

CLAIMS HANDLERS BEWARE! INVESTIGATION REPORTS NOW DISCOVERABLE?

17 DECEMBER 2018 | PROCEDURE

A plaintiff in a CTP claim has successfully appealed a decision of a District Court Master before Her Honour Judge Bochner. Her Honour found that an investigation report obtained by the defendant's CTP insurer prior to litigation did not attract legal professional privilege.

IN ISSUE

Whether an investigation report obtained by the defendant's CTP insurer was subject to legal professional privilege.

The Background

- The claim relates to a pedestrian vs motor vehicle accident that occurred on 9 December 2012 in the CBD of Adelaide.
- Notification of the claim was first received by the insurer on 14 December 2012 by way of a notice of motor vehicle injury form from the plaintiff's general practitioner. The only description was that the plaintiff had been hit while crossing the road.
- On 17 December 2012 the insurer received the police report which identified the time of the incident and that the defendant returned a positive alcohol test.
- On 21 December 2012, the insurer received a letter from the plaintiff's solicitor confirming that they were acting and would otherwise write again further once the plaintiff had seen her general practitioner.
- On 27 December 2012 the insurer's claims consultant appointed factual investigators to investigate the claim, including taking statements from witnesses and photographs of the scene.
- The factual investigation report was received on 26 February 2013.
- Solicitors were not appointed by the insurer until May 2016.

THE DECISION AT TRIAL

The Master ruled that the report attracted legal professional privilege as it had been prepared for the dominant purpose of use in anticipated litigation. In making the decision, the Master considered the following of importance:

- External investigators are not retained on all matters by CTP insurers (who have a greater exposure to/knowledge of litigated claims);

- The evidence given by the CTP insurer's employees of the circumstances when external investigators are retained, namely to preserve evidence early (such as doubt over the collision, involvement of drugs/alcohol, potentially significant claims, and/or when lawyers are engaged by the claimant);
- The speed at which the report was requested following the notification of the claim (13 days) in late December; and
- The wording of the letter of request, specifically "comment on credibility of those interviewed" on the basis that the witness would be scrutinised and open to cross examination at a later date.

THE DECISION ON APPEAL

Her Honour Judge Bochner upheld the appeal finding that the Master failed to give proper weight to the available evidence. In making her finding, Her Honour found:

- The Master gave improper importance to the role of the CTP insurer, elevating it above an ordinary defendant. Litigation cannot reasonably be anticipated simply because the CTP insurer was in the business of being sued on a regular basis.
- The Master incorrectly made an inference with respect to the evidence provided by the Insurer's employees. Neither was in a position to conclusively say that investigators were appointed for the dominant purpose of litigation. In fact, Her Honour was critical of the fact that the defendant failed to adduce any direct evidence as to the purpose for which the report was requested.
- There was nothing to demonstrate the claims handler was doing more than merely following procedure in requesting the report or had turned their mind to whether litigation was anticipated. It is not enough that the report was commissioned merely because litigation was a contingent possibility.
- The purpose of investigation reports to "preserve evidence" did not translate solely to mean evidence to be used in litigation. Similarly, the request wording to "comment on credibility of those interviewed" did not allow an inference to be drawn. Her Honour deemed both as erroneous attempts to use an expression within ordinary correspondence to arouse an "apprehension of litigation".
- The early retention of solicitors was given undue weight by the Master. The fact that the plaintiff retained solicitors to assist her with her claim did not give rise to an inference that proceedings would be instituted. Further, nothing in the plaintiff's solicitors' initial letter indicated that litigation was anticipated.
- The finding that the speed of requesting the report as significant was erroneous. No inference can be drawn based on the time of year the report was requested particularly as many businesses now operate over the Christmas period.
- Finally, a letter from the claims handler to the plaintiff's solicitor indicated that the CTP insurer was attempting to obtain details of the accident from the participants. Her Honour considered this to be the true purpose of the report. As the claim was still being considered, litigation could not have been reasonably anticipated.

IMPLICATIONS FOR YOU

For claims handlers it is essential that, whenever retaining investigators, the dominant purpose of the report is contemplated, and where practicable, indicated on the retainer letter. Detailed notes should also be made on the file recording the considerations given when requesting the

report.

It is also worthwhile considering the early engagement of lawyers, by way of a limited retainer, to obtain the investigation reports for the very purpose of trying to prevent disclosure. The early engagement helps to shore up (although does not necessarily guarantee) the 'dominant purpose' argument to attract legal professional privilege.

[Morgan & Anor v Douglas \[2018\] SADC 125](#)

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