. 364, 60 C.R.R. (2d) 46, 132 C.C.C. (3d) 225, 22 C.R. (5th) 203; *R. v. Brown*, [2002] S.C.J. No. 35; *R. v. McClure*, [2001] 1 S.C.R. 445, 195 D.L.R. (4th) 513, 266 N.R. 275, 80 C.R.R. (2d) 217, 151 C.C.C. (3d) 321, 40 C.R. (5th) 1; *Samoila v. Prudential of America General Insurance Co. (Canada)*, [2000] O.J. No. 2746 (S.C.J.); *Torchia v. Royal Insurance Co. of Canada* (2000), 20 C.C.L.I. (3d) 229, 2000 CarswellOnt 1876 (S.C.J.)

Authorities referred to

8 J. Wigmore, *Evidence* (McNaughton rev. 1961)

Sharpe, R.J., "Claiming Privilege in the Discovery Process", *Law in Transition: Evidence*, L.S.U.C. Special Lectures (Toronto: De Boo, 1984)

APPEAL from orders for production of documents.

Terence J. Collier, for plaintiff (respondent).
Elliott A. Zeitz, for defendant (appellant).

The judgment of the court was delivered by

BLAIR R.S.J.: —

Overview

[1] These appeals bring into play the scope of solicitor-client and litigation privilege in the context of "bad faith" claims against insurers.

[2] The plaintiff, a dentist, was injured in a home accident on September 18, 1997. As a result of the accident, his right index finger was amputated and he can no longer practise dentistry. He asserted a claim for a dismemberment benefit under a policy of insurance with his insurer, American Home Assurance Company ("American Home"). The insurer investigated the claim and retained counsel, but neither accepted nor denied the claim until after the plaintiff had commenced this action for exemplary and punitive damages for the defendant's failure to comply with its duty of good faith to its insured. In the statement of defence filed on May 28, 1998, American Home denied the claim, raising for the first time the allegation — somewhat startling to the eye, at least at first blush — that Dr. Davies had deliberately cut off his finger.

[3] By order dated February 27, 2001, Justice Kiteley directed that the defendant's solicitor, James M. Regan, Q.C., produce to the plaintiff any and all legal opinions prepared for the defendant in relation to the plaintiff's claim between the date of the accident and May 28, 1998. She concluded that solicitor-client privilege is an exception to the general rule requiring disclosure, that the information available to the insurer upon which it decided whether or not to pay the claim was critical and therefore relevant, and that the evidentiary basis to establish solicitor-client privilege in relation to the legal opinions had not been established by American Home.

[4] Subsequently, by order dated March 19, 2001, Justice Kiteley required American Home to produce its complete claims file, including the file folder or jacket and all documents relating to the investigation details from the initial report to the defendant by the plaintiff in September 1997 up to March 19, 2001. She also imposed a continuing obligation to produce such documents up to the commencement of trial.

[5] The appellant seeks to set aside these orders, pursuant to leave granted by order of Hill J. dated June 8, 2001.

Facts

[6] The plaintiff, Edward Davies, is a dentist living in Orangeville, Ontario. On September 18, 1997, while performing some

woodworking tasks in his backyard after work, he severed a portion of his right index finger with a saw. As a result, the finger was amputated, and he can no longer practise dentistry.

[7] Dr. Davies had coverage under a valid Accident Death and Dismemberment insurance policy issued by American Home, which provided for a lump sum payment of up to $500,000 for accidental dismemberment. He notified the insurer's agent immediately of the incident and formally presented a claim on October 10, 1997.

[8] The defendant established a reserve based on the medical information it had and its policy limits, notified management and began investigating the claim. It hired an investigator, Derek Pulchinski, to do the latter. Mr. Pulchinski interviewed the plaintiff at his home on October 23 "as a matter of course" and prepared two reports which he submitted, along with photographs, to the insurer. He also prepared a videotape consisting of an attempted re-enactment of the events of the injury as described by Dr. Davies.

[9] In early November 1997, the defendant sent the Claim for Specific Loss Form, the two Pulchinski reports, and the Pulchinski videotape to Mr. Regan "for a legal opinion". There had been no denial of the plaintiff's claim by the defendant at that point. From and after the time of his retainer, the rest of the defendant's investigation was controlled by Mr. Regan.

[10] Although the defendant did not honour the plaintiff's claim, it did not deny the claim either. On May 14, 1998, the plaintiff sued. A Statement of Defence was filed on May 28, 1998. It contained the defendant's first denial of Dr. Davies' dismemberment claim, and raised the defence that the plaintiff had intentionally cut off his finger and was therefore not entitled to coverage by virtue of the "intentional act" exclusion of the policy.

[11] In respect of this defence, the plaintiff relies upon, amongst other things, the following admission by the defendant's discovery representative, Mr. Skeie, regarding a lack of evidence to suggest a motive for Dr. Davies to mutilate himself:

> Q. Mr. Skeie, I know that the substance of your defence is that Dr. Davies intentionally cut his finger off, but is there any information possessed by American Home to suggest why Dr. Davies might do such a thing?
>
> A. No.

[12] The plaintiff's claim in the action is not for recovery under the policy, but rather for exemplary and punitive damages for breach of the defendant's duty of good faith. The plaintiff asserts that the basis of his claim begins with the insurer's investigation of the loss, its failure to make known its position

to him, its subsequent denial of the benefit, and the continued denial of the benefit on the basis defended in light of what is said to be overwhelming evidence provided over the course of the action — including four expert opinions — supporting the plaintiff's position. The plaintiff submits that American Home's conduct throughout the entire handling of the claim, from beginning to end, gives rise to his claim for exemplary and punitive damages.

Framing the Issues

[13] Although the motion was framed as a motion to compel production of a further and better Affidavit of Documents, it was apparently argued on the basis that it was a "production" motion.

[14] The defendant had delivered an unexecuted draft Affidavit of Documents in November 1998 listing 16 Schedule "A" documents (which were provided to the plaintiff). An executed version of that Affidavit of Documents was delivered just prior to the motions. This Affidavit did not contain a particularized Schedule "B" delineating documents respecting which privilege was claimed and setting out the nature and particulars of the privilege claimed on a document-by-document basis. Instead, the Schedule B adopted the general description approach. It stated:

> 1. Documents consisting of adjuster's notes and records and confidential communications which since the commencement of this action or in view of this action while it was contemplated or anticipated, have passed between the defendant, its solicitors and third persons for the purpose of obtaining or furnishing the information or material to be used as evidence on their behalf in this action or to enable such evidence to be obtained and to enable the solicitors for the defendant to conduct this action on its behalf and to advise with reference thereto, including:
>
> 2. Interim report, supplementary report and notes of C.I.D. Consulting Inc.;
>
> 3. Reports of Albright Investigations Limited dated March 15, 2000 and April 10, 2000;
>
> The grounds for privilege claimed are that the documents consist of professional communications of a confidential nature passing between me and my solicitors or prepared in contemplation of this litigation, or for the purpose of asking for or receiving legal advice in anticipation of litigation. The said documents consist of statements, reports and memoranda, photographs and copies thereof and other material prepared or obtained for the purpose of furnishing information to my solicitors in order to obtain their advice during the course of this action for the use of my solicitors to enable them to defend this action.

[15] The affidavits in relation to the motion for production also made general declarations in terms of the privilege claims. However, a claim was asserted for solicitor-client privilege in relation

to the legal opinions of Mr. Regan. At the hearing, counsel for the plaintiff conceded for the purposes of the motion that both litigation privilege and solicitor-client privilege had been properly asserted, and the motions judge "dealt with the motion on the basis that the defendant asserts litigation privilege as it relates to the notes and reports of the investigator and solicitor-client privilege as it relates to legal opinions by Mr. Regan".

[16] The question of the production of the two reports and the notes of the investigator, Mr. Pulchinski, was resolved during the course of argument at the motion. Counsel for American Home agreed that any privilege attaching to those documents had been waived, and undertook to produce them. The motions judge was originally under the impression that this concession had resolved the entire issue of the contents of the insurer's file, and therefore dealt with the question of the production of Mr. Regan's legal opinions in her first endorsement on February 27, 2001. She indicated that if counsel for the plaintiff wished to pursue other matters relating to the insurer's file, she could do so at the next return date. Counsel for the plaintiff did so, resulting in the second decision, dated March 19, 2001, in which the motions judge directed that:

> The defendant shall forthwith (a) produce the complete claims file (including the file folder or jacket) and all documents as defined by Rule 30.01(1)(a) relating to the investigation details from the initial report to the defendant by the plaintiff in September, 1997 up to the date of receipt of these reasons, and a continuing obligation to produce same up to the commencement of the trial; and (b) produce a detailed list of all such productions.

Conclusion

[17] In my respectful opinion, the motions judge erred in concluding, as she did, that the mere assertion of a bad faith claim against an insurer is sufficient to destroy the solicitor-client privilege attaching to communications of legal opinions from the insurer's counsel to the insurer. Such an intrusive undermining of a fundamental protective principle of substantive law cannot be justified on legal or policy grounds.

[18] Secondly, her blanket disposition requiring the production of all of the contents of the defendant insurer's claims file, including all additional contents created or acquired prior to trial, on the ground that litigation privilege had not been established — thus pre-judging any solicitor-client or litigation privilege issues that may pertain to these new documents — goes too far and is not justified. I agree with the motions judge that the burden of proof is on the party claiming the privilege to establish entitlement, and that American Home could have put forward

better evidence in this regard. However, the prospective ordering of the production of all future documents in the claims file that are relevant, without regard to their potential privileged character is clearly wrong in law, in my opinion. Keeping in mind that the motion was initially brought as a motion to compel delivery of a further affidavit of documents, the preferable disposition, in my view, would have been — and is — to make such an order and compel delivery of an affidavit in which the documents respecting which privilege is claimed are individually listed and the grounds for the privilege articulated and particularized, as required by the Rules. This would apply to documents which become part of the claims file at a later date as well. Once such an affidavit of documents, or supplementary affidavit, is produced, any necessary decision about the privileged nature of documents in the claims file can more properly be determined.

Law and Analysis

Solicitor-client privilege respecting the legal opinions

[19] There can be no debate that solicitor-client privilege — sometimes called legal advice privilege — is one of the cornerstones of our system of justice. As Doherty J.A. noted, in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321, 180 D.L.R. (4th) 241 (C.A.) at p. 346 O.R., it "is the oldest and best established privilege in our law. It can be traced back some 400 years to English law." Justice Major articulated the central importance of the privilege succinctly in *R. v. McClure*, [2001] 1 S.C.R. 445, 195 D.L.R. (4th) 513. At para. 17, he said:

> Solicitor-client privilege is part of and fundamental to the Canadian legal system. While its historical roots are a rule of evidence, it has evolved into a fundamental and substantive rule of law.

[20] Earlier in that decision Major J. described the history and significance of the privilege (paras. 1 and 2):

> This appeal revisits the reach of solicitor-client privilege. This privilege comes with a long history. Its value has been tested since early in the common law. Its importance has not been diminished.
>
> Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.

[21] See also, *Jones v. Smith*, [1999] 1 S.C.R. 455, 169 D.L.R. (4th) 385; *R. v. Brown*, [2002] S.C.J. No. 35; *General Accident Assurance Co. v. Chrusz*, *supra*. Most analyses of the subject have recourse to the following classic statement from 8 Wigmore, *Evidence* (McNaughton rev. 1961), at p. 554:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

[22] Thus, not all communications between a lawyer and client are privileged — only those which arise from communications between the lawyer and client where the latter has sought legal advice: *R. v. McClure*, *supra*, para. 36. Such is the case here with respect to Mr. Regan's opinions. The privilege is not absolute, but "must be as close to absolute as possible to ensure public confidence and retain relevance": *infra*, paras. 34-35.

[23] One of the ways in which solicitor-client privilege may be waived is where a party asserting the privilege places its state of mind in issue by attempting to justify its position on the grounds of detrimental reliance upon the legal advice received: see *Bank Leu Ag v. Gaming Lottery Corp.*, [1999] O.J. No. 3949 (S.C.J.). That is not the situation in this case, however. In fact, the motions judge specifically held that waiver was not the basis upon which her decision was founded. In the nub of her reasons she said [at paras. 29 and 30 I.L.R.]:

> I agree with the principle that waiver applies where the party who seeks to protect the privileged communications originated the state of mind argument. That is not to say that waiver might not also apply when state of mind is raised by the party who seeks to breach privilege. Given the basis upon which I have resolved this motion, I need not decide that issue.
>
> The motion is not resolved on the basis of waiver of solicitor and client privilege. Rather, I conclude that the opinion letters by Mr. Regan are not protected by client-solicitor privilege. The evidence sought by the plaintiff is relevant to the allegations of bad faith as pleaded. The general rule is that the plaintiff is entitled to disclosure. Client-solicitor privilege is an exception to the general rule. The issue of disclosure must be considered in the context of the claim by the insured that the insurer acted in bad faith. The insurer and the insured have mutual obligations to each other to act in good faith. The insurer must investigate, evaluate, assess and decide whether or not to pay the claim, all in a balanced and reasonable manner. Throughout all those states, the conduct of the insurer must be transparent. The evidence as to the manner in which the claim was processed is relevant to a bad faith claim. The information available to the insurer upon which it decided whether or not to pay the claim is critical. Client-solicitor privilege cannot be raised to protect communications during the investigation, evaluation,

> assessment and decisions stages. If legal opinions were protected by client-solicitor privilege where "the investigation was controlled by counsel" instead of by the insurer, whose duty it is to act in good faith toward the insured, then that would encourage insurers to delegate such responsibility to counsel. That would only serve to undermine the right of the insured to expect that the insurer would act in good faith. Simply because the insurer seeks an opinion does not mean, in this context, that client-solicitor privilege is created. Furthermore, it is irrelevant that there is also a contract claim being asserted. Disclosure must be made based on the broader of the two causes of action.

[24] I agree that "the evidence as to the manner in which the claim was processed is relevant to a bad faith claim", and that "the information available to the insurer upon which it decided whether or not to pay the claim is critical", and that "client-solicitor privilege cannot be raised to protect communications during the investigation, evaluation, assessment and decisions stages" (unless those communications are otherwise properly the subject of the privilege). I do not agree, however, that these principles lead to the conclusion that the legal opinion of the solicitor upon which the insurer may have acted is producible simply because its contents may be relevant and the plaintiff is asserting a bad faith insurance claim.

[25] Respectfully, I think the motions judge erred in mixing the concepts of "solicitor-client privilege" and "investigative information" in the foregoing passage. Certainly, an insurer may not protect investigative information that it has gathered and that would otherwise be producible, behind the cloak of solicitor-client privilege simply by the expedient of placing control of the claim investigation in the hands of its lawyer. The legal opinion rendered by the lawyer to the client based upon the information obtained in the course of that investigation is another matter, however. It remains privileged, in my opinion, unless the insurer puts its state of mind in issue in the sense contemplated in *Bank Leu* and other related cases, or otherwise waives the privilege.

[26] In *Samoila v. Prudential of America General Insurance Co. (Canada)*, [2000] O.J. No. 2746 (S.C.J.) — another bad faith insurance claim — Justice Brockenshire ordered the production of legal opinions (as well as other documents). He did so, however, on the basis of a finding that solicitor-client privilege had been waived. This conclusion was reached after an examination of the transcript of the discovery of the insurer's representative, as a result of which he was satisfied waiver had taken place. While I think it is doubtful that solicitor-client privilege can be pierced simply through the expedient of counsel for the party seeking to set aside the privilege "setting up" the claim by cross-examining the

insurer's witness on discovery and establishing the not-unlikely scenario that the insurer has been prudent enough to obtain a legal opinion and consider or even rely on it, the decision in that case was that waiver had been established. As Hill J. noted at para. 23, in granting leave to appeal from the motions judge in the present case:

> As a general rule, a displacement of legal advice privilege otherwise recognized to exist, cannot be forced on the party seeking to maintain the privilege for example by responses to interrogatories (*Gower v. Tolko Manitoba Ltd.*, [2001] M.J. No. 39 (C.A.), at para. 24-29, 52, 59) or by answers in cross-examination (*Campbell and Shirose v. The Queen* (1999), 133 C.C.C. (3d) 257 (S.C.C.), at 298-9 *per* Binnie J.).

[27] I agree. The fact that an insurer has sought and obtained a legal opinion for purposes of assessing its liability to respond to an insured's claim, and presumably has considered that opinion in deciding what to do, is not sufficient in and of itself to render the legal opinion producible in litigation — even "bad faith" litigation — at the instance of that insured. The assertion of a bad faith claim for punitive and exemplary damages for breach of the insurer's obligation of good faith may affect the scope of what is relevant and what is not relevant in the proceedings. However, in my view, the nature of the claim — even a bad faith claim against a "bad" insurer — should not (and in my opinion, does not) change the analysis as to what is or is not protected by solicitor-client privilege and/or litigation privilege. The principles that the courts have enunciated for determining the existence or non-existence of those privileges — and the evidentiary basis necessary to establish them — remain the same.

[28] In *General Accident Assurance Co. v. Chrusz*, *supra*, Doherty J.A., with whom the majority concurred on this issue, examined the notion of solicitor-client privilege at length. He did so, however, in the context of determining whether or not communications between a third party — in that case, the insurer's investigator — and the client and solicitor were protected by solicitor-client privilege. He concluded, as did the majority, that they were not. It was accepted by all three appellate judges, and all parties, in *Chrusz* that the communications between General Accident and its solicitor were protected by that privilege.

[29] No facts other than those before the motions judge were necessary to arrive at the foregoing conclusion with respect to the production of Mr. Regan's legal opinions. Hence, the motions judge erred in principle in concluding that a sufficient evidentiary basis had not been established for purposes of the

solicitor-client privilege issue, and she was clearly wrong in law, in my opinion, in ordering the production of the opinions on the basis that they were not protected by privilege.

[30] As Major J. noted in *McClure*, at para. 33,

> The danger in eroding solicitor-client privilege is the potential to stifle communication between the lawyer and client. The need to protect the privilege determines its immunity to attack.

(Emphasis added)

[31] A legal opinion from a lawyer to his or her client is the quintessential example of a communication between solicitor and client for the purpose of obtaining legal advice, and falls squarely into this category, in my opinion. It is immune from attack in the absence of an express or implied consent or waiver.

[32] Such is not the case here and, in my opinion, the motions judge erred in concluding that the opinion letters by Mr. Regan are not protected by solicitor-client privilege, and in directing that they be produced.

Litigation privilege and the claims file

[33] I turn now to the issue of the claims file and the investigative documentation ordered by the motions judge to be produced on the basis that litigation privilege in that documentation had not been established.[1]

[34] Litigation privilege exists to protect from production a communication made or a document created for the dominant purpose of assisting the client in litigation, actual or contemplated. It applies to third party communications made in confidence and for purposes of preparing for trial. It is different from solicitor-client privilege and the rationale and purpose upon which it is based are different as well. The following helpful description of the difference, from a lecture by R.J. Sharpe (now Sharpe J.A.) entitled "Claiming Privilege in the Discovery Process" in *Law in Transition: Evidence*, L.S.U.C. Special Lectures (Toronto: De Boo, 1984) at pp. 164-65, was cited with approval by Carthy J.A. in *General Accident Assurance Co. v. Chrusz*, *supra*, at pp. 330-31 O.R.:

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1 The argument as to whether this documentation was to be produced proceeded on the basis of whether or not litigation privilege applied. There was no suggestion that the production of any of the contents of the claims file fell to be determined on the basis of solicitor-client privilege. This latter question was the main question concerning the Court of Appeal in *Chrusz*, *supra*, but appears not to be an issue in the case at bar.

> It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved [whereas] litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
>
> 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).
>
> Rationale for Litigation Privilege
>
> Relating litigation privilege to the needs of the adversary process is necessary to arrive at an understanding of its content and effect. The effect of a rule of privilege is to shut out the truth, but the process which litigation privilege is aimed to protect — the adversary process — among other things, attempts to get at the truth. There are, then, competing interests to be considered when a claim of litigation privilege is asserted; there is a need for a zone of privacy to facilitate adversarial preparation; there is also the need for disclosure to foster fair trial.

[35] In the case at bar, the argument concerning the production of the contents of American Home's claims file turned on the question of litigation privilege. Solicitor-client privilege was argued only with respect to Mr. Regan's opinion letters. The motions judge engaged in an extensive discussion of the Court of Appeal's decision in *General Accident Assurance Co. v. Chrusz*, but in the end essentially ordered production of all documents in the claims file on the basis that American Home had not met the burden of establishing an evidentiary basis for the application of litigation privilege. In paras. 14, 17 and 19 of her reasons dated March 19, 2001, she stated:

> Schedule B of the affidavit of documents does not list and identify the contents of the insurer's file and the investigation details. Furthermore, the

> only "evidence" as to the existence of litigation privilege is that contained in the general description contained in Schedule B of the affidavit of documents sworn by Skeie. There is no evidence to indicate (a) what specific documents were prepared; (b) by whom they were prepared; (c) when they were prepared; (d) to whom they were directed; (e) the relationship between the creator and the receiver; (f) the purpose for which they were prepared; (g) if for more than one purpose, whether one purpose was more "dominant" than the other; (h) whether the "dominant" purpose for the creation of any specific document was litigation.
>
> . . . . .
>
> It is important to remember that the file for which production is sought is not Mr. Regan's file. What is being sought is documents in the possession, power or control of the defendant which were created as a result of the defendant's obligation pursuant to the contract of insurance to investigate, evaluate, assess and decide whether or not to pay the claim, all in a balanced and reasonable manner. In the absence of evidence that certain identified documents were created for the dominant purpose of investigation while other identified documents were created for the dominant purpose of litigation, I am not prepared to give the benefit of the doubt that all of them after the point of Mr. Regan's retainer were created for the dominant purpose of litigation. The fact that after early November, 1997, the investigation was "controlled by counsel" does not necessarily mean that the dominant purpose for the creation of all documents in the defendant's file was litigation.
>
> . . . . .
>
> Whatever the basis for the privilege claimed, the burden of proof is on the party claiming the privilege to establish entitlement. As Doherty J.A. said at page 348-9 in *Chrusz*, *supra*, "broad privilege claims which blanket many documents, some of which are described in the vaguest way, will often fail, not because the privilege has been strictly construed, but because the party asserting the privilege has failed to meet its burden." This is such a case.

[36] There was certainly some justification for the motions judge's concern about the frailties in the evidentiary basis for the litigation privilege claim. However, I am not persuaded that the evidence was as inadequate as she seems to have felt. The standard form language of Schedule B, with its sort of "rolled up" claim for privilege, is, after all, part of an affidavit of documents. It is evidence. It makes a claim for privilege for the documents globally described, and asserts that "the grounds for privilege are that the documents consist of professional communications of a confidential nature passing between me and my solicitors or prepared in contemplation of this litigation, or for the purpose of asking for or receiving legal advice in anticipation of litigation." In addition, there was separate affidavit evidence asserting both solicitor-client privilege, with respect to the Regan opinion letters, and litigation privilege, with respect to the other documents.

[37] The motions judge concluded that "in the absence of evidence that certain identified documents were created for the

dominant purpose of investigation while other identified documents were created for the dominant purpose of litigation, [she was] not prepared to give the benefit of the doubt that all of them after the point of Mr. Regan's retainer were created for the dominant purpose of litigation". Were there no evidence concerning the claim for privilege, this conclusion and the order made in consequence of it might have been justified. However, there was some evidence and it is not altogether clear that the entire burden in cases such as this rests upon the person asserting the privilege. In *Chrusz*, for instance, Rosenberg J.A. noted [at pp. 368-70 O.R.] that "[w]here, as in *Smith v. Jones*, a party seeks to set aside the privilege, the onus properly rests upon the party seeking to set aside the privilege: see *Smith v. Jones*, at pp. 474-75 S.C.R.".

[38] In circumstances such as this, the preferable order, I think, would have been — and is — for the matter to be remitted to the parties and the delivery of a further and better Affidavit of Documents with a properly particularized Schedule B to be ordered. This is particularly so when, as the motions judge noted in her first set of reasons, counsel for the plaintiff "was prepared to concede for the purposes of the motion that both litigation privilege and solicitor-client privilege had been properly asserted by the client."

[39] Like Hill J., who granted leave to appeal to this court, it seems to me that,

> the evidentiary record observation [on which the motions judge based her decision] amounts to a secondary issue which did not attract any analysis as to those prophylactic measures, short of full scale production, best suited to ensuring the privilege, asserted to exist . . . was protected to the extent possible.

[40] The blanket requirement in the motions judge's order of March 19, 2001, that all future documents in the claims file relating to the investigation details be produced on a continuing basis up to the commencement of trial, is particularly troubling. In this respect the motions judge clearly went too far, in my view. Such an order potentially deprives American Home of any privilege claims (litigation privilege or solicitor-client privilege) that may properly attach in future to documents created in the course of this lawsuit, because it has already pre-judged that issue. American Home, like any party to an action, has a continuing obligation to disclose relevant documentation. The appropriate manner for dealing with such documentation is for the insurer to deliver a supplementary affidavit of documents, when such documentation arises, and to assert a claim for privilege in a correct manner in that supplementary affidavit. Any issues of privilege can then be resolved in the usual fashion. To hold otherwise is to hamper American Home procedurally in its defence of this action in too restrictive a way.

[41] Both in her reasons respecting the opinion letters of Mr. Regan (February 27, 2001) and in her reasons respecting the contents of the claims file (March 19, 2001), the motions judge placed considerable emphasis on the undoubted duty of an insurer to act in good faith in responding to a claim. In the former, she cited Justice Doherty's comment in *Chrusz* (at p. 350 O.R.) that "the mere possibility of a claim under an insurance policy [does not entitle] an insurer . . . to keep confidential information concerning the investigation of the claim", and his preference for "the view which assumes that the insurer 'fairly and open mindedly' investigates potential claims". She also emphasized the clear and ringing articulation of an insurer's obligation when dealing with a claim, penned by O'Connor J.A. on behalf of the Court of Appeal in *702535 Ontario Inc. v. Lloyd's London* (2000), 184 D.L.R. (4th) 687, [2000] I.L.R. ¶1-3826 (Ont. C.A.), including the following observations from para. 29 of the latter decision (which were highlighted in the motions judge's reasons):

> The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. . . . A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy.

[42] The motions judge acknowledged that "while helpful on the issue of the duty of good faith", the Lloyd's case did not "shed any light on the disclosure obligations of an insurer against whom a bad faith claim is asserted", and, indeed, the passage which she included in her reasons from the decision of Doherty J.A. in *Chrusz*, referred to in the preceding paragraph, notes the right of an insurer to assert a privilege over the product of its investigation on proper demonstration of its intention to keep the information confidential from its claimant. In her March 19 reasons dealing with litigation privilege, the motions judge repeats the same themes, but in the end — with deference to her — she seems to have subordinated this right to the ethic of relevance in bad faith insurance claims. This is apparent from the following paragraphs in those reasons (paras. 18, 20 and 21):

> The defendant is entitled to take appropriate steps to defend the action. But simultaneously with defending itself, this defendant has an ongoing obligation towards its insured to act in good faith. The commencement of these proceedings did not terminate the contractual obligation on the insurer to investigate, evaluate, assess and decide whether or not to pay the claim, all in the context of its obligation to act in good faith.
>
> The defendant first denied the claim in the statement of defence. Mr. Zeitz argues as an alternative, that at least at that point, any obligation to disclose

> ended. Again I disagree. The obligation on the insurer to investigate, evaluate, assess and decide whether or not to pay the claim does not end simply because a lawsuit starts. Indeed, as additional information became available after the lawsuit started, whether at its initiative or as a result of the initiative of the plaintiff, the insurer would be required by contract to continue to evaluate and assess the strength of the claim and continue to turn its mind to whether the additional information has an impact on the previously made decision (as manifested in the statement of defence) to deny the claim. The obligation on the insurer to evaluate and assess continues until the commencement of trial. Absent evidence as to "dominant purpose", I therefore agree with Ms. Gunter that the defendant is required to produce the claims file and the investigation details up to the commencement of the trial.
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> The plaintiff has pleaded bad faith and punitive and exemplary damages. The insurer has an obligation to act in good faith from the moment the events giving rise to a claim on the policy occur. The information available to the insurer upon which it decided whether or not to pay the claim is critical and is therefore relevant. Disclosure of the contents of the insurer's file will foster a fair trial. On the record before me, those documents described in the affidavit of documents are not within the "zone of privacy".

[43] While I do not disagree with the foregoing observations, in general, they appear to have led the motions judge to the conclusion that no further resort to the "dominant purpose test" exercise was necessary with respect to American Home's claims file, not just in its current state but in the future as well. In this respect she erred, in my respectful opinion.

[44] The point is that litigation privilege (or solicitor-client privilege), when properly asserted, trumps relevance in almost all circumstances. That is its very nature. There is no "bad faith insurance claim" exception to either litigation privilege or solicitor-client privilege that creates a special rule for bad faith claims against insurers and consigns the normal rules respecting privilege to other claims. The same rules apply in all cases.

[45] Justice Rosenberg, in concurring with Carthy J.A. for the majority in *Chrusz*, rejected "the competing interests or balancing approach" with respect to litigation privilege proposed by Doherty J.A. in dissent. He was "concerned that a balancing test would lead to unnecessary uncertainty and a proliferation of pre-trial motions in civil litigation" (*supra*, p. 369 O.R.). He concluded:

> In my view, with established privileges like solicitor-client privilege and litigation privilege it is preferable that the general rule be stated with as much clarity as possible. Deviations from the rule should be dealt with as clearly defined exceptions rather than as a new balancing exercise each time a privilege claim is made.

[46] Claims for litigation privilege require the determination of questions of mixed law and fact, rather than the exercise of discretion: *Torchia v. Royal Insurance Co. of Canada*, 2000 CarswellOnt 1876, 20 C.C.L.I. (3d) 229 (S.C.J.) at para. 6. We are therefore not

dealing with an exercise of discretion on the part of the motions judge. There is authority as well for the proposition that where there is concern about the adequacy of privilege claims, the court is empowered to order a further affidavit of documents, further cross-examination or inspection of the documents in question rather than denying peremptorily the claim for privilege on the ground of insufficiency of the evidence: see *Ansell Canada Inc. v. Ions World Corp.*, [1998] O.J. No. 5034 (Gen. Div.), at para. 20.

[47] I conclude that the orders of the motions judge must be set aside in part, and the defendant ordered to produce a further and better Affidavit of Documents. The documents in the claims file are to be identified, and any claims for privilege are to be properly asserted in Schedule B of the new affidavit by identifying the document, describing its nature, and setting out the privilege claimed and the grounds for that privilege. The particulars are to be described sufficiently to enable the privilege to be challenged, if the plaintiff is so advised, and a just decision made by the court in that regard, if called upon to do so.

Disposition

[48] I would therefore allow the appeal and

(a) set aside para. 3 of the order of the motions judge dated February 27, 2001 (requiring production of Mr. Regan's opinion letters);

(b) set aside paras. 2 and 3 of the order of the motions judge dated March 19, 2001 (requiring production of the claims file and all documents relating to the investigation details, as set out therein); and

(c) direct that the defendant insurer deliver a further and better affidavit of documents, in which all relevant documents are properly listed and any claims for privilege, and the grounds therefor, appropriately asserted with requisite particularity.

[49] It follows, of course, that the defendant will be required to deliver proper supplementary affidavits of documents in the course of its continuing obligations for disclosure, raising therein any appropriate claims for privilege as it may be advised to do, and in a proper fashion.

[50] If the parties are unable to agree with respect to costs, they may submit brief written submissions in that regard within 30 days of the release of these reasons.

Appeal allowed.