

THE PRIVILEGE AGAINST PRODUCTION: ARE THE WALLS OF JERICHO FALLING?

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Counsel, in determining whether or not to claim privilege against production when preparing an Affidavit of Documents, has to contend with three kinds of documents:

- (1) those prepared by or at the request of the client, either before or after counsel is retained;
- (2) those prepared by an adjuster (or an expert) employed by the insurer of a party to investigate the facts surrounding an event which may or may not give rise to litigation; and
- (3) those prepared by or at the request of counsel (including communications between client and solicitor).

In practice, it is common to see in affidavits of documents the "litigation privilege" invoked to shield from discovery documents that fall into all three categories.

It is clear that the third category of documents is and should be privileged. The solicitor must be unencumbered in his efforts to defend or prosecute his client's case. As Jackett P. explained in *Susan Hosiery Ltd. v. M.N.R.*, [1969] 2 Ex. CR. 27 at 33, [1969] C.T.C. 353, 69 D.T.C. 5278, "a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials he prepares can be taken out of his file and presented to the Court in a manner other than that contemplated when they were being prepared. . . ." In other words, the privilege is designed to ensure that the solicitor is free to investigate fully and prepare thoroughly his client's case for trial. It is designed to facilitate the adversary process, unlike the solicitor-client privilege, which is designed to protect the confidential relationship between a lawyer and his client: see, for example, R.J. Sharpe, "Claiming Privilege In The Discovery Process," L.S.U.C., Special Lectures (1984); S.N. Lederman, "Discovery - Production of Documents - Claim of Privilege to Prevent Disclosure" (1976), 54 Can. Bar Rev. 422.

It is the thrust of this article, however, to argue that the "litigation privilege," as it is often called, does not properly

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apply to the first two categories of documents. Indeed, the term "litigation privilege" is misleading and inaccurate when applied to documents falling within those categories. Misleading, because it obscures the origin and rationale of the privilege against production when it is applied to those documents; inaccurate, because it does not adequately explain why Courts will find documents falling within those categories to be privileged from production.

It will be submitted that the applicable rationale to explain the privilege against production when it is applied to documents in the first two categories is that of solicitor-client. It will be submitted that a document in either of the first two categories will be privileged only when it has been prepared for the dominant purpose of *being put before a solicitor for advice*. In other words, the fact that the document was prepared in contemplation of litigation, existing or pending, is not sufficient to give rise to the privilege against production. Moreover, where the document is prepared for a person who must himself consider and act upon it, then no privilege can arise, even if the report is later put before a solicitor for the purpose of assisting him in conducting litigation.

The argument made in this article, if accepted, may have significant impact on disclosure requirements, particularly in the case of documents falling within the second category (i.e. adjuster's reports). As a general rule, most insurance counsel believe that their adjuster's reports are privileged from production, as having been prepared "in contemplation of litigation". As will be argued below, there is no such privilege. Rather, the privilege is founded, and always has been, on the solicitor-client relationship; that is, upon the need to encourage and foster full and frank communication between a client and his solicitor. And any close analysis of the genesis of the average adjuster's report reveals that it is not called into existence for the purpose of being put before a solicitor. That being the case, it will be argued that there is no policy reason for adopting as a rule of practice a stance that would make all adjuster's reports privileged against production.

This article is divided into two parts. The first considers documents prepared by or at the request of the client, together with the rationale underlying the erection of a privilege against production in the case of such documents. The second applies the principles discussed in the first to reports prepared by or on behalf of an insurance company, and argues that most reports falling into that category do not properly fall within the sphere of privilege. Finally, it will be argued that there are no policy reasons for adopting a more expansive definition of privilege in the case of adjuster's reports than in the case of reports prepared by or on behalf of a party.

Category 1: Reports Prepared by or on Behalf of a Client

The discussion begins with *Anderson v. Bank of B.C.* (1876), 2 Ch. D. 644 (C.A.). It is often forgotten that this case, which is usually cited as providing the rationale for the solicitor-client privilege, decided that documents which were prepared by a client whose anticipation of litigation approached that of certainty, were nevertheless not privileged.

In *Anderson*, the defendant bank had its head office in London, and a branch in Portland, British Columbia. Money was transferred to the account of the bank which the plaintiffs said the bank knew belonged to them. On November 11, 1874, the defendant's English manager received a letter from the plaintiffs' solicitors. The letter asked whether the bank intended to repay the plaintiffs, or whether they were to be "driven to litigation". In the latter case, the letter asked that the matter be referred to the bank's solicitors. About the same time, the bank's manager had a discussion with one of the plaintiffs.

As a result of receiving the letter, and of the interview, the bank's manager concluded that litigation was imminent. He felt that it was essential that the bank should have the benefit of legal advice. To that end, he decided to obtain from the branch in British Columbia the particulars of the case which were likely to be required by the solicitor. He telegraphed the branch manager as follows: "Claims referred to letter 18 Sept. made for 25,000 dollars. Send by letter fullest particulars whole transactions, especially cargo *Melancthon* and copy of account." [p. 645]

The branch manager replied by letter of November 16, 1874. The plaintiffs sought production of this letter. The defendants refused, relying upon the legal professional privilege.

Lord Jessel M.R. ordered its production. He emphasized that there was nothing in the material before him which indicated that the branch manager was informed that the purpose of his report was "to be a confidential one for the purpose of being submitted to the professional man - that is, the solicitor - for advice": p. 648. If such had been the case, the report would have been privileged: p. 648.

Lord Jessel then went on to give the often-cited rationale for the privilege against production (at p. 649):

"The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary,

it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating [of] his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule."

It is important to emphasize here that Jessel M.R. thought that the applicable principle was the solicitor-client one; that that principle was founded on the adversarial system; and that since the author of the report did not prepare it in the expectation of placing it before his (or his employer's) solicitor for the purpose of obtaining advice, it was not privileged.

Lord Jessel's decision was upheld by the Court of Appeal, although the emphasis was slightly different.

Lord James began with a statement of the basic rule: "that every document in the possession of a party must be produced if it was material or relevant to the cause, unless it was covered by some established privilege": p. 656. He rejected outright the argument that "any communication made by a person with a view to litigation, whoever the person is, must be protected": p. 656. Rather, he held that the privilege rested upon the solicitor-client privilege: "as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as materials for the brief": p. 656.

He went on to say (and in this he was joined by Lords Mellish and Baggallay) that this principle had no application whatever to communications between a principal and his agent, where the latter's purpose is to inform the former as to the facts and circumstances of the events giving rise to the litigation: see, for example, pp. 657, 659 and 661-62.

In part, this reluctance to extend the privilege to the letter in question was based on the duties of full disclosure associated with the conduct of an action. As Baggallay J.A. observed at pp. 661-62, it is no answer on discovery for the deponent to say, "I did not attend to this matter personally. I sat upstairs, and the business was managed by my clerks. . . . He would be bound, for the purpose of making the discovery, to ascertain from his clerks or manager all the particulars of the case."

It is submitted, however, that there was another reason

for the Court of Appeal's reluctance. This reason lay in the realization, albeit poorly articulated, that the purpose for which the agent prepared the report was not to put it before a solicitor for advice. Rather, it was to enable the principal to ascertain all the facts, so that he could then decide how best to deal with the matter. The fact that the principal might decide, as a result of reviewing the report, to obtain the advice of a solicitor, could not detract from the fact that the initial purpose of the report was to inform *him*, not the solicitor. Thus James L.J. observed that where company officials lack information in respect of a claim made against them, they communicate with their agent who transacted the business giving rise to the claim. The purpose of this original communication is to obtain information for themselves, not their solicitors. And as he observed at p. 657:

"That is exactly what they ought to do. It is the duty of a man, in the ordinary course of business, to do it, and it is not necessarily connected with the litigation, either actually commenced or expected."

Similarly, during the course of argument before the Court of Appeal, Mellish L.J. observed [at p. 655] that the purpose of the head office telegram to the branch office was:

". . . not to obtain evidence, but to learn what the facts were, in order to know whether the claim should be resisted. It seems to be an extension of the rule as to privileged communications to apply it to such a case."

In *Southwark Water Co. v. Quick* (1878), 3 Q.B.D. 315, the Court of Appeal, differently constituted, reaffirmed the principle that the privilege here in question was based upon the need to protect the solicitor-client relationship, in turn founded on the adversarial process. At issue in that case were transcripts of interviews between the party, witnesses and employees. The transcripts were prepared for the express purpose of being handed over to the party's solicitor. The Court applied the principle in *Anderson*, supra, and held that they were not producible. The transcripts had come into existence to be put before the solicitor for his consideration, and were accordingly privileged: p. 320, per Brett L.J.

Lord Cotton concurred. As he observed at pp. 321-22:

"Privilege only extends to communications with legal advisers, or in some way connected with legal advisers; communications with a most confidential agent are not protected if that confidential agent happens not to be a solicitor. And this proceeds on the principle that laymen

(by which I mean persons not learned in the law) cannot be expected to conduct their defence or litigation without the assistance of professional advisers; and, for the purpose of having the litigation conducted properly, the law has said that communications between the client and the solicitor shall be privileged, and that no one shall be entitled to call for the production of a document which has been submitted to the solicitor for the purpose of obtaining advice, or for the purpose of enabling him to institute or defend proceedings. There must be the freest possible communication between solicitor and client, and it is on this ground that professional communications are entitled to privilege, which excepts them from the general rule."

It is important to emphasize that in both *Anderson*, and *Southwark*, the documents in issue were not documents which fell within the third category of documents discussed above. Nor were they the product of direct communication between a client and his solicitor. Rather, they were both documents which were prepared prior to communication with the solicitor in clear contemplation of litigation. But in both cases, the Court of Appeal considered that the applicable principle was that described or circumscribed by the solicitor-client privilege. In both cases, the issue was this: were the documents prepared for the purpose of being placed before a solicitor to obtain his advice? Where, as in *Anderson*, the author of the report was not aware that it was to be put before a solicitor, the report was not privileged.

It was earlier suggested that there was a subsidiary rationale or explanation for the decision in *Anderson*. It was that the report of the branch manager was not privileged because the principal to whom it was made had first to consider and evaluate it before going to his solicitor to seek his advice. That rationale or explanation became explicit in the House of Lords decision in *Jones v. Great Central Railway Co.*, [1910] A.C. 4.

Jones is a case not often cited in Canada; yet it has profound implications for the doctrine of privilege. In *Jones*, the plaintiff brought an action for wrongful dismissal against the defendant. He was a member of a trade union. One of the benefits provided by the union was the right to receive legal assistance in cases of wrongful dismissal. To obtain such assistance, he was required by the rules of the union to give full particulars to its officers. The union would then decide, on the basis of that report, whether a solicitor should be retained. It is important to note that the plaintiff's report to the union was written before any action was brought, and that the purpose of the report was to satisfy the union that it ought to

sanction the employment of a solicitor. Once that decision was made, the report was passed on to the solicitor to assist him in the conduct of the action.

Lord Loreburn L.C. delivered the decision of the House of Lords. Lord Loreburn stated that the rule applicable was that expressed by James L.J. in *Anderson*; namely, that "in order to enable a man to confide unreservedly in his legal advisor, all communications between client and solicitor are protected": p. 5. He went on to observe that the privilege extended to communications between a solicitor and the client made through the medium of an agent. However, if the communications were made to the agent

" . . . as a person who has himself to consider and act upon them, then the privilege is gone; and this is because the principle which protects communications only between solicitor and client no longer applies." (p. 6)

Since the documents in question were communicated to the union, who had itself to consider and act upon them, and not to the solicitor, nor to the mere alter ego of the solicitor, the documents were not privileged.

In *Jones*, the documents ordered to be produced were documents prepared by the party which were to be considered and acted upon by a person not involved in the litigation. The principle has since been held to apply in reverse case: that is, where the documents are prepared by a person not involved in the litigation, and have to be considered and acted upon by the party before being put before its solicitor: *Alfred Crompton Amusement Machines Ltd. v. Commrs. of Customs and Excise* (No. 2), [1974] A.C. 405, [1973] 2 All E.R. 1169 (H.L.).

In *Alfred Crompton*, one of the issues involved the valuation, for tax purposes, of amusement machines manufactured by the plaintiff. To that end, the defendant obtained certain reports to help it decide that value. At the time the reports were prepared, the defendant knew that if its opinion were challenged, the reports would be forwarded to its solicitor.

The House of Lords, following its earlier decision in *Jones*, supra, held that such reports were not privileged. As Lord Cross of Chelsea observed, the fact that the defendant happened to expect that there would be litigation arising out of its decision, and had called in its solicitor to "hold its hand" in the early stages, was not enough to make the documents privileged. "The Commissioners had to form their own opinion as to the value on the evidence available to them, including these documents, before any arbitration could take place": pp. 1183-84. The case was analogous to *Jones*. The documents

were not privileged because the defendant "had to form their own opinion as to the value before the solicitor would use the documents for the purpose of defending their opinion in the anticipated arbitration": p. 1184.

Finally, there is the by now well-known case of *Waugh v. British Railways Bd.*, [1980] A.C. 521 (H.L.). That case arose out of an accident involving the defendant's rolling stock, in which the plaintiff was injured and subsequently died. (The action was brought by his widow.)

When such accidents occurred, there were three reports prepared. Of these, the first, a brief report to the railway inspectorate, was made on the day of the accident.

Soon afterwards, an internal report was prepared incorporating the statements of witnesses. This was also sent to the railway inspectorate. This report was prepared as a matter of practice: it was not required by statute or regulation.

Production of this second report was sought. The defendant's affidavit in support of its claim for privilege indicated that there were two reasons for such reports. First, they were prepared to assist in establishing the causes of the accident. Second, and equally important, they were prepared for the purpose of being submitted to the board's solicitor as material upon which he could advise the defendant upon its legal liability and for the purpose of conducting any litigation that might arise therefrom. The report itself was headed with the following wording:

" 'For the information of the board's solicitor: This form is to be used by every person reporting an occurrence when litigation by or against the B.R.B. is anticipated. It is to be provided by the person making it to his immediate superior officer and has finally to be sent to the solicitor for the purpose of enabling him to advise the B.R.B. in regard thereto.' " (pp. 530-31)

It may be that the intent of this wording was to get around the decision in *Anderson*. The wording would make clear to the person preparing the report that it was to be put before a solicitor. Hence, the ratio of the decision in *Anderson* was to be avoided.

Nevertheless, the House of Lords held that the report was not privileged, because it had not been prepared for the dominant purpose of being put before a solicitor to obtain advice. The other, equally important, purpose was to assist the defendant in determining the cause of the accident.

Once again, it can be said that the report in question was being prepared for a person who had himself to consider and act upon it. That is to say, it suited the defendant's

corporate purposes to ascertain the causes of the accident, in part, undoubtedly, to assist it in deciding whether any changes in procedure were necessary to avoid future accidents. Just as in *Anderson* or *Jones*, the purpose of the report was to enable its recipient, who was not a solicitor, to himself consider the matter reported upon, so as to determine what action on his part was called for.

It is also important to note that all of the decisions delivered by the law lords emphasized that the privilege arose only with respect to documents that were prepared for the dominant purpose of *being put before a solicitor*. The fact that the party preparing the report might have expected that litigation was certain was not enough.

Once again the rationale for the privilege was founded on the need to foster and protect the solicitor-client relationship. Lord Wilberforce suggested that the more powerful argument in support of the privilege against production is that "everything should be done in order to encourage anyone who knows the facts to state them fully and candidly - as Sir George Jessel M.R. said, to bare his breast to his lawyer . . . This he may not do unless he knows that his communication is privileged": p. 531.

Similarly, Lord Simon of Glaisdale observed at p. 536 that the adversarial system

" . . . with legal professional advice and representation demands that communications between lawyer and client should be confidential, since the lawyer is for the purpose of litigation merely the client's alter ego. So too material which is to go into the lawyer's (i.e. the client's) brief or file for litigation. This is the basis for the privilege against disclosure of material collected by or on behalf of a client for the use of his lawyer in pending or anticipated litigation"

Lord Edmund-Davies observed at pp. 541-42 that, in the past, the Courts had failed to maintain a distinction between solicitor-and-client communications, and communications between the client and third parties made for the purpose of obtaining information to be submitted to the client's solicitors for the purpose of obtaining advice upon pending or contemplated litigation. In cases falling within the first group, absolute privilege arises. It is immaterial whether or not the possibility of litigation was contemplated. But in cases within the second group, the communication between the client and the third party must have been for the dominant purpose of obtaining information *to be placed before the solicitor*.

It is submitted that these principles can be found, albeit not always expressed, in numerous decisions in Canada. These

will be discussed below.

In *Davies v. Harrington* (1980), 39 N.S.R. (2d) 258, 71 A.P.R. 258, 115 D.L.R. (3d) 347 (N.S. C.A.), the issue involved the production of a report prepared by a civil engineer for an insurance company. The case arose out of a fire which had damaged the plaintiff's poultry building. The plaintiff was insured against fire loss. The insurance company paid the claim, and a little over a year later commenced a subrogated action in the plaintiff's name against the defendant. The plaintiff alleged that the defendant, who had been driving a truck at the time, had collided with a power pole, which had set off a chain of events leading to the fire.

The engineer had been retained by the insurance company's adjuster 2 days after the fire. The report was prepared shortly thereafter. The adjuster had employed the engineer because at the time it had appeared to him that there was a chance that the fire which destroyed the poultry building was electrical in origin. He thought that it might have been caused by the collision of the defendant's truck with the power pole. Once the report was prepared, it was considered by the insurance company. It was then forwarded to its solicitor, with the following comment: "Based on [Engineer's] report do you feel it would be wise to commence subrogated proceedings?"

The Court, following the decision of the House of Lords in *Waugh*, supra, decided that the report was not privileged. It held that the dominant purpose behind the report was to determine the origin of the fire. The opinion of the expert engineer would determine whether the insurance company sought legal advice as to whether it had a subrogated cause of action. If the answer had been negative, it was doubtful that the report would have been forwarded to the solicitor for advice, since there would have been no practical reason for doing so: pp. 354-55.

The reasoning, although not the result, was criticized by Professor Robert J. Sharpe in his comment on the decision: "Discovery - Privilege and Preliminary Investigative Reports" (1981), 59 Can. Bar Rev. 830. As Professor Sharpe mused at p. 831:

"What purpose, other than litigation, did anyone have in mind? The evidence was that the engineer was only engaged where subrogated proceedings were contemplated. According to the evidence, apart from the prospect of a lawsuit, there is no other reason for obtaining the report."

Professor Sharpe supported the result, however, because the disclosure of the report would not breach any solicitor-client privilege, since the report had been made to the insurer, not the solicitor.

With respect, it is submitted that the decision of the Appellate Division of the Nova Scotia Supreme Court was indeed correct in its reasoning. The reason falls within the principle established in the *Jones* case. That is, the report was not prepared for the dominant purpose of being put before the insurance company's solicitor. Rather, it was prepared for the purpose of enabling the insurance company to decide the cause of the fire and then to decide whether it should consider or commence a subrogated action. Only once the insurance company had made those decisions, based on the report's contents, would it put the report before its solicitor.

In *Bank of N.S. v. Dutta* (1984), 58 B.C.L.R. 257 (B.C. C.A.), the plaintiff bank commenced an action against the defendant claiming repayment of moneys loaned to him. After the action was commenced, the defendant wrote to the plaintiff's head office in Toronto to complain about the manner in which the plaintiff had dealt with him in British Columbia. The head office wrote back to the defendant, indicating that it would look into his comments, obtain a report, and then, on the basis of that report, respond to him. Thereafter, the head office responded to the defendant, and rejected his suggestion that the outstanding debts upon which the action had been commenced should be forgiven.

The defendant then applied for production of the report. The plaintiff claimed privilege. The defendant's application was dismissed, but on the appeal the report was ordered produced. The Court of Appeal found that the dominant purpose for the preparation of the report "was to enable officers of the plaintiff to answer the inquiry sent by the defendant complaining of the conduct of the bank and requesting some relief": per Taggart J.A. at p. 260. The fact that the report was prepared after litigation had been commenced was an important factor, but the "fundamental concern must always be what was the dominant purpose for the coming into being of the document": per Craig J.A. at p. 260.

In *Nova, An Alta. Corp. v. Guelph Engineering Co.*, [1984] 3 W.W.R. 315, 30 Alta. L.R. (2d) 183, 42 C.P.C. 194, 50 A.R. 199, 80 C.P.R. (2d) 93, 5 D.L.R. (4th) 755 (Alta. C.A.), the action arose out of an alleged valve failure in a gas transmission line compressor station. The defendants were all alleged to have been involved in the design, manufacture or supply of the valve. The failure of the valve led to the shutdown of a major gas transmission line. Shortly after the failure the plaintiff consulted its solicitors, contemplating that it was at risk of being sued, and also that it might have a claim against whoever was responsible for the failure. It would appear that both before and after the plaintiff consulted its solicitors, a series of documents, comprising reports, letters and memoranda were prepared. Some of these were prepared solely

for counsel. Others were prepared so as to provide information to management for the purpose of deciding the cause of the failure, to plan repair and replacement, to protect other facilities, to design future systems and to satisfy various regulatory bodies as to the cause of the failure and as to the steps taken to prevent further occurrences. The Alberta Court of Appeal, applying the *Waugh* test, held that the documents falling into the second group were not privileged, since it could not be said that they were prepared for the dominant purpose of being placed before the plaintiff's solicitors for advice.

In *C.M.H.C. v. Foundation Co. of Can.* (1984), 63 N.S.R. (2d) 402, 141 A.P.R. 402, 7 C.L.R. 179, 43 C.P.C. 66 (N.S. T.D.), the plaintiff had commenced an action against the defendant general contractor, alleging various construction defects in a building complex built for it by the defendant. In the course of investigation the alleged defects, the plaintiff retained the services of an engineer to advise it as to the causes of the problems with the building, and as to the appropriate restoration work which should be carried out. During the course of his investigations, the engineer retained a number of subconsultants to advise him on the defects as well as on the remedial work to be recommended to the plaintiff. On examination for discovery of the engineer, it was learned that the purpose of the communications with the subconsultants related to remedial work, and as well to whether or not such work would qualify for government funding. The Court held that the reports should be produced. They were prepared on behalf of the plaintiff, not at the request of its solicitors, and not for the purposes of litigation (although they arose out of the subject-matter of the litigation).

In *Falconbridge Ltd. v. Hawker Siddeley Diesels & Electrics Ltd.* (1985), 50 C.P.C. 307 (Ont. Master), affirmed (1985), 50 O.R. (2d) 794, 3 C.P.C. (2d) 133 (Ont. H.C.), the plaintiff owned an engine at its mine in British Columbia. In December 1981, it decided to rebuild that engine and contracted with Hawker Siddeley to do so. As part of the job, the main bearings were reconditioned by another defendant. The engine was restored to service at the beginning of July 1982. It operated for approximately 1,400 hours, and then broke down, allegedly because of the failure of the rebuilt bearings. The writ was issued on April 26, 1984, and was served together with a statement of claim shortly thereafter: p. 314 C.P.C.

The plaintiff moved for production of certain documents for which the defendant Hawker Siddeley claimed privilege. Master Peppiatt exhaustively reviewed those documents. Without going into an exhaustive review of the documents which he ordered produced, it can be said that the fact that the document was concerned with the subject-matter of the

litigation (i.e., the failure of the bearings), or that reference was made in the document to a meeting with solicitors, or that a reference was made to the possibility of civil action, or that the report was made after the service of the statement of claim, was not sufficient to determine whether or not the privilege existed: see documents 7, 8, 17, 19, 30 and 37 of Master Peppiatt's decision.

To conclude this portion of our discussion, it can be said that a document prepared by or on behalf of a party will only be privileged where the dominant purpose for that report is its being placed before a solicitor for advice. Where, on the other hand, the report is prepared for the purpose of enabling the party, or some other person (for example, a regulatory body) to make a decision, or to take some action on it, then the report cannot be privileged. Since it was not called into existence to form part of a client's communication with his solicitor, its production cannot breach that relationship. This is so, even where it is contemplated that the report will thereafter be put before the party's solicitors for the purpose of seeking their advice, or assisting them in the conduct of any litigation that may then be contemplated.

Category 2: Reports Prepared by or on Behalf of Insurers

The second category of documents include reports prepared by insurance adjusters, and by experts retained by either the adjusters, or the insurance company, prior to the commencement of litigation. It is submitted that a review of the case law makes clear that identical principles apply, though their application may be somewhat more difficult.

We have already considered *Davies v. Harrington*, wherein a report prepared for an insurer to assist it in determining whether to commence a subrogated action was ordered produced.

Similar results were reached by the British Columbia Court of Appeal in *Steeves v. Rapanos*, [1982] 2 W.W.R. 380, 41 B.C.L.R. 312, 33 C.P.C. 70, 142 D.L.R. (3d) 556, [1983] I.L.R. 1-1626 (B.C. C.A.). That case involved a motor vehicle accident. The plaintiff was a pedestrian who alleged that he was struck by a motor vehicle driven by the defendant. The defendant gave a statement to an insurance adjuster a few weeks after the accident. A writ was issued approximately 2 months after the statement was given. (The facts are taken from the Motions Court's decision reported at [1982] 6 W.W.R. 244, 39 B.C.L.R. 60, 29 C.P.C. 141.)

The plaintiff sought production of the statement. The Chambers Judge ordered its production, applying the dominant purpose test in *Waugh*. The affidavit in support of the defendant's claim of privilege was silent as to the purpose for

which the statement was prepared. The Chambers Judge held that in the circumstances there were other reasonable inferences to be drawn as to the purpose for the statement, other than that it was for use in litigation. The Chambers Judge noted that the report could have been gotten as part of the statutory reporting requirement. In addition, the insurance company may have required the report to ascertain whether the defendant was in breach of his policy, which would have allowed the insurance company to deny liability beyond the statutory limits: see p. 149 C.P.C.

The Chambers Judge's decision was upheld by the Court of Appeal, which specifically adverted to these other possible purposes: 41 B.C.L.R. at p. 316.

The Manitoba Court of Appeal reached a similar conclusion in *Levin v. Boyce*, [1985] 4 W.W.R. 702, 12 C.C.L.I. 119, 34 M.V.R. 55, 19 D.L.R. (4th) 128, 34 Man. R. (2d) 1. This case also involved a motor vehicle accident. Both the plaintiff and the defendant were insured by the same insurance company (the Manitoba Public Insurance Corporation). Two days after the accident, both the plaintiff and the defendant made statements, as they were required to do by the Manitoba Public Insurance Corporation Act, S.M. 1970, c. 102 (also C.C.S.M., c. A180) [title am. 1974, c. 58, s. 1]. The statements were given to different adjusters.

The defendant refused to produce this statement, claiming privilege. The Court of Appeal applied *Waugh*. It went on to note that the making of the statement by the defendant was a condition of her insurance coverage by virtue of regulations passed under the Act. She was aware of that condition when she gave the statement. In addition, when she gave the statement she was aware that litigation was a possibility, because the plaintiff had been injured in the accident.

The Court of Appeal held that there was accordingly a duality of purpose: first, to comply with the statutory requirement; and second, for counsel in anticipation of litigation: p. 134. That being the case, it could not in the circumstances of that case be said that the report was prepared for the dominant purpose of preparing her case for litigation. The report was not privileged: pp. 136-37.

In *McCaig v. Trentowsky* (1983), 47 N.B.R. (2d) 71, 124 A.P.R. 71, 148 D.L.R. (3d) 724, the New Brunswick Court of Appeal held that the mere fact that the reports in question were prepared by an adjuster was not sufficient, in and of itself, to establish the privilege. That case arose out of a motor vehicle accident. The action was commenced approximately 2 years after the accident. The defendant's affidavit of documents claimed privilege in respect of adjuster's reports that had been prepared between the accident and the commencement of the action. The defendant argued that the

adjusters' reports had been compiled with a view to furnishing evidence to the defendant's solicitors to enable them to defend the action which the defendant believed was being contemplated by the plaintiff: p. 726 [D.L.R.]. The New Brunswick Court of Appeal held that this was insufficient to establish that the dominant purpose for the reports was their being placed before a solicitor: p. 730. Accordingly, the Court of Appeal sent the matter back to the Chambers Judge with a direction that he either inspect the documents to determine whether that dominant purpose existed, or to order a cross-examination on the affidavit of documents, or the production of a further and better affidavit: p. 730.

In Ontario, it has been said that where two motor vehicles collide "the anticipation of litigation immediately arises and the confidential nature of the documents obtained in the investigation is not displaced until fault is accepted or a court on proper materials so orders": *Anger v. Dykstra*, 45 O.R. (2d) 701, 43 C.P.C. 268, [1984] I.L.R. 1-1758 (Ont. H.C.), per J. Holland J. at p. 703 [O.R.].

It is submitted, with respect, that this is not a proper inference to be drawn from a motor vehicle accident. It is certainly not in accord with the above-discussed decisions of Appellate Courts in other jurisdictions. It is as well unrealistic. As was noted by Master Peppiatt in *Rush v. Phoenix Assurance Co. of Can.*, 40 C.P.C. 185 at 189, [1984] I.L.R. 1-1737 (Ont. H.C.): "One can take judicial notice of the fact that the vast majority of motor vehicle accident claims are settled without litigation and without the intervention of solicitors." And in *Walters v. T.T.C.* (1985), 50 O.R. (2d) 635, 4 C.P.C. (2d) 66 (Ont. H.C.), Steele J. disagreed with the comments of J. Holland J. in *Anger v. Dykstra*, supra. His Lordship said that he could not believe that the defendant (a self-insurer) considered itself to be "a company that assumes it will dispute all claims and will be sued for every accident that occurs": pp. 637-38 [O.R.].

It is submitted that all of the above cases can be explained according to the principles already discussed. Whether or not an insurance adjuster's report is producible depends on the circumstances of the claim or events giving rise to the report. In most cases, the initial reports prepared by the adjuster will be made for the purpose of determining the facts of the case to enable the insurer to determine whether there is coverage under the policy. At the same time, the adjuster may be looking for evidence which may justify a subrogated action against a third party. However, unless it is abundantly clear from the start that an action will be commenced or defended, it is difficult to accept that the adjuster prepares his reports with the idea of placing them before a solicitor for advice. The adjuster prepares these

reports for the insurance company that retains him. the insurance company must consider those reports, and act upon them, before it can decide whether or not to retain a solicitor.

In some cases, a plaintiff may force an insurance company into the arms of its solicitor by commencing an action against the insured almost immediately after the events giving rise to his claim. It is more usual, however, for a number of months, if not years, to pass before the plaintiff decides to commence an action. During that time negotiations are conducted between the adjuster (or adjusters) in an attempt to settle, or adjust, the claim. During this adjusting stage, the adjuster's reports are more likely prepared with the idea of informing the insurance company as to the nature of the claim, the progress of the negotiations, and whether or not a settlement is possible and, if so, recommended. It may be that at the back of the adjuster's mind, and of the insurance company's mind, it is contemplated that litigation may be at some point a possibility. And, if litigation does ensue, the adjuster knows that his reports will be put before the solicitor by the insurance company for the purpose of obtaining the solicitor's advice, or to assist him in conducting the defence or maintaining the subrogated action. But that is surely no different than the expectation of the author of the report in *Waugh*, who knew that the report, after being considered by his superior, would end up in a solicitor's brief. And in both cases, that expectation will be subsidiary to the dominant purpose of the agent (adjuster) and of the principal (insurance company), which, at least initially, is to investigate and settle the claim. For it has to be emphasized that until a solicitor is retained, an insurer has full power to act on behalf of the insured, and to settle a claim where it suits its purposes to do so. Since adjusters' reports are prepared as part of *the insurer's* handling and management of the claim, it is hard to see how they can fall under the rubric of solicitor-client communications.

The difference between the adjusting and litigation stages of an insurance claim, and of the purposes associated with each stage, has been discussed by the Courts in cases involving litigation between an insured and his insurance company. For example, in *Heritage Clothing (Can.) Ltd. v. Sun Alliance Ins. Co.*, summarized (1985), 1 W.D.C.P. 383 (Ont. Master), affirmed (1985), 4 C.P.C. (2d) 154 (Ont. H.C.), the action arose out of a claim by an insured for indemnification for loss and damage sustained by reason of a burglary and theft under its insurance policy with the defendant. The defendants denied any loss by burglary and theft, and in the alternative pleaded fraud.

The alleged burglary took place on December 19, 1982. The plaintiff sought production of a number of documents, including a letter from the insurer to an investigator, several

investigative reports, and a report from a chartered accountant. These documents covered the time period from February 1, 1983 to April 14, 1983. All were generated after the approximate date that counsel was contacted. Counsel for the insurer was consulted by the insurance company for two purposes: advice on the manner of investigating the plaintiff's claim, and consultation in contemplation of a denial of the claim and the subsequent litigation that was bound to ensue. Master Donkin reviewed the documents, and concluded that their dominant purpose "was to obtain information to determine the facts surrounding the claim, rather than to determine facts with which to refute the claim having decided or attentively decided, that the claim would be rejected": p. 9. Master Donkin's decision to order their production was upheld on appeal. Madame Justice Van Camp, citing Master Donkin's conclusion as to the dominant purpose of the materials, held that they did not disclose that either the substantial or the dominant purpose for which the documents were prepared was litigation: p. 157.

A similar approach was adopted by the British Columbia Court of Appeal in two decisions. In the first, *Pound v. Drake Ins. Co.* (1984), 8 C.C.L.I. 108, a cabin cruiser owned by the plaintiff burned. The insurance company engaged an adjuster. As a result of the adjuster's reports (which were not the subject of any claim for privilege), the insurance company retained another expert adjuster to conduct a further investigation. The second adjuster prepared three reports which were considered by the insurance company and formed the basis of its conclusion that the plaintiff's claim under his policy should be denied: p. 109. Mr. Justice Hutcheon, for the Court, agreed with the conclusion of the Chambers Judge that the dominant purpose of the reports prepared by the second adjuster "was to consider whether or not to deny liability": p. 111. Accordingly, the reports were producible. But the reports prepared after the denial of liability were privileged: p. 111.

In *W.K. Construction Ltd. v. Maritime Ins. Co.* (1985), 31 A.C.W.S. (2d) 53, the British Columbia Court of Appeal, referring to *Pound*, supra, accepted that there could very well be a division between the adjusting and litigation stages of an insurance claim. However, there was a "stage beyond the bona fide adjustment of a claim where some resistance to the simple process of adjustment starts to arise": p. 6, per Lambert J.A. At that point, the privilege may arise.

The distinction between the adjusting and litigation stages were also discussed by Taylor J. in *Shaughnessy Golf & Country Club v. Uniguard Services Ltd.* (1985), 63 B.C.L.R. 212 (B.C. S.C.). Mr. Justice Taylor appeared to accept the existence of the two stages (p. 218), although in the circumstances of the case before him, he found that the

litigation stage had arisen almost at the outset of the claim. This was because of the extremely suspicious circumstances surrounding the fire, and the existence of a strong suspicion from the outset that the fire had been caused or spread by the deliberate act or negligence of the insured: p. 218.

Notwithstanding that the difference is most often discussed in cases involving litigation against an insurer, there is no reason why the principles applicable to such actions should be any different from those applicable to actions between two parties (each of which, in the usual course, undoubtedly has an insurer lurking in the background): for example, see *Davies v. Harrington*. In both kinds of actions, the initial work done by the adjuster is the same: he investigates the claim to determine the facts. And the purpose of such an investigation is to enable the insurance company to decide whether or not there is coverage under the policy, or whether, even if there is coverage, there is a ground for denying the insured's claim under the policy. Once those decisions are made, the insurer then attempts to adjust, or settle, the claim. The cases diverge only at the point where the insurance company makes the decision to deny the claim.

There are two arguments that one often hears in support of a privilege for adjusters' reports. First, they are prepared in contemplation of litigation. Second, to ensure full and complete investigation on the part of adjusters, their reports should be considered confidential and, accordingly, privileged from production.

It is submitted that these arguments are not convincing. As to the first, the discussion so far has already indicated that the issue is always one of fact, and its resolution depends on the circumstances of each case. The fact that the author of the document contemplates litigation, even seriously, is not enough. Where an adjuster initially investigates a claim, he does no more than what the agent in *Anderson* did. That is, he investigates the claim so as to inform his principal of the facts of a claim, so as to enable the principal to decide how to handle the matter. As a rule, he does not prepare the report for the dominant purpose of putting it before a solicitor to obtain his advice or assistance. Rather, he prepares it as part of the insurer's management of the claim.

As to the argument with respect to the confidentiality, the fact that the reports may be prepared in confidence is not and never has been a ground for the privilege against production. From the very start, since at least the decision in *Anderson*, the fact that a report was prepared in confidence was not a ground for refusing production: see also *Wheeler v. Le Marchant* (1881), 17 Ch. D. 675 at 681 (C.A.). And as was observed by Lord Kilbrandon, in *Alfred Crompton*, supra, at p. 1186 [All E.R.], when dealing with reports prepared by

professionals, it seems unreal "to suggest that he will adjust the form and content or vary the candour of the report he is required to make according as the report on its face bears or does not bear that it will at an early stage, or at any stage, be submitted to his employer's solicitor"; and see *Nova*, supra, 50 A.R. at p. 204. An adjuster owes a duty to his employer (the insurer) to investigate the matter giving rise to a claim under the policy fully, and with an open mind. It is difficult to see how that duty could be affected by the production of his reports.

Indeed, there is a policy reason which supports the production of an adjuster's report. In the ordinary course an insured may never conduct any investigation on his own behalf. He leaves that task to the adjuster. If he had no insurer (or, which is the same thing, he was a self-insurer), he would investigate matters himself. Since it is arguable that an insurance company acts as an arm of the insured in conducting these investigations, then to refuse to apply the principles discussed above would be to place an insured in a better position vis-à-vis production than a non-insured (who has to conduct his own investigation), notwithstanding that the purpose of the reports prepared in either case is the same.

In conclusion, it is submitted that the following points can be made:

- (1) the fact that litigation is contemplated, even expected, by the author or recipient of the document, is not enough to give rise to the privilege against production;
- (2) the fact that the document originates in a confidential communication is not enough to give rise to the privilege;
- (3) the dominant purpose of the author of the document, or of the person who directs that the document be prepared, must have been *to place it before a solicitor for the purpose of obtaining advice*; and
- (4) where the person for whom the document is prepared must himself first consider and act upon it before the solicitor is employed, or before the document is put before him for his advice, then the document is not privileged at all.