



## MAKING SENSE OF THE UNINSURED, UNIDENTIFIED, AND UNDERINSURED AUTOMOBILE COVERAGE CLAIM



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Your comments are appreciated and If there are any accident benefits or tort topics that you would be interested in reading about, please feel free to [email](#) me and I will certainly explore the possibility of writing an article.

Claims commenced against the insurer on the basis of the uninsured, unidentified, and underinsured provisions of the *Insurance Act* can be both confusing and mind-numbing. The basic concept is that an innocent claimant who has been involved in a motor vehicle accident should not be denied appropriate compensation on account of the fact that the at fault party (1) did not have insurance, (2) left the scene of the accident, (3) or did not have adequate insurance in order to account for the damages sustained. Although the rationale behind the concept is straight-forward, the application of same is anything but.

### UNINSURED AUTOMOBILE COVERAGE

#### Background

Every contract of automobile insurance in the Province of Ontario provides for uninsured automobile coverage. If a Plaintiff is involved in an accident involving an uninsured defendant he may sue his own insurance company for compensation. If the accident was caused by an

insured tortfeasor who has at least 1% liability, then there is no viable claim in law based on the uninsured provisions of the *Insurance Act*. The amount to which the claimant is entitled to receive in compensation is reduced to the automobile minimal policy limits of \$200,000.00.

The \$200,000.00 policy limits is reduced by the amount of insurance benefits to which the claimant is entitled to receive. Specifically, this revolves around the claimant's entitlement to income replacement benefits and disability benefits (such as long term disability benefits) that are paid to the claimant. So, if the claimant has been paid \$50,000.00 in income replacement benefits, the maximum to which he would be able to receive in the tort claim is \$150,000.00.

#### Limitation Period

There appear to be essentially two limitation periods with respect to claims against one's own insurance company pursuant to the uninsured provisions of the *Insurance Act*.

The first limitation period revolves around direct actions against the insurer. The relevant time for determining the limitation period against the insurer is when the insured knew or ought to have known the material facts of the cause of action against the tortfeasor i.e., that the tortfeasor was uninsured. In *Galego v. State Farm* (2005), the insurer informed the insured in 1998 that the alleged tortfeasor was uninsured. The insured knew that she had a claim based on the fault of an uninsured motorist more than two

years before she sought to commence an action against her own insurer. Accordingly, the claim against the insurer was statute-barred.

In *Miller v. Bacchus* (1999), the tort defendant submitted false identification and insurance information to the police. The Plaintiff commenced the claim based on the incorrect information listed on the police report and only discovered the error after the limitation period had expired. The Plaintiff commenced a claim against his own insurer pursuant to the unidentified provisions of the *Insurance Act* and the insurer brought a summary judgment motion to dismiss the claim. The Court found that there are limits on the ability of a citizen to investigate crime as opposed to the resources / expertise of the police and the insurer. After the insured has provided all of the relevant information to the police and his insurer he has complied with the reporting and co-operation requirements of the policy. It was determined in this case that the claimant had not missed the limitation period.

The second limitation period revolves around claims against the insurer based on declaratory relief, breach of contract, and for enforcement of Judgment against the insurer. In circumstances in which the Plaintiff only sues the uninsured tortfeasor, (not the insurer), she is entitled to proceed to trial and then present the Judgment to the insurer. If the insurer refuses to pay the Judgment, then the cause of action accrues from the date of the denial. The claimant then has two years from the date of the denial to commence an action based on the insurer's refusal to pay the Judgment (*Chambo v. Musseau* [1993] Court of Appeal; *Din v. Hage* [2007] affirmed by Court of Appeal).

Accordingly, a claimant can neglect to sue her own insurer and after obtaining Judgment, proceed with a separate action. Or, a claimant can neglect to sue her own insurer within the limitation period for a direct action, and then simply threaten to commence an action after

obtaining Judgment if the insurer refuses to participate in settlement discussions. This is a useful tool for a claimant to use if they were negligent in failing to issue a claim within the limitation period.

### **Operating A Vehicle Without Consent**

In situations in which the driver of the vehicle is operating the vehicle without the consent of the owner, the insurer of the vehicle is not obligated to provide any insurance coverage pursuant to the uninsured provisions of the policy. It is the responsibility of the MVACF to provide coverage. In *Shipman v. Dominion* (2004) (Court of Appeal), the plaintiffs were pedestrians who were struck by a motor vehicle driven without the owner's consent; accordingly the vehicle was uninsured. There was a dispute between the Motor Vehicle Accident Fund and Dominion as to which insurer was obligated to respond pursuant to the uninsured provisions of the *Insurance Act*. The Court relied on the excluded drivers and driving permission section (section 1.8.2) to find that the MVACF and not Dominion, is obligated to respond in these circumstances.

Similarly, a passenger in a vehicle which is being driven without the consent of the owner is also precluded from commencing an action pursuant to the uninsured provisions of the *Insurance Act*. The claimant's recourse is to the MVACF (*Simison v. Catlyn* [2004] Court of Appeal).

### **Procedural Issues**

Somewhat surprisingly, there is no obligation for the Plaintiff to actually sue the alleged tortfeasor. In *Loftus v. Robertson* (2008) the claimant was involved in a motor vehicle accident with an uninsured motorist and accordingly sued his own insurer Security National. Security National in turn commenced a third party action against an alleged insured tortfeasor based on the allegation that this third party defendant was at least 1 % liable for the accident. Security National then

brought a motion for a question of law as to whether the claimant is compelled to claim against the third party defendant and not Security National. The Plaintiff refused to sue the Third Party and the Court agreed that it was under no obligation to do so. Accordingly, a claimant is not obligated to commence an action against an insured / identified tort defendant.

A Plaintiff who is a passenger in a vehicle, without their own their own automobile insurance coverage, will not have to resort to the Motor Vehicle Accident Claims Fund in circumstances where there is an insured vehicle involved in the accident. Where an at fault driver is uninsured, but there is another insured vehicle involved in the accident, (who is not at fault), an uninsured Plaintiff will be entitled to receive uninsured automobile coverage from the insurer of the not-at-fault party (*McArdle v. Bugler* [2007] Court of Appeal). Indeed, in these circumstances the insurer for the not-at-fault insured will be obligated to pay both accident benefits and provide uninsured coverage to the Plaintiff; a situation which this insurer likely did not bargain for!

## UNIDENTIFIED AUTOMOBILE COVERAGE

### Background

Claims for uninsured coverage and unidentified automobile coverage are substantially similar. If you are involved in a hit-and-run you should not be thwarted from receiving compensation for suffering from legitimate injuries on account of the fact that the tortfeasor took-off. A claimant is entitled to sue her own automobile insurance company up to a maximum sum of \$200,000.00. If an identified tortfeasor is 1% liable for the action, then there is no viable claim in law pursuant to the unidentified provisions of the *Insurance Act*. The same deductions apply for any income replacement benefits received from the claimant's own accident benefits carrier or disability benefits carrier as with claims pursuant

to the uninsured provisions of the *Insurance Act*.

### Limitation Period

Unlike claims commenced against an insurer based on the uninsured provisions of the *Insurance Act*, there is only one limitation period / cause of action in claims made pursuant to the unidentified provisions of the *Insurance Act*.

The cause of action against an insurer with respect to a claim pursuant to the unidentified provisions of the *Insurance Act* commences when the claimant knew, or ought to have known, that the accident occurred as a result of an unidentified defendant.

Where an unidentified automobile has caused bodily injury, the only relief available to the insured is by an action brought against his insurer. A claimant cannot proceed to Judgment against an unidentified defendant whereas he is able to against an uninsured defendant. One is an identifiable live person while as the other is not. Accordingly, there is no cause of action available to the claimant for declaratory relief, breach of contract, or for enforcement of a Judgment (*Hier v. Allstate* [1988] Court of Appeal).

### Operating a Vehicle Without Consent

Occupants in a vehicle that is being driven without consent of the owner are barred from commencing a claim against their own insurer pursuant to the unidentified provisions of the *Insurance Act*. Similarly, claims commenced on behalf of *Family Law Act* claimants are also excluded as these claims are purely derivative and accordingly also barred (*Coombs v. Flavel* and *Riddell v. McClean* [1988] Court of Appeal).

### Test To Prove Claim Caused By Unidentified Motorist

In the decision of *Johnson v. John Doe* (2006) the Court found that the claimant has a duty to

ascertain the identity of the driver of the third party vehicle at the scene of the accident if it was reasonable and practical to do so. Otherwise a claimant's action may fail at trial. If the claimant took reasonable action to co-operate with the police and his insurance company, then he is entitled to rely on the actions of the latter to investigate the identity of the third party driver due to their resources and expertise.

In *Vesco v. Peterman* (1998), the Court placed significant weight in the reporting and cooperation requirements of section 4.7 of the OPFI. The provision requires an insured, in unidentified automobile cases, to report the accident to police within 24 hours, to file with the insurer within 30 days a written statement, and upon request to make the vehicle available for inspection. In this case the plaintiff recorded the at-fault defendant's license plate incorrectly and did not get the plaintiff's name. He provided the incorrect license plate to the police and the correct owner was never located. In this case, the Plaintiff established that he took all proper action and claim stood.

## **UNDERINSURED AUTOMOBILE INSURANCE**

### **Background**

Unlike claims made for uninsured and unidentified automobile coverage, "underinsured" vehicles are not specifically mentioned in the *Insurance Act*. That concept is introduced by the OPCF 44R Family Protection Coverage. This type of coverage is "optional" in that it is not required for a claimant to purchase same, while as it is compulsory to own automobile insurance in Ontario. Claims made for underinsured automobile coverage are claims made against a claimant's own automobile insurance company based on the allegation that the tortfeasor's policy limits are inadequate to provide proper compensation. The maximum insurance that a claimant is entitled to is based the maximum policy limits to which a claimant purchased minus

the insurance available to the tortfeasor.

For instance, if a claimant purchased insurance on her own vehicle in the amount of \$1,000,000.00, and the at fault defendant only had \$200,000.00 in policy limits, then the claimant could have access to compensation from her own insurance company for any shortfall. In this scenario, if the claimant suffered damages with a value of \$500,000.00 she would be entitled to receive \$200,000.00 from the tort defendant (policy limits) and the remaining \$300,000.00 from her own insurance company pursuant to the underinsured provisions of the OPCF-44. The claimant would need to first exhaust the policy limits of the tortfeasor before accessing her own policy.

In order to access any claim for underinsured coverage, the claimant's own policy limits must exceed that of the tort defendant. If the tort defendant's policy limits are \$1,000,000.00 and the claimant's own policy limits are \$1,000,000.00 or lower, then there is no viable claim in law based on the underinsured provisions.

A Plaintiff who is involved in an accident involving an unidentified driver, may also have access to underinsured automobile coverage if she is able to corroborate the accident by way of material evidence. If the involvement of an unidentified driver/owner is established by way of an independent witness, (specifically excluding a spouse or dependent relative), or physical evidence then the Plaintiff may access his own underinsured automobile coverage and thereby exceed the \$200,000.00 limits (Section 1.5 (D) of the OPCF-44R).

### **Limitation Period**

The limitation period for a claimant to pursue claim for underinsured driver coverage does not begin to run until the claimant's damages were assessed by way of settlement or Judgement (*Caruso v. Guarantee Co. of North America*

[1996] Court of Appeal). In the latter case, it was not definitive that the claimant's damages would exceed the \$200,000.00 limits. It is not clear how a Court would rule in a situation where it is beyond doubt that the claimant's damages would exceed \$200,000.00.

### **Underinsured Coverage Extends To Accidents in Foreign Countries**

A claimant is entitled to claim underinsured policy coverage if he is involved in a motor vehicle accident in a foreign country in which the tortfeasor has minimal automobile policy limits. In *Sutherland v. Pilot* (2006) the claimant became a quadriplegic on account of a motor vehicle accident that occurred in Jamaica. The tortfeasor in Jamaica had the equivalent of \$18,500.00 Canadian in insurance coverage and the claimant sought to have the OPCF 44R endorsement apply which would allow him access his own policy coverage of \$1,000,000.00. The Court found that the OPCF 44R is a self-contained code which is separate from the *Insurance Act*. The Court found that there was an absence of clear and express language that limits the territorial scope of the OPCF 44R. As such, despite the fact that the Plaintiff was involved in a motor vehicle accident in Jamaica, the claimant was entitled to make a claim as against his own insurance company pursuant to the underinsured provisions of the *Insurance Act*. Had he been involved in an accident with an uninsured or unidentified defendant, he would not be able to make a claim against his insurance company.

### **Operating a Vehicle Without Consent**

A passenger in a vehicle who does not know that a vehicle is being driven without the consent of the owner is prohibited from commencing a claim pursuant to the underinsured provisions of the *Insurance Act* (*McCauley v. Blagman* [2006]).

### **CONCLUSION**

There are some common elements that arise from the uninsured, unidentified, and underinsured provisions of the *Insurance Act*. If a claimant is an occupant of a vehicle that is being driven without the consent of the owner then she is not entitled to commence a direct action against her insurer under any of these provisions. On the other hand, there are some apparent inconsistencies and confusion. For instance, a claimant is entitled to receive underinsured motor vehicle coverage if she is involved in an accident in Jamaica, but cannot make a claim on the basis of the uninsured and unidentified provisions of the Act. A claimant may commence an action against her own insurance company based on the unidentified provisions of the *Insurance Act* even if she knows the identity of the third party driver. The limitation periods for all of the provisions appear to be multi-faceted and constantly in flux.

If you are confused about the various nuances involved in these sorts of claims you are not alone. The Court of Appeal has been asked to clarify these claims on various occasions and continues to do so on a semi-regular basis. At the root of these provisions is the intention to provide compensation to a claimant who would otherwise not receive same. This is always in the background when Courts are interpreting this legislation, and as insurers are well aware, often is an influencing factor to find in favour of a claimant.

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