

Joint Liability and the Nature of Subrogation under the OPCF 44R

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The Court of Appeal has released a new and detailed decision in [Tuffnail v. Meekes](#), 2020 ONCA 340, which addresses issues related to underinsured automobile coverage.¹ The decision was written by Associate Chief Justice Hoy, who was joined by Justice Doherty and Associate Chief Justice Marrocco (*ad hoc*).

The key takeaways from the decision are:

- The amounts available under the OPCF 44R endorsement are excess to the amounts available to the plaintiff from the insurers of a person jointly liable with the inadequately insured motorist.
- A plaintiff does not need to sue a tortfeasor in order for the tortfeasor to be found jointly liable. In other words, the tortfeasor's insurance can be "available" to the plaintiff even if the plaintiff does not sue the tortfeasor.
- Under the OPCF 44R, a subrogated claim advanced by an insurer by way of a third party claim is necessarily based on the third party's status as a potentially responsible joint or concurrent tortfeasor.
- When an insurer seeks to recover the amounts it paid by way of subrogation, it has to share the recovery with the plaintiff on a *pro rata* basis until the plaintiff receives full indemnification under the judgment.

Overview

¹ On appeal from the judgment of Justice Helen A. Rady of the Superior Court of Justice, dated July 23, 2019, with reasons reported at [2017 ONSC 4610](#), 72 C.C.L.I. (5th) 281; 2018 ONSC 4113; [2019 ONSC 525](#), [2019] I.L.R. I-6127; 2019 ONSC 1334; and 2019 ONSC 2399.

Tuffnail was a passenger who was seriously injured in a single-vehicle crash following a wedding reception. Tuffnail commenced an action against the driver of the vehicle (Meekes), the groom (Bolton), and Tuffnail's automobile insurer (State Farm).

Tuffnail sought a declaration that he was entitled to coverage under the OPCF 44R, which had been purchased by Tuffnail from State Farm. Meekes was an inadequately insured motorist within the meaning of OPCF 44R.

State Farm defended the action and brought a third party claim against the bartender at the wedding, Coulthard, for contribution and indemnity for amounts it was required to pay pursuant to the OPCF 44R. The defendant, Bolton, also brought a third party claim against Coulthard. However, Tuffnail never sued Coulthard.

At trial, liability was apportioned amongst the parties as follows:

- Meekes (driver) – 65%
- Bolton (host) – 20.03%
- Coulthard (bartender) -11.12%
- Tuffnail (plaintiff) – 3.85%

The following insurance coverage was available to the tortfeasors:

- Meekes (driver) - \$200,000
- Bolton (host) - \$2,000,000
- Coulthard (bartender) - \$1,000,000

After taking into account Tuffnail's contributory negligence, the net amount payable to Tuffnail (\$3,435,034.71) exceeded the aggregate insurance coverage available.

The trial judge ordered that State Farm pay Tuffnail \$800,000, which the parties agreed was the limit of coverage under the OPCF 44R².

The trial judge also concluded that State Farm was entitled to pursue recovery of its subrogated interest against Bolton and Coulthard, and that State Farm would share with Tuffnail on a *pro rata* basis any amounts it recovered by way of subrogation until Tuffnail received full indemnification pursuant to the terms of the OPCF 44R endorsement.

² \$800,000 was the amount by which the \$1,000,000 of coverage under the OPCF 44R exceeded the \$200,000 limit of the Meekes motor vehicle liability policy, as the Bolton and Coulthard policies were not motor vehicle liability insurance policies.

Following the release of the trial judge's reasons on the post-verdict issues, State Farm, Tuffnail and Coulthard argued that the trial judge made several errors and raised these issues on appeal. The issues involving the discussion of OPCF 44R are outlined below.

1. **Did the trial judge err in her interpretation of s.7 of the OPCF 44R, leading to an erroneous calculation of the amount State Farm was required to pay Tuffnail?**

The Trial Judge's Decision

One of the issues before the trial judge was whether Coulthard's insurance coverage was "available" to Tuffnail to reduce State Farm's liability to Tuffnail pursuant to s.7 of the OPCF 44R, which states:

7. The amount payable under this change form to an eligible claimant in excess to an amount received by the eligible claimant from any source, other than money payable on death under a policy of insurance, and is excess to amounts that were available to the eligible claimant from [...]

b) the insurers of a person **jointly liable** with the inadequately insured motorist for the damages sustained by an insured person [emphasis added].

The trial judge concluded that because Tuffnail had **not** commenced a claim against Coulthard and named Coulthard as a defendant, the proceeds of Coulthard's policy were not available within the meaning of s.7 of the OPCF 44R. Therefore, State Farm could not also deduct the limits of Coulthard's insurance coverage, and was required to pay the entire amount available under the OPCF 44R.

Decision of the Court of Appeal

On appeal, the Court determined that Coulthard was "jointly liable" to Tuffnail within the meaning of s.7b), and as such, his insurance was "available" to Tuffnail within the meaning of s.7b). Accordingly, State Farm was entitled to deduct the limits of Coulthard's insurance coverage in calculating the amount it was required to pay Tuffnail.

The Court considered that, in State Farm's claim for contribution and indemnity against Coulthard in respect of any amounts it was called upon to pay Tuffnail, State Farm actually had made a subrogated claim against Coulthard on behalf of Tuffnail. State Farm had no independent right to claim against Coulthard, as State Farm did not cause or contribute to Tuffnail's damages. As such, the consequence of State Farm's claim was that Coulthard's liability to Tuffnail was put in issue.

The Court reviewed State Farm's rights of subrogation pursuant to the *Insurance Act* and the OPCF 44R.

Section 278(1) of the *Insurance Act* states:

Subrogation

278 (1) An insurer who makes any payment or assumes liability therefor under a contract is subrogated to all rights of recovery of the insured against any person and may bring action in the name of the insured to enforce those rights.

Section 20 of the OPCF 44R states:

20. Where a claim is made under this change form, the insurer is subrogated to the rights of the eligible claimant by whom a claim is made, and may maintain an action in the name of that person against the inadequately insured motorist and the persons referred to in section 7 of this change form.

The Court noted that State Farm's third party claim made an allegation of negligence against Coulthard vis-à-vis Tuffnail. At trial, the jury found that Coulthard was partially liable for the plaintiff's injuries.

As a result, the Court concluded that Coulthard was "jointly liable" with Meekes within the meaning of s.7 of the OPCF 44R. This was based on the nature of State Farm's subrogated action, the trial judge's determination that State Farm had a right of subrogation against Coulthard under s.20 of the OPCF 44R, and the jury's finding of Coulthard's liability.

State Farm was thus entitled to deduct Tuffnail's percentage of the proceeds from the Meekes policy, the Bolton policy and the limits of the Coulthard policy, limiting its exposure under the OPCF 44R to approximately \$347,454.71 instead of \$800,000³.

2. Did the trial judge err in providing for pro rata sharing under s.278(2) only until Tuffnail received full indemnification pursuant to the terms of the OPCF 44R,

³ Meekes' and Bolton's policy limits were subject to *pro rata* sharing with the Petrie plaintiffs, (the companion action), thus Tuffnail was entitled to 94.89% of the proceeds. Accordingly, Tuffnail was entitled to \$189,780 from the Meekes policy and \$1,897,800 from the Bolton policy.

or in concluding that the section was applicable?

The Trial Judge's Decision

As the net amount recoverable from Meekes', Bolton's and Coulthard's insurers was less than the amount of the judgment in favour of Tuffnail, the trial judge ordered that State Farm was entitled to pursue recovery of its subrogated interest against Bolton and Coulthard.

Further, the trial judge stated that State Farm was required to share with Tuffnail on a *pro rata* basis, any amounts it recovered by way of subrogation until Tuffnail received "full indemnification pursuant to the OPCF 44R⁴".

Decision of the Court of Appeal

On appeal, Tuffnail argued that the trial judge erred in ordering that State Farm share any amounts it recovers by way of subrogation with Tuffnail until Tuffnail received full indemnification. On cross-appeal, State Farm argued that the trial judge erred in requiring it to share at all.

The Court considered s.278 (1) of the *Insurance Act* (outlined above) which permits an insurer to subrogate before the insured is fully indemnified, and s.278(2), which stipulates that, where the net amount recovered is insufficient to provide complete indemnity, the insurer and insured recover *pro rata*:

Pro-rating recovery

(2) Where the net amount recovered whether by action or on settlement is, after deduction of the costs of the recovery, not sufficient to provide complete indemnity for the loss or damage suffered, the amount remaining shall be divided between the insurer and the insured in the proportion in which the loss or damage has been borne by them.

The Court noted that s.20 of the OPCF 44R also modified State Farm's common law right of subrogation, which permitted State Farm to subrogate even sooner (when a claim is made under the OPCF 44R). However, the Court noted, that the OPCF 44R is silent on what happens where the net recovery is **insufficient** to provide complete indemnity.

⁴ Referred to in *Tuffnail v. Meekes*, 2020 ONCA 340 (CanLII) at paragraph 51.

Tuffnail argued that the trial judge erred in providing for *pro rata* sharing only until Tuffnail received full indemnification pursuant to the terms of the OPCF 44R endorsement, rather than until Tuffnail received full indemnification under the judgment.

The Court concluded that the trial judge's decision contained a possible unintentional error, as it made no sense to require the *pro rata* sharing of those amounts that State Farm would receive by way of subrogation only until Tuffnail received full indemnification pursuant to the terms of the OPCF 44R.

State Farm argued that indemnification for the purpose of s.278(2) would be achieved on Tuffnail's recovery of the OPCF 44R policy limit. However, the Court opined that, if the trial judge had intended to give effect to this position, there would have been no need to provide both for State Farm's payment of \$800,000 and for *pro rata* sharing with Tuffnail out of State Farm's recovery on subrogation.

The Court highlighted that an insurer pays under an insurance contract **before** it can seek to recover, by way of subrogation, the amounts that it paid to its insured. As such, the wording of the trial judge gave no effect to the purpose of s.278(2).

The Court concludes that s.278(2) of the *Insurance Act* applies to State Farm's right of subrogation under OPCF 44R. In this regard, Associate Chief Justice Hoy writes at paragraphs 68 and 69:

[68] With respect to State Farm's arguments on its cross-appeal, I disagree that [s. 278\(2\)](#) cannot apply to its right of subrogation under the OPCF 44R. While, as State Farm asserts, its right of subrogation arose under the OPCF 44R, State Farm also acquired a right of subrogation under the stricter provisions of [s. 278\(1\)](#) of the *Insurance Act*. [Section 278\(1\)](#) provides that an "insurer who makes any payment or assumes liability therefor under a contract is subrogated..." By virtue of the judgment, if not before, State Farm assumed liability for payment under the OPCF 44R, thereby meeting the stricter pre-condition for subrogation in [s. 278\(1\)](#). Moreover, State Farm will have made payment under the OPCF 44R by the time the issue of sharing of recovery arises.

[69] As I have said, the OPCF 44R is silent on what happens where the net recovery is insufficient to provide complete recovery. [Subsection 278\(2\)](#) fills that gap.

As a result, the Court allowed Tuffnail's appeal and altered the judgment to provide that State Farm was entitled to pursue recovery of its subrogated interest against Bolton and Coulthard, and that State Farm would share with Tuffnail on a *pro rata* basis, any amounts

it recovers by way of subrogation until Tuffnail received **full indemnification under the judgment.**

The Court went on to address three other post-verdict issues raised by the parties, including the proportion of liability of the defendant Bolton and the trial judge's discretion to award prejudgment interest at a higher rate than the bank rate.