

## Chapter 4 – Third Party Liability Coverage in Automobile Insurance Context: Key Concepts and Practical Strategies

### 1. INTRODUCTION

Automobile coverage issues in Ontario include principles extending coverage (such as consent), and principles limiting coverage (such as breach of statutory conditions).

This article serves to explore a number of issues, including:

- when coverage will extend beyond the named insured;
- the concept of a breach of a condition;
- the relatively newly imposed concept of honest but mistaken belief; and
- resurfacing of the relief from forfeiture doctrine.

We will also consider practical strategies for insurers, such as reservation of rights letters and non-waiver agreements, and consider the related strategy of the insurer adding itself as a statutory third party to the litigation.

Lastly, we will consider the absolute liability provisions of the Ontario Insurance Act, including an indication of the coverage related circumstances when such liability be imposed and when it will not.

### 2. THIRD PARTY LIABILITY CONCEPTS: DRIVER

Third party liability coverage under an automobile policy may extend beyond coverage to the named insured, and may include coverage to another 'driver.' This extension of coverage, however, has limits, typically defined by the scope of 'consent.'

#### **Consent**

The Ontario *Insurance Act* provides that a driver (who is not the named insured on a motor vehicle policy) is only an insured on a policy if the driver had consent of the named

insured to drive or be an occupant of, or be in possession of, or use, or operate the insured vehicle.

Generally speaking, where the owner of the vehicle has, either expressly or by implication, expressed confidence in a driver to be in charge of his/her vehicle on a highway, even for a limited purpose, that owner will be deemed to have provided consent to drive the vehicle. This is so even if the vehicle is being used for some other purpose when an accident takes place.

Once even limited consent is granted (e.g. consent to use the vehicle only to go to and from work, or to only drive during the daytime), the onus then shifts to the owner to prove that the driver did not have consent at the time of the accident. Controversies can arise, however, about whether the driver had consent, in instances where the owner had previously expressed clear limits on the driver's use of the vehicle, such as not driving on highways.

The proper approach is a subjective one from the point of view of the driver, namely whether the driver, under all the circumstances, would be justified in thinking that he or she had the implied consent to drive (or operate possess, occupy, or use) the insured automobile.

### **3. AUTHORITY TO DRIVE AND HONEST BUT MISTAKEN BELIEF**

In Ontario, many drivers have restrictions in place on their driver's licence. This is especially true in the context of new drivers, who are subject to the province's "graduated licencing scheme," designed to delay receipt of a full driver's licence.

Drivers with restrictions may be found not to have been in compliance with the terms and conditions of their licence. Generally speaking, when an insured drives in contravention of a term of his/her license, this is considered a breach of the insuring agreement, requiring an insured to have the proper 'authority to drive' the automobile.

The inquiry for insurers considering whether such violations negate coverage under a policy of insurance, however, does not end with proving that a violation took place.

As discussed below, once coverage is extended it may prove difficult, absent the clearest of cases, for an insurer to successfully deny coverage. This is so even in circumstances where the insured has clearly committed a clear breach of the policy.

In *Tut v. RBC Insurance*, 2011 ONCA 644, a young driver drove his mother's vehicle the morning after a night of alcohol consumption. The mother consented to her child driving the vehicle in order to take some of his friends home after the party.

Under his G2 license, the young driver was to have zero alcohol in his blood at all times while driving. The Ontario Court of Appeal held that since the son (driver) was found to have had a reasonable belief that he had zero blood alcohol content, his onus was discharged such that he believed himself to be driving under the conditions of his licence. The court concluded that the son held an honest but mistaken belief that he had zero alcohol in his blood.

He was found not to have been in contravention of his licence restrictions, and he thus had the appropriate authority to drive.

The focus in instances such as this will be on the extent of the due diligence undertaken by the driver to satisfy himself/herself that he/she was in compliance with the terms of his/her licence.

Interestingly, even if it is found that the insured was in fact in breach of the terms of his license, and did not have a reasonable but mistaken belief regarding his conformity with the conditions of his license, that does not end the coverage analysis.

#### **4. RELIEF FROM FORFEITURE**

Recently, the Ontario Court of Appeal decided that relief from forfeiture can be applied to automobile insurance contracts where the exclusion is due to imperfect compliance with a statutory condition, rather than non-compliance with a condition precedent (eg. failure to renew driver's license vs. never having had a license)

In *Kozel v. Personal Insurance Co*, 2014 ONCA 130, a 77 year old woman was involved in a serious motor vehicle accident while driving with a license that had expired four months previously. The woman did not realize her license was expired, because she

mistakenly believed the renewal form sent to her only pertained to her vehicle license plate renewal.

Despite concluding that the insured did not have a 'reasonable' but mistaken belief regarding her licencing status, the court granted relief from forfeiture to the insured.

The court reiterated that, if a breach is substantial and prejudices the insurer, however, relief from forfeiture is not an available remedy for an insured. Where relief from forfeiture is available, the following factors will be considered by the court to determine if it should be granted:

- The conduct of the insured (in totality, before and after the incident):
  - In *Kozel*, breach had never happened before; the insured renewed her license without difficulty; the insured had always paid premiums in timely manner and acted in good faith on all occasions.
- The gravity of the breach (nature and impact):
  - The Court found that the breach in *Kozel* was minor in nature and had no impact on insured's ability to drive safely, and no impact on the contractual rights of the insurer.
- The disparity between the value of the property forfeited and the damage caused by the breach (i.e. prejudice to the insurer caused by the breach)
  - The Court, in *Kozel*, found that the insured stood to lose \$1 million in coverage, whereas the breach caused no prejudice to the insurer.

As a result, insurers will need to consider much more than whether an insured has breached a condition of his/her driver's licence. An insurer must also consider whether an insured may be found to have an 'honest but mistaken belief' regarding compliance and/or whether the insured may be entitled to relief from forfeiture for any such breach of the policy.

## 5. CONSEQUENCES OF COVERAGE BREACH

### **The Absolute Liability Provisions**

Section 258 of the Ontario *Insurance Act* enables injured parties to recover damages in an action, and not be deprived of a remedy based solely on the conduct of the defendant insured. Accordingly, if a defendant insured is in breach of an expressed or implied term of the insuring agreement, the insurer is still 'absolutely liable' to the plaintiff. The insured, however, may forfeit entirely his/her right of indemnity with the insurer.

Indemnity can be denied by an insurer based on a finding that the insured breached a statutory condition, or made a material misrepresentation to the insurer.

In cases where an insurer is required to pay a plaintiff based on the absolute liability provisions, the insurer may then pursue the insured for reimbursement of any amounts that it was required to pay to the plaintiff, as a result of the section (s.258(13)).

When it applies, an insurer may only raise policy defences to claims in excess of the minimum limit for coverage in Ontario (CAN\$200,000). Hence, an insurer is considered to be 'absolutely liable' to the plaintiff upon judgment against its putative insured for amounts up to \$200,000.

For amounts in excess of \$200,000, the insurer may avail itself of any defence it is entitled to set up against the insured.

Given the consequences associated with application, of particular importance is the question of which coverage related circumstances give risk to 'absolute liability' and which do not. There appears to be no clear demarcation at law. However, appellate level authority in Ontario has determined the outcome with respect to a number of common situations, as follows:

### **When do Absolute Liability Provisions Apply?**

Section 258 has been held to apply in the following cases:

- Breach of Condition
- Intentional (Criminal) Act
- Material Misrepresentation

Section 258 has been held NOT to apply in the following cases:

- Breach of “Other Automobile” Coverage
- No Consent
- Excluded Driver

As a result, it will be important to be aware of the nature of the coverage limiting conduct of the putative insured, and whether such conduct will negate entirely the coverage under the policy, or whether the insurer will remain ‘absolutely liable’ to the plaintiff up to the minimum limits.

## 6. CONCLUSION

In sum, we have canvassed a number of coverage concepts under the automobile policy, including common breaches and coverage exclusions, and court created exceptions to those exclusions.

***Automobile Coverage Issues:*** This paper has canvassed coverage issues which typically arise with respect to drivers and owners, particularly as they relate to issues of consent and breach of statutory conditions. Further, it also has considered when an insurer is made aware of potential breaches of the policy or other coverage issues. Those include communications with the insured.

Fairness and transparency emerge as the key concepts so that insurers make their insureds aware of the situation, and the insurer’s position and decision regarding coverage.