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ARTICLE

Under-insured driver entitled to deduct third party's insurance limits

On June 1, 2020, the Ontario Court of Appeal (the ONCA) released its decision in *Tuffnail v. Meekes*, 2020 ONCA 340. Among other issues, the decision deals with underinsured motorist coverage pursuant to the standard-form OPCF-44R, and in particular, whether an uninsured motorist carrier is entitled to deduct insurance available to a third party from its own exposure.

Background

The underlying action arose from a single-vehicle accident following a wedding reception, which took place on September 13, 2009. The plaintiff, Tuffnail, and the driver of the motor vehicle, Meekes, were guests at the reception, hosted by the groom. Another passenger in the Meekes vehicle was killed and a companion claim was commenced by his Estate.

Tuffnail commenced an action against Meekes and the groom. Tuffnail also made a claim against his own auto insurer, State Farm Mutual Automobile Insurance Company (State Farm) for underinsured motorist coverage under the Ontario Policy Change Form 44R-Family Protection Coverage endorsement (OPCF-44R). The OPCF-44R is considered excess to "an amount received by the eligible claimant from any source". Tuffnail did not, however, commence an action against the bartender who allegedly over-served the operator. State Farm then commenced a third-party claim against the bartender for contribution and indemnity.

At trial, the jury found that the bartender was just over 10 per cent liable for the accident, with the remainder of the fault being apportioned between the driver, the groom/host and the plaintiff. The tort defendants had a combined $3.2 million in available insurance, $200,000 of which was available under Meekes' insurance policy, but Tuffnail's damages (after deduction for contributory negligence) were in excess of $3.4 million. The plaintiffs in the companion action agreed to be bound by the findings of liability and apportionment of damages in the Tuffnail action. At trial, counsel advised the policies of Meekes and the groom were subject to *pro-rata* sharing with the plaintiffs in the companion action, with Tuffnail entitled to 98.89 per cent of the proceeds. Practically, this meant that Tuffnail was entitled to $189,780 under the Meekes' policy and $1,897,800 from the groom's policy, which had limits of $2 million. This left a shortfall to Tuffnail of approximately $1.35 million.

State Farm argued its liability ought to be reduced by the amount of insurance available to the third-party bartender, $1 million, meaning that it would only be required to pay to Tuffnail approximately $350,000. However, the trial judge ordered State Farm to pay Tuffnail $800,000, the amount the parties had agreed was the limit under the OPCF-44R after Meekes' policy limits were considered. In doing so, the trial judge rejected State Farm's argument that the limits of the bartender's policy were available to Tuffnail and that his failure to sue the bartender should not increase his entitlement under the OPCF 44R. The basis for this finding was the fact Tuffnail had not sued the bartender. The trial judge relied on the prior wording of the OPCF-44R which included "any amounts the eligible claimant is entitled to recover (whether such entitlement is pursued or not)" in coming to her decision. This wording, left out of the current version of the OPCF-44R, signalled that it was not necessary for Tuffnail to pursue all possible tortfeasors before he was able to access his own insurance.

Appeal decision

On appeal, the ONCA noted that s. 7(b) of the OPCF-44R states the amounts available under the endorsement are excess to any amounts available to an eligible claimant from the "insurers of a person jointly liable with the inadequately insured motorist". Tuffnail advanced the argument that the bartender was a third party only and thus, could not be jointly liable to Tuffnail within the meaning of s. 7(b).

As noted above, the trial judge's determination that the bartender's policy was not available to Tuffnail stemmed from the fact that Tuffnail had not sued the bartender. However, the ONCA noted the trial judge was not asked to consider whether the bartender was "jointly liable" through the "lens" of the subrogated action commenced by State Farm. The ONCA stated that while the claim was pled as a claim for contribution and indemnity, State Farm was actually making a subrogated claim against the bartender on behalf of Tuffnail and thus, the bartender's liability to Tuffnail was put in issue.

In determining that the claim advanced by State Farm was a subrogated claim, the ONCA reviewed prior cases involving a subrogated claim advanced by way of third party claim and noted the key element is that:

> 46 It is apparent from both these cases that the subrogated claims were advanced as causes of action that could have been available to the plaintiffs and in both cases the third party's negligence vis-à-vis the plaintiff was in issue. The insurers sought to add the third parties on the basis of a claim by which the third parties were or might be liable to the plaintiffs.
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> 47 A subrogated claim advanced by way of third party claim is necessarily based on the third party's status as a potentially responsible joint or concurrent tortfeasor...
>
> (emphasis added)

The liability of a third party in a typical third-party claim is usually considered to flow directly from the defendant that issued the third-party claim. There is usually no basis to consider the third party jointly and severally liable with the defendants in the main action. In this case, however, the third-party claim was a subrogated one, commenced by the insurer, who had stepped into the plaintiff's shoes. As a result, the bartender was on equal footing with the other defendants and could therefore be held jointly liable to the plaintiff. If this were the case, by the wording of the OPCF-44R, State Farm could deduct the limits of the bartender's coverage.

Commentary

In addition to providing an interesting discussion on the nature of third party claims, this decision should give insurers and plaintiffs some comfort when faced with potential excess claims in over-limits cases. Plaintiffs are no longer required to name every potential tortfeasor in an effort to qualify for OPCF-44R coverage while allowing auto insurers with some potential avenues to reduce their exposure.

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