

File No. CI15-01-98227
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Appeal No. _____

IN THE COURT OF QUEEN'S BENCH FOR MANITOBA
JUDICIAL CENTRE OF WINNIPEG

BETWEEN

PATRICK GUILBERT AND GUILBERT ENTERPRISES LTD.

Plaintiff

and

ECONOMICAL MUTUAL INSURANCE COMPANY,
TRADING AS THE ECONOMICAL INSURANCE GROUP

Defendant

TRIAL
(Excerpt)
(Pages T1 - T20)

October 23, 2018
Winnipeg, Manitoba

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1 Proceedings taken in the Court of Queen's Bench, Winnipeg, Manitoba

2

3

4 October 23, 2018

Afternoon Session

5

6 The Honourable Mr. Justice

The Court of Queen's Bench

7 D. Kroft

for Manitoba

8

9 M. Davids

For the Plaintiffs

10 S. Fast

For the Plaintiffs

11 M. Finlayson

For the Defendants

12 G. Lisi

For the Defendants

13 D. Delaronde

Court Clerk

14

15

16 **Submissions by Mr. Finlayson (*Voir dire*)**

17

18 MR. FINLAYSON:

So, My Lord, I need to deal with the

19

issue in two stages from Economical's perspective. On July 30th of 2015, RCMP

20

polygrapher, Sergeant John Tost, T-O-S-T, told Shane Devlin in a telephone

21

conversation that that day Mr. Guilbert had submitted to a polygraph examination

22

in connection with the Neepawa Home Hardware fire of February 25 of '15, and

23

that he had failed the test. Mr. Devlin, I believe, that -- that evening -- I think he

24

was on holidays at the time, but that evening he communicated that information to

25

Economical's counsel, myself, and to the more important people at Economical,

26

with a warning that the information should be kept confidential.

27

28 Now, the chronology is important, I think, overall, depending on what you decide

29

obviously, but at that time there was no thought in the minds of anybody at

30

Economical that it might later be asserted that Economical had acted in bad faith.

31

The only issues on Economical's radar at that time were the issues of arson and

32

fraud, breach of statutory conditions 6 and 7, and the breach of the duty of good

33

faith by Mr. Guilbert. Those were the only duties. So when you're looking at --

34

when you're conceptualizing that information and looking at it now and later, if

35

you do look at it later, it's important to recognize that everybody knew at the time

36

Mr. Devlin -- or everybody thought, I guess, at the time that that information was

37

received that it would never see the light of day, that the result would be

38

inadmissible because they didn't think bad faith was going to be a -- bad faith of

39

Economical was going to be an issue. They never thought -- dreamt that they

40

would be seeking the admission for any purpose of the result of the polygraph

41

exam. They -- everybody knows that in arson and fraud, et cetera, it's not

1 admissible. Like, so you got that. And, you know, Mr. Devlin may speak to -- to
2 what weight, if any, what reliance, if any, one person might have given -- put on it,
3 but everybody knew that in -- in the -- on the questions that we thought then were
4 the issues in the case the polygraph was not in play.

5
6 And so remember the timing, so that's July 30th. And it was August 25th of 2015
7 that I wrote to Mr. Davids --

8
9 THE COURT: So that was July 30th of what year?

10
11 MR. FINLAYSON: '15.

12
13 THE COURT: '15, okay.

14
15 MR. FINLAYSON: Yeah. And it was only, like, less than a
16 month later that I wrote to Mr. Davids -- and this is in the -- it's in the materials.
17 It's actually volume 2, tab 38. It's the letter in which, on behalf of Economical, I
18 wrote to Mr. Davids and said the claim is denied based on arson and fraud and
19 breach of statutory conditions 6 and 7.

20
21 So thereafter, as you will hear and as you see -- have seen already, it's in the
22 materials before you, Economical's investigation continued. Further statements
23 were taken. You'll -- you'll hear from Mr. LaBrash and Mr. Devlin, for example,
24 that Economical did not get the OFC report, the report of Dick Harvey, until
25 October 7th. So after they had already denied coverage they get this report from
26 Harvey. It comes to me, and I say to Shane Devlin, you know, speak to him and
27 him and him. And you'll see statements that are within a couple of weeks of that
28 where the investigation continues. But at this time, again, still there's no idea that
29 bad faith is in play.

30
31 Then, on October 23rd of '15, the statement of claim is issued. And, of course, the
32 statement of defence and counterclaim were filed by Economical, and a defence to
33 counterclaim was filed on behalf of the plaintiffs. And then a motion is made by
34 Economical for production of the RCMP file. And on -- well, by order of Master
35 Berthaudin, on February 17 of 2016, that file was ordered to be produced to both
36 parties. And within that file was this, among other things, this document which is
37 the polygraph examination report. So in later February of 2016, Economical got a
38 report which says, among other things: (as read)

39
40 The main issue under consideration was whether the
41 subject was truthful in claiming he did not set fire to the

1 Neepawa Home Hardware store. It is my opinion ...

2

3 Sergeant Tost indicated on this form: (as read)

4

5 ... based on the polygraph examination, that in the above-
6 mentioned subject -- that the above mentioned subject
7 provided ...

8

9 And then there are three boxes, as I said, truthful, deceptive, and inconclusive, and
10 he's checked deceptive: (as read)

11

12 ... in response to these three questions.

13

14 So he answered these three questions in the negative, and Sergeant Tost
15 concluded, based on the exam, that the answers were deceptive. The first question
16 was: (as read)

17

18 On February 25th did you set that Home Hardware fire?

19

20 The answer was no: (as read)

21

22 On February 25th was it you that set the Home Hardware
23 fire?

24

25 The answer was no: (as read)

26

27 On February 25th were you the person that set that Home
28 Hardware fire?

29

30 And the answer was no. And then it goes on to discuss the circumstances, et
31 cetera.

32

33 So later February of 2017 (sic), Economical has this report in its possession.

34

35 THE COURT: '16 or '17?

36

37 MR. FINLAYSON: '16. '16.

38

39 THE COURT: Yeah.

40

41 MR. FINLAYSON: February 17th of '16. Sorry.

1

2 THE COURT:

Okay.

3

4 MR. FINLAYSON:

5 And within the RCMP file were many
6 statements, which are in evidence -- all the statements that -- I believe that all the
7 statements, apart from Mr. Guilbert's, himself, in the lengthy videotaped interview
8 that occurred after the polygraph -- videotaped interview that occurred after the
9 polygraph, all of the statements are in evidence, I believe. And it's important to
10 remember that, you know, obviously, Economical takes the matter very seriously,
11 was continuously re-assessing its position, and would have looked at all those
12 statements.

13 So, as I said, Economical, clearly, mistakenly, did not think, in the circumstances,
14 that an allegation of bad faith would be pursued, but it has been, which means that
15 any information that it possessed at the time of its denial, and thereafter, is
16 relevant. And the result of the polygraph is not sought to be adduced to establish
17 arson or fraud or bad faith by Patrick Guilbert, it is not sought to be adduced to
18 show that Pat Guilbert is dishonest or was dishonest, it is sought to be adduced
19 only because it has been asserted that not only was there no arson and no fraud and
20 no bad faith by Patrick Guilbert, but that the process by which Economical made
21 and maintained otherwise was dishonest or unreasonable. And to explain the
22 process that Economical followed, and to prove that it has acted honestly and
23 reasonable, it is not only entitled but actually -- My Lord, I go -- I go further, I say
24 it's legally obligated, it's legally obligated to refer to the polygraph.

25

26 Now, just as Your Lordship said, if Economical had relied on a reading of tea
27 leaves in coming -- in maintaining its denial, if somebody at Economical had
28 claimed to have heard the voice of God or Allah Mackenzie King, his dead mom,
29 you know, and said that that voice, God or my dead mom said deny that claim,
30 you would be entitled -- we would -- you would be entitled -- Mr. Guilbert would
31 be entitled to know that that was the case. There's no question about this. This is
32 not a -- I'm sorry, I don't really -- consider a different case just to show the
33 absurdity of not letting this evidence in for this purpose. Suppose that what
34 happened was that Mr. Guilbert had passed the polygraph, and suppose that
35 Economical, in the context of a bad faith allegation against it, concealed this and
36 then it was discovered. What would the plaintiff be saying, do you think? If Mr.
37 Guilbert had passed the polygraph -- John Tost phones up Shane Devlin on July
38 30th, 2015, and says, Shane, you're not going to believe this, he passed the poly,
39 and then Mr. Devlin -- we kept it, we concealed it, and somehow it came out.
40 What would the plaintiff be saying about whether it's relevant to the question of
41 Economical's good faith or bad faith? There's no question. And I -- I can say this

1 with absolute certainty, and my friend will not contradict me, I guarantee this, My
2 Lord, I guarantee that he will not say -- he will not say that if Mr. Guilbert had
3 passed the polygraph it would not be alluded to, relied upon, or in some way
4 adduced in this case. I guarantee it.

5
6 Now, Rule 53, which my friend relies upon, is what I think of as the expert rule of
7 the Court of Queen's Bench. And I guess, you know, in fairness, it is true that, sort
8 of, implicit in the polygraph result is an opinion, right. I mean, Sergeant Tost is a
9 polygrapher, he's an expert, and he's, in effect, opining with a check mark an
10 opinion which is, presumptively, of an expert nature to the effect that Pat Guilbert
11 was deceptive in his answers. But Economical doesn't seek to rely on the opinion.
12 We're not adducing the report or what we were told in connection with the
13 opinion. We're not going to be relying on it to say he was deceptive. We're not
14 going to be relying upon it to say that he committed arson. We're not going to be
15 relying upon it to say he committed fraud. The only thing we're relying upon it for
16 is to say we got this and you're entitled to know that this is one of the things that
17 was in play as the case went forward, especially once the issue of bad faith was
18 elevated to a real issue.

19
20 In the *Béland* case, the Supreme Court of Canada case, the point was there that the
21 polygraph was being used to oath-help, like, it was to do with the credibility of a
22 witness or a party. Well, that's not what we're doing. We're not adducing it to say
23 anything about Mr. Guilbert's credibility. And the Supreme Court said that it was
24 inappropriate -- by a majority, at least, said it was inappropriate because it, in
25 effect, deals with character evidence and displaces the traditional role of a judge or
26 a jury. So the plaintiff here confuses the case where we call -- adduce the
27 polygraph to establish that the plaintiff is a liar, which we don't, with a case where
28 we say only its information we got that is in the mix of -- that might have
29 influenced somebody at some point in time to some degree, keeping in mind that
30 when we got it we knew it wasn't going to be admissible so how much could we --
31 how much weight could you -- have you put on it, right. Maybe it gave somebody
32 in the mix comfort, like some kind of moral comfort, because who wants to deny a
33 claim on this basis unless you believe it to be true. So somebody might have got
34 some comfort from it, but everybody knew that it wasn't admissible, nobody relied
35 on it on the material issues, and Mr. Devlin will -- will speak to that.

36
37 Now, in the area of insurance law -- and this is not an isolated area, of course, but
38 in the area of insurance law, Canada and the United States have evolved in
39 tandem. It's very traditional for Canadian courts to look to be influenced by and
40 certainly consider American authorities in the context of insurance law. And in
41 many ways we follow them in connection with punitive damages and breaches of

1 duty of good faith. We -- we're a bit behind them in some ways. Maybe that's
2 good. But we -- we -- we are influenced by them, and it is totally appropriate for
3 Canadian courts to be -- at least consider what American courts have done. And
4 that's why we filed the authority we did, which is --

5
6 THE COURT: From Ohio.

7
8 MR. FINLAYSON: From Ohio, where it says exactly what
9 we're saying here is appropriate. And it's at, what is tab --

10
11 THE COURT: Fifteen.

12
13 MR. FINLAYSON: Yes, exactly. And it's at page -- page 4 of
14 8. And it's really that whole page that deals just with this issue. And I'll just go to
15 the second last paragraph since Your Lordship, clearly, has read it, but it says:

16
17 The better rule of law, and the one adopted here, is that
18 where an insured claims bad faith and the lack of a basis
19 for rejecting coverage by an insurer, the results of a
20 polygraph ... (exam by) the insured, taken with his
21 consent, are admissible with the proper cautionary
22 instruction as proof of a basis to reject coverage.

23
24 That seems reasonable. Like, really what's -- what's at stake, in essence, in a bad
25 faith assertion is, in some sense, state of mind. And how -- how can Economical
26 say -- like, I wouldn't -- I can tell you, I wouldn't be here making this argument if
27 he passed the polygraph, so how can it not be pertinent to say Economical got this,
28 you should know.

29
30 That's my -- those are my comments. Thank you.

31
32 THE COURT: I have a question for you --

33
34 MR. FINLAYSON: Yes. Yes.

35
36 THE COURT: -- before I hear -- because it may have to
37 do with the response. If -- if, for the record -- and I think you've -- you've
38 answered it in your submissions -- if, for the record, and assuming for the minute I
39 were inclined to allow it, what -- give me the words of the limitations that we
40 would put on it.

41

1 MR. FINLAYSON: This is what I proposed to Mr. Guilbert
2 on Friday, and I think it's still helpful. Pardon me, to Mr. Davids. It's really just the
3 second paragraph that you're concerned with now.

4
5 THE COURT: So really that last sentence --

6
7 MR. FINLAYSON: Exactly.

8
9 THE COURT: -- there.

10
11 MR. FINLAYSON: Yes.

12
13 THE COURT: Okay. All right. Thank you.

14
15 Mr. Davids?

16
17 **Submissions by Mr. Davids (*Voir dire*)**

18
19 MR. DAVIDS: My Lord, *R. v. Béland*, decided 30 years
20 ago, a decision of the Supreme Court of Canada, provides that polygraph evidence
21 is inadmissible in courts in Canada. The Supreme Court of Canada set out several
22 contexts in which the inadmissibility is found, including the general rule against
23 oath-helping, including the rule against past consistent statements. In other words,
24 you can't adduce evidence that says, oh, this statement is consistent with
25 something said in the past by the -- the witness.

26
27 THE COURT: M-hm.

28
29 MR. DAVIDS: Rule relating to character evidence. You
30 can't, sort of, bolster character with statements that aren't simply statements of
31 fact. And, last but not least, expert evidence.

32
33 The purpose for which my learned friend seeks to use the polygraph evidence in
34 this case is to submit the results in evidence. It doesn't have anything to do with
35 the mere taking of the polygraph test in a situation where passing or failing is not
36 at hand. It has to do with submitting the result. The result was a fail, therefore
37 Economical acted in good faith. That's what is happening here. The Court would
38 be on very spongy ground to say, well, I think we can let the polygraph in if it's
39 under certain very strict strictures. I suppose strict strictures is a bit redundant, but
40 the idea being that my learned friend's statement, which is certainly cogent,
41 certainly sets out what he is attempting to do, which is to say, well, it's not going

1 to the plaintiff's actual -- an actual finding against the plaintiff, it's going only to
2 the good faith of the defendant. But as my learned friend says, on one hand -- he
3 said two things in his submission. He said, well, if the polygraph were positive
4 you can be sure that the plaintiff would be saying what -- the polygraph was
5 positive, that's bad faith that we're still here. And then Mr. Finlayson goes on to
6 say if the polygraph was positive we wouldn't be here. Precisely, that's the whole
7 point, is that it has nothing to do with the examples in the cases set out in Mr.
8 Finlayson's book of authorities.

9
10 And I'll go to the Canadian cases, where he cites *Whiten*, and then one involving
11 this defendant, *Economical Mutual Insurance Company*. In each case, the issue is
12 an offer to -- an offer of a polygraph exam. Daphne Whiten offered to take a
13 polygraph, and the Court found, well, the jury must have considered that in its
14 deliberations as evidence of her good faith. But the point is there was no result
15 there. It was simply an offer and that's it. There was never a result put to the Court.
16 The same goes for the *Economical Mutual Insurance Company* case and the
17 numbered company in Ontario, but flipped it around. The insurance company said
18 will you take a polygraph, and the insured refused. And the Court of Appeal said,
19 well, that's relevant. We're not talking about results. We're talking about the
20 making of the offer to have the test and that's it, period. As soon as you have a
21 result you're in a completely different realm. The fact of the result cannot be
22 avoided. There is a result. So because there is a result, that is what is being
23 admitted into evidence. And the Supreme Court of Canada, in *Béland*, clearly says
24 you can't submit the result into evidence. It's clear.

25
26 So from that point of view, I -- I look for cases. Where -- where is this --

27
28 THE COURT: Well, to be -- to be fair, you haven't
29 submitted -- neither side, when I say you -- but it -- it talks about solely for the
30 purpose of bolstering. In other words, I -- I don't think it forecloses -- I don't read
31 it as absolute as you do. I mean, if -- it clearly says that you can't use it to oath --
32 what's the word they use?

33
34 MR. FINLAYSON: Oath-helping.

35
36 MR. DAVIDS: Oath -- oath-helping.

37
38 THE COURT: Oath -- oath-helping --

39
40 MR. DAVIDS: Yeah.

41

- 1 THE COURT: -- or to substitute the tester's discretion
2 for my own. I mean, that -- that, to me, was -- is crystal clear. Anyway, I'm just
3 saying I don't know if -- if I --
4
- 5 MR. DAVIDS: Well, but --
6
- 7 THE COURT: -- I --
8
- 9 MR. DAVIDS: -- but in the -- the specific context --
10
- 11 THE COURT: What about the American case, which
12 seems to be on all fours with this one?
13
- 14 MR. DAVIDS: Well, I -- the American case, read it
15 once. I don't have any comments about the American case, other than to say that
16 the -- the case specifically says the results of a polygraph examination taken with
17 his consent are admissible with the proper cautionary instruction. That's not the
18 law in Canada.
19
- 20 THE COURT: So that -- that's your answer. You're
21 saying even if it is on point, I -- I'm not --
22
- 23 MR. DAVIDS: Well --
24
- 25 THE COURT: -- not only I'm not bound to it, you're
26 saying that's not the law in Canada?
27
- 28 MR. DAVIDS: That's correct. The -- the -- the Court in
29 Ohio makes its decision based on the law as it sees it for the citizens of the State of
30 Ohio. The Supreme Court of Canada is clearly better authority. And -- and that's
31 the -- the simple response, is that the Supreme Court of Canada has to be followed.
32 The -- the Court would be, again --
33
- 34 THE COURT: But the facts in -- in -- in the Supreme
35 Court case are -- are also very different than the facts in our case.
36
- 37 MR. DAVIDS: But the principle is -- is the same. The --
38 the Supreme Court of Canada talks about the expert evidence and -- and the reason
39 why you bring in expert evidence, and that's the -- and that's the key, is --
40
- 41 THE COURT: Can you -- let me ask you -- and, again,

1 I'm not -- I'm cutting you off, but I -- I -- I've read the cases, we've had some pre-
2 discussion. But what do you say to the argument that if -- if I'm here to do -- to
3 decide fairly, both in respect of your client and the other side, that if -- if your
4 client has alleged bad faith in the context of punitive damages, in other words to --
5 as a -- as a pre-condition to getting punitive damages, that I'm foreclosed from
6 looking at all the evidence of the conduct of the -- of the insurer?

7

8 MR. DAVIDS: I don't think we're saying that.

9

10 THE COURT: Well, that's what you're -- that's what
11 you're saying, I think. If -- if I can't look at what -- as part of -- that they received
12 something and acted on it, just that fact, that -- that I'm -- that -- that there's a --

13

14 MR. DAVIDS: Your --

15

16 THE COURT: -- and -- and what I'm trying to weigh
17 that against is if I admitted it, and then looked at it once I've heard all the case of
18 bad faith, give it the appropriate weight -- I may give it no weight in the -- I may
19 say this was such a miniscule piece of the overall pie, but I really can't make that
20 determination based on the evidence I have so far.

21

22 MR. DAVIDS: But -- but that's -- that's precisely the
23 point, My Lord, is that Your Lordship doesn't need the result of the polygraph.
24 And *R. v. Abbey* -- well, *Béland* citing *R. v. Abbey*, it's at page 13 of 25 of the
25 report, under expert evidence, says when you accept an expert, what you, as the
26 Court, are doing is saying there are certain things not within my purview.

27

28 THE COURT: M-hm.

29

30 MR. DAVIDS: I --I can't figure out exactly what the
31 science behind this phenomenon is that the expert led evidence on. It helps the
32 Court --

33

34 THE COURT: Help me understand something. What
35 decision is it making for me in the context of the bad faith?

36

37 MR. DAVIDS: Well --

38

39 THE COURT: What -- what -- what -- what -- what
40 decision --

41

- 1 MR. DAVIDS: Yeah.
2
- 3 THE COURT: -- does the fact of the polygraph
4 determine for me in the context of -- I'm not talking about arson, I'm not talking
5 about anything that we've talked -- that -- in terms of the -- the -- the reason for the
6 denial --
7
- 8 MR. DAVIDS: Yeah. Yeah.
9
- 10 THE COURT: -- but in terms of the conduct of the
11 defendant, what decision does -- does -- does the consideration of the receipt of a
12 polygraph test determine for me, as opposed to what it takes away from my ability
13 to determine?
14
- 15 MR. DAVIDS: Well, I -- I think the -- the -- the key is
16 the second part. It -- it -- your deliberations are going to be based on the evidence
17 you've heard so far and the evidence that my learned friend is going to lead. If you
18 don't have the polygraph, that's what -- the Supreme Court of Canada is saying if
19 you don't have the polygraph, you're in no different a position than if you had the
20 polygraph. The Court is saying you've got plenty of other stuff with counsel
21 leading evidence and hearing cross-examination on that evidence, you've got all
22 you need to make your decision about bad faith.
23
- 24 THE COURT: But -- but you're not -- and you've said
25 yesterday and you're not saying anything different today -- you're not taking issue
26 with the fact of the polygraph?
27
- 28 MR. DAVIDS: No. We're taking issue with the
29 admission of the result. The -- the admitting of the result is -- whether it's only a
30 tiny bit or whether it's a fair bit or a lot, whatever it is --
31
- 32 THE COURT: What if that was a material piece in why
33 they acted the way they did? From their -- from --
34
- 35 MR. DAVIDS: But -- but if it -- if --
36
- 37 THE COURT: -- from their perspective --
38
- 39 MR. DAVIDS: -- but, My Lord, if -- if -- if -- if --
40
- 41 THE COURT: Because there's nothing wrong with them

1 -- say there was -- assume for a minute -- and I'm assuming, nobody has suggested
2 otherwise -- there's nothing wrong in terms of their receipt of the information.

3
4 MR. DAVIDS: Correct.

5
6 THE COURT: So -- and let me take an extreme --
7 maybe it's not an extreme, but you may not argue this, but what if you say there
8 was absolutely no basis for them to do the next step and they're -- they're
9 foreclosed -- they're -- (INDISCERNIBLE) per se, well, there was a basis, we had
10 received some information that caused us -- being the polygraph -- that caused us
11 to take the next step. So on one hand you're saying I can make the argument of bad
12 faith, but they can't explain why they took the step. That's -- this is what I'm, kind
13 of, struggling with in my head. Totally separate, and I'm -- I'm not speaking --

14
15 MR. DAVIDS: Yeah.

16
17 THE COURT: -- at all to my conclusions about
18 deliberate setting of the fire --

19
20 MR. DAVIDS: And -- and --

21
22 THE COURT: -- opportunity, nothing to do with that
23 piece of the case.

24
25 MR. DAVIDS: And -- and -- and here's why, because
26 they got a result. That's why, because they got a result.

27
28 THE COURT: Okay. Maybe let's -- I don't want to
29 foreclose you, but I do have a question for -- for Mr. Finlayson. We talked about it
30 a little bit when we were bantering things around. How -- I'll make a decision on
31 this, don't worry, today, and before we leave for today. Does anything more than
32 the fact of the -- and I'm not clear if Mr. Davids objects to this -- but if -- if the
33 evidence was everything you said except we received a polygraph and because of
34 our receipt we continued -- like -- I mean, do -- do we need the punchline? I mean,
35 it might be -- it might be obvious, but do we need -- do we need the punchline?

36
37 **Submissions by Mr. Finlayson (*Voir dire*)**

38
39 MR. FINLAYSON: You know, My Lord --

40
41 THE COURT: I don't know if that changes things, but, I

1 mean, if that --

2

3 MR. FINLAYSON: I -- well, I think it does, and I think the --
4 the -- the American case suggests it does. And -- and, you know, this wouldn't be
5 an issue if bad faith weren't asserted, right.

6

7 THE COURT: Yes.

8

9 MR. FINLAYSON: You know, the one way to do away with
10 it is for the plaintiff to abandon the assertion of bad faith. That could have been
11 done at any time once --

12

13 THE COURT: Yeah.

14

15 MR. FINLAYSON: -- they knew this was in -- in the mix. I
16 don't see -- if you say they got the polygraph and they continued on, it's certainly
17 an ambiguous message, right, because -- I guess if it was understood that -- yeah,
18 you see, I -- I can't speak to whether it influenced and how much it influenced any
19 of the deciders later on, especially when, you know, other stuff happened. I just
20 think it's right to admit it, that's what it comes down to.

21

22 THE COURT: Okay.

23

24 MR. FINLAYSON: But -- but if Your Lordship thought --
25 well, yeah, I just don't see -- I think the example I gave is -- is fair, that -- that if --
26 if Mr. Devlin's dead grandma had said, you know, we have to deny this claim --

27

28 THE COURT: M-hm.

29

30 MR. FINLAYSON: -- that would be admissible even though
31 it's crazy, right. It's admissible because -- and the plaintiff would want and should
32 want to know that --

33

34 THE COURT: Yeah.

35

36 MR. FINLAYSON: -- because it influences the decision
37 making and the reasonableness of the decision making. How do you -- how can
38 you say -- how can you deny us, Economical, the right to say, you know, we acted
39 -- if we lose on the arson, if we lose on everything else, we still acted reasonably,
40 and one of the reasons we say that is, look, he failed a polygraph.

41

1 THE COURT: And you're saying if the -- if the failure
2 of the polygraph isn't there -- I mean, not -- if someone were to do mischief, they
3 may say they acted on a --
4

5 MR. FINLAYSON: A whim or --
6

7 THE COURT: -- on a whim or something --
8

9 MR. FINLAYSON: Yeah. Yeah.
10

11 THE COURT: -- even though we have --
12

13 MR. FINLAYSON: Yeah.
14

15 THE COURT: -- the fact of the polygraph there.
16

17 MR. FINLAYSON: Yeah, it's -- I do need to correct
18 something my friend said before I forget. He said Mr. Guilbert failed the
19 polygraph so Economical was acting in good faith. We don't say that, right. We're
20 not saying that that's full answer or anything or that --
21

22 THE COURT: I've never assumed that that's the case.
23

24 MR. FINLAYSON: Okay. Okay. Yeah. But -- but he did say
25 that that --
26

27 THE COURT: Yeah.
28

29 MR. FINLAYSON: -- was my argument, and it isn't, so,
30 okay. I'm sorry.
31

32 THE COURT: Sorry, I -- I kind of went to Mr.
33 Finlayson. Did you have anything --
34

35 MR. DAVIDS: Well --
36

37 THE COURT: -- we're a little out of order, but I had to
38 -- wanted to ask my question.
39

40 **Submissions by Mr. Davids (*Voir dire*)**
41

- 1 MR. DAVIDS: Well, yes. Mr. Finlayson, in effect, said I
2 -- I don't know the degree to which it influenced his client, and that's precisely the
3 point, is that it doesn't really matter the degree to which it influenced his client
4 because that's not an area you're going to explore unless you are talking about the
5 result itself being relevant. It's the result. That's what he's saying, he wants the
6 result in.
7
- 8 THE COURT: He -- he is saying that. I'm -- I'm not --
9
- 10 MR. DAVIDS: Yeah.
11
- 12 THE COURT: -- I'm not -- I was asking him what if you
13 kept -- but I think, in fairness --
14
- 15 MR. DAVIDS: Yeah.
16
- 17 THE COURT: -- and he'll acknowledge, that at the end
18 of day --
19
- 20 MR. DAVIDS: That --
21
- 22 THE COURT: -- but he -- but it -- it's in the context of
23 the damages and the -- and the bad faith, and -- and he -- and he says -- and how
24 do you address -- I don't want to involve -- I'll use my deceased grandmother, but
25 -- but, like, if -- if -- taking that analogous -- analogy, without, in any way,
26 diminishing the seriousness of -- of what we're talking about, I mean, is -- is this
27 anything other than a piece of information that, like it not, existed at the time that
28 caused them to go -- go further, and can it not be admitted -- and remember this
29 isn't going to a jury or anything, this is me. It's not like I have to give an
30 instruction on this piece. I -- I -- I understand -- and I'm not saying it's a different
31 approach, but contextually this is a judge alone trial. I'm not giving the fact finding
32 to the jury here. I -- it's -- it's me. But if I -- if we stipulate that it is -- it's irrelevant
33 -- it's relevant really only to the allegation of bad faith. To me, in one hand -- and
34 I'm sympathetic to what you're saying. It's, kind of -- you're raising an argument
35 and saying but you can't use all your -- your bullets to fight back. And you don't
36 object to the bullet being shot, you're just saying that we can't talk about the bullet.
37 And -- and maybe that's a bad analogy too, but -- but in one sense that's what it
38 keeps coming down to me. You're raising an issue, as you're entitled to do, and --
39 and, at the end of the day, may be right, but to raise it and then say but you can't
40 do anything to -- to -- or not you can't do anything, you can't put all your -- you
41 can't use all your ammo --

1
2 MR. DAVIDS: And -- and --
3
4 THE COURT: -- to me also has to be factored into this.
5
6 MR. DAVIDS: Well -- but to use that analogy, it's as the
7 Supreme Court of Canada is saying, find -- however many bullets you have in
8 your arsenal, if it's a hundred, what you do is -- and this is one, what, in effect, you
9 do is you -- you -- you put something around that bullet and say and this casing
10 and stuff substitutes for this bullet. So you've got 99 others, and then you put --
11 and -- and then you do work to, in effect, replace that bullet. That's what -- that's
12 what the Court --
13
14 THE COURT: Yeah, and the replacement would be
15 conditions that it cannot, in any way, be used to, basically, allege bad faith against
16 your --
17
18 MR. DAVIDS: No, I don't think that's what --
19
20 THE COURT: -- client.
21
22 MR. DAVIDS: -- the Supreme Court is -- is saying.
23
24 THE COURT: Okay.
25
26 MR. DAVIDS: I -- I --
27
28 THE COURT: Well, maybe then I just have to make the
29 decision.
30
31 MR. DAVIDS: I -- I think the Supreme Court --
32
33 THE COURT: I hear what you're saying.
34
35 MR. DAVIDS: -- the Supreme Court is saying it's not a
36 question of safeguards, it's a question more of you don't need something, in a
37 sense, redundant. You already have that bullet. You say you have 99 and here's the
38 hundredth. Well, you actually do have the hundredth somewhere else.
39
40 THE COURT: Where is it and what use can be made of
41 it?

1

2 MR. DAVIDS:
3 goes to --

It's all of the -- all of the evidence that

4

5 THE COURT:

So I have 99, not 100?

6

7 MR. DAVIDS:

Well, I think the Supreme Court of
8 Canada is saying you don't need the hundredth.

9

10 THE COURT:

Okay. So I think we're down to an
11 interpretation of the law you both have given me. I propose that we break for a
12 half-an-hour. Let me just gather my -- my thoughts, and I'll make a ruling.

13

14 MR. DAVIDS:

Thank you, My Lord.

15

16 THE COURT CLERK:

Order, please rise.

17

18 THE COURT:

Thanks.

19

20 THE COURT CLERK:

Court will take a recess.

21

22 (ADJOURNMENT)

23

24 THE COURT CLERK:

All right, we're back on the record.

25

26 **Ruling (*Voir dire*)**

27

28 THE COURT:

Thank you for your submissions. These
29 are my reasons on the *voir dire* respecting the polygraph test. Should a transcript
30 be ordered, I reserve the right to revise or elaborate on the reasons in a manner
31 consistent with my conclusions.

32

33 As Mr. Davids did not take issue with Mr. Finlayson's explanation of how and
34 when the polygraph came to be in the possession of Economical, I will simply
35 incorporate Mr. Finlayson's explanation into these reasons by reference, and it will
36 certainly be reflected on the transcript.

37

38 Mr. Guilbert does not assert requesting the polygraph amounted to bad faith. In
39 support of his position, Mr. Guilbert relies on the 1987 Supreme Court of Canada
40 criminal case of *R. v. Béland*. In *R. v. Béland*, two accused were seeking to re-
41 open their defence so that they could each take a polygraph and then tender the

1 results in court. The conclusions of the court are adequately summarized in the
2 headnote of the CanLII version of the decision, and I'll just read that:
3

4 The results of a polygraph examination are not admissible
5 as evidence. The polygraph has no place in the judicial
6 process where it is employed as a tool to determine or to
7 test the credibility of witnesses. The admission of such
8 evidence would offend well established rules of evidence,
9 in particular, the rule against oath-helping, which prohibits
10 a party from presenting evidence solely for the purpose of
11 bolstering a witness' credibility, the rule against the
12 admission of past or out-of-court statements by a witness
13 and the character evidence rule. The polygraph evidence is
14 also inadmissible as expert evidence. The issue of
15 credibility is an issue well within the experience of judges
16 and juries and one in which no expert evidence is
17 required. Further, the admission of polygraph evidence
18 will serve no purpose which is not already served. Such
19 admission will disrupt proceedings, will open the trial
20 process to the time-consuming and confusing
21 consideration of collateral issues and will deflect the focus
22 of the proceedings from the fundamental issue of guilt or
23 innocence.
24

25 And I will stop there.
26

27 I respectfully disagree that the proposed purpose for the evidence is as described
28 by Mr. Guilbert. More particularly, it is Mr. Guilbert who, in support of his
29 punitive damages claim, alleges the defendant conducted itself in bad faith. It is in
30 this context, i.e. as a shield, that Economical seeks to refer to the polygraph. It is
31 not to undermine credibility or any other evidentiary rule, but instead, to establish
32 Economical did not act in bad faith, as alleged by Mr. Guilbert. It goes to course
33 of conduct, nothing else.
34

35 I believe it is appropriate to admit the evidence. It is probative -- it's probative
36 value outweighs any possible risk of confusion. And bear in mind, that at the end
37 of the day, when I assess the evidence as a whole, the polygraph may prove to be
38 of little or of no weight, or somewhere in between. It will go to course of conduct,
39 as I said, and that is it. I further order that it won't be referred to or relied on or
40 used in any way in the context, argument, or the determination of the issues or
41 arson, fraud, breach of statutory conditions, and/or breach of duty of good faith, as

1 pled by Economical.
2

3 I find support for my decision in the Ontario Superior Court decision of Fisher's
4 Fine Cleaners (phonetic), which, in turn, relied on the 1999 Ontario Court of
5 Appeal decision in the *Whiten v. Pilot* litigation. As I do in this case, the Court in
6 Fisher's Fine Cleaners distinguished the *R. v. Béland* decision. My views also find
7 support in the Ohio 1985 decision of *Moss v. Nationwide Mutual Insurance*. And
8 to that end, I'll read in two paragraphs appearing on page 4 out of 8:
9

10 This case does not involve the question of whether and
11 under what circumstances the results of a polygraph test
12 are admissible as bearing on the issue whether Robert
13 Moss committed the arson. Rather, the question presented
14 is whether such evidence is admissible on the issue of
15 whether defendant had a valid basis for rejecting plaintiffs'
16 claim and, if the evidence is so admissible, whether its
17 probative value is outweighed by the possibility of
18 confusion of the issues.
19

20 Skipping down one paragraph:
21

22 The better rule of law, and the one adopted herein, is that
23 where an insured claims bad faith and the lack of a basis
24 for rejecting coverage by an insurer, the results of a
25 polygraph examination of the insured, taken with his
26 consent, are admissible with the proper cautionary
27 instruction as proof of a basis to reject coverage.
28

29 It is for these reasons I'm prepared to admit the fact and result of the polygraph,
30 subject to the conditions that I have previously noted a few moments ago.
31

32
33
34 EXCERPT CONCLUDED

IN THE MATTER OF PATRICK GUILBERT AND GUILBERT ENTERPRISES
LTD. V. ECONOMICAL MUTUAL INSURANCE COMPANY,
TRADING AS THE ECONOMICAL INSURANCE GROUP

I, KARI SHORT, Court Transcriber, HEREBY MAKE OATH AND SAY that the foregoing typewritten pages being numbered T One (T1) to T Nineteen (T19), inclusive, contain a true and correct transcription of the recorded proceedings taken herein to the best of my knowledge, skill and ability.



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