

The costs of just one more alcoholic drink resulting in the driver having a blood alcohol level above 0.80 – drag racing, intentionally causing a collision or any other criminal activity – extend far beyond the criminal courtroom and can have a staggering effect on the insurance policy of the owner or driver of the vehicle, including on the payment of Statutory Accident Benefits, payment for loss of or damage to the vehicle, and, depending on the crime, the provision of a defence and indemnification against a civil claim.

For the purposes of comparison in this article, two examples will be used: a driver, Jane Doe, who has one too many drinks, has a blood alcohol level of 0.085 and causes a collision, and a driver, John Doe, who is enraged after a physical altercation with another patron at a bar, hops into his vehicle, chases the other patron's vehicle, causes a collision between the two vehicles, and is convicted of aggravated assault.

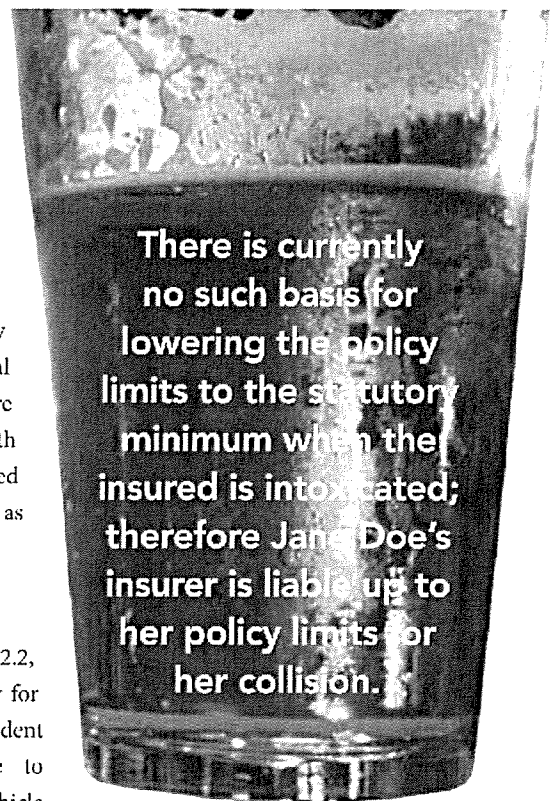
Statutory Accident Benefits

Under section 31 of the *Statutory Accident Benefits Schedule – Effective September 1, 2010*,² the insured or driver's right to access Statutory Accident Benefits is severely restricted if the insured or driver was convicted of a criminal offence involving the operation of an automobile. Specifically, the insured or driver is not entitled to income replacement benefits, non-earner benefits, or payment of other expenses, including housekeeping and home maintenance benefits, lost education expenses, or expenses of visitors.

Thus by having just one more drink resulting in a blood alcohol level of more than 0.80 and being convicted of same, Jane Doe is in the same position as John Doe who was convicted of aggravated assault. They are both limited to claims for medical rehabilitation benefits, attendant care benefits, caregiver benefits, and death and funeral benefits, and are excluded from other important benefits such as income replacement.

Loss or damage coverage

Pursuant to the OAP 1, section 7.2.2, the insurer is not obligated to pay for loss or damage caused in an incident where the insured was unable to maintain proper control of the vehicle because he was driving the vehicle while under the influence of intoxicating substances; if the insured uses or permits the automobile to be used in a race or speed test or for other illegal activity; if the insured drives the vehicle while not authorized to do so; or if the insured was convicted of criminal negligence causing bodily harm, dangerous operation of a vehicle, failure to stop at the scene of a collision, operation of a motor vehicle when impaired or with more than 80 mg of alcohol in the blood, refusal to comply with a demand for a breath sample, causing bodily harm during operation of a vehicle impaired or over 80 mg of alcohol in the blood, or operating a motor vehicle while disqualified from doing so. In addition, if another person, with the insured's permission, drives or operates the automobile under these conditions, the insurer is not obligated to pay for any resulting loss or damage to the vehicle. Again Jane Doe and John Doe are in the same position. They are both excluded from receiving payment for the loss or damage of the vehicle.



On the other hand, under section 7.4.2, if the insured allows the other person to drive his or her vehicle, but has no knowledge of the fact that the driver is in breach of 7.2.2, the insurer will pay for the loss or damage to the vehicle and will recover the costs from the driver. If Jane Doe and John Doe were lent vehicles by other persons who were not aware of their intentions, Jane Doe and John Doe are both liable for the amount that the insurer will have paid to the insured for the loss or damage to the vehicle.

Tort claim

The true costs in tort are more complex to fully envision. The start of any discussion on the topic begins with section 251(1) of the *Insurance Act*,³ which provides that the minimum liability under every contract of motor vehicle insurance is \$200,000, plus interest and costs. Under section 258(4), the right of an injured person to have insurance money applied to his or her claim is not prejudiced by any contravention of the *Criminal Code*

(Canada) or any statute of any province or territory in Canada by the owner or driver of the automobile or by breach of the policy. Unfortunately, this absolute liability is limited to the \$200,000 statutory minimum and not the full policy limit. In this regard, Section 258(11) states:

Defence where excess limits

- (11) Where one or more contracts provide for coverage in excess of the limits mentioned in section 251, except as provided in subsection (12), the insurer may,
- (a) with respect to the coverage in excess of those limits; and
 - (b) as against a claimant, avail itself of any defence that it is entitled to set up against the insured, despite subsection (4).

Thus if there is a defence available to the insurer on the basis of criminality or breach of contract, the policy limits will drop to \$200,000 plus interest and costs (colloquially referred to as the “drop-down limit”).

The first defence available to the insurer is illegal activity with the intent to cause harm. Section 118 states:

Violation of law, effect of, on claim for indemnity

118. Unless the contract otherwise provides, a contravention of any criminal or other law in force in Ontario or elsewhere does not, by that fact alone, render unenforceable a claim for indemnity under a contract of insurance except where the contravention is committed by the insured, or by another person with the consent of the insured, with intent to bring about loss or damage, but

in the case of a contract of life insurance this section applies only to insurance undertaken as part of the contract whereby the insurer undertakes to pay insurance money or to provide other benefits in the event that the person whose life is insured becomes disabled as a result of bodily injury or disease.

Thus under this section, the insurer of John Doe can now limit the claim of the occupants of the other tavern patron's vehicle to \$200,000.00 plus interests and costs. As Jane Doe did not intend to cause harm by drinking and driving, this section does not lower her policy limits to statutory minimums; however, this section does leave the door open to exclusions due to a breach of contract under the OAP 1.

The OAP 1 states that by entering into the insurance contract, the insured agrees as follows:

- Not to drive or operate the automobile, or allow anyone else to drive or operate the automobile, when not authorized by law (1.4.5); and
- Not to use or allow anyone to use the automobile in a race or speed test or for any illegal trade or transportation (1.4.6).

A breach of either of these two conditions will constitute a breach of contract and result in a defence to the policy limits in excess of the minimum limits. Interestingly, it does not state that the insured agrees not to use or allow anyone to use the automobile for illegal activity or while under the influence of an intoxicant. The statutory condition prohibiting the use of an automobile while the driver was incapable of proper

control of the automobile by reason of the influence of intoxicating liquor or drugs, thus allowing the insurer to drop coverage to the statutory minimum, was removed in 1973 as noted in *Kereluik v. Jevco Insurance Co.*¹ There is currently no such basis for lowering the policy limits to the statutory minimum when the insured is intoxicated; therefore Jane Doe's insurer is liable up to her policy limits for her collision. If, however, at the time of the collision, Jane Doe was street racing while intoxicated or was driving with a suspended license while intoxicated, her insurer would be able to drop coverage to the minimum limit because of a breach of contract.

The public policy debate

The issue of whether an insurer should be able to reduce its policy limits or refuse coverage altogether due to alcohol consumption began with the 1934 Supreme Court of Canada decision in *Home Insurance Co. v. Lindal*.⁵ In *Lindal*, the driver of the vehicle was found to be intoxicated. At the time of the collision, it was a statutory condition that the insurer will not be liable while the automobile is driven by an intoxicated person. It was found that where the collision is brought about by an act which is a violation of the criminal law, the contract of indemnity will be regarded as unenforceable on the grounds of public policy. This is due to the public policy that one should not benefit from criminal activity, including receiving the benefit of protection from liability by an insurer, even when it would remove any possible source of compensation for an innocent victim.

In *Kereluik*, the insurer argued that by driving while intoxicated, the driver was in breach of a condition of the insurance policy, which states that the insured shall not operate the vehicle

or permit another person to operate the vehicle unless the insured or the other person is authorized by law to do so. In analysing this argument, the Court of Appeal found that “the legal authority to drive, at any given time, depends on the existence of a valid license issued by the responsible regulatory authority and compliance with the conditions attaching to the license”. This condition was not intended to apply to breaches of law not directly connected with violations of the license’s conditions. Justice Cronk on behalf of the Court of Appeal went on to state as follows:

... s. 118 of the Act signals a clear legislative intent to allow for the possibility of compensation for innocent tort victims beyond the statutory minimum amounts provided for under the Act, notwithstanding that the losses in respect of which compensation is sought may have been occasioned by a tortfeasor’s criminal wrongdoing. ... s. 118 is also designed to provide insurance protection for negligent tortfeasors who do not intend to cause harm. [Para 19]

These public policy choices by the legislature stand in stark contrast to former versions of the Ontario standard automobile insurance policy, which expressly prohibited the use of an automobile by an insured while incapable of the proper control of the automobile by reason of the “influence of intoxicating liquor or drugs”... [Para 20]

The legislature’s policy choices regarding the availability of

compensation for tort victims injured in motor vehicle accidents require respect from the courts. By enacting s. 118 of the Act, by repealing former statutory conditions under the Act that expressly precluded the operation or use of an automobile while under the influence of alcohol (i.e., former Statutory Condition 2(1)(a), above-cited), and by not incorporating a coverage exclusion in the current standard form automobile insurance policy pertaining to drunk drivers, the legislature must be taken as having elected to protect the potential of tort compensation for innocent victims of drinking and driving. ... [Para 21]

Thus it is only when a blood alcohol level of zero is a condition of driving, such as when the driver holds a G1 or G2 licence, that the driving while intoxicated will reduce policy limits to the statutory minimum.

Conclusion

The cost of Jane Doe’s one extra drink includes the loss of income replacement benefits, non-earner benefits, housekeeping benefits, visitors’ expenses benefits, lost educational benefits, and coverage for loss or damage to the vehicle. While steep, this cost is not as high as the cost of street racing, assaulting someone with a vehicle as in the example of John Doe, or consuming any alcohol as a G1 or G2 driver, which would include the above as well as serve to reduce the policy limits to the statutory minimum.

A close reading of the *Insurance Act* and the statutory conditions of

the standard auto policy is always recommended when dealing with criminality in the operation of a motor vehicle that may impact coverage, available limits and accident benefits.




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NOTES

- ¹ With thanks to articling student, Melissa Novis, for her assistance with research.
- ² O Reg 34/10.
- ³ RSO 1990, c I-8.
- ⁴ 2012 ONCA 338, 2012 CarswellOnt 6272 [hereinafter referred to as *Kerelutuk*]; *Insurance Act*, RSO 1970, c 224, s 205.
- ⁵ (1933) [1944] SCR 33, 1933 CarswellAlta 53 [hereinafter referred to as *Lindal*].

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