A PLAINTIFF COUNSEL'S *Guide to* NAVIGATING THE AUTO COVERAGE MAZE

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How do you push your client's claim forward when you discover that the Defendant does not have access to an insurance policy?

One of the first issues Plaintiff's counsel must consider is whether there is insurance to cover the losses that their client sustained in a motor vehicle collision. The total lack of an insurance policy to indemnify a proposed Defendant may come to light quickly, or coverage issues can arise throughout the course of the litigation. A lack of coverage can have dire consequences for an injured person's ability to recover their damages.

How do you push your client's claim forward when you discover that the Defendant does not have access to an insurance policy? Maybe the Defendant's insurer is alleging there was a policy breach and is denying coverage. Maybe the proposed Defendant was driving without insurance. Or, maybe you don't know the identity of the at-fault motorist at all. This article provides a concise guide to accessing a source of compensation for your client when faced with coverage issues.

When the Defendant is Insured, but Their Policy Will Not Respond

Even if the Defendant's vehicle was insured pursuant to an automobile insurance policy at the time of the collision, the insurer may refuse to respond if it has reason to believe that the insured was in breach of the policy. The conditions are part of the Ontario Automobile Policy ("O.A.P. 1") and cannot be varied or omitted.[1] They include the following:

- Failing to advise of a material change in risk
- Driving while not authorized, i.e. driving without consent, without a license, or with a suspended license
- Racing
- Failing to give notice of the accident
- Failing to cooperate[2]
- Failing to provide the insurer with a statutory declaration within 90 days of the date of loss
- Using the vehicle to carry explosives or radioactive material (absent a special endorsement on the policy)
- Using the vehicle to carrying passengers for compensation (absent a special endorsement on the policy)
- Driving the vehicle without consent or by an excluded driver
- Renting or leasing the vehicle without approval (absent a special endorsement on the policy)
- The vehicle is driven by garage personnel while involved in conducting the business of selling, repairing, maintaining, storing, servicing or parking the vehicle (unless that person is the owner, partner or employee of the owner)
- Using the vehicle for war activities
- Giving false particulars of the described automobile, making a material misrepresentation, committing fraud, or willfully making a false statement in respect of a claim under contract.[3]

Section 258 of the *Insurance Act* ("the *Act*") states that even if the Defendant's actions were such that the insurer will not defend and indemnify them, the insurer remains liable to pay a judgment in favour of the Plaintiff up to minimum limits.[4] Minimum limits are $200,000.00 per accident, exclusive of interest and costs.[5]

The purpose of section 258 was defined by Justice Gillese in *Joachin v. Abel* as enabling "innocent, injured third parties to recover from the insurer of the driver who struck them and caused their injuries."[6] In other words, a Plaintiff's action under s. 258(1) is independent of the insured's right of indemnification.[7] It creates an absolute liability on the part of the insurer toward the injured Plaintiff. Payment under section 258 is a statutory payment, not an insurance payment.

However, some policy breaches negate coverage entirely. For example, a vehicle driven without consent or driven by an excluded driver will result in coverage being negated. In such cases, the vehicle will be deemed to be uninsured. In that case, Plaintiff's counsel should proceed as if the Defendant had no insurance at the time of the collision.

Regardless of the type of breach alleged, when the insurer determines that its insured (i.e. the Defendant) has breached the policy, it may take an "off-coverage position," meaning it takes the position that the insured is not entitled to defence or indemnity pursuant to the contract. When the insurer takes an off-coverage position, it can add itself to the action as a statutory third party pursuant to s. 258(14), regardless of whether the Defendant defends the action. This allows the insurer to participate in and defend the action without forcing it to defend an insured with respect to whom it is denying coverage and from whom it might ultimately attempt to recover the money that it had to pay to a Plaintiff.[8] By becoming a statutory third party, the insurer limits its exposure to minimum limits but can still defend the Plaintiff's claim with respect to liability and damages. Becoming a statutory third party provides the insurer with certain rights, as laid out in section 258(15):

> 258(15) Upon being made a third party, the insurer may,
> (a) contest the liability of the insured to any party claiming against the insured;
> (b) contest the amount of any claim made against the insured;
> (c) deliver any pleadings in respect of the claim of any party claiming against the insured;
> (d) have production and discovery from any party adverse in interest; and
> (e) examine and cross-examine witnesses at the trial,
>
> to the same extent as if it were a defendant in the action. R.S.O. 1990, c. I.8, s. 258 (15).

Where both the owner and the driver were covered under an automotive policy, the owner may still have access to coverage even if the driver does not, if that owner took reasonable and prudent precautions to see that the Statutory Conditions were not contravened. Similarly, in a lessor/lessee situation, coverage may still be extended to the lessor even if it is denied to the lessee.[9]

> *When the insurer determines that its insured has breached the policy, it may take an "off-coverage position."*

When the Defendant is Uninsured or Unidentified, but Your Client is Insured

If your client was struck by an uninsured or unidentified vehicle, their own insurance will provide uninsured and unidentified motorist ("UIM") coverage. UIM coverage is statutorily mandated via section 265 of the *Act* and is set out at section 5 of the O.A.P. 1. It applies when there is either (a) an uninsured vehicle, which is defined as one where neither the owner nor the driver has insurance, or the insurance is not collectible,[10] or (b) an unidentified automobile, defined as one where the identity of the owner or driver cannot be ascertained.[11] Applicable coverage is then minimum limits ($200,000.00, exclusive of interest and costs), pursuant to section 251 of the *Act*. In other words, you turn to your own client's UIM coverage when they were struck by an uninsured driver, or an unidentified driver, or when the Defendant's insurer is alleging that the Defendant was driving without consent or was an excluded driver at the time of the collision.

If your client's injuries were caused by an unidentified vehicle (i.e. a hit-and-run), you should be aware that there are notice requirements to be fulfilled. Pursuant to section 5.3.5 of the O.A.P. 1, the accident must be reported to the police within 24 hours of the accident, and a written statement must be provided to the insurer within 30 days of the accident, or "as soon as practicable". The vehicle must also be made available for inspection.

What if your client is struck by an insured vehicle with only $25,000.00 in limits? This can happen, for example, when your client is struck by an American insured driving in Ontario. In such a case, your client cannot access the other $175,000.00 from their UIM insurance because the uninsured provisions apply to uninsured, not underinsured, motorists. However, if the collision occurred in Ontario, the automobile your client was struck by must provide minimum limits even though their coverage is lower if the foreign insurer is signatory to a Power

of Attorney and Undertaking filed with the Canadian Council of Insurance Regulators.[12]

UIM coverage is only available when there is no motor vehicle policy to cover against. In order to access UIM coverage, you need to sue all other parties having **motor vehicle liability policies** that could be available to compensate your client. If your client can recover against any of them, the UIM coverage will not respond. However, you do not need to sue all tortfeasors to access UIM.[13]

Additionally, your insured client has also likely purchased "family protection coverage" as part of their policy, which is an optional endorsement providing coverage in the case of an injury caused by an inadequately insured, uninsured or unidentified motorist. Family protection coverage is incorporated into the auto policy via the OPCF-44R. The limits of the OPCF-44R coverage typically match the insured's liability limits. It is not mandatory but is purchased so widely that most insured motorists in Ontario have coverage. Since it is optional, however, you must obtain a copy of your client's certificate of insurance to confirm your client is covered and to ascertain the coverage limits.

An uninsured driver does not have a right of action to recover any loss or damage from bodily injury or death if they were driving without a valid contract of automobile insurance.

You do not need to sue, for instance, a tortfeasor covered under a commercial general liability policy (e.g. a tavern that is responsible for over service), or a road authority. The UIM coverage will still kick in even if your client can recover from a policy other than a motor vehicle liability policy. In that case, if the uninsured driver is found to be 75% liable and a tavern is found to be 25% liable due to over service, the UIM will pay 75% of damages (subject to the minimum limits) and the tavern will be liable to pay the remaining 25%.

OPCF-44R insurance is strictly excess insurance. It does not stack with other policies. For example, if the Defendant has $250,000.00 in limits, and the total coverage of your client's OPCF-44R coverage is $1,000,000.00, then the total amount that your client can recover from the OPCF-44R policy is $750,000.00. The OPCF-44R limits are per collision, not per individual. If there are multiple injured individuals (say, a family of five travelling together in the same vehicle and all injured in the collision collision), they will split the limits among them. Furthermore, since it is excess insurance, the underinsured carrier need only respond once your client's damages exceed the $250,000.00 available from the Defendant's policy.

Furthermore, you must sue all tortfeasors, including those covered by insurance policies other than motor vehicle policies for the OPCF-44R to respond. The OPCF-44R coverage is in excess of amounts received by your client from both the inadequately insured motorist as well as persons jointly liable with the inadequately insured motorist.[14] If your client can attach even 1% liability to another tortfeasor, the OPCF-44R coverage is not accessible (referred to colloquially as the "1% rule").

If your client's claim against their underinsured carrier arises from having been injured by an unidentified driver, note that there are additional requirements to meet. The OPCF-44R requires the insured to provide "other material evidence" that there was, in fact, a second vehicle involved in the collision. This could be physical evidence of your client's own vehicle, or it could be a witness to the crash.

The limitation period to pursue the underinsured carrier was established by the Ontario Court of Appeal in *Schmitz v. Lombard General Insurance Co. of Canada*.[15] The two-year limitation period begins to run the day after the demand for indemnity is made. However, Plaintiff's counsel may consider bringing the underinsured carrier into the action once it has reason to believe its client's damages will exceed the amount of the Defendant's policy, as it will typically result in a more timely resolution for the Plaintiff.

When Neither the Defendant nor Your Client is Insured

Firstly, if your uninsured client was driving a motor vehicle at the time of the collision, they are precluded from suing in tort. An uninsured driver does not have a right of action to recover any loss or damage from bodily injury or death if they were driving without a valid contract of automobile insurance.[16]

In all other circumstances, if neither the Defendant nor your client was insured at the time of the collision, one potential avenue for compensation is to look to any other vehicle that was involved in the collision. For example, let's say your client is the uninsured passenger in an uninsured vehicle, and the collision is the uninsured motorist's fault, but there is some involvement by an insured third party vehicle. Maybe the uninsured motorist crashed into that third party vehicle. Regardless of fault, your client may be able to access both Statutory Accident Benefits ("SABs") and UIM coverage through the insured third party vehicle's policy. This was the result in *McArdle v. Bugler*.[17] McArdle was an uninsured passenger travelling in Bugler's uninsured vehicle. Bugler collided with another vehicle. McArdle accessed accident benefits through that vehicle's insurance. Ultimately she was also able to access the UIM coverage pursuant to s. 265 under that vehicle on the grounds that she was an 'insured' pursuant to s. 224 because she was entitled to SABs.

You may also run into a situation where there is no available insurance, even if your client was insured, because they were in breach of their policy. An individual forfeits their right to UIM coverage through breach of their own policy. For instance, UIM coverage will not be available to your client if the vehicle was being driven without consent or by an excluded driver.[18]

However, similarly to the operation of section 258 discussed above, it is possible for UIM coverage to survive a policy breach. Section 234(3) of the *Act* provides that both UIM insurance and SABs will survive a breach of a statutory condition unless otherwise provided in the contract. For example, consider the case *Bruinsma v. Cresswell*.[19] The Plaintiff

was injured while knowingly driving his girlfriend's vehicle with a suspended license. The girlfriend, who was insured, consented to his driving the vehicle even though she knew that his license was suspended. In these circumstances, the Court of Appeal found the Plaintiff was still entitled to UIM coverage. Justice Hoy explained that the provisions of the policy which the insurer was relying upon to deny coverage, i.e. section 1.4.5 and Statutory Condition #4 of the O.A.P. 1 are statutory conditions and, pursuant to s. 234(3) of the *Act*, they do not apply to uninsured automobile coverage unless otherwise provided in the contract.[20]

Contrast that case to *Conners v. D'Angelo*.[21] Conners was injured when travelling as a passenger driven by an unlicensed driver without the vehicle owner's consent. Conners sued the driver d'Angelo, the owner of the vehicle, and the owner's insurer. The insurer refused coverage. Relying on *McArdle*, Conners argued that he obtained SABs from the owner's policy and was therefore an 'insured' for the purpose of s. 265. However, his case was different in that D'Angelo was driving without the owner's consent. Conners was found not to be entitled to UIM coverage.

In the event that there is simply no insurance policy to access (other than a life insurance policy), your client can access the Motor Vehicle Accident Claims Fund ("the Fund"). As such, it is known as "the payor of last resort."

The Fund is governed by the *Motor Vehicle Accident Claims Act*.[22] The *Act* sets out the method for proceeding against the Fund. Where the identity of the at-fault motorist and/or owner is known, you must name them on the Statement of Claim. Once they are noted in default, notify the Fund. The Fund will take over the defence on their behalf.

When the identity of the at-fault motorist and/or owner is unknown and your client is uninsured, you must notify the Fund within 90 days of the collision. This provision is in place to allow it the opportunity to investigate the circumstances of the collision. In that case, you would name the Director of the Motor Vehicle Accident Claims Fund as the Defendant on the Statement of Claim. The Fund will only pay if it is demonstrated that all reasonable efforts were made to ascertain the identity of the unknown motorist.

The Fund pays up to $200,000.00 in damages plus partial indemnity costs and disbursements. However, the Fund will not agree on the payment to be made for costs; costs must be assessed.

The Fund will also provide SABs to your injured client to the same extent and with the same limits as an automobile insurance policy, but only with respect to collisions that have occurred in Ontario and only at the lowest benefit level, and not the optional benefit level.

In the situations envisioned in this article, minimum limits and SABs may sadly not be enough to compensate your client for injuries sustained in a motor vehicle collision, but it may be all there is. Being alive to the basics of which insurer provides coverage in which situation, and being familiar with the Fund, will ensure that you maximize what is available for your client to recover.

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NOTES

[1] *Insurance Act*, RSO 190, c I.8, section 234(2).

[2] The failure to cooperate must be "substantial". What constitutes "substantial non-cooperation" is a pragmatic question to be determined in each case in the light of the particular facts and circumstances (*Reid v. Gore Mutual Insurance Co*, [1980] OJ No. 750 (Ont HC) at para 46). In a case where the insured failed to provide an updated address but same did not interfere much with the insurer's ability to defend the case, the court found it did not constitute "substantial" non-cooperation. See *Ruddell v. Gore Mutual Insurance Company*, 2019 ONCA 328, 2019 CarswellOnt 6402 (WL Can).

[3] *Ibid.* at section 233. With respect to section 233(1)(a) and material misrepresentation, see *Merino v. Ing Insurance Company of Canada*, 2019 ONCA 326, leave to appeal to the SCC refused, 2019 CarswellOnt 15246 (WL Can), wherein the court held that a misrepresentation on the initial insurance application does not render the contract void. It had to be properly rescinded by the insurer in accordance with the applicable legislation.

[4] See *Lockhard v. Quiroz* (2006), 83 OR (3d) 797, 153 ACWS (3d) 967 (Ont CA) for the proposition that a Plaintiff must have a judgment against the insured before s. 258 applies.

[5] *Supra* note 1 at section 251(1).

[6] *Joachin v. Abel* (2003), 64 OR (3d) 475, 2003 CarswellOnt 1497 (WL Can) (Ont CA) at para 11.

[7] *Ibid.* at para 13.

[8] *Gordon v. Pendleton* (2007), 87 OR (3d) 706, 160 ACWS (3d) 891 (Ont SCJ) at para 18.

[9] *GMAC Leasco Corp v. Lombard Insurance*, 2007 ONCA 665, 286 DLR (4th) 125.

[10] *Supra* note 1 at section 265(2)(c).

[11] *Supra* note 1 at section 265(2)(c). The Court has approached this requirement through the lens of reasonableness. Is it reasonable in the circumstances that the Plaintiff could not ascertain the identity of the at-fault motorist? See *Lamb v. Co-Operators General Insurance Co.*, 2020 ONSC 4955, 2020 CarswellOnt 11728 (WL Can). In that case, Lamb was struck by a motorist while travelling in her motorized scooter. She fractured her knee in the collision. Although the motorist stopped at the scene and exited the vehicle, neither the Plaintiff nor her husband, who was at the scene, ascertained the motorist's name. However, in these circumstances, the court found it was reasonable that the Plaintiff's focus was on her fractured knee and her husband's focus was on taking care of her. In these circumstances, it was reasonable that they did not ascertain the at-fault motorist's identity.

[12] A list of signatories is available online at https://www.cclr-ccrra.org/PrivatePassengerAutomobiles.

[13] *Loftus v. Robertson*, 2009 ONCA 618, leave to appeal to the SCC refused, 2010 CarswellOnt 435 (WL Can).

[14] See section 7(b) of the OPCF-44R endorsement, which states:

> The amount payable under this change form to an eligible claimant is 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.

This interpretation has been upheld by the court in *Osborne (Litigation Guardian) v. Bruce County*, 1999 CarswellOnt 42 (WL Can) (Gen Div), at para 172-173.

[15] *Schmitz v. Lombard General Insurance Co. of Canada*, 2014 ONCA 88, leave to appeal to the SCC refused, 2014 CarswellOnt 11090 (WL Can).

[16] *Supra* note 1, section 267.6.

[17] *McArdle v. Bugler*, 2007 ONCA 659, 87 OR (3d) 433.

[18] Section 5 of the O.A.P. 1 deals with uninsured automobile coverage. Section 5.7.1 provides instances when UIM coverage is not available. Among the exclusions noted in this section, the insurer will not pay for loss or damage while a person is driving without consent or is specifically excluded from the policy. *Shipman v. Dominion of Canada General Insurance Co.* (2004), 73 OR (3d) 144 (Ont CA). The court held that the exclusion of coverage where an automobile is used without the owner's consent as per section 1.8.2 of the policy, applied to uninsured automobile coverage.

[19] *Bruinsma v. Cresswell*, 2013 ONCA 111, 114 OR (3d) 452.

[20] Ibid. at para 43.

[21] *Conners v. D'Angelo*, 2019 ONCA 905, 2019 CarswellOnt 18599 (WL Can).

[22] *Motor Vehicle Accident Claims Act*, RSO 1990, c M.41.