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UNINSURED AND UNDERINSURED MOTORIST COVERAGE: 2014 UPDATE

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Introduction

This paper is intended as an overview of the current law in Ontario regarding uninsured and underinsured motorist coverage. Although these areas have certain similarities – both are highly complex, technical areas of the law that arise when there is insufficient insurance to cover the plaintiff's damages – there are critical distinctions between the two. Prior to working on any case involving either uninsured or underinsured motorist coverage, every lawyer should review the sources of coverage and the recent case law.

The coverages available in these areas are complex and often confusing to both the plaintiff and defence bar. Much judicial ink has been spilled on these subjects, a trend that will invariably continue, and their complexity has been well-acknowledged by the bench.

It is important to keep in mind that these claims are covered by an insurance policy, and thus arise out of contract, and not tort. While they are normally resolved along with the determination of the tort lawsuit, both plaintiff and defence counsel must ensure they turn their minds to adducing evidence in respect of the coverage determination of the uninsured or underinsured claims, which is contractual.

Recent decisions of import have affected the way in which these claims are determined. This paper will analyze some of those recent cases in the past year. Prior to getting to that point, it is imperative to grasp where these coverages come from.

Uninsured Motorist Coverage: Background

An uninsured motorist is one who does not have insurance. Included in this definition is the concept of an unidentified motorist (one who cannot be found or identified – who, for example, has fled the scene and cannot be located). The idea here is that the uninsured motorist is at fault for the plaintiff's injuries but lacks any insurance through which to compensate them.

Uninsured motorist coverage is statutorily mandated by section 265 of Ontario's *Insurance Act*. Since 1980, this coverage has been a required element of every contract for motor vehicle liability insurance. The purpose of this provision is to spread the risk of uninsured drivers among

drivers, through insurance policies, rather than among taxpayers generally, through the Motor Vehicle Accident Claim Fund.[1] Section 265 reads:

> 265(1) Every contract evidenced by a motor vehicle liability policy shall provide for payment of all sums that,
>
> (a) a person insured under the contract is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injuries resulting from an accident involving an automobile;
> (b) any person is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injury to or the death of a person insured under the contract resulting from an accident involving an automobile; …
>
> subject to the terms, conditions, provisions, exclusions and limits as are prescribed by the regulations.

Section 265(2) defines "person insured under the contract". The insured, their spouse, and any dependant relative of either fall within this definition. Occupants of the vehicle are also considered "persons under the contract". Where the insured is a corporation, unincorporated association, or partnership, "persons under the contract" also includes any director, officer, employee, or partner of the insured who regularly uses the insured automobile, as well as their spouse and any dependant relative of either.

Minimum Limits

The amount of uninsured motorist coverage in Ontario is $200,000, as set out in the *Insurance Act* Regulations. Section 2 of Ontario Regulation 676, limits uninsured motorist coverage to the minimum limits for automobile liability insurance in the jurisdiction in which the accident occurs. This limit also applies despite the number of claimants: if there is more than one claimant with respect to the uninsured motorist coverage, the $200,000 will be shared *pro rata* among the claimants. An example of this situation arising is where there are several plaintiffs who were the occupants of one vehicle that was hit by an uninsured motorist.

The 1% Rule

Uninsured motorist coverage will not be available when the person insured under the contract is entitled to recover money under the third party liability section of a motor vehicle liability policy.[2] This section creates a built-in 1% rule: if there is liability on another vehicle which is insured, even if that liability is limited to 1%, then the uninsured motorist coverage is not available to the plaintiff. Under the *Negligence Act*, the plaintiff will be able to recover the full amount of their damages from the other at-fault and insured vehicle. As noted by O.Reg 676, s. 2(1)(c):

> 2.(1) The insurer shall not be liable to make any payment,

[1] *Bruinsma v. Cresswell*, [2013] O.J. No. 770 at para 24 (C.A.).

[2] O. Reg. 676, s. 2(1)(c).

> (c) where the person insured under the contract is entitled to recover money under the third party liability section of a motor vehicle liability policy

Thus, even if there is 1% on another vehicle which is insured, the uninsured motorist carrier (UMC) is not liable to the plaintiff. In practice, many cases have been settled on a 50-50 split between the UMC insurer and the tortfeasor's insurer due to a perceived risk that the tortfeasor may escape liability altogether. In reality, it is incorrect to assume all cases of this nature ought to settle on a 50-50 basis. The UMC insurer needs to assess the risk that no liability will fall to the tortfeasor (which may be an unlikely prospect) and the tortfeasor's insurer needs to assess the risk that *at the least* 1% will be found against its insured. A case-by-case analysis is required.

Unidentified Claims

An "unidentified automobile" means one with respect to which the identity of either the owner or driver cannot be ascertained (s. 265 *Insurance Act*).

Section 3 of Ontario Regulation 676 sets out a particular procedure that insured plaintiffs must follow immediately after an accident with an unidentified motorist in order to make a claim to their own insurer for uninsured motorist coverage. This procedure exists to prevent fraud. Insureds that are solely at fault for their own accidents may have a motivation towards dishonesty and claim that the accident was caused by an unidentified motorist. The steps mandated by this regulation provide the police and the insurer with the opportunity to investigate the claim. The procedure, as outlined by the regulation, requires the following steps:

1. The plaintiff must report the accident to a police officer within 24 hours of the accident or as soon as practicable after that time.
2. The plaintiff must provide a written statement to the insurer within 30 days of the accident or as soon as practical after that date. This statement must set out:
    a. the details of the accident;
    b. whether the accident was caused by an unidentified driver;
    c. whether the person insured under the contract was injured or killed.
3. The plaintiff must also make the vehicle involved in the accident available to the insurer upon request for inspection.

The requirement that the plaintiff notify the police can be met by the plaintiff phoning the police, by the police attending at the scene of the accident, or by the plaintiff reporting to a Self Reporting Collision Centre. The plaintiff is also obligated under section 258.3 of the *Insurance Act* to notify the insurer within 24 hours of the accident.

The limitation period for an action against the insurer providing uninsured motorist coverage is 2 years from the time when the plaintiff knew or ought to have known that the at-fault vehicle was uninsured or that the accident was caused or contributed to by an unidentified vehicle.

Evidence of the Insured

When alleging an unidentified motorist caused the accident, given that discoveries do not occur for some years following the accident, the Regulation sets immediate evidentiary steps for an insured to take. Timeliness of the insured reporting the accident is critical. All facts should be

sought as early as possible by claims examiners and questioned thoroughly at discoveries by counsel. Such questioning at discovery should focus on (by no means an exhaustive list): when the insured first saw the unidentified vehicle, its description (colour, make, model), its location on the roadway and movements, whether there was contact between it and the insured's vehicle, or any other vehicle, and any damage that may have left debris on the roadway. The questioning should also focus on whether there was any paint transfer; the property damage to the insured vehicle is critical in this regard (requiring photos, appraisals, repair documents, all of which may require engineering evidence), and whether there were any witnesses, their relationship to the insured, and why the insured may have not complied with the Regulation (i.e., whether they were aware of the requirements under the Regulation). Lastly, if it appears that the insured only later arrives at the allegation that the accident was caused by an unidentified driver, questions about how, when and why that allegation was formulated should also be the focus of questioning (including when the insured met with/retained a lawyer), as long as the answer would not breach privilege.

Two Standards of Proof for (1) Unidentified Claims Under *Insurance Act* and for (2) OPCF 44R Underinsured Endorsement

For an insured to prove that an uninsured/unidentified vehicle caused the accident, the standard of proof to first access the $200,000 limits under the *Insurance Act* is assessed on the balance of probabilities. This may be clearly made out on the property damage evidence. However, in cases where no property damage evidence is secured by the insured (by way of photos, vehicle appraisal, or Self-Reporting Collision Centre records), an insurer may argue prejudice by the plaintiff's failure to comply with the timeliness in reporting the accident imposed by the Regulations.

For an insured to prove that he/she is entitled to the higher OPCF 44R coverage to access the remaining $800,000, the standard of proof is higher. It requires "other material evidence" defined as the evidence of an "independent witness other than spouse or dependant relative" or "physical evidence". This standard, higher than the balance of probabilities, must be met in order for the insured to prove his/her contractual entitlement to the additional coverage under the OPCF 44R.

As noted above, the key difference between uninsured motorist coverage and underinsured motorist coverage is the standard of proof. Entitlement to uninsured coverage is determined when the plaintiff proves, on a balance of probabilities, that the at-fault motorist was uninsured or unidentified. Entitlement to underinsured coverage requires stricter proof. Where the plaintiff was involved in an accident with an unidentified driver and seeks entitlement to their underinsured coverage, the plaintiff must adduce corroborative material evidence. This material evidence must be either independent witness evidence (other than the evidence of a spouse as defined in the endorsement) or physical evidence indicating the involvement of an unidentified automobile (section 1.5(c) and (d)).

The following recent cases on uninsured motorist coverage illustrate the current issues and development in this area of law.

Recent Cases on the Standard of Proof

a. Standard of proof differs for entitlement to uninsured motorist coverage and underinsured motorist coverage: *Chmielewski v. Pischak*, 2014 CanLII 7592 (S.C.J.).

The plaintiff claimed against her insurer for damages she allegedly sustained when she rear-ended a car stopped ahead of her. The plaintiff blamed the accident on an unidentified third car: the plaintiff claimed that this car cut into and out of the plaintiff's lane, distracting her and causing the collision, and then took off. The insurer moved for summary judgment on the basis that the plaintiff had no corroborative evidence as required by OPCF 44R. The motion judge accepted that there was neither independent witness evidence nor material evidence corroborating the plaintiff's version of events, but declined to dismiss the entirety of the plaintiff's claim as requested by the insurer. No corroborative evidence is necessary for the $200,000 available for uninsured motorist coverage; it was open to a trial court to accept the plaintiff's uncorroborated version of events. The motion judge granted partial summary judgment in the form of a declaration limiting the plaintiff's damages to the $200,000 available under uninsured motorist coverage.

b. The courts take a flexible approach to corroborative physical evidence: *Armstrong (Litigation guardian of) v. Dominion of Canada General Insurance Co.*, [2013] O.J. No. 2646.

The plaintiff was catastrophically injured in a motor vehicle accident. Another vehicle in the oncoming lane suddenly veered into the plaintiff's lane, forcing the plaintiff to take evasive action. The evasive action caused the plaintiff's car to leave the roadway and roll over. The other vehicle did not stop and was never found. The plaintiff claimed against her own insurer for both the uninsured motorist coverage and the underinsured motorist coverage, as she had the OPCF 44R Endorsement on her policy. The insurer disputed her entitlement to the underinsured coverage and moved for summary judgment on the basis that there was no corroborative evidence. In dismissing the insurer's motion, the court found that there was physical evidence that could indicate the involvement of an unidentified automobile sufficient to trigger coverage under the plaintiff's OPCF 44R. The physical evidence requirement could be satisfied by the black box diagnostic data from the plaintiff's vehicle, tire tracks on the road, and even deer tracks near the scene of the accident.

Note: another recent case, *Featherstone v. John Doe*, [2013] O.J. No. 2541, also held that tire tracks could constitute the necessary corroborative evidence to trigger coverage under the OPCF 44R, and also dismissed the insurer's motion for summary judgment. The reasoning in *Featherstone* was then followed by *Azzopardi v John Doe* 2014 ONSC 4685 in concluding that a doctor's consultation report was also sufficient corroborative evidence to indicate the involvement of an unidentified vehicle.

Recent Cases on Uninsured Coverage

The following recent cases on uninsured motorist coverage illustrate the current issues and development in this area of law.

a. Breach of a statutory condition does not necessarily invalidate uninsured motorist coverage: *Bruinsma v. Cresswell*, [2013] O.J. No. 770 (C.A.).

The plaintiff was injured in a 2006 motor vehicle accident with an uninsured driver. At the time of the accident, the plaintiff was driving with a suspended driver's licence and was thus in breach of his insurance policy. The defendant insurer denied coverage. The Minister of Finance, as the administrator of the Motor Vehicle Accident Claim Fund, brought a cross-claim against the insurer for a declaration that the plaintiff was entitled to coverage despite his breach of the policy. The insurer moved for summary judgment of the cross-claim, which was dismissed: the motion judge concluded that the plaintiff was covered and the *Limitations Act* did not apply to the Minister's cross-claim on behalf of a defendant (the defendant uninsured driver). The insurer appealed and the appeal was dismissed. The Court of Appeal held that the plaintiff's admitted breach of the policy did not disentitle him to uninsured automobile coverage under the policy. The provisions of the policy that the insurer relied on to deny coverage were found to be statutory conditions, which – pursuant to s. 234(3) of the *Insurance Act* – do not apply to uninsured motorist coverage unless otherwise provided in the contract, which the policy at issue did not.[3]

b. The meaning of the phrase "the insured" for the purposes of coverage refers to the person making the claim: *Jubenville v. Jubenville*, [2013] O.J. No. 2094 (C.A.).

A 5-year-old child was injured as a passenger in a single vehicle accident. The car involved was owned by, registered in the name of, and driven by her father; however, the car was not insured. The child's mother owned 2 vehicles and insured them under a standard automobile insurance policy issued by Economical. The issue of whether the child was covered under her mother's insurance policy with Economical turned on the proper interpretation of "the insured" in the exclusionary phrase at the end of the definition of "uninsured automobile" in the policy. That phrase excluded "an automobile owned by or registered in the name of the insured or his or her spouse" from being considered as an "uninsured automobile". The motion judge found that the child was entitled to recover on the basis that "the insured" referred only to the person making the claim. Economical unsuccessfully appealed. The Court of Appeal found that the term "the insured", as used in the policy, was capable of two meanings: it could refer to all persons coming within the definition of "insured" in s. 224 of the *Insurance Act*, or it could only mean the insured person making the claim. Both interpretations were reasonable. Given this ambiguity, it was open to the motion judge to use interpretive principles in determining the meaning of "the insured".

Underinsured Motorist Coverage

An underinsured motorist is one who does not have enough insurance to compensate the plaintiff for their damages. For example, where the plaintiff was involved in a car accident with another motorist whose insurance was limited to $200,000 and the plaintiff's injuries were quantified at $1,000,000, the at-fault motorist in this situation would be underinsured for the purposes of the plaintiff's recovery of their damages.

[3] Bruinsma at para 43.

Unlike uninsured motorist coverage, underinsured motorist coverage is not a creature of statute but a creature of contract. It is an optional endorsement that can be purchased by the insured. Underinsured motorist coverage provides a secondary layer of liability coverage from the insured's own insurer where the third party liability coverage of the at-fault motorist is insufficient to compensate the insured for the extent of the their damages.

The current version of the endorsement is the OPCF 44R Endorsement. It is important to note at the outset that there have been several previous versions of this endorsement and coverage has varied under the different versions. Lawyers must ensure that they have the version of the endorsement corresponding with the date of loss at issue.

Uninsured and underinsured motorist coverage interact as follows. Underinsured motorist coverage under the OPCF 44R is excess insurance. As has been previously discussed, the availability of other insurance is determinative of whether uninsured coverage is available. However, the excess insurance under the OPCF 44R is an exception: where the only other insurance available is that under the OPCF 44R, this does not displace the uninsured coverage.

Persons who can recover under the OPCF 44R are "eligible claimants" as defined in the endorsement. An "eligible claimant" is "the insured person who sustains bodily injury" and any other person who, in the jurisdiction in which an accident occurs, is entitled to maintain an action against the inadequately insured motorist for damages because of bodily injury to or death of an insured person" (section 1.3). An "insured person" refers to the named insured, their spouse, and any dependent relative of either. Where the named insured is a corporation, unincorporated association, partnership, sole proprietorship, or other entity, an "insured person" may also be any officer, employee, or partner of the named insured who regularly uses the vehicle, as well as their spouse and any dependent relative of either. It should be noted that "dependent relative" is a defined term in the endorsement, and that case law has held that a "relative" need not be a blood relation.

Section 4 of the OPCF 44R determines the amount payable under the endorsement:

> 4. The insurer's maximum liability under this change form, regardless of the number of eligible claimants or insured persons insured or killed or the number of automobiles insured under the Policy, is the amount by which the limit of family protection coverage exceeds the total of all limits of motor vehicle liability insurance… of the inadequately insured motorist and of any person jointly liable with that motorist.

The "limit of motor vehicle liability insurance" means the limit of third party liability coverage stated on the certificate of automobile insurance, regardless of the amount that is actually paid out for claims under the endorsement.

The Latest Word on the Limitation Period for an Underinsured Claim

a. The limitation period for an underinsured motorist coverage claim begins to run on the date the plaintiff demands payment from their insurer under the OPCF 44R: *Schmitz v. Lombard General Insurance Company of Canada*, 2014 ONCA 88.

In July 2006, the plaintiff was hit by a car driven by Mr. Bakonyi. The plaintiff had automobile insurance with Lombard which included the OPCF 44R. In June 2007, the plaintiff and members of his family sued Mr. Bakonyi for damages in excess of $1,000,000 arising out of the plaintiff's injuries. In June 2010, Mr. Bakonyi's auto insurance coverage was limited to $1,000,000. The plaintiffs brought an action against Lombard for indemnity under the OPCF 44R for any amounts found owing to them in excess of $1,000,000. Lombard pleaded that the action was commenced after the expiry of the 12-month limitation period in s. 17 of the OPCF 44R. The plaintiffs relied on the 2-year limitation period as set out in s. 4 of the *Limitations Act, 2002*. The plaintiffs moved under rule 21 for a determination of the limitations issue. The Court of Appeal held that, since the *Limitations Act, 2002* specifically excluded some pre-existing limitation periods, the legislation would have done the same with the 12-month limitation period in the OPCF 44R if the legislature intended for that limitation period to be preserved. Applying the discoverability principle, the Court of Appeal held that the plaintiff has not suffered a loss until they have made a demand for indemnity which the insurer has not been accepted.

> Note: the practical consequences of this decision may be that there is effectively no limitation period in this situation. The OPCF 44R does not require a plaintiff to demand payment of the excess coverage at any particular time.

The application for leave to appeal to the Supreme Court of Canada was recently dismissed without reasons: [2014] S.C.C.A. No. 143. Previously, the Court of Appeal's 2012 decision in *Rocque v. Pilot* led plaintiffs to name their own insurers as defendants in every action where there was a possibility that damages might exceed the available limits if they were less than those afforded by the OPCF 44R limits. *Schmitz* has now overturned *Rocque* and effectively eradicated the limitation period set out in s. 17 of the OPCF 44R, the Court of Appeal holding that the *Limitations Act, 2002* trumps s. 17 of the OPCF 44R. Given that the limitation period is now tied to when a demand for payment is made, the limitation period is effectively indefinite.