LOFTUS V. SECURITY NATIONAL INSURANCE COMPANY – CLARIFYING UNINSURED AUTOMOBILE COVERAGE

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On January 28, 2010 the Supreme Court of Canada denied leave to appeal in *Loftus v. Security National Insurance Company*,[*] thus ending a saga of litigation that has shed a new and different light on Ontario's mandatory uninsured automobile coverage.

Loftus v. Security National Insurance Company – Background

The facts of *Loftus* were relatively straightforward. The Plaintiff was stopped at a red light when she was struck by an uninsured automobile which was being pursued by police. The Plaintiff sued the uninsured driver (who did not defend the action), and her own insurer, Security National, under the uninsured automobile coverage provisions of her O.A.P. 1. Security National subsequently proceeded to commence third party claims against the local municipality and police force, claiming that their actions during the pursuit of the uninsured driver had contributed to the accident.

The case did not actually go to trial. Instead, Security National brought a pre-trial motion for a determination of a hypothetical legal question: if the third parties admitted that they were at least 1% liable for the accident, would the Plaintiff still be entitled to access the uninsured automobile coverage or would the existence of another insured tortfeasor preclude her from doing so? Given that the Plaintiff had not sued the third parties, and could no longer do so due to an expired limitation period, a finding that the uninsured automobile coverage was not available would effectively leave the Plaintiff without any recovery against an insured party. Both the Superior Court of Justice and the Court of Appeal held that the existence of 1% liability on the part of the third parties did not preclude the Plaintiff from accessing her uninsured automobile coverage with Security National.

"Legally Entitled to Recover" vs. "Entitled to Recover"

The Court of Appeal's decision in *Loftus* turned on the interpretation of the phrases "legally entitled to recover" and "entitled to recover" as they appear in the legislative provisions governing uninsured automobile coverage. Uninsured automobile coverage is statutorily mandated coverage. The coverage provisions, found in section 265 of the *Insurance Act*, state that uninsured automobile coverage encompasses the payment of all damages for bodily injury suffered in a motor vehicle accident (subject to specific limits and exclusions contained in regulations) that an insured person is "legally entitled to recover" from the owner or driver of an uninsured automobile. The phrase "legally entitled to recover" has already been interpreted as requiring only that an insured prove both the amount of his/her damages, and that the uninsured driver was at fault. Section 265 gives an insured a direct right of action against their own insurer without requiring the insured to first obtain a judicial finding of liability against the uninsured driver.

[*] The Court of Appeal's decision is reported at: 2009 ONCA 618 (CanLII).

The availability of uninsured automobile coverage is subject to specific limits and exclusions. For present purposes, the salient exclusion considered by the Court of Appeal is that found in section 2(1)(c) of Regulation 676, which provides that an insurer does not have to make *any* payments under the uninsured automobile coverage if the insured is "entitled to recover money" under the third party liability coverage of another motor vehicle insurance policy.[†] The Court of Appeal held that there is a distinction between an insured being "legally entitled to recover" money, and being "entitled to recover" money. The latter situation, the Court held, only arises when an insured is "entitled to recover in fact". The Court stated that this entitlement "in fact" would occur either when the insured obtains judgment against an insured tortfeasor, or when an insured tortfeasor's insurer admits liability to pay (as opposed to an insured tortfeasor merely admitting negligence or being found negligent).[‡]

The Court of Appeal held that the availability and characteristics of uninsured automobile coverage provides insureds with a choice of how to proceed with claims involving an uninsured, negligent motorist. An insured can either recover his/her damages under their uninsured automobile coverage, or can forgo the coverage and pursue other insured tortfeasors. The Court further held that this approach to uninsured automobile coverage both reflects and complements the current automobile insurance regime in Ontario:

> *The regime permits accident victims to sue in tort for some pecuniary losses and non-pecuniary losses only where their injuries meet a high threshold … Given the high threshold, many claims will be for amounts well in excess of the $200,000 minimum coverage provided under s. 265 of the Insurance Act. Claimants with claims in excess of $200,000 are likely to sue insured potential joint tortfeasors if there is any reasonable prospect of success. If the claimant also sues his or her insurer under the uninsured provisions of the policy, the insurer will only be liable if the claimant does not recover against the insured potential joint tortfeasor. However, where the claim is for less than the $200,000 minimum coverage provided under s. 265 of the Insurance Act, we see no indication that it was the intention of the legislature to require insured claimants to pursue potentially costly and speculative litigation before seeking recovery against their insurer.*

In response to the suggestion that this interpretation might allow an insured to achieve double recovery by first pursuing their own insurer under the uninsured automobile

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[†] The Court of Appeal actually considered both section 2(1)(c) and section 2(1)(b), which has since been repealed, although *Loftus* will be applicable to any claims that arose before section 2(1)(b) was repealed. Section 2(1)(b) provided that an insurer could deduct from the limit of uninsured automobile coverage any amounts that the insured was entitled to recover under a valid policy of insurance, save for "money payable on death". Security National's position in *Loftus* was actually based on section 2(1)(b), as the third parties in that action were insured under a commercial general liability policy, not a motor vehicle policy. However, arguments were raised concerning section 2(1)(c), and the Court of Appeal gave similar consideration to it as well.

[‡] In *Loftus*, the third parties were presumed to have admitted negligence that contributed to the Plaintiff's accident, but they had not admitted liability to actually pay the Plaintiff's damages. Under the approach argued by Security National, as the Plaintiff had not sued the third parties directly, a failure by the Plaintiff to recover against Security National would have precluded the third parties from having to pay anything to the Plaintiff.

coverage and then subsequently pursuing other insured tortfeasor for damages, the Court of Appeal held that to attempt successive actions in such a manner would constitute an abuse of process. Unfortunately, the Court did not provide much additional detail as to what circumstances would constitute an abuse of process.

What of the 1% Rule?

Prior to *Loftus*, the generally prevailing understanding of uninsured automobile coverage was that an insured injured in a motor vehicle accident could not recover against their uninsured coverage if there was another insured motorist who was at least 1% liable for the accident. The decision in *Loftus* does not necessarily change this rule. Rather, in many ways it only clarifies when and how it applies and, in doing so, perhaps allows one to see that the general consensus surrounding the 1% rule was perhaps more nebulous than many may have realized.

With respect to the issue of timing, the fact that the 1% rule may not apply until the point in time that judgment is obtained against an insured motorist may not, by itself, result in a significant change in the way motor vehicle litigation is conducted. In most cases involving uninsured motorists, the Plaintiff's own insurer usually finds itself added as a party along with any other potentially liable insured parties. Few such cases are pursued to judgment against any party, and settlements are often achieved that do not involve contribution by the Plaintiff's insurer.

The real effect of *Loftus* is likely to be on which party bears the informal onus of locating and adding potentially liable insured parties to litigation. After *Loftus*, plaintiffs in motor vehicle claims may no longer have to be as diligent as they once were in ensuring that all potentially liable insured parties are included in litigation. This is because the mere existence of such parties, and the possibility that the Plaintiff's insurer will locate and sue them, can no longer threaten the plaintiff's ability to recover under their uninsured automobile coverage. However, it bears noting that even prior to *Loftus*, an insured who was involved in a motor vehicle accident with an uninsured driver was never under an obligation to chase down every potentially liable insured party before having access to their uninsured automobile coverage. No such requirement is provided by either the *Insurance Act* or the O.A.P. 1. This point was not even debated during *Loftus* itself - Security National readily conceded that the Plaintiff did not have to sue every conceivable tortfeasor.

Furthermore, whatever newfound opportunities for lassitude may exist for plaintiffs after *Loftus*, they are only practically available to a plaintiff who wishes to forgo any recovery beyond the current $200,000 minimum limit of uninsured automobile coverage. The Court of Appeal was likely quite prescient in noting that in many cases a Plaintiff will either obviously have (or, perhaps more likely, will believe they have) suffered damages well in excess of $200,000, thus forcing them to locate and pursue other potentially liable insured parties, and concordantly depriving themselves of recourse to their uninsured automobile coverage.

Conclusion

While the Court of Appeal left several questions unanswered about the availability of uninsured automobile coverage, the decision in *Loftus* perhaps adds some needed clarity

to this area of law. If we accept the rationale behind uninsured automobile coverage, then it is at least arguable that the result that Security National wanted the Court of Appeal to endorse was problematic. It seems somewhat counterintuitive that a Plaintiff who is not otherwise required to sue every conceivable party should have the existence of their uninsured automobile coverage contingent on whether their insurer decides to do so.

Still, insurers may rightly complain that the *Insurance Act* does not provide sufficient remedies to protect the interests of uninsured automobile coverage carriers. For example, Security National argued that while the *Insurance Act* provided for a right of subrogation against the uninsured motorist, no such right of subrogation exists against an insured, negligent motorist. The Court of Appeal's somewhat laconic response to these concerns was that it was within an insurer's power to compensate for any lack of remedies by adjusting premiums.

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