The Duty to Disclose Material Changes in Risk

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March 2019

There are a number of important milestones for a parent who is raising a child. Many of these milestones are celebrated with great joy.

Other milestones, however, can evoke considerable dread. For many parents, the day their child first takes the family vehicle for a drive after obtaining a driver's license is a fearful experience.

Unfortunately, those fears sometimes become reality and the child may be involved in a motor vehicle accident. This unfortunate reality can in turn become a nightmare when the parents' insurer advises them there is no coverage under their motor vehicle liability policy, as they did not notify the insurer that their child had obtained a driver's license.

This is a surprisingly common scenario, and one that played out recently in *Seetaram v. Allstate Insurance Company of Canada*, 2019 ONSC 683.

Background Facts

Zalimoon Seetaram and Lakeram Sitaram were insured under a motor vehicle liability policy with Allstate Insurance. Their son, Avinash Sitaram, who lived with them, had obtained his G2 license in February of 2013.

The Allstate policy was set to expire on April 17, 2013, and Allstate sent a renewal offer to Zalimoon and Lakeram. The renewal form confirmed that the only licenced drivers in the household were Zalimoon and Lakeram.

Further, in the driver information section, Allstate asked: "*Are any other persons in the household or business licensed to drive?*" As Lakeram and Zalimoon had answered no to that question when the policy was first issued, a "*no*" was included in the policy renewal.

The policy was in turn renewed based on this information. The son, Avinash, was then involved in an accident, and Avinash and Lakeram were put on notice of a possible claim against them. They looked to Allstate for a defence and indemnity under the insurance policy.

Allstate began investigating the claim and determined that Avinash was a licensed driver in the household at that time of the policy renewal.

Ultimately, Allstate determined that, had it been aware of this fact, it would have charged an annual premium almost double what was actually charged.

The failure to advise that Avinash was licensed to drive was, according to Allstate, a violation of both the policy's Statutory Condition 1(1), which required notification to the insurer promptly of any material change in risk in the contract, and Section 233(1)(a)(ii) of the *Insurance Act,* which deals with misrepresentation on an application for insurance.

That section provides that where an applicant for a contract for automobile insurance "*knowingly misrepresents or fails to disclose in the application any fact required to be stated therein … a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited*."

Allstate then sent a registered letter to the applicants with the full refunded premium and advised that Allstate declared the policy void as of April 17, 2013, due to the failure to disclose facts material to the evaluation of the risk.

Zalimoon, Avinash and Lakeram in turn brought an application seeking a declaration that the Allstate policy remained valid and, in the alternative, relief from forfeiture from any breach of the policy.

The Decision

The applicants took the position that Allstate had a duty to explain to them what constituted a material change in risk and had failed to do so.

Further, that they had an honest but mistaken belief in coverage and any breach should in turn be excused, or alternatively, relief from forfeiture should apply to relieve the breach.

What is "Material" to the Risk?

The first issue to be considered was what should be considered a fact "material" to the risk. Justice Glustein confirmed that the law in Ontario is that the duty of utmost good faith between parties to an insurance contract requires the applicant to disclose all material facts to the insurer.

A fact will be material where, if properly disclosed, it would influence a reasonable insurer either to decline the risk or accept a different premium.

Is there a Duty to Explain what is Material to the Policy Holder?

The applicants argued that an insurer has a duty to explain to the policy holder what constitutes a material change in risk. They relied on appellate authority from New Brunswick for this position.

However, Justice Glustein rejected this argument and confirmed that in Ontario, unlike other provinces in Canada, **an insurer does not have a duty to explain to the insured what constitutes a material change in risk. The duty is on the insured to disclose all material facts, even in the absence of questions from the insurer.**

Does an Honest but Mistaken Belief in Coverage Excuse the Breach?

The applicants then argued that their honest but mistaken belief in coverage should excuse any beach of condition.

They relied on caselaw interpreting Statutory Condition 4(1), which found that an honest but mistaken belief in coverage can in some circumstances excuse a breach of that condition.

Justice Glustein rejected this argument as well. Statutory Condition 4(1) requires an analysis of "*whether the insured acted reasonably in all the circumstances*", thus importing a subjective view of the insured into the analysis.

However, **this language is absent from Statutory Condition 1(1), which does not take into account the subjective view of the insured.**

Instead, the test under Statutory Condition 1(1) is analogous to the test under Section 233(1)(a)(ii) of the *Insurance Act*. That is, a fact will be material where, if properly disclosed, it could influence a reasonable insurer either to decline the risk or accept a different risk regardless of the subjective belief of the putative insured.

Does Relief from Forfeiture Excuse the Breach?

Finally, Justice Glustein considered the applicants' request for relief from forfeiture.

In *Kozel v. Personal Insurance Co*., the Ontario Court of Appeal had determined that a court may grant relief from forfeiture "*to prevent hardship to beneficiaries of an insurance contract where there has been a failure to comply with the condition for receipt of insurance proceeds and where leniency in respect of strict compliance with a condition will not result in prejudice to the insurer*".

Justice Glustein clarified the important distinction, however, between imperfect compliance with a policy term and non-compliance with a condition precedent to coverage.

Where there is imperfect compliance with a policy term, such as a woman who drove without a license in *Kozel*, relief from forfeiture is available.

However, where the breach constitutes non-compliance with a condition precedent to coverage, such as non-disclosure on an application for insurance (pursuant to Section 233(1)(a)(ii)), or when the insured fails to advise the insurer of a change material to the risk (pursuant to Statutory Condition 1(1)), the contract is not properly formed and as such the insurer is not bound by it.

This is, therefore, not a breach of the nature that can be addressed by relief from forfeiture.

Based on all of the above, Justice Glustein dismissed the entire application and awarded costs to Allstate.

Key Consideration for Insureds

The failure to properly disclose material facts when applying for insurance, or to promptly notify the insurer of a material change to the risk insured, is a surprisingly common error made by policy holders.

The impact of such an error can be devastating, leaving the policy holder with no coverage at all following a serious accident.

This underscores the unique relationship between the parties when forming an insurance contract, and the absolute obligation of good faith between those parties.

For policy holders, it is imperative that they are aware of their duty to notify their insurer of any change material to the risk, as well as their requirement not to misrepresent any fact during the application for insurance. For example, if you child lives with you and gets their driver's licence, advise your insurer.

A policy holder should never rely on the insurer to explain to them what would be material in that insurer's assessment of the risk. Instead, they must be aware that a fact is considered material where, if disclosed, it would influence their insurer to either decline the risk or accept a different risk.

The best advice to policy holders or applicants for insurance is to be thorough and completely truthful when applying for insurance and to update their insurer with any factual change that may impact their policy in any way.

The insurer can then make the decision on whether the change is material to the risk insured or to be insured.

Key Consideration for Insurers

For insurers, a thorough investigation should always be undertaken following an accident to confirm that the risk underwritten is in fact fairly represented in the policy itself and in the premiums collected.

If not, and the insurer had in fact insured a risk different than what was understood, it may be that the insurance policy was not properly formed in the first place and it is in turn voidable.

Assuming the insurer properly follows the procedures for voiding the policy, the policy will be deemed void from inception. There would be no entitlement to indemnity thereunder, and relief from forfeiture would not be available to excuse the insured's non-compliance with a condition precedent to coverage.