Chapter 2 – Cross-Border Issues

1. ONTARIO LAW SUITS FOR ACCIDENTS HAPPENING IN ONTARIO

Problems arise for foreign (out of province and U.S.) insurers when either their insured vehicle and/or their named or unnamed insureds are involved in a motor vehicle accident in Ontario.

What are the rights of these foreign insurers and their insureds, and what are the rights of the third parties in action against those insureds?

What policy terms and laws govern in the circumstances?

Despite the difficulties posed by these questions, the answers have recently become clearer in Ontario jurisprudence, although the result may not be one which foreign insurers may appreciate.

The Power of Attorney and Undertaking

A foreign insurer who is either licensed to write automobile insurance in Ontario (whether or not it actually does so) and/or files a Power of Attorney and Undertaking ("PAU") with the Canadian Council of Insurance Regulators ("CCIR"), provided it is in standard form, will be required to treat its policy as an Ontario policy with all consequent coverages and benefits.

Similar provisions are in effect in most, if not all, jurisdictions in Canada, and a single PAU filed with the CCIR is effective for all applicable Canadian jurisdictions.

Any vehicle that enters Ontario is considered an uninsured vehicle if it is insured only by an insurer which is not a signatory to the PAU. The owner, lessee and operator of such a vehicle would be in breach of Ontario's *Compulsory Automobile Insurance Act* and subject to substantial penalties, including (in the case of the owner or lessee) the loss of the right to sue for damages sustained in an accident involving the vehicle.

Discussion

This interpretation of the PAU set out above has been almost uniformly adopted by all courts in Canada. In Ontario, it has received the endorsement of the Ontario Court of Appeal and the Divisional Court in two important cases:

- *Potts v. Gluckstein* (1992), 8 O.R. (3D) 556 (Ont. C.A.); and,
- *Schrader v. United States Fidelity & Guaranty Co. et al.* (1987), 59 O.R. (2nd) 178, additional reasons (1987), 59 O.R. (2d) 797 (Ont. Div. Ct.).

The practical effect of this rule is that foreign insurers may find themselves with far greater exposure with respect to a particular policy than was ever intended or considered possible under the terms of the policy as written in its place of origin.

This is true both with respect to first party and third party scenarios.

For instance, consider an example where a foreign insurer's insured travels to Ontario and drives a motor vehicle (whether the described motor vehicle in the policy or otherwise) and is involved in a motor vehicle accident for which he or she is totally at fault.

The foreign insurer will be responsible in the tort action to the third party and will be required to provide the statutory minimum liability limits in Ontario ($200,000, in Canadian funds), despite the fact that its policy may have contractual third party liability limits which are dramatically lower and/or geographic limitations applicable to the described vehicle(s).

Similarly, the foreign insurer will be responsible for paying the insured Statutory Accident Benefits (SABs) of the type and at the level available under an Ontario policy. Since Ontario, under its current regime, has one of the most comprehensive schemes in the world, it is likely that the insurer's exposure to its own insured is greater than would have been the case had the accident occurred in the foreign insurer's jurisdiction.

The Ontario Court of Appeal in *Healy v. Interboro Mutual Indemnity Insurance Company* (1999), 44 O.R. (3d) 404 (Ont. C.A.), has ruled that the obligation of a foreign insurer who has signed the PAU to pay SABs extends to its insureds who are passengers in other vehicles in Ontario, even if they have not brought the insured vehicle into the jurisdiction.

Furthermore, where a vehicle insured by a foreign insurer (which is signatory to the PAU) is driven in Ontario and involved in an accident, the foreign insurer is potential liable to pay Ontario-level SABs to its own insured, as well as all occupants of the insured vehicle and other individuals involved in the accident (subject to priority rules set out in the Ontario *Insurance Act*).

Although by signing the PAU, the foreign insurer makes itself liable to pay no-fault benefits on an Ontario scale, it also entitles the signing insurer to avail itself of the benefits of the Ontario Loss Transfer legislation (see *I.C.B.C. v. Royal Insurance*, [1999] I.L.R. I-3705 (Ont. C.A.)).

Broadly, this provision allows the insurer of an automobile to demand reimbursement from the insurer of a heavy commercial vehicle (essentially a truck weighing more than 9,900 pounds) for all no-fault benefits the auto insurer has paid out to its insured, subject to apportionment for liability. There is a similar provision for motorcycle insurers to recover from automobile insurers.

Determining whether an insurer is a signatory to the PAU can be done by visiting the CCIR webpage at: http://www.ccir-ccrra.org/en/pau/

The Two FSCO Undertakings

In addition to the PAU (which applies across Canada), as of November 1, 1996, two other undertakings, **The Protected Defendant Undertaking** and **The Direct Compensation Property Damage Undertaking** were made available to foreign and out-of-province insurers. These undertakings apply only in Ontario and are filed with the Financial Services Commission of Ontario (FSCO). Details of these undertakings are set out in FSCO Bulletin No. A-9/96.

Foreign and out-of-province insurers who do not file the **Protected Defendant Undertaking** cannot avail themselves of certain protections of the Ontario *Insurance Act*, including the protection of the "permanent serious impairment" threshold and protection from subrogation (in certain circumstances) by the provincial health insurer, OHIP.

Foreign and out-of-province insurers who do not file with the **Direct Property Damage Undertaking** may not be able to assert a defence they might otherwise have against claims for property damage to other vehicles and cannot sue for property damage to their insured vehicle.

There is, however, now appellate authority for the proposition that the **Protected Defendant Undertaking** has the same effect as the **Direct Property Damage Undertaking** (see *Clarendon National Insurance v. Candow*, 2007 ONCA 680). This reasoning may also extend to the impact of the PAU, such that filing it alone may be interpreted as affording the protections (and, consequently, the obligations) of both the **Protected Defendant Undertaking** and the **Direct Property Damages Undertaking**.

MOST U.S. INSURERS ARE SIGNATORIES
TO ALL THREE UNDERTAKINGS

SOME USEFUL LINKS:

- Rogers Partners Publications and Resources:
  - http://rogerspartners.com/#/publications
- Canadian Council of Insurance Regulators:
  - http://www.ccir-ccrra.org/en/
- Power of Attorney and Undertakings:
  - http://www.ccir-ccrra.org/en/pau/
- List of Protected Defendant Undertaking Signatories:
  - https://www5.fsco.gov.on.ca/undertaking/protected_defendant.aspx
- List of Direct Property Damage Undertaking Signatories:
  - https://www5.fsco.gov.on.ca/undertaking/direct_compensation.aspx

2. ONTARIO LAW SUITS FOR ACCIDENTS IN THE U.S.

The situation where an Ontario resident plaintiff attempts to sue for damages occasioned by an accident that occurred in the U.S. is considerably more complicated. There are two primary issues to be considered – first, whether the Ontario Court can or will hear the matter and second, if the matter is heard in Ontario, which laws are applicable in the law suit. The former issue is the "Choice of Forum" issue and the latter is the "Choice of Law" issue.

Choice of Forum

The choice of forum boils down to two issues: do the courts in Ontario even have jurisdiction to hear the matter; and, if so, should they exercise their discretion to decline jurisdiction on the grounds that another jurisdiction is more convenient. These two issues are referred to as the "*jurisdiction simpliciter*" and "*forum conveniens*" issues.

Jurisdiction Simpliciter

The leading authority on these issues is *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 ("*Van Breda*"). The Supreme Court outlined that a court hearing a jurisdiction challenge must first determine if it even has the ability to hear the dispute.

To do so, the court must look at four factors which, if present, mean that there is a presumed connection between the incident(s) at issue in the law suit and the jurisdiction which is hearing the challenge. Those factors are:

- The defendant is domiciled or resident in the province;
- The defendant carries on business in the province;
- The tort was committed in the province; and
- A contract connected with the dispute was made in the province.

The court left the door open for new presumptive factors to be brought forward and incorporated into the above four. To date, however, there has not been any successful attempt at enumerating new presumptive factors.

If none of the four above factors are present, then the court will not move on to the next step as the court does not have the jurisdiction to hear the matter before it.

The fact that the defendant is insured by an insurer who has filed the PAU has been held to be insufficient to grant *jurisdiction simpliciter*.

The Ontario Court of Appeal in the case of *Tamminga v. Tamminga*, 2014 ONCA 478, found that the mere existence of a contract of insurance in Ontario is not a presumptive factor. Accordingly, even if a plaintiff has a contract for insurance in Ontario which includes underinsured or uninsured motorist coverage and gets into an accident in another jurisdiction, the mere fact of the insurance contract is not a presumptive factor for jurisdiction in Ontario.

It seems the (Ontario made) contract "connected with the dispute" needs to include the foreign defendant as one of the contracting parties for the fourth presumptive factor to be engaged.

If one or more of the above presumptive factors are present, the court will move on to the next step – determining whether the court should decline jurisdiction in favour of a more convenient one.

Forum Conveniens

At this second stage of the analysis, Canadian courts will look at whether there is a substantial and compelling connection between the litigation and the jurisdiction in which the law suit was commenced. The burden is on the defendant challenging the choice of venue to show why the Canadian court should decline to exercise its jurisdiction, and why an alternative forum should be preferred. Generally speaking a defendant will need to show that the alternative forum is clearly more convenient to successfully challenge jurisdiction on this ground.

The Supreme Court in *Van Breda* outlined a number of factors that the court will consider in determining whether a Canadian court should decline its jurisdiction, including:

1. The location of parties and witnesses;
2. The cost of transferring the case to another jurisdiction or of declining the stay;

3. The impact of the transfer on the conduct of the litigation or on related or parallel proceedings;
4. The possibility of conflicting judgments;
5. Problems related to the recognition or enforcement of judgments;
6. The relative strengths of the connection of the parties;
7. Loss of juridical advantage (although the Supreme Court notes that on this contextual analysis, a court should refrain from leaning too instinctively in favour of its own jurisdiction); and
8. Existence of other parties/defendants with a connection to the jurisdiction.

If the above factors point toward a foreign jurisdiction being preferable, then the court has discretion to order a stay of proceedings in the 'home' jurisdiction.

Choice of Law

If the court determines that the matter is to be heard in Ontario, the next issue is what law is applicable.

The first and most important point to note is the PAU is not applicable to accidents occurring in the U.S., even if the case is tried in Ontario. Therefore, when accidents occur in the U.S., but are tried in Canada, your policy limits are NOT increased to the Ontario statutory minimum limits.

The choice of law rules are set out in the Supreme Court of Canada case of *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon,* [1994] 3 S.C.R. 1022. The rule is that the substantive issues are to be determined by the law of the place where the accident happened, but procedural issues are to be determined by the law of Ontario. The difficulties lie in determining which issues are substantive and which are procedural.

It has been held that laws which take away a right altogether are substantive, whereas laws which only serve to determine the quantum of damages or how the matter is to proceed are procedural.

As a result, the following issues have been held to be substantive and would be determined by the law of the place where the accident occurred:

1. Any applicable threshold and deductibles of the state in which the accident occurred. The Ontario threshold and deductibles would not apply;
2. If there are any heads of damages taken away by the laws of the state where the accident happened, those laws would be applicable in that regard;
3. Laws in the jurisdiction in which the accident happened, corresponding to or equivalent to the Ontario Family Law Act apply. The Ontario *Family Law Act* would not be applicable;
4. Ontario law with respect to pre-judgment interest would not be applicable; and
5. The limitation period which would be applicable is that of the state in which the accident happened.

The following are procedural and would be determined by the laws of Ontario:

1. The quantum of damages would be assessed as if it were an Ontario loss;
2. Ontario law with respect to legal costs would be applicable; and
3. The cap on general damages is procedural and, therefore, the law of Ontario would apply in that regard.

(See *Somers v. Fournier et al* (2002), 60 O.R. (3d) 225 (Ont. C.A.), *Britton v. O'Callaghan* (2002), 62 O.R. (3d) 95 (Ont. C.A.) and *Wong v. Lee* [2002] O.J. No. 885.)

We have been unable to find any case law that determines whether the deductibility of collateral benefits is procedural or substantive. It seems likely, however, that this issue is substantive and would be determined by the law of the place where the accident occurred.

Finally, it should be noted that an Ontario court will consider U.S. law to be an issue of fact to be proven. In a case tried in Ontario in which U.S. law is at issue, a U.S. attorney would have to be called as an expert witness to testify as to U.S. law.