



Insurers: Don't Tell on Your Insureds



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By Drew Wilson

Insurance companies will occasionally assign an employee to investigate claims that are expected to be substantial or may appear suspicious. However, what happens when an investigator discovers incriminating evidence against their insured? Are they obligated to report the evidence to the police?

In *Barata v Intact Insurance Company*, 2021 ABQB 419, the insured husband and wife struck a pedestrian while operating their insured vehicle. They initially stopped but left the scene without waiting for the police. The pedestrian later died in the hospital due to his injuries. The police were able to locate the husband and wife and arrested the husband on the assumption he was operating the vehicle at the time of the accident.

The wife reported the collision to her insurer who assigned an employee to investigate. The investigator spoke to the wife who advised him she was actually the operator of the vehicle that struck the pedestrian. Like most "Good Samaritans" the investigator volunteered the information to the police and the wife was subsequently charged. The wife later commenced legal action against the insurer alleging a breach of the duty of good faith claiming punitive damages.

In 2015, the Alberta Court of Appeal confirmed in *R v Porter*, 2015 ABCA 279, that statements given by an insured to their insurer under compulsion are not admissible against the insured in a criminal trial. Statements made to an insurer are considered to be made under compulsion due to the mandatory nature of vehicle insurance and section 556 of the *Insurance Act* which places an obligation on the insured to "promptly give to the insurer written notice, with all available particulars, of any accident involving loss of damage to persons or property..."

Statements made under compulsion cannot be used against a person for incrimination as that would be a violation of section 7 of the *Charter* which protects a person's right against self-incrimination.

Here, Justice Dunlop held, "...an insurer has a duty to investigate an insured's claim in utmost good faith, which includes what it does with the information it obtains during that investigation, and that it breaches that duty if it acts without reasonable justification."

Justice Dunlop did comment that there may be cases where an insurer would be reasonably justified in disclosing some or all of its insured's compelled statement to the police, particularly if it is for the purpose of seeking information to assist the insurer's investigation of an accident. Whether the disclosure is reasonable will depend on the facts in each case but Justice Dunlop did not elaborate further on when a reasonable justification exists. However, without any reasonable justification, disclosing some or all of its insured's compelled statement to the police will be a breach of the insurer's duty of good faith.

Notwithstanding Justice Dunlop's finding of a breach of the duty of good faith, no damages were awarded to the plaintiff as Justice Dunlop found there was no evidence that the insurer's disclosure led to the plaintiff's arrest. The insurer's breach of the duty of good faith did not cause or contribute to the plaintiff's arrest. The police would have found out the wife was driving and she would have been arrested eventually.



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The plaintiff also failed to establish that punitive damages were warranted as the investigator was trying to assist the police. The investigator's conduct was not "reprehensible" and did not cause the plaintiff any harm. Accordingly, while the insurer was found to be in breach of its duty of good faith, the plaintiff did not suffer any damages.

Nonetheless, *Barata* provides an example of an insurer's breach of the duty of good faith and confirms the importance of maintaining the confidentiality of compelled statements taken by insurers during their investigations.

Questions?

Should you have any questions with respect to this bulletin, or if you would like more detailed information related to statements made to insurers under compulsion, please contact the following member of the Brownlee LLP Insurance Defence Team:



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