INSURANCE COVERAGE FOR INJURIES CAUSED BY AT-FAULT UNINSURED, INADEQUATELY INSURED AND UNIDENTIFIED MOTORISTS

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Introduction

In Ontario an injured person may commence a tort claim against an at-fault-motorist, subject to the statutory threshold and deductible. In the normal course the at-fault motorist's own insurance company will defend him or her under the third party liability provisions of the policy.

The statutory minimum limit for third party liability in Ontario is $200,000 but most policies typically have in place at least $1,000,000. This ensures that in the majority of cases there are adequate policy limits in place to ensure that injured parties are made whole, even where the at fault motorist may be impecunious.

However, an at-fault party may have no insurance or may be inadequately insured. Further, where an unidentified motorist is at-fault (as in the case of a hit-and-run) there may be no practical means of securing compensation for an injury as the at-fault party and his insurer may never be identified.

The system in Ontario has two mechanisms for dealing with such scenarios:

1. Uninsured / Unidentified Motorist coverage under s. 265 of the Insurance Act, and
2. Coverage pursuant to the optional OPCF 44R Family Protection Endorsement.

The purpose of this paper is to provide a primer on these two mechanisms. The footnotes provide further elaboration on the issues, with reference to leading cases and specific legal issues considered in those cases.

The Uninsured / Unidentified Motorist – S. 265 of the Insurance Act

The first layer of protection is s. 265 of the *Insurance Act*. By virtue of this section, all policies have in place coverage for injuries caused by uninsured and unidentified motorists. This is a mandatory form of coverage. It is not possible to purchase an automobile insurance policy in Ontario without this form of protection. Further, U.S. insurers that have filed a Power of Attorney and Undertaking with the Office of the Superintendent of Financial Institutions in British Columbia (subsequently transferred to the Canadian Council of Insurance Regulators) to be bound by the Ontario automobile insurance regime, are also required to furnish this type of coverage to their insureds while they are operating motor vehicles within Ontario.

In the event that a person is injured in a motor vehicle accident involving an at-fault motorist who is uninsured or unidentified, the injured party may commence an action against his own insurance company claiming compensation under s. 265. In such an action, the insurance company essentially steps into the shoes of the uninsured or unidentified motorist. The injured party is obligated to prove liability on a balance of probabilities, and any award may be subject to contributory negligence. The usual rules applicable in any motor vehicle accident case, such as the threshold, statutory deductible and deductibility of collateral benefits, are in effect.

This action is subject to a two year limitation period per s. 8 (for bodily injury claims) of Regulation 676 to the *Insurance Act*. The limitation period runs from the time the insured knew, or ought to have known, that the driver of the other vehicle was unidentified or uninsured.[44]

There are two key limitations on uninsured coverage provided in s. 265. The first is that it is subject to a maximum limit of $200,000. In no circumstance will an insurer be liable to pay more than the statutory maximum of $200,000.

The second key limitation is found at s. 2(1)(c) of Regulation 676 to the *Insurance Act*. This section states that the insurer shall not be liable to make a payment under s. 265 where the insured "is entitled to recover money under the third party liability section of a motor vehicle liability policy".

This has come to be known as the 1% rule. In essence, s. 265 coverage is limited to situations where no other motor vehicle liability policies are available to compensate the insured.[45]

For example, if an insured is injured in a motor vehicle accident involving an at-fault motorist with $200,000 in third party liability limits, and this motorist is found to be at least 1% responsible for the accident, then the insured's entitlement to claim under s. 265 of the *Insurance Act* is nil, even if the at-fault party's limits are inadequate to compensate the insured and an unidentified or uninsured motorist's fault caused or contributed substantially to the injury. In this scenario, if the insured's damages were $400,000, it would make no difference if the at-fault motorist only had available $200,000 to compensate the insured – the insurer would have no obligation to pay anything under s. 265 so long as the insured was entitled to collect a single dollar from the insurer of an at-fault motorist.

[44] *Miller v. Bacchus* , 1999 CarswellOnt 3411 (S.C.J.) at para. 31. (eC).

[45] Not just any policy of insurance will qualify as a "motor vehicle liability policy" in this context. For example, a municipality accused of failing to plow a roadway during a snow storm may take the position that the policy of insurance responding to the loss is not a "motor vehicle liability policy". Accordingly, if there is a claim against an insurer under s. 265 with respect to an at-fault unidentified or uninsured motorist, the municipality could argue that the insurer is liable to contribute up to $200,000 even if the municipality has exposure for the same loss. A bar or tavern in a commercial host case may make a similar argument that the 1% rule would not apply to its insurance policy.

Thus we see that s. 265 is designed to compensate for injuries caused by uninsured motorists or by unidentified motorists. It is not, however, a form of coverage for *inadequately* insured motorists. This type of coverage is of no assistance where there are at-fault parties with valid and collectible motor vehicle insurance policies, even where those policies are inadequate to cover the insured's actual damages.

There are additional limitations where the accident was caused by an unidentified motorist. The regulation provides that the claimant, or his representative, must report the accident to the police (or some other peace or judicial officer) within 24 hours of the accident, as a condition precedent to coverage under s. 265. There is also a requirement to provide a written statement to the insurer within 30 days of the accident, or "as soon as practicable" and the vehicle involved must be made available for inspection. These conditions are found at s. 3 of Regulation 676 of the Insurance Act. It is very much in doubt, however, how stringently courts enforce these conditions as claimants have readily been able to circumvent them in the past, even in cases of total non-compliance.[46]

Another requirement, derived from 265 itself, is that the insured must make reasonable efforts to identify the at-fault motorist at the scene of the accident. An unidentified automobile is defined in the *Insurance Act* as one "with respect to which the identity of either the owner or driver cannot be ascertained". If the identity could have been ascertained at the scene of the accident by the insured, then there can be no claim under s. 265, even if the insured had no reason to believe

[46] It is open to question how strictly the courts enforce these conditions, even when they are flagrantly ignored. For instance, in *Fitzgerald v. Royal Sun Alliance Insurance Company* dealing with virtually identical provisions of the Nova Scotia statute and regulation, a court granted the plaintiff recovery under her policy for an accident caused by an unidentified motorist, notwithstanding the fact that she failed to notify the authorities about the accident, she failed to provide written notice to the insurer until more than two years after the accident, and her truck was no longer available for inspection as it had been involved in a subsequent accident and written off. The court found that the plaintiff had failed to meet all of the conditions for making her claim, yet granted her relief from forfeiture for "imperfect compliance" under s. 33 of Nova Scotia's *Insurance Act* (which is replicated at s. 129 of Ontario's *Insurance Act)*. The court found that the plaintiff had not acted "with a careless disregard for the rights of the insurer", that she had mistakenly, but honestly believed that she had no claim at the outset (noting her Grade 12 education and lack of sophistication about the insurance contract) and that earlier notice or reporting to the police would likely not have assisted the insurer or produced any tangible results.

See also *Coombs v. Royal Insurance Company of Canada*, an Ontario case (affirmed by the Court of Appeal) where the court again granted relief from forfeiture for failure to comply with the notice requirements. The court's ruling turned primarily on the issue of whether or not the late notice prejudiced the insurer. The court concluded that it had not. This was a case where the plaintiff had retained a lawyer within months of the accident and had wrongly assumed that the lawyer would provide notice to the insurer. There was also an issue that the plaintiff had misrepresented the amount of alcohol he had consumed to the insurer. The court concluded that he had misrepresented this issue, but as no prejudice was found to flow from the misrepresentation, it did not preclude recovery.

See also *Vallabh v. Kay*, another Ontario case where the plaintiff was granted relief from forfeiture following a two year delay in notifying the insurer. In this case the plaintiff's lawyer became aware of the involvement of an unidentified motorist when a defendant filed a defence citing this as a factor, but the plaintiff himself did not.

at the time of the accident that he had suffered an injury or had a right of action against the at-fault driver.[47]

[47] See *Donovan v. McCain Foods Ltd.*, a Newfoundland Court of Appeal decision wherein an insured that failed to exchange information at the scene of an accident was denied coverage under the equivalent unidentified motorist provisions of her policy, as the at-fault automobile did not meet the definition of "unidentified automobile", namely one "with respect to which the identity of either the owner or driver cannot be ascertained". The onus was on the insured to establish that she had made all reasonable efforts to ascertain the identity of the at-fault motorist at the scene of the accident, and she had not met this onus. This was notwithstanding her argument that she did not know that she had suffered an injury until several days later.

A similar conclusion was reached by the British Columbia Court of Appeal in *Leggett v. Insurance Corp. of British Columbia*. The court found that where a person knows that he or she has been involved in a motor vehicle accident, but refrains even from recording the licence number of the other vehicle, when that number is visible and the claimant could, had he or she wished, reasonably have recorded it, such a claimant would find it "particularly difficult" and "probably impossible" to establish reasonable efforts. This was also a case where the court rejected the excuse that the plaintiff did not realize at the time of the accident that he was injured.

However, see also *Johnson v. John Doe*, an Ontario case where the plaintiff's case succeeded, despite the fact that he failed to request the identity of the at-fault taxi driver at the scene of the accident. This case was unusual in that the plaintiff immediately reported the accident to the police, they attended the scene and interviewed the taxi driver, but failed to file a report or record his identifying information. The plaintiff was entitled to assume that the police would record the identity of the at-fault motorist. This is similar to another Ontario case, *Vescio v. Peterman*, where the plaintiff took note of the license plate number of the at-fault motorist, called the police and relayed that information, but the officer incorrectly inputted it into the system, failing to identify the correct party. In that case too the plaintiff was found to have made reasonable efforts.

Also see *Miller v. Bacchus*, another Ontario case where the court concluded that once the plaintiff notifies the police and the appropriate insurer, there is no ongoing duty on a plaintiff to make any further independent investigation unless the person becomes aware of facts that indicate the driver may be uninsured or unidentified.

Motor vehicle liability insurance is, once again, a narrowly defined term of art. For example, the Court of Appeal in *Heuvelman v. White* found that the Personal Liability Umbrella Policy (PLUP) in use by some insurers (notably State Farm) does not qualify as "motor vehicle liability insurance". Thus, if an at-fault insured has $200,000 in primary coverage and $800,000 in coverage under a PLUP, the PLUP coverage is *not* factored into the calculation of entitlement under the claimant's OPCF 44R. In the latter case, if the OPCF 44R has a face value of $1,000,000 the amount payable under the OPCF 44R would be $800,000, as the value of the PLUP would not be factored in.

Further, as confirmed by the Court of Appeal in the *Maccaroni v. Kelly* decision, in cases where an at-fault defendant's insurer is taking an off-coverage position and seeking to reduce the liability limits to the statutory minimum of $200,000, the OPCF 44R insurer may argue against the defendant insurer's coverage position. Indeed, in that case the plaintiff and defendant insurer settled for $200,000 even though the policy limits were $1,000,000. The court concluded that this settlement could not bind the OPCF 44R insurer for the purposes of calculating the maximum entitlement under the OPCF 44R as there had been no legal determination of the coverage issue. Whether or not the limits were properly $1,000,000 or reduced "by operation of law" to $200,000 was an issue for trial.

There is also a line of unusual cases involving plaintiffs injured as a result of unidentified motorists operating the plaintiff's own vehicle. For instance, the recent *Vogler v. Lemieux* case involved the bizarre scenario where the plaintiff was found unconscious and intoxicated in his own vehicle following an apparent single vehicle accident. Later, another individual in the course of a criminal proceeding, confessed that he had been the driver of the plaintiff's vehicle on the date of loss. The issue was the plaintiff's ability to claim against his insurer under the OPCF 44R in circumstances where the "inadequately insured" motorist was operating the plaintiff's own car while he was in it. For reasons far too lengthy and convoluted to set out in this paper, the Divisional Court ruled that the plaintiff could not advance such a claim.

The Inadequately Insured Motorist – OPCF 44R Family Protection Coverage

The second type of insurance available in Ontario is the OPCF 44R – Family Protection Coverage. Unlike s. 265 the OPCF 44R is not mandatory. Rather, it is an optional form of coverage purchased by the insured as an endorsement to the policy of motor vehicle insurance. It is, however, included by default in most standard motor vehicle policies.

The OPCF 44R is designed to take over where s. 265 coverage leaves off. The face value of this endorsement, typically $1,000,000, determines the amount of available coverage. This coverage is calculated by deducting the maximum available coverage under motor vehicle liability insurance policies belonging to at fault drivers from the face value of the OPCF 44R.[48]

For example, if an insured is injured by an at-fault party with third party liability limits of $200,000, where the face value of the OPCF 44R is $1,000,000, the maximum entitlement under this endorsement would be $800,000. If the third party liability limits of the at-fault motorist are $1,000,000 then the entitlement under the OPCF 44R would be $0, as $1,000,000 - $1,000,000 is of course $0.

The OPCF 44R is considered excess to any other valid motor vehicle policy. So if the limits of the at-fault motorist's policy are $200,000 and the OPCF 44R has a face value of $1,000,000, the at-fault motorist's insurer would pay the first $200,000 of the claim and the OPCF 44R insurer would cover whatever is left over, up to a maximum of $800,000. If the claim resolved for $200,000 or less, the OPCF 44R insurer would be obliged to pay nothing.

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Further, as confirmed by the Court of Appeal in the *Maccaroni v. Kelly* decision, in cases where an at-fault defendant's insurer is taking an off-coverage position and seeking to reduce the liability limits to the statutory minimum of $200,000, the OPCF 44R insurer may argue against the defendant insurer's coverage position. Indeed, in that case the plaintiff and defendant insurer settled for $200,000 even though the policy limits were $1,000,000. The court concluded that this settlement could not bind the OPCF 44R insurer for the purposes of calculating the maximum entitlement under the OPCF 44R as there had been no legal determination of the coverage issue. Whether or not the limits were properly $1,000,000 or reduced "by operation of law" to $200,000 was an issue for trial.

There is also a line of unusual cases involving plaintiffs injured as a result of unidentified motorists operating the plaintiff's own vehicle. For instance, the recent *Vogler v. Lemieux* case involved the bizarre scenario where the plaintiff was found unconscious and intoxicated in his own vehicle following an apparent single vehicle accident. Later, another individual in the course of a criminal proceeding, confessed that he had been the driver of the plaintiff's vehicle on the date of loss. The issue was the plaintiff's ability to claim against his insurer under the OPCF 44R in circumstances where the "inadequately insured" motorist was operating the plaintiff's own car while he was in it. For reasons far too lengthy and convoluted to set out in this paper, the Divisional Court ruled that the plaintiff could not advance such a claim.

The OPCF 44R does not stack with the $200,000 available under s. 265, so if the insured is injured by an at-fault uninsured motorist and no motor vehicle liability policies are available to pay the claim, then the maximum entitlement under the OPCF 44R would factor in the $200,000 available under s. 265 as if it were another motor vehicle liability policy, and accordingly the aggregate limit available under both forms of coverage would be $1,000,000.[49]

The OPCF 44R provides coverage to any "eligible claimant". An "eligible claimant" is defined as an "insured person" or any other person with a derivative cause of action related to injuries suffered from an "insured person" (such as Family Law Act claimants). The "insured person" is defined as the "named insured" or the spouse / dependant relative of the named insured. If the named insured is a corporation or sole proprietorship then there are provisions covering employees and other related individuals. It is important to note that only individuals that meet the above criteria qualify as "eligible claimants". Accordingly, while a passenger who is the husband of the named insured may advance a claim under the OPCF 44R, a mere boyfriend or close friend would not have this right.[50]

The OPCF 44R, in contrast to s. 265 coverage, is designed to follow the named insured and his / her family, and does not limit itself to a specific vehicle. A named insured who is a passenger in a stranger's vehicle would look to his own OPCF 44R for coverage in the event of an injury in that vehicle.

In the case of unidentified motorist coverage, the OPCF 44R requires the insured to corroborate the existence of an at-fault unidentified motorist with "other material evidence". This must take the form of either independent witness evidence from someone other than a spouse or dependant relative[51] or physical evidence indicating the involvement of an unidentified motorist.[52]

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[49] While the OPCF 44R expressly precludes stacking with s. 265 coverage where the insured is injured by an uninsured motorist, there is some ambiguity in the OPCF 44R on the question of whether or not the two forms of coverage are stackable where the injury is caused by an unidentified motorist. There appears to have been an oversight or omission in the drafting of the OPCF 44R which does not seem to extend the no-stacking rule to unidentified motorist coverage. This may have to do with the fact that coverage for unidentified motorists is a more recent addition introduced only in 1998 and the wording of the endorsement may not have been properly updated.

In any event, there has been no case law commenting on this specific point to this author's knowledge, but this raises that question of whether it is open to a party injured by an unidentified motorist to argue that the maximum entitlement under the OPCF 44R should be $1,000,000 even where $200,000 is available under s. 265. In this case the aggregate amount available under both forms of coverage could be as high as $1,200,000.

[50] As the Court of Appeal determined in Schneider v. Maahs, unlike previous incarnations of the Family Protection Coverage, the OPCF 44R coverage follows the named insured and his / her family, not the vehicle itself. This form of coverage is therefore portable and may be invoked even where the insured are passengers in a stranger's motor vehicle. However, only the named insured and defined family members / dependant relatives are covered.

[51] There has been some controversy over the definition of "independent witness" in this context. For example, if a driver and his girlfriend who is a passenger both testify to the involvement of an unidentified motorist, can the two of them point to one another as "independent witness" evidence for the purpose of advancing their respective tort

The limitation period for issuing a claim under the OPCF 44R is set out at s. 17:

> Every action or proceeding against the insurer for recovery under this change form shall be commenced within 12 months of the date that the eligible claimant or his or her representative knew or ought to have known that the quantum of claims with respect to an insured person exceed the minimum limits for motor vehicle liability insurance in the jurisdiction in which the accident occurred, but this requirement is not a bar to an action which is commenced within 2 years of the date of the accident.

This provision has, in essence, been **invalidated** by the recent decision of the Court of Appeal in *Schmitz v. Lombard General Insurance Company of Canada* in most cases. The limitation period for bringing a claim under the OPCF 44R is **two years**, and only begins to run at the moment the insured has made a demand under the OPCF 44R and the insurer has failed to satisfy it.[53] However, it is open to question whether the ratio in Schmitz would apply to cases involving **commercial** policies.[54]

It is also worth noting that per s. 14 of the OPCF 44R endorsement, the findings of a court on liability and damages are not binding on an insurer unless the insurer was provided a reasonable

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claims? This very scenario occurred in Pepe v. State Farm Mutual Automobile Insurance Co. and the court sided with the insured and his girlfriend, finding that any witness will qualify provided he/she is not a spouse or dependant relative.

[52] The need for "physical evidence" does not require that the evidence emanate from the other vehicle. So long as the physical evidence indicates somehow the involvement of another vehicle, it will suffice. This was the case in the recent Featherstone v. John Doe case, where the court declined to grant summary judgment to the insurer given the presence of a single paint mark at the scene of the accident, which the plaintiff claimed was left by an unidentified vehicle that forced him to take evasive action, causing the accident. A similar result arose in the Armstrong v. Dominion of Canada General Insurance Co. case. This was another failed summary judgment motion involving a contentious set of facts including the analysis of deer tracks and unidentified tire tracks, which were sufficient to create a genuine issue. Thus, it is correct to say that the definition of "corroboration" is broad indeed.

[53] *Schmitz v. Lombard General Insurance Company of Canada*, 2014 ONCA 88 (C.A.) at para. 20 (CanLii).

[54] By virtue of s. 22 of the *Limitations Act, 2002*, any attempt to abridge or shorten the basic two year limitation period found in s. 4 by contract is nullified, subject to certain exceptions. The key exception is per s. 22(5), where the contract in question is a "business agreement", which is defined as an agreement by parties, none of who meet the definition of a "consumer" under the *Consumer Protection Act*. A consumer is defined as a person acting for "personal, family or household purposes".

A typical motor vehicle policy taken out by an individual or a family would not be considered a "business agreement" and thus would not qualify under this exception. This type of policy would be subject to the Court of Appeal's ruling in the *Schmitz* case.

However, it is open to argument whether the ratio in *Schmitz* could apply in a case involving a CGL type policy, or any policy of motor vehicle insurance subsumed under a commercial policy. Such a policy would be considered a "business agreement" and thus it could be argued that for the purposes of claims advanced under such policies (for instance, where the employee of a corporation is injured while operating a corporately owned vehicle) the one year limitation period under s. 17 is back in play.

opportunity to participate in those proceedings. Thus, even under Schmitz, a claimant would not be entitled to proceed to trial, obtain a verdict and then pursue his insurer under the OPCF 44R without providing it an opportunity to participate in this trial.