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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.

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THE BEARD WINTER DEFENDER

Statutory Third Parties and the Tripartite Relationship

Alexander J.D. Curry

In the recent decision of *Master Dash* in the case of *Ho v. Vo* [2006 CarswellOnt 6739] the conflict issues associated with an insurer Statutory Third Party and the “tripartite relationship” as between an insured, insurer and defence counsel was examined. Beard Winter had been retained by an Insurer to defend the Defendant Vo in a case arising out of a motor vehicle accident. Beard Winter filed a defence on behalf of Vo and attended at the Examination for Discovery of the Plaintiff. After the non-attendance of Vo at his examination for discovery and a failure to communicate with counsel a motion was brought to remove Beard Winter as Solicitors of Record and to appoint the insurer as a Statutory Third Party pursuant to Section 258 (14) of the Insurance Act. This of course was on the basis that Mr. Vo had not cooperated in the defence of the action as per his obligations.

Master Dash allowed Beard Winter to be removed as solicitors of record, however, refused to add the insurer as the Statutory Third Party in the action. *Master Dash* reasoned that should he allow Beard Winter to add the insurer as the Statutory Third Party and continue to act for the insurer in the ongoing handling of the action a conflict would arise. The Master reasoned that given the fact that the motion materials indicated that Mr. Vo’s “non cooperation” constituted a policy breach Beard Winter would be have represented two adverse parties in the handling of the litigation.

Master Dash opined that it would be improper for Beard Winter to act against the interest of their former client [the insured] in the same matter which they had previously represented the said client. He reasoned in this manner even though no confidential information was ever received from Mr. Vo and despite the fact that Beard Winter had never even spoken to the Defendant.

Overall and based on strict application of conflict principles it is difficult to disagree with reasoning underlying *Master Dash*’s decision. It is felt that the court had concerns in the manner in which Statutory Third Parties had been added in the past as “a matter of course” and without analyzing the conflict issues arising from same. It is clear that a defence counsel in a standard piece of automobile litigation has two distinct and possibly adverse clients; the Insured and the Insurer. The adversity (strictly speaking) arises in the court’s mind by the perception that a counsel previously representing an insured (and possibly obtaining evidence through such a relationship) may ultimately be representing an insurer client as statutory third party and attempting to secure a subrogated interest against the prior client once the issues as between the said insurer and the plaintiff are resolved. That said, it is opined that a conflict does not automatically

arise out of such a situation. In many cases defence counsel never has any contact with the insured prior to bringing such a motion. Even if he or she does have such contact the evidence obtained through the relationship as between defence counsel and the defendant insured is likely not of the nature that would raise conflict issues. In most cases such evidence will be used by the Statutory Third Party to advance the very same interests; dispute liability and minimize damages.

To distinguish this particular situation in the future insurance adjusters’ and defence firms must be careful to separate coverage and defence issues. It seems that the Order may not have been made by *Master Dash* if the issues of coverage were not addressed in the Affidavit material delivered in support of the motion.

We are not aware of any case in which the decision of *Master Dash* has been followed. In fact, in many jurisdictions including Toronto, motions to add statutory third party insurers continue to be successful as a matter of course. However, this case may serve to remind the insurance industry that the role of the ‘tripartite relationship’ in cases where coverage is an issue is being actively addressed by the Court and may continue to undergo changes in the future. It is recommended that if there are any issues that may be arising prior to defence it should be brought to the attention of defence counsel so that a proper plan may be put in place. If a defence is entered and then cooperation fails to be forthcoming (or some other breach) on behalf of the insured counsel should be careful in their drafting of the motion material to set the complete history of the relationship with the insured. It is felt that if there is no contact with the insured the court is likely to take no issue with such a motion. However, with contact, generation of evidence etc. it is felt that the court will be leery in light of the conflict issues that arise. With proper preparation and evidence within the motion materials it is expected that we will slowly return to such motions being successful as a matter of course. Same will result in savings given that it will become unnecessary for the insurer to have to go to the expense and time of retaining new counsel in order to protect the interests of the insurer as statutory third party.



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Why a WAD II Injury is not a WAD II Injury

Cary N. Schneider

In an effort to both simplify and streamline claims, one of the changes to the *Schedule of Accident Benefits* may have had the unintended effect of creating a significant trap for unsuspecting insurers.

Section 5(2)(e) of the *Schedule* states as follows:

- 5(2) The insurer is not required to pay an income replacement benefit...
- (e) for any period longer than 16 weeks after the accident, in the case of an insured person whose impairment comes within the *Grade II Whiplash Guideline*, if the accident occurred after April 14, 2004.

On the face of it the language is simple enough. If the claimant is diagnosed with suffering from a WAD II injury, she is entitled to receive income replacement benefits to a maximum of 16 weeks. So, rather than conducting an insurer examination, the most obvious approach is to pay the insured income replacement benefits for the maximum allotted period and deny payment thereafter based on the clear wording of the statute. Unfortunately, it is not so simple.

In the May 9, 2006 FSCO preliminary issue hearing decision of *Kieffer v. Economical* it was found that Ms. Kieffer was entitled to benefits beyond the 16 week period, despite the fact that she suffered WAD II injuries. There was no dispute that she suffered WAD II injuries. The Arbitrator found that the question was not merely whether a claimant has suffered a WAD II injury, but whether the claimant's impairments come within the WAD II Guidelines. Ultimately, it was concluded the WAD II guidelines are in fact just that -- a guideline as opposed to a rule.

A claimant could be excluded from the WAD II restrictions if (1) he suffers from radicular back symptoms, (2) has "other" significant impairments (distinct from the WAD II), and (3) has additional symptoms associated with the WAD II injury that required separate treatment from that provided under the guideline. Furthermore, section 3 of the *Grade II Whiplash Guideline* sets out exceptions in which an individual who suffers from a WAD II injury does not come under the Grade II Whiplash Guidelines if there are specific pre-existing occupational, functional, or medical conditions that significantly distinguish the insured's needs from that of others with similar impairments.

So, if a claimant suffers from pre-existing back pain complaints, then she may fall outside of the *Grade II Whiplash Guidelines*. If subsequent to the accident the claimant develops psychological problems or chronic pain, (as in the case of *Kieffer*), then he may fall outside of the Grade II Whiplash Guidelines. It is not difficult to imagine circumstances in which the claimant would be unanimously diagnosed with suffering from a WAD II injury, but not subject to the *WAD II Whiplash Guidelines*.

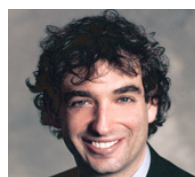
The problem is how do you address this?

If an insurer relies on the initial disability certificate in which the claimant is diagnosed with suffering a WAD II injury and dutifully advises the insured that income replacement benefits will be terminated at the 16 week mark then this is being done at the insurer's potential peril. An insurer may not receive the pre-accident clinical notes and records of the treating physician for greater than one year after the denial (if at all) at which point it is determined that the claimant has a significant health history. Psychological problems often do not manifest themselves for months or years post accident and it is clear that chronic pain cannot be properly classified as chronic until at least six months post-accident. At that point, income replacement benefits have been terminated and the insurer has not had the benefit of an insurer examination report to address these issues.

The claimant may serve her own assessment just prior to the expiry of the 104 week period in which a conclusion is reached by the doctor that the claimant suffers from a disability that falls outside of the *WAD II Whiplash Guidelines*. The insurer would not have any medical assessments to respond and it is far from certain that an insurer would be allowed to conduct its own section 42 assessments (if the matter were commenced in Superior Court then you would at least have the right to proceed with a defence medical assessment). To say the least, this would be a difficult case to win at Arbitration.

The *Kieffer* decision was not appealed and at present there are no other decisions in FSCO or in Superior Court that address this issue. I expect that this will become a key and pivotal issue into the future. At the end of the day, it is always best to obtain an insurer examination report in order to deny payment of income replacement benefits. In order to address the issues raised in the *Kieffer* decision, it would also be wise to ask the assessor to provide an opinion as to whether the claimant's WAD II injuries fall within the *WAD II Whiplash Guidelines* (and provide the doctor a copy for his reference).

Good claimant's counsel will find ways to thwart the supposedly clear intentions of the *Schedule*. Good adjusters will recognize the pitfalls in the *Schedule* and take a proactive way to strengthen the denial.



Cary N. Schneider is an associate at Beard Winter who specializes in accident benefit and tort defence claims. He focuses on being effective and efficient in his law practice with the goal of achieving excellent results for his clients in a timely matter. For more information please visit <http://www.beardwinter.com/people/profile.asp?259>

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