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The Beard Winter Defender reports on legal issues related to the insurance industry.

The Beard Winter LLP Insurance Litigation Group acts for numerous insurers, ensuring that their claims are resolved promptly and economically, or proceed to trial quickly when necessary.

The Examination Under Oath: Underused and Underappreciated.

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The Examination Under Oath: Underused and Underappreciated

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Your comments are appreciated and If there are any accident benefits or tort topics that you would be interested in reading about, please feel free to **email** me and I will certainly explore the possibility of writing an article.

An insurer is at a sizeable disadvantage when a claimant chooses to proceed to Arbitration as opposed to Litigation in a claim for accident benefits. Among other things, an insurer does not have a right of discovery in an Arbitration and accordingly will typically not have an opportunity to assess how a claimant will present as a witness, (or even meet her), until the Arbitration. Although the claimant will most often attend at the pre-hearing at the Financial Services Commission of Ontario, (FSCO), her contribution to the discussions is normally limited to a few words at best. Insurers are left essentially to guess-work and speculation about the claimant's credibility, key details of her life, and substantive matters about her claim. As of October 1, 2003, however, an important provision was enacted which has granted insurers the right to proceed with an examination under oath. The examination under oath is a powerful tool which is a right given to an insurer and not the insured. Yet, for some reason, this tool is being underused and underappreciated by insurers.

Section 33 (1.1) of Schedule provides that an insured "shall" submit to an examination under oath if so requested by an insurer but is only required to attend at one examination for that particular accident. Accordingly the choice of when to conduct the examination under oath is important as the insurer only gets one shot. The insurer is not restricted to asking questions regarding the specific benefits that are in dispute as the section provides that: "the insurer shall limit the scope of the examination under oath to matters that are relevant to the person's ***entitlement to benefits***". This means that an insurer can ask all relevant questions regarding his "***entitlement to benefits***" as opposed to just benefits that are in dispute.

The section is silent as to the time frame in which the examination under oath must be conducted. The Court of Appeal in ***Baig v. Guarantee Company of North America (2007)*** (leave to appeal to the Supreme Court of Canada denied), concluded that even in cases in which the insured has commenced a civil action against the insurer, this did not affect the separate statutory entitlement of the insurer to conduct an examination under oath. The insurer's right to conduct an examination of the insured under oath is statutory. As such, an insurer has the right to proceed with an examination under oath even after the commencement of a Regular Rules Statement of Claim, a Simplified Procedure Statement of Claim, a Small Claims Court Claim,

or an Application for Arbitration. Indeed, an insurer would have the right to conduct both an examination under oath in a Regular Rules Court Action and a separate examination for discovery.

The main drawback of the examination under oath is the consequences of non-cooperation. Section 33(1.1) (2) states that the repercussions of the claimant failing to attend the examination is that the insurer is not liable to pay a benefit in respect of any period during which the insured person failed to comply. In ***Salah v. State Farm (2005)*** and ***Balanki and Zurich (2005)*** the insurers sought to stay the arbitration due to the non-attendance of the insured at the examination under oath similar to the failure of an insured to attend at a section 42 assessment. The Arbitrators concluded that the only remedy provided under the section is a suspension of benefits (section 33(2)) or if non- compliance is unreasonable, the loss of those benefits for the period of non-compliance (section 33(4)). Otherwise, the Arbitrators are powerless to order any other sanction.

As such, if a matter has proceeded to Arbitration on account of the fact that all benefits have been terminated, then there is no repercussion to the claimant failing to attend at an examination under oath. The fact that his benefits have already been terminated means that a suspension of his benefits is irrelevant. However, if the claimant is only proceeding to Arbitration with respect to one benefit such as medical benefits, but is still receiving other benefits such as an income replacement benefit, an insurer is entitled to suspend or ultimately deny all of his benefits (including in this example income replacement benefits) for the time period to which the claimant fails to attend at the examination under oath. The suspension of the benefits is not limited to simply the benefits that are in dispute.

Accordingly, the most effective use of the examination under oath provisions is to conduct the examination when the claimant has something to lose by failing to attend. This means that an insurer has to be strategic regarding when to conduct the examination.

For instance, in questionable soft tissue injury claims where the claimant is receiving income replacement benefits, it may be beneficial to examine the claimant to determine whether their complaints are legitimate, the nature of their job, whether they have obtained another job, attempts to seek other work, and assess credibility. In claims involving caregiving / housekeeping / attendant care benefits an insurer would have the right to inquire as to the claimant's pre-accident activities, the family situation, post-accident activities, the invoices submitted, and the veracity of the claim. For medical benefits, the extent to which the claimant has incurred a benefit from the treatment, whether they are in fact going for treatment, and why they continue to go if their condition is not improving. If surveillance has been obtained then this would be a good opportunity to specifically question the claimant in order to ascertain the usefulness of same.

For more substantial claims, it is an opportunity to meet and assess the claimant with an eye on what will transpire into the future. For claims involving potentially fraudulent circumstances, an examination under oath is an essential investigative tool. If an insurer alleges fraud on behalf of the claimant, but cannot prove this at

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the Arbitration, then there is a distinct possibility that the insurer be obligated to pay both the denied accident benefits and a special award.

At the examination under oath, the insurer has an opportunity to determine through the questioning what further records are required and ought to be obtained. Although there is no statutory right to ask for an undertaking at the examination under oath, an insurer can certainly make requests for documentation pursuant to section 33 of the Schedule. Most importantly, the examination under oath transcript is admissible evidence at trial / arbitration and may be used effectively to cross-examine the claimant if her evidence is contradictory.

There is no question that the vast majority of claims revolve around the credibility of the claimant. The best way of assessing this is to proceed to an examination under oath and put the claimant under a microscope. Although there is a short term cost for retaining a lawyer to conduct the examination under oath, there is a distinct likelihood that there will be a cost savings down the line. At the very least, in all circumstances, the insurer will have a more complete and better understanding of the nature of the claim.

Successful Advocacy at Mediation – What works?

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The most egregious error that Counsel commits at a Mediation session is the failure to recognize a serious problem in their case. It actually amazes me the number of times that this occurs.

When you have a serious flaw in your case whether it relates to liability or damages you must deal with it immediately and you must deal with it effectively. The ground work for dealing with such a significant problem requires that it must be prominent in your mediation memo. You can rest assured that your opponent is well aware of the glaring problem in your case and your failure to deal with it in your mediation memo will only strengthen his or her views about the weakness of your case. In other words, if you are afraid to deal with it in the memo, the chances are it will not be mentioned in your opening statement. A failure to deal with such an issue merely serves to entrench the opposite side in their beliefs about the case. You will never be able to reacquire credibility on this issue no matter how hard you try. Everything you do will be interpreted as posturing.

No matter how significant your problem, with a little bit of creative thinking you can find something positive about it. It is simply the ability to utilize the long standing cliché “Is the Glass half full or is it half empty”.

The situation is no different then if you are preparing for trial and had to deal with an admission by your client such as a plea of guilty to a Highway Traffic Act charge. You would deal with that issue in examination in chief; you

wouldn't wait until your opponent cross examined on that issue.

Similarly, at mediation you must deal with these kinds of issues up front. For example, if when acting for a defendant who makes a left hand turn at an intersection; dealing with an argument in support of contributory negligence can be a problem; but you can turn it around. You can deal with that issue by simply conceding in your Mediation Memo; that yes your client was negligent but the plaintiff was traveling at a very fast rate speed and you have engineering evidence to prove it. Review the evidence, and the strength of your proof, and it will be clear that your argument has merit.

When you have an obvious problem in a lawsuit whether it is factual or based on a legal issue; don't hide from it, acknowledge it but then turn it around. Simply demonstrate to your opponent that in spite of this significant stumbling block, your case has other positive aspects which are compelling.

Another classic situation is plaintiff Counsel, dealing with a threshold case that is not clearly capable of meeting the threshold requirements. The simplest way to deal with that, is to point out in the opening statement that you do have a case with supporting medical evidence that will meet the threshold requirements but you recognize that you have to deal with the deductible because the general damages do not exceed 100,000.00 dollars. Once you make the concession that the deductible is on the table, many defence Counsel will abandon the threshold argument just because the amount they will be paying will be reduced by 30,000.00 dollars.

Just imagine what your opponent is thinking if in the above described case, if you neither mentioned the threshold or the deductible, in either your memo or your opening statement.

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