



Third Party Liability
Coverage in
Automobile Insurance
Context:
Key Concepts and
Practical Strategies

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Outline

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Fact Pattern

- The players:
 - Son - Driver with a G1 licence;
 - Daughter - intoxicated passenger in insured vehicle;
 - Father - Owner of vehicle insured by Insurer;
 - Plaintiff - Pedestrian.
- Son drives Father's vehicle in breach of his G1 licence and against Father's instructions.
 - Father was away for the weekend and told Son not to drive his car.
 - However, in the past Father had allowed Son to drive his vehicle provided he complies with the terms of his G1 licence.

Fact Pattern

- The accident:
 - Son makes a left turn at an intersection. Because of his inexperience, he makes a wide turn into the right lane, rather than into the left lane as he is supposed to.
 - Plaintiff sees Son begin to turn, but anticipates that he will make a normal left turn into the left lane, and so he steps off the curb and begins to cross the intersection.
 - Because Son's turn was wide, he hits Plaintiff with his vehicle.
 - Plaintiff commences an action against Son (driver) and Father (owner) for damages sustained in the accident.

Coverage Issues re: *Driver*

- Insurer's named insured is the owner, Father.
- Son has no insurance of his own.
- Does Father's policy with the Insurer provide coverage to Son?

Driver is only an insured if he had consent of the Insurer's named insured to drive, and/or be an occupant of, and/or be in possession of, and/or to use, and/or to operate the insured vehicle.

- S.239 of *Insurance Act*: Other person who with consent drives or is an occupant of insured vehicle
- O.A.P. 1, s. 3.2: You or anyone else in possession with owner's consent uses or operates it (insured vehicle)

Coverage Issues re: *Driver*

- If insured meets any of consent to:
“drive”; “occupancy”; “possession”; “use”; or
“operate”
then consent will likely be found.
- Coverage granting terms are read broadly and interpreted in favour of insured (where ambiguous)
- If grant language is found in either the Act or the Policy, coverage is likely to be found

Coverage Issues re: *Driver*

- Consent defence is very difficult for insurer to make out.
- There are arguments of 'limited consent' but generally speaking if a person gives permission to drive vehicle on a highway consent will likely be seen to have been given.

Coverage Issues re: *Driver*

- Where owner has by implication expressed confidence in driver to be in charge of vehicle on highway even for a limited purpose, an owner will be deemed to have provided consent even if the vehicle is used for some other purpose. (*Naccarato v. Quinn* (Ont. Gen. Div., 1994))
 - Limitations on consent relative to use of vehicle at night (or only to go to and from work) should be regarded as no more effective than limitations of consent to driving carefully, sober, or at reasonable speeds. It has been said that neither limitation can or should be enforced.
 - Key factors are usually whether owner permitted driver to operate on highway on prior occasions and whether any steps taken to prevent driver from operating the insured vehicle.
 - Onus is on owner to prove driver does not have consent (*Crangle v. Kelsey* (ONSC, 2003)).
 - However, issue is not free of debate and where there are clearly expressed limits on consent (not on a highway), will want to consider the coverage defence.
 - 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 an implied consent to drive (*Palsky v. Humphrey* (S.C.C., 1964))

Application to Present Facts

- Father had previously permitted Son's use of vehicle on highway so long as G1 license conditions were met.
- Father said not to use the vehicle this weekend, but presumably left keys available and Son will likely say something like "he said not to take car all over the place but I did not think he would mind if I took it to and from the party with my sister."
- Courts are very insured-friendly.

Application to Present Facts

- Father permitted use on highway previously and took virtually no steps to prevent Son from using the vehicle while he was away (keys and vehicle remained accessible).
- Son would arguably be justified in thinking that “in all of the circumstances” he had implied consent to drive.
 - IA consent likely to be found.
 - Therefore, driver will be insured entitled to coverage unless he has committed some other coverage breach... such as driving in contravention of his G1 licence.
 - Son is within grant of cover. Do any exclusions apply?

Authority to Drive

- Son is insured under Father's policy, but:
 - Terms and conditions under the policy may apply to exclude Son.
 - Statutory Condition 4(1) breached?
 - (1) The insured shall not drive or operate or permit any other person to drive or operate the automobile unless the insured or other person is authorized by law to drive or operate it.

Authority to Drive

- Courts have equated conditions of driver's licence with "authorized by law"
 - Therefore, if found in violation of restrictions on G1 or G2 licence, driver can be found to be in breach of statutory condition.
 - The Ont. Div. Crt. in *VanderWal v. State Farm* (1994) found that driver was in breach of a condition of his motorcycle licence (driving on a highway with a posted speed limit over 80 km/h) and was therefore excluded from coverage under the policy.
 - Many cases have followed and extended this principle to almost all aspects of G1 and G2 licence conditions.

Authority to Drive

- *Kereluik v. Jevco Insurance Company* (ONCA, 2012)
 - Failure to comply with an Undertaking to a peace officer to abstain from consumption of alcohol is not a breach of a condition.
 - “Authorized by Law” under Condition 4 is met where a drunk driver:
 1. Held a valid licence;
 2. Was in compliance with the licence;
 3. The licence had no alcohol-related conditions or prohibitions;
 4. The licence was in good standing
- Noteworthy that with a full G license, it is not a breach of condition or any other coverage violation as it relates to third party liability to drive while impaired by alcohol.

Authority to Drive

G1 Restrictions on Son's Licence

- Must have a full G licenced driver (Sister) in car;
- Sister's blood-alcohol content must be below 0.05;
- Sister must have at least 4 years of licensed driving experience;
- Only the accompanying driver and Son may occupy the front seats;
- # of passengers = # of seatbelts;
- Son cannot drive between 12:00 am and 5:00 am; and
- Son cannot drive on the 400 series highways, the QEW, the DVP, the Gardiner's, etc.

(HTA, ON. REG. 340/94)

Authority to Drive

Restrictions under a G2 licence:

- Zero alcohol (same as G1)
- For the first 6 months, seatbelt restrictions apply
- Other restrictions (see Regulation 340/94)

But see *Shah v. Becamon* (ONCA, 2009): The graduated licencing scheme in *HTA* only applies to a highway. Therefore driving without a proper licence is not a breach of condition if not driving on a highway. Ambit of *Shah* restricted in *R v. Hajivasilis* (ONCA, 2013): *HTA* provisions only limited to a highway if so indicated in the provision.

Authority to Drive

By having Daughter, who was intoxicated and has less than 4 years of licensed driving experience, in the vehicle, Son was in breach of his G1 license conditions.

- Therefore, Son is likely in breach of the conditions and restrictions of his licence and therefore in breach of statutory condition 4(1).

Authority to Drive re: *Driver*

Exception to Exclusion of permission:

**Honest but mistaken belief in compliance
(the hangover defence)**

- In *Tut v. RBC Insurance* (ONCA, 2011), the young male driver, drove his mother's vehicle the morning after a night of partying.
 - Mother consented to her son driving the vehicle in order to take some of his friends home.
 - Under his G2, the son was to have zero alcohol in his blood.
- The Court found that in order to breach s. 4(1), there had to be a breach of s. 6(1) of *HTA REG. 340/94* (the G2 restrictions). If there is an entitlement to the due diligence (or honest but mistaken belief) defence with respect to quasi criminal conviction.

Authority to Drive re: *Driver*

Exception to Exclusion of permission:

**Honest but mistaken belief in compliance
(the hangover defence)**

- The 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 and thus “authorized by law”.
- The court concluded that the son held an honest but mistaken belief that he had zero alcohol in his blood.
- See also *Kozel v Personal Insurance* (ONSC, 2013) where court found 77 year old woman held honest but mistaken belief she had a valid driver’s licence. Finding was overturned on appeal: Court of Appeal found insured did not meet due diligence test.

Application to Present Facts: Can Son rely on the Honest But Mistaken Belief Exception?

No.

- Son would have to show that he had an honest but mistaken belief that his sister was sober and had 4 or more years of driving experience.
- Driver knew or should have known that he did not meet the requirement of his license.
- Any amount of due diligence would have revealed that he was in breach.

Authority to Drive re: *Driver*

Exception to Exclusion:

Relief from Forfeiture

- In *Kozel v. Personal Insurance Co.* (ONCA, 2014), a 77 year old woman was involved in a serious motor vehicle accident while driving with a license that had expired four months prior. 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.
- The Court of Appeal decided that relief from forfeiture can be applied to insurance contracts where the exclusion is due to imperfect compliance with a statutory condition, rather than non-compliance with a condition precedent.
 - E.g.: Failure to renew driver's license vs. never had a license.
- The Court held if a breach is substantial and prejudices the insurer, relief from forfeiture is not an available remedy.

Authority to Drive re: *Driver*

Exception to Exclusion:

Relief from Forfeiture

- 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 found that the insured stood to lose \$1 million in coverage, whereas the breach caused no prejudice to the insurer.
- Relief from forfeiture is a purely discretionary remedy. In this case, relief from forfeiture was granted.

Application to Present Facts: Can Driver rely on Relief from Forfeiture?

No. (*but this is a new test*)

- **Conduct of the Insured:**
 - Son's behaviour was careless, but not reprehensible. Totality of conduct (e.g. no previous breaches) will be considered. A court would likely find this test was satisfied.
- **Gravity of Breach:**
 - There was a breach of the statutory conditions, but it was a near miss. Although debateable as it relates to the impact on the insurer, this test would likely be met as well.
- **Disparity between Value Forfeited and Damages Caused by Breach**
 - This is the most difficult test, in this case.
 - Value of property forfeited was limits of insurance coverage.
 - Damages caused by breach are likely all of the plaintiff's damages (and defence costs), as the accident likely would not have occurred had Son complied with the terms of his license and had a sober, experienced driver supervising his driving.
 - Unlike *Kozel*, this breach: had an impact on the insured's ability to drive safely; increased the risk on the insurer; and caused prejudice to the insurer in the same amount that the insured is forfeiting, being the damages to be paid to Plaintiff which could have been avoided (or the risk lessened).

What coverage issues emerge re: *Owner*?

Father is covered because he is a named insured on the policy and is also the owner of a described automobile

- IA, s. 239;
- O.A.P. 1, s. 3.2

Exclusions or Coverage Issues re: Owner

- Consent does not affect owner's coverage
 - Not a factor because owner is named and remains covered whether vehicle is driven by person who had permission or not (e.g. theft)
 - NB: Although coverage of the owner is not an issue, consent may need to be considered re: liability.
 - Usual outcome is that coverage flows to owner but owner is not (or may not be) liable because there is no *HTA* consent to driver, no vicarious liability on owner.

Authority to Drive re: *Owner*

- Statutory condition 4.1 relates to *permission* to drive:
 - (1) The insured shall not drive or operate or permit any other person to drive or operate the automobile unless the insured or other person is authorized by law to drive or operate it.

Authority to Drive re: *Owner*

- Owner must show due diligence in satisfying himself that permission to the driver was warranted. That owner took steps to ensure driver was authorized by law to drive.
- The due diligence test is not strict, even opening the mail (and not finding MTO notice) has been found to meet the due diligence requirement.
See *Miller et al v. Carluccio et al.* (ONCA, 2008)
- If “no reason to expect” the car will be driven in contravention of policy terms, then owner cannot be said to have “permitted” the improper use.
See *Co-operative Fire v. Ritchie* (SCC, 1983)

Authority to Drive re: *Owner*

Miller et al v. Carluccio et al. (ONCA, 2008)

- Insured was a family run business.
- Employee was permitted to use the company vehicle, but was involved in an accident while not having a proper licence.
- The Court of Appeal overturned the trial judge and found that the insured owner had a reasonable method of checking the employee's mail to see that he was properly qualified to drive.
- The Court of Appeal found that these were reasonable steps and therefore the corporate insured had not "permitted" the employee to breach the condition, even though he was given permission to drive and was admittedly unlicensed at the time.

Authority to Drive

Wawanesa Mutual Insurance v. S.C. Construction Ltd.
(ONSC, 2012)

- Employer permitted an employee to drive a van home, on occasion, without first checking to see if he had a valid driver's licence.
- Test is fact-specific: did the insured act reasonably in all the circumstances?
 1. Employer did not hire employee as a driver;
 2. Where employee is not a driver, it is not unreasonable to let the employee drive the employer's vehicle occasionally without first demanding to see the actual licence. "No reason to expect..."
 3. So, no breach of Statutory Condition.

Authority to Drive re: *Owner*

Did Father “permit” Son to drive the vehicle when he was not authorized to do so?

- No, because he will likely be seen to have satisfied the due diligence test by taking reasonable steps to satisfy himself that his son would not drive in contravention of his G1 license requirements.
 - This will turn on many facts we don’t have, such as past discussions between father and son regarding use of vehicle.
 - Our facts suggest Father was aware of restrictions and took some steps to ensure that Son had complied with them.
- Note contradiction: owner (Father) found to have “consented” to Son driving on highway but Father not likely to be found to have “permitted” breach of the policy.
See *Traders General Insurance Co. v. McCubbin* (ONSC, 2009)

Authority to Drive re: *Owner*

But, if Father is found to not satisfy the due diligence test, and thus excluded from coverage, would he meet the exceptions to the exclusion?

- Recall *Tut* (hangover case) → There is a potential exception to an exclusion based on an honest but mistaken belief of the owner that the condition was complied with.

Authority to Drive re: *Owner*

In *Tut*, court agreed that the mother had an “honest but mistaken belief” that her son had zero percent alcohol in his system.

Analysis:

- If Father permitted Son to drive the insured vehicle, he will likely be found to have an honest but mistaken belief that Son would drive in compliance with his G1 licence restrictions.

Authority to Drive re: *Owner*

- If Father is found to have “permitted” son to drive in contravention of his licence in breach of s. 4(1), is Father entitled to relief from forfeiture?
- Similar to the analysis in *Kozel*, if the Court finds that the conduct surrounding the breach alone is not reasonable (so no due diligence defence), it will then turn to the relief from forfeiture analysis, which includes the broader concept of the conduct (both before and after the breach) of the insured as reasonable and/or in good faith.

Authority to Drive re: *Owner*

The Test for Relief from Forfeiture

- Threshold issue: imperfect compliance with terms vs. non-compliance with conditions precedent. (skip as subsumed in later three-part analysis)
- The Three-Part Test
 - Conduct: Generally, Father's conduct appears reasonable. Although he had reason to expect Son might contravene his licence since he knew Daughter's condition and that they may drive together and should have done more, his conduct is not reprehensible, nor did he act in bad faith. Totality of conduct will be considered.
 - Gravity: Although there is overlap with issue of prejudice, the breach is "by no means grave".
 - Disparity: Similar analysis as for Son, although once removed. Not clear that if he had done more, Son would not have breached in any event. The causation issue is harder to demonstrate here, because it is difficult to know what damages, if any, were caused by Father's breach. On balance, though, if Son does not get relief from forfeiture, neither should Father, on the same basis (the risk of loss greatly increased because of the breach, therefore prejudice to the insurer).

Procedural Issues with Coverage: What Practical Steps should the Insurer Take?

- Preliminary Considerations:
 - Driver's breach of G1 licence restriction = likely no coverage
 - Owner not likely in breach or 'saved' by the *Tut* (honest but mistaken belief) exception or relief from forfeiture.
 - But issue is uncertain.

Procedural Issues with Coverage: What Practical Steps should the Insurer Take?

- Ongoing Further Investigation
 - Contractual issue of insurer “**Election**”
- When a potential policy breach is found to exist, the insurer is put to an election of either:
 - Refusing to defend the insured → thereby repudiating the contract; or
 - Defending the insured in spite of the breach → thereby waiving the insurer’s right to deny liability on the policy.
 - » C. Brown and J. Menezes, *Insurance Law in Canada*, 2nd Ed. (1991) at pg. 255.

Procedural Issues with Coverage: What Practical Steps should the Insurer Take?

- The insurer's "Election" can be done expressly or impliedly.
 - Actions or correspondence that suggest that a defence is being granted to the insured will imply an election to affirm the contract and obligate the insurer to defend the insured.

Advise insured of potential off-coverage position

- The usual approach is a non-waiver agreement, or a reservation of rights letter.
 - Non-waiver agreement is preferable insofar as it is a signed agreement between the insurer and the insured. However, there are certain difficulties in completing a non-waiver agreement that must be considered.

Advise insured of potential off-coverage position

- Non-waiver agreement

- An agreement signed by the insured that he or she agrees that the insurer does not waive its right to deny coverage while further steps including investigation into the details of the claim are undertaken.
- Be careful in taking a non-waiver agreement so as to not be seen to have elected to forgive the breach and affirm the contract to defend in spite of the non-waiver.
- Adjuster will need to deal with issue at outset of meeting or else insured will say the meeting itself and giving statement is part of the duty to cooperate and by exercising that right, the insurer is relying on or affirming the contract.

Advise insured of potential off-coverage position

- Reservation of Rights letter:
 - A Dear John letter to the insured that states that the insurer will proceed with a defence **but** reserves the right to deny coverage to the insured because of a potential policy breach.
 - Can be sent before any meeting so insured is aware of coverage situation.
 - Fairness and transparency are key concepts when dealing with insured and coverage problems.
 - Not even Reservation of Rights is foolproof

Advise insured of potential off-coverage position

- Reservation of Rights letter (con`t)

- *Economical Insurance Group v. Fleming* (ONSC, 2008), upheld on appeal (2009, ONCA)
 - Insurer aware of coverage issue.
 - Sends Reservation of Rights letter which states essentially:
 - there is a coverage issue, we are looking into it, do not mistake our on going efforts as either affirmation or denial of coverage.
 - We are still trying to decide.
 - We have not “Elected” yet.
 - Insurer (via defence counsel) sends excess letter stating essentially: you are covered up to liability limits but not beyond.
- Court found that once the excess letter was sent, the insurer had made the “election” to defend its insured.

Practical Steps when Coverage Issues Arise

Summary:

- Insurer aware of coverage issue should communicate same with insured and continue to investigate until facts are clear enough to make a decision.
 - Send Reservation of Rights and/or Non-Waiver or while investigating.
- A Non-Waiver Agreement or Reservation of Rights letter should not be indefinite.
 - A sophisticated insured may demand the insurer make an election right away.
- To the extent possible, keep defence and coverage issues separate.
- Even excess letter is coverage (limiting), so communication should be sent by insurer who could address any other coverage issues in the same letter.
 - If defence counsel send the excess letter, it may paper over any and all coverage issues and defences.

Practical Steps when Coverage Issues Arise

Application to Our Facts:

- Send Reservation of Rights letter or Non-Waiver Agreement.
- Complete investigation
- Deny coverage to Son as driver (because of breach of condition 4(1) based on breach of G1 licence).
- Embrace Father as Owner.

Next Steps:

- Add Insurer as a Statutory Third Party to the tort proceedings.
 - Add as stat third party for driver even though in action as owner's insurer.
 - Process more definite if owner/driver is same person, but makes sense even when separate for reasons we shall discuss.

When and why Insurer should add itself as a Statutory Third Party

When:

- Insurer is taking an off-coverage position with respect to its insured.
 - E.g. breach of statutory condition, ongoing failure to cooperate, material misrepresentation or fraud

Why:

- To allow Insurer to fully defend liability/damages in the shoes of the putative insured
- As a coverage strategy to permit a suspension of duty to defend which will then fall to be determined with the duty to indemnify.

Insurer as a Statutory Third Party

Purpose:

- Generally, duty to defend determined by pleadings alone. In most cases the coverage breach will not be raised in the Statement of Claim. Therefore, to avoid requirement to defend despite breach, insurer can add itself as a statutory third party.
- By alleging policy violation and adding itself as a statutory third party, the insurer who takes an off-coverage position... merely preserves its position. It will then be an issue to be determined in the subsequent litigation. - *Maccaroni v. Kelly* (ONCA, 2011)

Consequences of Coverage Breach

Driver:

- Not covered (denial will likely be upheld)
- Liable to the plaintiff *and* his insurer for any payment under s. 258 of IA

Owner:

- In this case, insurer embraced and owner likely liable, so judgment will be covered and insurer will likely pay plaintiff the full amount.
 - But, there can be situations (e.g. owner/driver are the same) where only exposure will through the driver via s. 258

We turn now to a consideration of the Absolute Liability Provisions...

The Absolute Liability Provisions

Insurance Act, s.258:

Purpose: to enable innocent, injured third parties to recover and not be deprived of remedy based solely on conduct of insured – *Joachin v. Abel* (ONCA, 2003)

- If the Insured is in breach of express or implied terms of insuring agreement:
 - Can forfeit entirely its right of indemnity
 - But insurer still absolutely liable to innocent party

Plaintiff must have judgment against insured before insurer's obligation under s. 258 is triggered.

(See: *Lockhard v. Quiroz* (ONCA, 2006))

When do absolute liability provisions apply?

The Absolute Liability Provisions Applied Breach of Statutory Condition

Statutory Condition 4(1): Authority to Drive

- *Northover v. Regier* (2000 Ont. S.C.J.)
 - Breach of a G1 or G2 restriction is sufficient to see one in breach of statutory condition 4(1) of the standard automobile policy
 - The insured held a G2 license and admitted to having had a “sip of beer” shortly before the collision
 - In our situation, Son drove without proper accompanying driver and involved in accident where a more experience accompanying driver could have made a difference.

The Absolute Liability Provisions Applied Breach of Statutory Condition

- Not “authorized to drive” – breach of condition 4(1), and not saved by due diligence defence or relief from forfeiture.
 - Insured forfeits rights to indemnity
 - Absolute Liability applies:
 - Still absolute liability on insurer (minimum limits to innocent third party)

The Absolute Liability Provisions Applied Intentional Criminal Act

Joachin v. Abel (ONCA, 2003)

- Putative insured used vehicle as weapon and purposely hit plaintiff (with intent to cause injury)
- Wrongdoer's insurer denied coverage to driver (denial affirmed as appropriate by the Court of Appeal) and issue was whether that insurer was liable under absolute liability provisions.
- "The intent of s.258(1) is to enable **innocent, injured third parties** to recover from the insurer of the driver who struck them and caused their injuries...An innocent third party is **not to be deprived of his or her remedy** because of criminal conduct of the insured"
- Court made clear that wrongdoer's right to coverage was forfeited since he had committed a criminal act with intent of bringing about loss or damage (see s. 118)
- Court held that where a person has a right to indemnity but forfeits that right by his actions, the absolute liability provisions will apply.
- S.258 applied and Abel's putative insurer responsible for \$200K of plaintiff's damages.

The Absolute Liability Provisions Applied Material Misrepresentation

Campanaro v. Kim (ONCA, 1998)

- Insured, Ki-Suk Kim misrepresented his ownership of the insured vehicle to his insurer, State Farm. He was the registered owner, but the actual owner was his brother (and driver) Ki-Jin Kim.
- After an accident, State Farm voided the policy and returned the premiums to insured.
- Court found essentially that there was an insured and hence coverage and that the material misrepresentation was to be seen as a breach of condition.
- The insured had a right to indemnity, but forfeited that right based on his actions (misrepresentation as to ownership)

The Absolute Liability Provisions Applied Material Misrepresentation

Campanaro v. Kim (ONCA, 1998)

- At para. 21, the Court of Appeal notes:
 - The absolute liability provisions are *not* insurance monies, but statutory payments made to the plaintiff as a judgment creditor.
 - This distinction is important and often lost on parties (and even the court)
 - The insured's limits are not reduced. The insured has no coverage, he is in breach.
 - The insurer is statutorily required to pay plaintiff as judgment creditor and can pursue the insured for amounts so paid (s. 258(13)).

Scope of Coverage

- What brings one completely outside of scope of Absolute Liability/Statutory Minimum Limits?
 - Difficult to predict, but some guiding principles emerge from case law:
 1. Breach of “Other Automobile” Coverage (*Winch*)
 2. No Consent (*Walker*)
 3. Excluded Driver (*Toulouse*)

Absolute Liability Not Applied Other Automobile

Where the accident involves heavy commercial vehicles:

- *Winch v. Keogh* (ONCA, 2006)
 - Defendant was driving a Hino Cube Van with a manufacturer's gross weight rating of over 4,500 kgs.
 - Plaintiff's insurer argues that Defendant's insurer should be required to pay out the stat. min. limits.
 - Defendant was found to be excluded from coverage and thus uninsured.
- Insured's use of heavy commercial vehicle
 - Insured defendant outside scope of coverage on private passenger vehicle policy
 - Vehicle outside insuring agreement
- Absolute liability – **no**
 - No possibility of indemnity because coverage will not follow him into a heavy commercial vehicle
 - Innocent party cannot recover on judgment

Absolute Liability Not Applied

No Consent

Where there is no consent of owner:

- *Walker v. Allstate* (ONCA, 1989)
 - At issue was whether the owner's insurer should be required to satisfy the judgment presented where the driver was driving without the consent of the insured owner.
- The Court of Appeal in *Walker* affirmed the trial judge's decision, as follows (at para. 1):

In our view, ... there can be no recovery by a third person unless the insured is entitled to indemnity under the policy... As the insured was driving without consent of the owner he was not entitled to indemnity under the policy and the plaintiffs who have judgment against him are not entitled to recover from his insurer.
- Therefore, plaintiff judgment against driver cannot be presented to owner's insurer under s. 258 when no consent.

Absolute Liability Not Applied Excluded Driver

Where the driver is an excluded driver under the policy:

- *Toulouse v. Makadebin* (Ont. Gen. Div., 1998)
 - The defendant was an excluded driver under his own insurance policy when driving a specific vehicle, and was involved in an accident with the plaintiff while driving that vehicle. At issue was whether the insurer was absolutely liable to the plaintiff under s. 258.
- The Divisional Court held that the absolute liability provisions do not apply in the case of an excluded driver:
 - While it is true that under Section 258 of the *Insurance Act* the insurer remains absolutely liable to an injured person for any act or default of the insured to the extent of the minimum limits, this only applies where a person has a claim against an insured for which indemnity is provided by a contract. In this case indemnity is not provided by the contract.
 - The provisions for the “excluded driver” ... recognize that with respect to the individual concerned no contract is in force.
- Therefore, plaintiff judgment against driver cannot be presented to owner’s insurer under s. 258 where the driver was an excluded driver under the policy.

Do Absolute Liability Provisions Apply to Father and Son?

- As indicated, where, as here, the issue is a breach of a Statutory Condition, the Absolute Liability provisions will apply.
 - The insurer still has recovery against its insured under s. 258(14), but need judgment
- The s. 258 line is supposed to be: no coverage to begin with vs. initially covered but forfeited by action of insured.
- But this is a difficult test to apply since in *Winch* the defendant was an insured who arguably took himself out of coverage by operating a heavy commercial vehicle.
- So, that is the rough rule, but the line is really drawn by the appellate cases on point.

When do absolute liability provisions apply?

S. 258 held to apply in the following cases:

1. Breach of Condition (*Northover*)
2. Intentional (Criminal) Act (*Abel*)
3. Material Misrepresentation (*Kim*)

S. 258 held NOT to apply in the following cases:

1. Breach of “Other Automobile” Coverage (*Winch*)
2. No Consent (*Walker*)
3. Excluded Driver (*Toulouse*)

Conclusion – Automobile Coverage Issues

- We have 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.
- We have also 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 re: coverage.

Conclusion – Non-Waiver Agreement and Reservation of Rights Letter

- The insurer often knows early on that there is an issue, but does not have enough information and is not ready to make a firm and final decision on coverage.
 - In those situations, strategies such as Non Waiver Agreement and Reservation of Rights letter can be employed.
 - We canvassed the difference between the two, when to use which, and common pitfalls to avoid when utilizing either.

Conclusion – Statutory Third Party

- Once the insurer has decided, that should be communicated to the insured, and insurer should consider whether to add itself as a Statutory Third Party.
 - We discussed this mechanism and the corresponding issue of the nature and applicability of the Absolute Liability Provisions, including when they apply both generally and in the context of the fact pattern we provided.

Conclusion

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

We hope this has been of assistance, please let us know if you have any questions.

Thank you.