

MANITOBA

WAIVER OF SOLICITOR/CLIENT PRIVILEGE

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Suspect or fraudulent claims made on insurance policies can sometime result in criminal charges being laid against the insured. In defending against such charges, the insured may choose to waive solicitor/client privilege and disclose his dealings with his civil lawyer. Such a waiver can be risky for the insured, as the recent Manitoba Court of Appeal decision in *Bone v. Person* shows that the privileged information might also be entered into evidence in the subsequent civil case in which the insured sues his insurer.

It is not uncommon that insurance claims are sometimes denied because of an allegation that the insured is making a false claim and attempting to defraud the insurance company. This can often lead to criminal fraud charges being prosecuted against the insured. The insured will sometimes be forced to waive solicitor/client privilege in order to defend himself and put information before the criminal court regarding the circumstances of his civil claim. In *Bone v. Person* (2000), 145 ManR.(2d) 85, the Manitoba Court of Appeal examined the question of whether a waiver of solicitor/client privilege given during a criminal case should also apply to the civil proceeding concerning the same subject matter.

Maria Bone claimed that she was injured in four separate motor vehicle accidents between 1987 and 1993, making claims on her insurance with the Manitoba Public Insurance Corporation (MPIC). Shortly before her civil trial was set to begin, Mrs. Bone was arrested and charged with attempting to defraud MPIC. The insurer felt that Mrs. Bone was not totally disabled, as she claimed, and relied upon video and similar evidence of her engaging in strenuous activities.

In the criminal proceeding, Mrs. Bone's counsel determined that it was necessary to call her civil lawyer to testify for the defence. He assured the civil lawyer and the court that:

“... my client, expressly waives any privilege with respect to communication dealing with those four accidents and your involvement as solicitor. So you need not be concerned with respect to the privilege that you would normally maintain with respect to those communications”.

After the civil lawyer had testified for some time, counsel for Mrs. Bone attempted to restrict the waiver of privilege to the criminal proceeding. The court responded by saying “once the privilege is waived, it's waived for all purposes”.

Mrs. Bone was eventually acquitted and able to turn her attention to her civil claim against her insurer. Counsel for MPIC made a motion for an order declaring that the waiver of solicitor/client privilege given during the criminal trial was also effective in the civil proceeding. Justice Nurgitz agreed with the Provincial Court Judge and concluded that privilege had been waived for all purposes.

The order of Justice Nurgitz was appealed by Mrs. Bone to the Court of Appeal. A panel of three judges heard arguments on the issue of privilege and came to a unanimous decision to uphold the decision of the motions judge. Chief Justice Scott provided reasons for the court's decision, including a detailed analysis of past cases concerning the waiver of solicitor/client privilege.

While the court recognized that "a party to legal proceedings may voluntarily waive solicitor/client privilege on a limited basis", they determined that Mrs. Bone's waiver was not so restricted.

"... in this case the waiver was not limited. A careful review of the record leads to the inevitable conclusion that the waiver by its express terms was unqualified."

Mrs. Bone's counsel attempted to argue that, even if the waiver was unrestricted, the court should consider the introduction of the privileged evidence as inherently unfair and exercise its jurisdiction to exclude the information. Although the court determined it had jurisdiction to make such an order, Chief Justice Scott said that "I see nothing inherently unfair in maintaining the waiver in the circumstances of this case". In fact, he said that claims of privilege do not lend themselves well to personal injury actions, where disclosure "of the nature and extent of the injuries is the very essence of the legal proceedings".

As a result of these determinations, the Court of Appeal decided that Mrs. Bone's waiver of solicitor/client privilege at the criminal trial should extend to the civil case. The insured took a risk in making the waiver, and more importantly, in failing to limit the scope of the waiver. This important case demonstrates a powerful tool available to insurers with which otherwise privileged evidence can be discovered, as well as a major pitfall which insureds should attempt to avoid.