CROSS-BORDER ISSUES

Rogers Partners LLP

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 might appreciate.

The Power of Attorney and Undertaking

A foreign insurer must file a Power of Attorney and Undertaking ("PAU") with the Canadian Council of Insurance Regulators ("CCIR"), to ensure that its insureds are not considered in contravention of the Ontario *Compulsory Insurance Act* while operating an insured vehicle in Ontario. 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.

The effect of the PAU is that a foreign insurer generally must treat its policy of insurance as an Ontario policy, while the vehicle is in Ontario. This is true for at least certain Ontario-mandated coverages, such as:

Minimum limits (currently $200,000 (CAD), exclusive of costs);
Availability of statutory accident benefits (Ontario's no-fault benefits); and
Uninsured motorist coverage.

Given the minimum limits in Ontario of $200,000 (CAD), a foreign insurer may be responsible for third party liability limits well above what was contracted for in the home jurisdiction. Furthermore, a foreign insurer may be responsible for paying no-fault accident benefits to its insured, even when the insured vehicle is not being driven in Ontario, but where the insureds are injured as passengers in another motor 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,
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> *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). This is so, despite the fact that its policy may have contractual third party liability limits which are dramatically lower, and/or there are geographic limitations on 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, when a vehicle insured by a foreign insurer signatory to the PAU is driven in Ontario and is involved in an accident, the foreign insurer is potentially liable

to pay Ontario-level statutory accident benefits to its own insured. The foreign insurer may also be liable to pay statutory accident benefits to all occupants of the insured vehicle, and/or 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.)). The ability of an insurer to avail itself of the Loss Transfer legislation, however, requires that the insurer has the requisite connection to Ontario at the time of the accident (See: *Unifund v. I.C.B.C.*, [2003] 2 SCR 63).

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.

Only those foreign and out-of-province insurers who file the **Protected Defendant Undertaking** can 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 insurers who do to file this undertaking risk being denied these protections.

The court in Ontario may find that filing the **PAU** is sufficient to entitle a foreign insurer to the protections contained in the **Protected Defendant Undertaking**. There is a risk, however, that the court does not agree in this regard, and the foreign insurer is denied those protections, while still being required to provide the expanded mandatory coverages outlined in the PAU. Accordingly, it is best for a foreign insurer to file both undertakings.

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** extends to provide property damage protection under s.263 of the *Insurance Act*, despite the fact that the Protected Defendant Undertaking does not refer to property damage. 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**.

In the event that a foreign insured is driving a foreign vehicle in Ontario, and where the insurer has not filed the PAU or either FSCO undertaking, it is likely that the insured driver would be unable to bring an action for personal injury in Ontario.

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

Some useful links:

Rogers Partners Publications and Resources	http://www.rogerspartners.com/resources/
Canadian Council of Insurance Regulators	http://www.ccir-ccrra.org/en/
Power of Attorney and Undertakings	https://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. If any one factor is present, 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:

1. The defendant is domiciled or resident in the province;
2. The defendant carries on business in the province;
3. The tort was committed in the province;
4. 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 will not require the foreign defendant submit to the jurisdiction of the Ontario court.

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. In addition, the fact that other party defendants are required to submit to the jurisdiction of the Ontario court is also insufficient to grant jurisdiction over a foreign defendant (eg. an underinsured motorist carrier).

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.

The reasoning from *Tamminga v. Tamminga* was upheld by a 5 member panel of the Ontario Court of appeal in the case of *Forsythe v. Westfall,* 2015 ONCA 810.

If one or more of the above presumptive factors are present, the defendant may challenge the next step – 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 of Ontario. A hard and fast rule is to perform a 'head-count' of the witnesses, and in what jurisdiction they reside.

Choice of Law

If the court determines that the matter is to be heard in Ontario, the next issue is what law is applicable. Even where an Ontario court has jurisdiction to hear a matter, in some circumstances, such as where an accident took place outside of Ontario, the law of a foreign jurisdiction may apply at trial.

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 minimum statutory limits.

The choice of law rules for tort matters 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 lies 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 <u>substantive</u>, and would be determined by the law of the place where the accident occurred:

1. Any applicable threshold 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 <u>not</u> be applicable; and

5. The limitation period which would be applicable is that of the state in which the accident happened.

The following are <u>procedural</u> and would be determined by the laws of Ontario:

1. The quantum of damages would be assessed as if it were an Ontario loss (i.e. The measure of damages);

2. The applicable statutory deductible(s);

3. Ontario law with respect to legal costs would be applicable; and

4. 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 procedural, as it is part of the measure of damages. As such, we expect that the court would find that it should be governed by the laws of Ontario.

Finally, it should be noted that an Ontario Court will consider U.S. law to be an issue of fact to be proven at trial. 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.

Attorning to the Jurisdiction

If a party files a statement of defence or notice of intent to defend in Ontario to a lawsuit, it is deemed to have accepted Ontario as the proper jurisdiction. Thus, if a party is considering challenging the jurisdiction, it is best to hold off on filing pleadings.