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Managing Conflicts—The Defence Perspective

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MANAGING CONFLICTS—THE DEFENCE PERSPECTIVE

The purpose of this paper is to provide a brief introduction to the ethical issues that arise from the relationship between an insurer, an insured and the lawyer retained to represent both and to highlight some of the common circumstances in which insurance defence counsel find themselves in a conflict of interest.

The opinions expressed in this paper are my own alone and do not necessarily reflect the opinions of ICBC or any other insurer.

I. Introduction

The peculiar relationship that exists between defence counsel, an insured and the insurer is a hot topic of discussion in the profession these days. You will find several CLE papers delivered in recent years debating whether the relationship is a tripartite or joint retainer and the ethical issues that can arise from the relationship. In the July-August 2006 *Benchers' Bulletin*, the Law Society's Ethics Committee invited comments from the profession on its draft policy for lawyer's obligations in joint retainers in the defence of third-party liability claims. The final draft of the policy is anticipated to be released sometime this year. Joint retainers were the topic for discussion at a CBA Insurance Law Subsection Meeting in November 2006. Despite there being active debate in the profession, there is a dearth of case authorities addressing the same issues. The dialogue reveals that there is considerable controversy amongst counsel about the ethical duties arising in insurance defence work.

The starting point for the discussion is to understand that it is well settled that counsel retained by an insurer to defend a claim brought against an insured has two clients: *Chersinoff v. Allstate Insurance Co.* (1969), 3 D.L.R. (3d) 560 (B.C.C.A.). Although the insurer sends you the file and pays your bill you must always remember that you act for both the insurance company and the defendant. You have ethical obligations to both clients.

Chapter 6 of the *Professional Conduct Handbook* sets out the applicable duties when acting for two or more clients. They are:

> **General principles**
>
> 1. As a general principle, a lawyer has a duty to give undivided loyalty to every client.
>
> 2. A lawyer may act for clients adverse in interest in circumstances permitted by this chapter.
>
> 3. A lawyer may, with informed client consent, represent clients in circumstances that might, in the future, give rise to divided loyalties.
>
> **Acting for two or more clients**
>
> 4. A lawyer may jointly represent two or more clients, if at the commencement of the retainer, the lawyer:
>
> (a) explains to each client the principle of undivided loyalty,
>
> (b) advises each client that no information received from one of them as a part of the joint representation can be treated as confidential as between them,
>
> (c) receives from all clients the fully informed consent to one of the following courses of action to be followed in the event the lawyer receives from once client, in the separate representation of that client, information relevant to the joint representation:
>
> i. the information must not be disclosed to the other jointly represented clients, and the lawyer must withdraw from the joint representation;
>
> ii. the information must be disclosed to all other jointly represented clients, and the lawyer may continue to act for the clients jointly, and
>
> (c) secures the informed consent of each client (with independent legal advice, if necessary) as to the course of action that will be followed if a conflict arises between them.

However, the rules for acting for two clients as set out in the *Professional Conduct Handbook* are subject to the terms of the particular governing insurance policy or, in the case of ICBC, ss. 73, 74 and 74.1 of the Regulation enacted pursuant to the *Insurance (Vehicle) Act*, R.S.B.C. 1969, c. 231. In fact, there are arguments that the joint retainer model has no application to the relationship between ICBC defence counsel and ICBC and the defendant.

Those sections provide:

> **Duties of Insured**
>
> 73(1) An insured shall
>
> ...
>
> (c) cooperate with the corporation in the investigation, settlement or defence of a claim or action,
>
> (d) except at his own cost, assume no liability and settle no claim, and
>
> ...
>
> (2) The corporation is not liable to an insured who, to the prejudice of the corporation, fails to comply with this section.

Duties of corporation

74. On receipt of notice of a claim for damages brought against an insured for which indemnity is provided under this Part and subject to an act or omission by the insured entitling the corporation to raise any question as to whether or not the insured is entitled to indemnity, the corporation, at its expense, shall

(a) assist the insured by investigating and negotiating a settlement, where in the corporations opinion its assistance is necessary, and

(b) subject to an application and directions given by the court under section 79 of the Act, defend in the name of the insured any action for damages brought against the insured.

Rights of corporation

74.1 Subject to section 79 of the Act, on assuming the defence of an action for damages brought against an insured, the corporation shall have exclusive conduct and control of the defence to the action and, without limiting the generality of the foregoing, the corporation shall be entitled to

(a) appoint and instruct counsel to defend the action,

(b) admit liability, in whole or in part, on behalf of the insured,

(c) participate in any non-judicial process which has as its goal the resolution of a claim, and

(d) compromise or settle the action.

Most third party liability policies contain terms similar to the provisions enacted in the Regulation.

As a consequence, there is a unique professional relationship that arises between defence counsel and the clients, the insurer and the defendant insured. It is a relationship that does not squarely fit within the model of a joint retainer as currently contemplated by the *Professional Conduct Handbook* (as is apparently recognized in practice as described in the July-August *Benchers' Bulletin*). For example, I would suggest that Rule 4(b) of Chapter 6 has no application when retained by ICBC to act on behalf of an insured defendant.

The major difference is that the insurer is entitled to retain and instruct counsel of its choice and its counsel is entitled to take instructions from the insurer, over the protest of the insured, subject to the duty of good faith (for cases that address the general principles of the rights of insurers to instruct counsel see *Groom v. Crocker*, [1938] 2 All E.R. 395, *Ontario v. Kansa General Insurance Company* (1991) 3 O.R. (3d) 543, reversed on unrelated grounds (1994) 17 O.R. (3d) 38; leave to appeal refused by S.C.C. (1994) 19 O.R. (3d) i).

The fact that, for example, Regulation 74.1 specifically provides for ICBC's exclusive conduct and control of the defence and its right to settle claims somewhat minimizes potential conflict for counsel regarding the conduct of the action. Otherwise, the reality for conflict is considerable. Consider, for example, when defending a husband being sued by his wife or a parent being sued by their child, whose interests are more truly aligned with the plaintiff than with their defence. In those circumstances, the husband or parent might otherwise instruct ICBC appointed counsel to accept an unreasonable settlement offer or to not conduct independent medical examinations. Despite ICBC's entitlement to control the litigation, defence counsel often find themselves in positions of an apparent conflict by virtue of the ongoing solicitor and client relationship with the insured.

Defence counsel should always be alive to the potential for conflicts and immediately address any conflict when one develops. It would be unwise to take a "wait and see" approach. These can be difficult and complicated issues to wrangle with and counsel would be wise to seek advice from others. There are many sources for such advice: other counsel; ICBC's Special Counsel's office (on limits and liability issues in particular, and subject to the advice below, on coverage issues); a bencher; and counsel at the Law Society. Any conflict issue should be approached thoughtfully and cautiously, with the two fundamental duties of confidentiality and undivided loyalty front and center in the analysis (the Supreme Court of Canada has addressed the duty of confidentiality in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 and the duty of loyalty in *R. v. Neil*, [2002] 3 S.C.R. 631).

The balance of this paper addresses conflicts in the context of defending ICBC claims being the most common experience for most of you; however, these issues equally arise with other third party liability insurers. I want to emphasize, again, that these are my thoughts alone and do not necessarily reflect ICBC's position on these matters.

II. Conflicts in ICBC Cases

Conflicts in ICBC cases typically arise in three circumstances: liability, coverage and limits issues.

A. Initial Retainer

The first step when a file comes in the door is to conduct the usual client conflict check. Despite ICBC providing instructions and paying your bill, the general rule remains that you cannot act against former or present clients.

ICBC will not, knowingly, assign the defence of multiple defendants to one counsel where there are true liability issues and the potential for the claim to exceed policy limits. However, you should be alive to the possibility that mistakes happen and, for example, should never blindly take an adjuster's instructions to file appearances on behalf of multiple defendants where there is a bona fide liability issue nor admit liability where there is the realistic risk the claim may exceed policy limits. An exception can be made for a global admission of liability where there is a live liability issue as between defendants but the plaintiff is a passenger (and so no prospect of liability against them) so long as there is no realistic risk that policy limits will be exceeded.

Before you file an appearance (or any other pleading) or receive the file material from the adjuster, you are wise to establish:

1. the terms of the retainer (i.e., on whose behalf are you retained or are you acting as coverage counsel);
2. whether there are any coverage issues;
3. whether there are any policy limits issues;
4. whether there are any out of province or excess insurers involved;
5. whether there are any unusual WCB or lessor/lessee issues; and
6. whether liability is in issue.

This means contacting the adjuster and learning enough about the claim so that you can feel comfortable with the retainer to receive the file material. It may require that you ask probing questions of the adjuster including the state of the medical information, who is acting for the plaintiff and when the last TTD benefit was paid. This is your first opportunity to catch a potential conflict.

Once you have the file material in hand, review it carefully to satisfy yourself that you are able to act for the party or parties on whose behalf ICBC has retained you and that it is appropriate to file the pleadings that ICBC is instructing you to file.

You should be careful when the file material does arrive in your office that the adjuster has not accidentally forwarded any privileged material that you should not have received (e.g., a privileged statement from another defendant). If you do, immediately return the confidential material to ICBC unread and advise them that you are doing so.

B. Representing Multiple Defendants

ICBC's right to retain one counsel to defend multiple defendants has been addressed by the Court of Appeal in *Mara (Guardian ad litem of) v. Blake* (1996), 23 B.C.L.R. (3d) 225. In that case, the plaintiff had the misfortune of having been involved in four accidents. ICBC retained one counsel to represent all named defendants in the four separate actions and instructed that counsel to admit liability, but plead the seatbelt defence in three of the actions and to deny liability in the fourth action. All four actions were to be tried together before a jury. The trial judge would not allow the trial to proceed unless ICBC was prepared to abandon the seatbelt defence in the three actions in which liability was admitted and to appoint separate counsel in the fourth action in which liability was denied. ICBC refused and the Judge ordered:

> ... the trials of these actions be adjourned generally because all of the defendants in the four actions are represented by the same counsel, despite having divergent interests resulting from issues of liability and contributory negligence raised on the pleadings in one or more of the separate actions ...

The Court of Appeal held, despite the "apparent conflict" there was no "disqualifying conflict" of interest. In so finding, the court addressed the question as to whether any conflict, in the circumstances, was such as to override the insurer's right to appoint and instruct counsel of its choice as follows:

> Each defendant in this case has, therefore, granted to the insurer the exclusive right to control and conduct the defence to the action against him. Subject to the duty of good faith, the insurer alone is entitled to appoint and instruct counsel, to settle within the limits of the policy notwithstanding that the insured may object, or to defend the claim notwithstanding that the insured may wish to settle. Essentially, by taking up the policy of insurance, the insured has agreed that, subject to 'good faith' remedies, his interest (at least in non-financial terms) and his wishes will be subordinated to those of the insurer in return for the latter's obligation to indemnify him for damages arising from the final award or settlement made against him. This reality would appear to have been accepted by the defendants in this case, none of whom have objected to I.C.B.C.'s appointment of one counsel to defend the four actions.

The Court noted that a Judge is always free to point out the potential for conflict and the need for counsel to be "scrupulously careful about his or her instructions." However, it is the Law Society that has the primary responsibility for the regulation and supervision of the conduct of counsel who may be in a position of conflict. The court retains inherent jurisdiction to intervene and remove counsel but that discretion should only be exercised with "the highest level of restraint" and only where the administration of justice is jeopardized.

Obviously, policy limits were not in issue in *Mara*. Subject to the comments below, if policy limits are in issue, separate counsel must be appointed for each of the defendants in the separate actions regardless of whether liability was admitted (generally, liability should not be admitted where there are policy limits issues) or denied on any of the claims. Counsel may act for the driver and owner of the same vehicle.

C. Policy Limits

One of the most common claims leading to conflicts are those in which the plaintiff's claim realistically appears likely to exceed the limits of the available insurance policies. The potential for policy limits issues inherently leads to a conflict of interest between defendants who are adverse.

As a general rule, liability should never be admitted where there is a realistic risk for a claim to exceed policy limits. There can be a few strategic exceptions to this "do not admit liability rule"; for example, where liability is hopeless and maintaining a denial may inflame a jury. In those circumstances, liability should never be admitted without the defendants' fully informed consent and written specific instructions to do so.

Counsel should ensure that they are familiar with the two leading authorities in BC addressing bad faith in the context of policy limits issues: *Fredrikson v. Insurance Corporation of British Columbia* (1990), 44 B.C.L.R. (2d) 303 (S.C.) and *Shea v. Manitoba Public Insurance Corporation* (1991), 55 B.C.L.R. (2d) 15 (S.C.). For a recent authority see *McLean v. Insurance Corporation of British Columbia*, 2007 BCSC 91.

In *Fredrickson*, the Court found that ICBC had met its obligations to the insured by acting in a fair an open manner and by approaching the question of settlement as if only its own resources were at risk.

At 69 of *Shea*, the Court summarizes the law relating to an insurer's duty to its insured as follows:

1. The relationship between insurer and insured is a commercial one, in which parties have their own rights and obligations;

2. Within the commercial relationship, special duties may arise over and above the universal duty of honesty, which do not reach the fiduciary standard of selflessness and loyalty;

3. The exclusive discretionary power to settle liability claims given by statute to the insurer in this case, places the insured at the mercy of the insurer;

4. The insured's position of vulnerability imposes on the insurer the duties:

   a) of good faith and fair dealing;

   b) to give at least as much consideration to the insureds' interests as it does to its own interests; and

   c) to disclose with reasonable promptitude to the insured all material information touching upon the insured's position in the litigation, and in the settlement negotiations.

5. The fact that the insured is at the mercy of the insurer for the purposes of settlement negotiations gives rise to a justified expectation in the insured that the insurer will not act contrary to the interests of the insured, or will, at least, fully advise the insured of its intention to do so;

6. While the commercial nature of the relationship permits an insurer to assert or defend interests which are opposed to, or are inconsistent with, the interests of its insured, the duty to deal fairly and in good faith requires the insurer to advise the insured that conflicting interests exist, and of the nature and extent of the conflict;

7. The insurer's statutory obligation to defend its insured imposes on the insurer, where conflicting interests arise, a duty to instruct counsel to treat the interests of the insured equally with its own; and where one counsel cannot adequately represent both conflicting interests, an obligation to instruct separate counsel to act solely for the insureds, at the insurer's own cost;

8. The insurer's duty to defend includes the obligation to defend on the issue of damages, and to attempt to minimize by all lawful means the amount of any judgment awarded against the insured. In this case that would include arguing that court order interest and no fault benefits are payable in addition to the policy limits, where such an argument is available in law; and

9. Defence preparations and settlement negotiations must take place in a timely way, and, where last minute negotiations are required, advance planning must be made to ensure that the insureds' interests are given equal protection with those of the insurer.

You are entitled to continue to act on behalf of a defendant (or defendant owner and driver of the same vehicle) whose policy limits are at risk (it is not a "disqualifying conflict" as per *Fredrikson*), but in doing so, you must be vigilant in keeping in mind the *Shea* principles.

A file that initially appears to be well within policy limits can change and counsel must always consider the impact of new information on the assessment of quantum until the matter is concluded.

If at any time, policy limits appear to be in issue, you must immediately provide advice to the defendant of that fact and recommend that they seek independent legal advice. It is important to put the defendant on notice by letter. Your letter should include advice about the specific risks resulting from a judgment exceeding the limits, the potential for conflicts of interests, your role in the defence of the case only and that you cannot provide any legal advice beyond that (i.e., to do so would be giving coverage advice and potentially contrary to ICBC's interests). You should follow up your correspondence to ensure that the letter was received and understood by the client. If there are language barriers, you should retain an interpreter to assist so that you can be satisfied that the defendant has understood your advice. If the defendant delays in retaining independent counsel, you should encourage them to do so; it will make your life easier. There may be circumstances in which you should consider recommending to ICBC that it pay for independent legal advice (e.g., the defendant is unsophisticated or where there are language barriers).

From that point, you must continue to keep the defendant informed of developments including offering copies of any of the medical or other reports, etc. They should be promptly informed of any settlement discussions as well as provided with copies of any settlement offers and your opinions regarding quantum and settlement. And, of course, the claim should never be settled for an amount over the policy limits without the defendant's express and informed consent. It is important for defence counsel to ensure that the defendant and their independent counsel understand that all offers of settlement must be made through ICBC's defence counsel as counsel of record. Any independent negotiations conducted directly between the defendant or independent counsel and the plaintiff could put the defendant in breach of his or her obligations to co-operate in the defence of the claim.

Most importantly, you must continue to vigorously defend the claim and to pursue settlement at the earliest and every opportunity.

In circumstances where there is a realistic risk that the policy limits may be exceeded, you must never act for more than one driver/owner defendant. If you have been handling a Part 7 claim, you must cease to do so and ask that ICBC appoint other counsel in that action. Query whether you must cease to act where the Part 7 action is purely a pro forma action (i.e., there are no benefits which were owed and it was merely commenced to protect against a limitation period).

D. Defending Tort and Part 7 Actions

It is well settled that defence counsel may defend both the tort claim on behalf of an insured and a Part 7 action on behalf of ICBC (*Klingbeil (Litigation Guardian of) v. Worthington Trucking Inc.* (1999), 172 D.L.R. (4th) 761 at para 19).

However, on those claims in which the policy limits are in issue, there is a conflict of interest in acting in the defence of the tort claim and the Part 7 action. You should not act on behalf of ICBC on any insurance coverage issues including in the Part 7 action. Further, it is in the interests of the insured to push as much of the claim onto ICBC under Part 7 and vice-versa. This is also true if acting on behalf of a defendant who carries excess insurance and the claim appears likely to exceed the third party liability coverage provided by ICBC even if it is within the coverage extended through the excess policy.

E. Coverage Issues

Coverage disputes will lead to a "disqualifying conflict" of interest (*Ontario v. Kansa General Insurance Co., supra*). For a discussion of an insurer's right to elect to defend an insured potentially in breach of coverage under a reservation of rights see the *Kansa* case.

It is important for defence counsel to establish the scope of the retainer and to be mindful of those terms from the moment a file is referred to your office. You need to understand whether you are retained to provide coverage advice to ICBC or, alternatively, if ICBC has retained you to act on behalf of a defendant. You cannot accept a retainer to do both.

If you are being retained as coverage counsel, you are not acting on behalf of the insured and so owe no duty to the insured (*Lust v. Lewis* (1989), 39 C.C.L.I. 233, *Planidin v. Insurance Corporation of British Columbia et al.*, 2004 BCCA 498) for so long as you do not have any contact with the insured. It is possible to be initially retained to provide coverage advice and if coverage is determined to be in order, to subsequently act for the insured (for example, see *McLean, supra*). Once retained to act on behalf of an insured, you should not engage in providing any further opinion to ICBC on coverage issues. However, there is authority that where an insurer refuses to assume the defence of an insured, and subsequently determines that a defence is owed, that the insured may be entitled to retain and instruct counsel of his choice (*Wear v. Robertson* (1969), 38 C.C.L.I. (2d) 140 (B.C.S.C.)).

Defence counsel may provide coverage advice to ICBC if the defendant is uninsured and ICBC is defending the claim pursuant to s. 20 of the *Insurance (Vehicle) Act* or if the defendant is in breach and ICBC is defending the claim by way of a Third Party Notice.

There may be circumstances where an insurer has retained you to act on behalf of a defendant and in the course of reviewing the file you discover facts that reveal a breach, apparently overlooked by the insurer. As long as you have not established any contact with the defendant or received any information, directly or indirectly from the defendant, you may offer your advice regarding the breach issue. In fact, there is case law that suggests you may have a positive duty to advise an insurer on coverage issues in those circumstances (*Fellowes, McNeil v. Kansa General International Insurance Co.*, (2000), 22 C.C.L.I. (3d) 1 (Ont. C.A.) (appeal to SCC discontinued, [2000] S.C.C.A No. 543). The same may be true for information that you uncover from a third party (i.e., unrelated to the defendant) as a result of your own investigation prior to establishing any contact with the defendant. If you do so advise the insurer on the breach issue, from that moment forward you are considered to be coverage counsel and cannot act on behalf of the defendant for so long as the coverage issues remain.

However, ICBC defence counsel should be mindful that ICBC may have retained you to act on behalf of a defendant and, unbeknownst to you, also retained coverage counsel in the background because of the possibility of a breach. In those circumstances, ICBC would not want you to actively investigate coverage issues even if there was information contained in the file revealing a potential breach. Thus, a firm understanding of the terms of your retainer is important.

Sometimes during the course of a file, a coverage issue arises because the defendant, your client, discloses for the first time facts which would put them in breach of their coverage. For example, it was clear to you from the file material that ICBC had no inkling that alcohol was involved in an accident. While preparing the defendant to give evidence on their discovery, the defendant tells you that he or she cannot remember the circumstances of the accident because they were impaired. This is a "disqualifying conflict" and requires that you take no further steps and immediately withdraw from the defence. You cannot disclose the information revealed to you by the defendant to ICBC nor can you disclose to ICBC the reason you have to withdraw.

The more difficult circumstance to handle happens when the damning disclosure occurs for the first time during the course of a discovery. As defence counsel, you should attempt to stop the discovery and cease to act. It may not be possible for you to control the conduct of the discovery. In those

circumstances, you must withdraw immediately after the discovery. As in the previous example, you cannot offer any opinion to ICBC about the consequence of the evidence (i.e., an opinion that the defendant would be in breach). However, there is controversy in the profession as to whether you are able to report to ICBC by merely factually outline the evidence without commenting on the implications of the disclosure.

What if the information which raises a coverage issue comes to you from a third party unrelated to the defendant, for example, during an interview of an unrelated witness to the accident? In my opinion, the fact that the information comes from a source other than the defendant should have no impact upon the outcome of the situation. Your duty of undivided loyalty places you in a "disqualifying conflict" and requires that you immediately withdraw. Are you able to report, factually, the information provided by the witness? If the witness is not known to ICBC, are you able to report the existence of the witness to ICBC? Again, there is controversy in the profession. In my opinion, once you are in a disqualifying conflict you cannot take any further steps whatsoever (unless, for example, some procedural step of a housekeeping nature is required to protect both the insured's and the insurer's interest or is owed as an officer of the court). You cannot offer any further opinion on the file. The practical consequence is most unsatisfactory; all it means is that the same problem is passed onto a new lawyer presumably with the same results.

ICBC's Special Counsel's office has a wealth of experience in matters of coverage issues and are always prepared to give helpful advice. However, you must be mindful of the manner in which you present the information to ICBC if you chose to seek their advice on any coverage issues. You are obliged to maintain confidentiality and so you can never identify the defendant by name. You must never disclose any facts which might allow ICBC to identify your client so that means always presenting a hypothetical and taking care in limiting the details. Ultimately, the conflict may lead to you having to recuse yourself and the mere act of sending the file back to ICBC has the potential of identifying the identity of the defendant and the cause of the conflict.

F. Conflicting Instructions from the Insured

ICBC's legislative right to instruct counsel regarding the conduct of litigation can directly collide with the wishes of an insured defendant.

It is common to have a defendant protest an admission of liability. As set out above, under Regulation 74.1 ICBC has the authority to make such an admission over the objection of the defendant, absent any limits concerns. However, counsel must always be careful not to prejudice a defendant's right to pursue their own personal injury claim by making an unrestricted admission of liability.

The Court of Appeal has recognized that the interest of a defendant insured by ICBC is often aligned with that of the plaintiff, as is the circumstance of a husband being sued by his wife and thus the husband is really only a nominal defendant and the real defendant is ICBC (*Banyay v. Actton Petroleum Sales Ltd.* (1996), 26 B.C.L.R. (3d) 75). Accordingly, there may be circumstances in which defence counsel can call evidence to contradict their client, the insured. In *Banyay*, defence counsel led evidence to contradict the insured defendant's testimony that the plaintiff, a passenger in his vehicle, was wearing a seatbelt. The plaintiff had argued that the defendant's evidence was an "admission." The Court of Appeal rejected that submission on the basis that it was not a statement against interest since the defendant was really only a nominal defendant.

ICBC is entitled to instruct its counsel to take positions in the course of the defence of an action which may be contrary to the interests of an insured defendant (*Alden v. Spooner* (May 7, 2001), New Westminster S041688). In *Alden*, the defendant, Mr. Alden, was the father of the plaintiff and by the time of trial the action had been discontinued against him (there were multiple car accidents). Mr. Alden sought to have his previous defence counsel disqualified (she also acted on behalf of other defendants) on the basis of conflict. In dismissing the application, Mr. Justice Wilson said:

> ... [Mr. Alden's previous counsel] may well take positions that are contrary to his interest, for example, in the course of cross-examination bringing out matters that may be embarrassing to him or raising matters which, if the claim is successful, would result in a reduction of the amount otherwise awarded to the plaintiff, in this case his daughter. Here he clearly has an interest in supporting the claims of his daughter, but that fact is not sufficient to put counsel appointed by the Insurance Corporation of British Columbia in a conflict such that she should be disqualified from acting as counsel at trial. Again referring to the *Mara* decision, I.C.B.C. in this case does have the exclusive right to control and conduct the defence of the action. That involves the appointment of counsel, and the positions taken by counsel in the defence of the action.
>
> So, notwithstanding that there may be a conflict with Mr. Alden's interest in terms of information being provided by him, pursuant to a statutory duty, being used in cross-examination, or that if the claims of Ms. Alden are not successful he will incur greater expenses, I am not satisfied that those establish a ground for disqualifying Ms. Armstrong as the counsel appointed by I.C.B.C.

In *Gignac v. Vieira* (December 8, 1997), Vancouver B940676, Madam Justice Saunders denied an application by the defendant, Viera, to have the Statement of Defence filed by his ICBC defence counsel amended and his ICBC defence counsel removed. Mr. Vieira was the driver of a vehicle in which his fiancée, the plaintiff, was a passenger when he drove into a fallen tree during a storm injuring both. Ms. Gignac commenced an action against Mr. Vieira and the City of Surrey. Mr. Vieira commenced an action against the City of Surrey and defence counsel was appointed. Mr. Viera sought the removal of a reference to "inevitable accident" in the Statement of Defence filed by his ICBC counsel on the grounds that it would be seen as an admission, contrary to his interests. Madam Justice Saunders held that the pleading did not prejudice Veira in his claim against Surrey because it did not allege inevitable accident in general but was made from the point of view of Viera encountering the tree. She further held:

> Secondly, I am satisfied that the pleading is not contrary to Mr. Viera's interest, as that term is used in the *Shea* decision, as Mr. Viera is not engaging the insurance contract between himself and the Insurance Corporation of British Columbia when he sues the City of Surrey.

In *Jackman (Guardian Ad Litem of) v. Jackman*, 2006 BCSC 507, the Court recognized the right of defence counsel to maintain control over access to a defendant who was the parent of the plaintiff and had important and relevant information necessary to the conduct of a plaintiff's claim.

So defence counsel is entitled to take all instructions from ICBC in matters such as whether liability can be admitted or whether to settle a claim, for so long as there are no policy limits in issue. Typically, a defendant is unaware of the day-to-day conduct of an action or when settlement offers are made. As set out above, the dynamic changes dramatically when the defendant's policy limits are in issue.

Does a defendant have the right to compel disclosure of any information in his or her ICBC's counsel's file where there are no policy limits? What if the information is sought solely to assist the plaintiff in the claim as might be in the circumstances of a defendant who is the husband of the plaintiff? Can the husband insist that defence counsel permit him to look through his file or provide him with copies of privileged documents or surveillance tapes? For an interesting discussion on this point, I refer you to Chapter 1: Preliminary Matters written by J. Derek James in CLE's publication, the *BC Motor Vehicle Accident Claims Practice Manual* at §1.23.

G. Owner/Driver Conflicts

Typically, no conflicts arise for counsel in the owner/driver retainer except in two circumstances: where vicarious liability is an issue (i.e., there is a dispute as to whether the owner consented to the

driver using the vehicle); or where there are policy limits issues and separate allegations of negligence made against the owner (e.g., the owner failed to maintain the vehicle). In both of these situations, counsel should act for either the owner or the driver but not both. Otherwise, there is no "disqualifying conflict" preventing defence counsel from acting for both an owner/driver in a limits case.

Counsel may act for an owner as a defendant and ICBC as a Third Party in those cases in which the driver (only) is found to be in breach where there are no policy limits issues. In fact, providing that there are no consent issues, it is possible to act for the owner and for ICBC as Third Party (where the defendant driver is in breach) where policy limits are in issue (i.e., the circumstances are akin to acting for an owner and defendant driver not in breach where policy limits are in issue). There is a unity of interest between the owner and ICBC as third party in those circumstances.

H. Lessor/Lessee Conflicts

In *Yeung (Guardian ad litem of) v. Au*, 2006 BCCA 217 (aff'd, [2007] S.C.J. No. 45), the BC Court of Appeal overturned the former cases limiting liability against lessors of motor vehicles.

Yeung has left open the question of whether a non-driver lessee is considered an "owner" within the meaning of s. 86(3) and, therefore, not vicariously liable for the negligence of another person operating a vehicle. There is the potential for conflict of interest between the driver and the lessor and the non-driver lessee where there are policy limits issues. For the reasons outlined in the next paragraph, this potential conflict is eliminated in respect of motorists governed by the *Insurance (Vehicle) Act* who are involved in an accident after November 8, 2007.

Since *Yeung*, *Bill 35, Miscellaneous Statutes Amendment Act (No. 2), 2007* came into force on November 8, 2007 amending the *Insurance (Vehicle) Act* and the *Motor Vehicle Act* to provide that vehicle leasing and rental companies are vicariously liable for the negligence of their lessees or of persons operating the vehicle with valid consent. Further, the Act limits the amount payable by vicariously liable lessors to a maximum of $1 million dollars for any one incident (see s. 82.1 of the *Insurance (Vehicle) Act*) (there is some uncertainty as to whether the meaning of the section is that the $1 million is addition to the insurance available to the driver or is limited to $1 million). Thus there is a "disqualifying conflict" which would arise in acting for a driver and a vicariously liable lessor where there is a risk of exceeding policy limits.

I. Workers Compensation Conflicts

There are potential conflicts peculiar to workers compensation claims that require counsel to direct their attention to if being retained to act on behalf of more than one defendant. Section 10(7) of the *Workers Compensation Act* provides that, where the injuries of a plaintiff who is a worker were caused partly by a worker and partly by a non-worker, the plaintiff worker can only recover that percentage of damages assessed against the non-worker. A judgment in these circumstances is not joint and several but several only and s. 4 of the *Negligence Act* does not override s. 10(7) of the *Workers Compensation Act* (see *Mitrunen v. Anthes Equipment Ltd.* (1984), 57 B.C.L.R. 287, appeal dismissed, [1985] 3 W.W.R. 445; *Frandle v. MacKenzie* (1990), 51 B.C.L.R. (2d) 190 (C.A.)).

ICBC's interests and the non-worker's interests are aligned in seeking to push as much of the liability as possible onto the worker defendant. Accordingly, there is a clear conflict that would arise if accepting the retainer to act on behalf of a non-worker defendant and a defendant who was covered under s. 10(7) of the *Workers Compensation Act* where policy limits are in issue.

J. Familiarity with Witnesses

It is inevitable that, at some point, during the course of your career, you will be asked to take on a file in which you have familiarity with a potential witness whether they be a lay witness (e.g., a friend of yours witnessed the accident, you worked for the plaintiff's employer while in law school) or an expert witness (you share the same GP, or your favourite IME neuropsychologist has provided an opinion to the plaintiff). As counsel, you must ask yourself whether, in the circumstances of the case, are you able to fulfill your duty of undivided loyalty. Will you be able to objectively report to your client regarding the effect of the potential testimony from the familiar witness? Will you be able to vigorously cross-examine your friend or GP at trial?

Thus it is important, when you assume conduct of an action that you turn your mind to whether you know any of the witnesses and, if so, whether that impacts upon your ability to fully defend the action.

III. Conclusion

The lesson is for counsel to be alive to conflicts from the moment a file comes in the door and to address any conflict problems that arise immediately. It is always best to take a conservative approach when trying to steer your way through the ethical minefield that conflicts create.