

## Insurance Coverage Conflicts: Is There An Alternative To “Independent” Counsel?

by Michael Teitelbaum

In a previous edition of *Noteworthy* (2002, No. 5), the Ontario Court of Appeal’s decision in *Brockton v. Frank Cowan Co.*, 57 O.R. (3d) 447, was considered. The *Brockton* decision laid down broad guidelines for determining whether an insurer has lost its usual right under a liability policy to appoint defence counsel and control the defence of a claim against its insured. The Court held that the “question is whether counsel’s mandate from the insurer can reasonably be said to conflict with his mandate to defend the insured in a civil action. Until that point is reached, the insured’s right to a defence and the insurer’s right to control that defence can satisfactorily co-exist”.

Two decisions by Ontario Masters dealing with the procedural issue of whether or not two counsel can represent one party have indirectly raised the issue of whether another solution might exist to situations where conflicts may arise between insurers and insureds.

Before exploring the comments made by Masters Haberman and Beaudoin, some *caveats* should be posted.

As indicated, the Masters’ decisions dealt with the procedural question of whether the Ontario

*Rules of Civil Procedure* permit the appointment of two separate counsel to represent a party. While, as will be seen, examples of insurance coverage issues are either given or exist in the cases, no analysis is offered in respect of the insurance implications of appointing two counsel to represent an insured; that is, one counsel representing allegations the insurer contends are covered by its policy, and the other to represent the alleged uninsured interests of the insured.

It appears no insurance coverage implications were raised or considered by the Masters in arriving at their decisions in either *Housley v. Barrie Police Services Board*, 62 O.R. (3d) 139, or *J.L. v. Sabourin*, [2002] O.J. No. 445 (Q.L.) (S.C.J.).

Moreover, there was no discussion of the Court of Appeal’s *Brockton* decision.

These decisions raise questions that may impact on the longstanding issue of whether, when there are covered and uncovered claims under an insurance policy, an insurer may be obliged to defend the entire claim by independent counsel at the expense of the insurer. Arguably, leaving aside the insurance implications, these two cases present a possible procedural remedy to the vexing coverage issues.

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In *Housley*, Master Haberman noted that the general rule is that there must be only one solicitor of record. However, there are instances where the norm can and should be departed from which require leave of the court to allow this exceptional approach. The onus is on the party seeking leave to establish a basis for it. In *Housley*, no leave was sought. Instead, the Plaintiff simply delivered a Notice of Change of Solicitors naming two different counsel as his solicitors of record. No explanation was provided as to why this was considered necessary or appropriate. In the circumstances, the Plaintiff's Notice of Change was struck.

The significance of *Housley* is in the arguably *obiter* comments of Master Haberman when discussing whether it was possible for a party to have two solicitors of record.

In the course of her Reasons, Master Haberman referred to the decision of Master Sandler in *755568 Ontario Ltd. v. Linchris Homes Ltd.*, 70 O.R. (2d) 35 (1989), in which two different solicitors of record were permitted in the unique circumstances of that case. One solicitor was appointed to defend a real estate broker who was sued, while another solicitor represented the broker to assert a counterclaim for his unpaid commission. At page 143, Master Haberman stated:

"I note that the inquiry in *Linchris* was focused on the particular needs of the

case, in that it was clear one party may have had two different interests in the same piece of litigation. *This scenario will also occur where a Defendant is subject to a claim that exceeds the limits of his insurance coverage or where punitive damages, excluded from most policies are claimed along with damages that would be covered. In those types of situations, as in Linchris, the Court is usually amenable to*

*" the Court is usually amenable to having two counsel on record for a party, one to represent the interests of the insurer, the other to represent the uninsured interest of the party"*

*having two counsel on record for a party, one to represent the interests of the insurer, the other to represent the uninsured interest of the party. This approach is seen as an exception to the general rule, usually as a result of potential conflict between the two interests."* [emphasis added]

Master Haberman also refers to the *Sabourin* decision, in which

the facts are more directly insurance-related.

In *Sabourin*, the Defendant, Upper Canada District School Board, was sued as the employer of a Defendant who allegedly sexually and physically assaulted the Plaintiff. During a period of two years of the four years over which the assaults took place, the School Board had no insurance coverage and, therefore, "may be directly responsible for any damages claimed by the Plaintiff".

Master Beaudoin states:

*"[Master Sandler in Linchris] contemplated a number of situations where separate interests needed to be represented by different solicitors. One example is the potential conflict between an insured and his insurer and the need for the insured to have his own independent counsel available to him. In this case, given the potential lapse in coverage, it will be in the interest of the Board to establish that all off [sic] the acts of sexual assault took place during the period of time when there was insurance coverage in place. Conversely, counsel for the insurer will be arguing that these actions took place at an earlier time when there was no coverage. It is reasonable in this case for the Board to be represented by two solicitors as there are two distinct and conflicting interests at stake."* [emphasis added]

The observations of both Masters are interesting. It is also

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interesting to consider, however, that in the *Brockton* case, the Court of Appeal found that although there had been a reservation of rights by the insurer based on the absence of coverage for punitive and exemplary damages, the reservation was “not based on any conduct of the insured that would be an issue in the underlying litigation. Hence defence counsel was under no mandate to show that the insured had acted in a way which would remove the insurer’s indemnity obligation”. Moreover, when there are two counsel representing two conflicting interests, as in *Sabourin*, *quaere* whether it is in the interests of an insured to have counsel representing them at odds with

each other instead of focusing their attention on the defence of the case and the interests of the insured.

Notwithstanding these issues and others, the School Board in the *Sabourin* case was allowed to have two solicitors over the objection of Plaintiff’s counsel who had brought a Motion to limit the School Board’s representation to one counsel, on the basis that it would be unduly stressful for his client to be subjected to two counsel attending at Mediation, Discovery and Trial. The Master found that the Court could control the process through the Rules insofar as the conduct of Examinations for Discovery and the Mediation were concerned, in order

to avoid duplication or an abuse of process. The Master also held that the Trial Judge would be easily able to control any abuse of the process at Trial.

It remains to be seen whether this approach may be adopted in other cases, and whether when a thorough-going analysis of the implications for doing so is undertaken, whether it will find favour as a practical solution to a longstanding problem, or be considered an approach that except perhaps in very special circumstances might be found to create more problems than it solves.

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## When Is A Cap Not A Cap

*by Jamie Trimble*

When is the Cap on claims under the Simplified Rules not a Cap on Claims under the Simplified Rules? -- when it comes to applying contributory negligence.

In *Qubti v. Ontario Jockey Club* (2003), 62 OR (3d) 290 (Div. Ct.), the Plaintiff had a claim worth well in excess of \$25,000, but waived the claim in excess of \$25,000 in order to take advantage of the Simplified

Rules (Note: the cap has now been raised to \$50,000). At trial, the trial judge assessed damages at \$35,000 (despite the \$25,000 cap under the Simplified Rules), fixed contributory negligence at 50%, applied the reduction to the assessment of damages, and awarded a Judgment of \$17,500.00. The Defendant appealed, arguing that waiving the amount in excess of the Rule 76 cap waived the excess for all purposes. Therefore, the 50% contributory negligence

reduction should have been applied to \$25,000.00, to reduce the judgment to \$12,500.00.

The Divisional Court agreed with the trial judge. It gave Rule 76 a liberal interpretation and held that a party, in waiving the amount in excess of the cap under Rule 76, only waives the entitlement to a judgment in excess of the cap. Thus, if the assessment in this case were over \$50,000, the award would have been limited to \$25,000.

## Firm News

The Partners of Hughes, Amys LLP are pleased to announce that, effective May 15, 2003, Jarvis Scott will replace Paul French as Managing Partner of the Firm.

We wish to thank Paul for his dedication to the demanding and responsible duties of his office; his tireless efforts over the past 6 years have enabled the Firm to successfully carry on in a rapidly changing business environment. He has made an extraordinary contribution and is most deserving of our praise and gratitude. Paul will of course remain with the Firm as a Senior Partner and looks forward to continuing his practice.

We welcome and congratulate Jarvis Scott, as Paul's successor, and look forward to many years of continuing success under his leadership.