A LITIGATOR'S GUIDE TO UNINSURED / UNIDENTIFIED / UNDERINSURED AND OFF COVERAGE POSITIONS

OTLA 2015 SPRING CONFERENCE

MAY 21, 2015

JIM DAVIDSON
WILL DAVIDSON LLP

WILL DAVIDSON LLP

INTRODUCTION

In Ontario, insurance coverage issues involving uninsured, unidentified and underinsured motorists continue to confuse and frustrate even the most experienced counsel. The purpose of this paper is to provide a practical guide to the numerous scenarios that give rise to such issues within the context of personal injury claims.

The starting point for this discussion is the very basic understanding that claims involving uninsured and unidentified motorists (where there is no insurance) are treated much differently than claims involving underinsured motorists (where there is not enough insurance).

In either case, an injured person may be able to seek compensation under one or both of the following insurance policies.

- A claim involving an uninsured or unidentified motorist is made against the **Uninsured Automobile Coverage** section of the Ontario Automobile Policy.

- By contrast, a claim involving an underinsured motorist can only be made against an **OPCF 44R – Family Protection Endorsement** which is typically (but not always) additional coverage forming part of the Ontario Automobile Policy.

While both policies are often dealt with together, it is important to know that they are different documents dealing with different situations.

UNINSURED AUTOMOBILE COVERAGE

A claim for Uninsured Automobile Coverage ("UAC") typically arises from one of the following situations:

- A person is injured by of the negligence of a driver of a vehicle that was not insured;

- A person is injured by of the negligence of a driver of a vehicle that flees the scene;

- A person is injured by the negligence of the driver of an insured vehicle that was being driven without the owner's consent.

A person injured in any of these situations will not be able to make a claim against a third party liability policy. Accordingly, their only recourse is against the UAC provisions of any valid automobile policy for which they are entitled to make a claim.

The Relevant Documents

Uninsured Automobile Coverage finds its source in the following 3 documents:

1. Section 265 of the *Insurance Act*;

2. Regulation 676 of the *Insurance Act*;

3. *Section 5* of the Ontario Automobile Policy.

Ultimately, UAC is a creature of Statute and more specifically s. 265 of the Ontario *Insurance Act* which reads in part:

> **265(1) Every contract evidenced by a motor vehicle liability policy shall provide for payment of all sums that,**
>
> **(a) A person insured under the contract is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injuries resulting from an accident involving an automobile;…**

This section of the *Act* is further regulated by Ontario *Insurance Act Regulation* 676 known as the "Schedule – Uninsured Automobile Coverage". This Schedule sets out the important procedures that must be followed when making a claim under this section.

The final relevant document is *Section 5* of the Ontario Automobile Policy which essentially incorporates the procedures set out in the *Schedule* into the actual policy wording.

All three documents must be considered when making a UAC claim.

Under Which Policy Can an Injured Person Claim?

1. If the injured person is the occupant of an insured vehicle then the claim is made to the insurer of that vehicle (OAP s. 5.3.1).

2. If the injured person is an occupant of an uninsured vehicle or a pedestrian injured by and uninsured or unidentified vehicle then the claim can be made to the insurer of:

    - A car they own (OAP s. 5.3.1);
    - A car their spouse owns (OAP s. 5.3.1);
    - A car of any person to whom they would be considered a "dependent relative"; (OAP s. 5.3.1 with certain limitations OAP s. 5.3.2).

Additionally, in certain circumstances a claim may also be made to:

- The insurer of a company car (with certain restrictions – see OAP s. 5.3.1);
- The insurer who provided the injured person accident benefits (see *McArdle v. Bugler* (2006) 82 O.R. (3d) 362 but also *McKenzie v. Zhang* 2013 ONSC 982;
- As a last resort, the Motor Vehicle Accident Claims Fund.

It is important to note that section 1.8.2 of the OAP can operate to exclude such coverage (including coverage for occupants) under certain circumstances where the vehicle is being knowingly operated by an excluded driver or without the owner's consent.

Other Important Issues and Considerations When Making a UAC claim

Family Law Act Claimants

Family Law Act claimants are also permitted to make claims under the UAC provisions of the Ontario Automobile Policy. In this regard, Section 265(1) of the *Insurance Act* states the following:

> **Every contract evidenced by a motor vehicle automobile policy shall provide payment of all sums that,**
>
> **…**
>
> **(b) any person is entitled to recover from the owner or driver of an uninsured or unidentified automobile as damages for bodily injury to or the death of a person insured under the contract resulting from an accident involving an automobile.**

Notice Requirements

Section 6 of *Regulation 676* deals with the Notice provisions involving UAC motorist claims. That section reads as follows:

> 6.(1) A person entitled to make a claim in respect of the bodily injury or death of a person under the contract shall do so in accordance with this section.
>
> (2) The claimant shall give the insurer written notice of the claim within **thirty days** after the accident or as soon as it is practicable after that date.
>
> (3) The claimant shall give the insurer, within **ninety days** of the accident or as soon as practicable after that date, such proof as is reasonably possible in the circumstances of the accident, the resulting loss and the claim.
>
> (4) The claimant shall provide the insurer upon request with a certificate of the medical or psychological advisor of the person insured under the contract stating the cause of the injury or death and, if applicable, the nature of the injury and the expected duration of any disability.
>
> (5) The claimant shall provide the insurer with the details of any other insurance policy, other than a life insurance policy, to which the claimant may have recourse…

Additional Requirements for Claims Involving Unidentified Vehicles

It is very important to note that the Notice requirements for cases involving an unidentified vehicle are more demanding and require almost immediate action compared to the Notice requirements involving an uninsured vehicle. In this regard, *Section 3* of *Regulation 676* reads as follows:

3. (1) This section applies if an unidentified automobile has caused bodily injury or death to a person insured under the contract.

(2) The person, or his or her representative, shall report the accident to a police officer, peace officer or judicial officer within **twenty-four hours** after it occurs or as soon as practicable after that time.

(3) The person, or his or her representative, shall give the insurer a written statement within **thirty days** after the accident occurs or as soon as is practicable after that date setting out the details of the accident.

(4) The statement shall state whether the accident was caused by a person whose identify cannot be ascertained and whether the person insured under the contract was injured or killed and property was damaged in the accident.

(5) The person, or his or her representative, shall make available for inspection by the insurer upon request the automobile in which the person was an occupant when the accident occurred.

Consequences of Failing to Give Proper Notice

The failure to give proper notice may not necessarily be fatal to a claim under the uninsured provisions of the policy. In *Coombs v. Royal Insurance Company of Canada*, [1986] 19 C.C.L.I. 163, the injured person reported a claim involving an unidentified motorist to his insurer almost one year post accident. The court hearing this case, considered the issue of prejudice and whether or not the insurer had been prejudiced by the late notice. At paragraph 31 of the decision, the following is stated:

> **In considering all the equities in this case, and acknowledging that that the plaintiff does not come with clean hands because of his misstatement I am persuaded that the late notice and the lack of proof of a claim constitute imperfect compliance within the meaning of Section 106 of the *Insurance Act.* The misstatement is not of such consequence to the insurer that I would take it to raise the status of the situation to one of non compliance. Accordingly, the Court has the discretion to allow for relief from forfeiture. Since the insurer has not demonstrated it was actually prejudiced or potentially prejudiced by the imperfect compliance, on all the equities I think the Court should relieve from forfeiture in this case. There will therefore be judgement to the plaintiff…**

Limitation Periods

Section 8 of Regulation 676 states the following:

(1) No person is entitled to bring an action to recover an amount provided for under the contract, as required by subsection 265(1) of the Act, unless the requirements of this Schedule with respect to the claim have been complied with.

…

(3) An Action or proceeding against an insurer in respect of bodily injury or death, or in respect of loss or damage to property other than the insured automobile or its contents, shall be commenced within two years after the cause of action arises.

The 1% Rule and the Loftus Decision

UAC is not available when the injured person is entitled to recover under the third party liability section of a motor liability policy (the insurance policy of a potential at fault motorist). Section 2(1)(c) of the Schedule states the following:

> **2(1) The insurer shall not be liable to make any payment,**
>
> **…**
>
> **(c) where the person insured under the contract is entitled to recover money under the third party liability section of a motor liability policy.**

Essentially, this section creates a 1% rule. If the injured person can attach at least 1% liability to another motorist that is insured, the UAC is not available. Pursuant to the joint and several liability provisions of the *Negligence Act*, the injured person may be able to obtain full compensation from that motorist.

It should be noted, however, that this 1% rule only applies to claims against other motorists. It does not apply to claims against taverns or municipalities for example. In the case of a claim against a non motorist, the UAC carrier would be treated simply as a joint tortfeasor. If liability was split 75/25 between the uninsured motorist and the tavern, the UAC carrier would pay 75% of the damages and the tavern would pay 25% of the damages.

It is important to note that this rule does not apply in the case of the OPCF-44R as will be discussed later in this paper.

The one percent rule has given rise to the question as to whether or not the injured person must pursue *every potential* 1% defendant before being able to access the uninsured motorist coverage provisions. The decision in *Loftus v. Robertson* (2009) 96 O.R. (3d) 721, answered this question in the negative. In this regard, the Court of Appeal stated the following at paragraph 35:

> **Reading Section 265 of the *Insurance Act* and Section 2(1)(b) and (c) of the Schedule in context, we conclude that the phrase "entitled to recover" as it appears in Section 2(1)(b) and (c*)* of the Schedule means entitled to recover in fact. Moreover, in our view, on a proper reading of these provisions, there is no requirement that an injured insured sue insured potential tortfeasor(s) in order to resort to the uninsured coverage. Rather, an injured insured will be disentitled from recovery under the uninsured coverage in O.A.P. 1 based on the negligence of an insured joint tortfeasor only where the joint tortfeasor's insurer admits liability to pay or where the injured insured obtains a judgment against the joint tortfeasor**.

Dependent Relatives

In addition to an insured person and his or her spouse, a dependant relative of either can also make a claim under the UAC provisions of the policy. While the term "dependent relative" is defined in the OPCF-44R Endorsement relating to underinsured motorists, there is no definition applicable to UAC.

Generally, the case law suggests that the term "dependent relative" be given a broad interpretation and is not necessarily restricted to "financial need" or being "principally dependent" (see generally the lower court decision in *Pagliarella v. Di Biasa Brothers Inc.* (1989) Carswell Ont. 2317).

Standard of Proof – Unidentified Motorist Claims

Unlike a claim involving an underinsured motorist (OPCF-44R), there is no special or heightened standard of proof in establishing that damages were caused by the negligence of an unidentified motorist for the purposes of UAC. The standard of proof is the balance of probabilities.

Amounts Payable

In Ontario, the limit for uninsured motorist coverage is $200,000. This is the absolute amount that an insurer can be liable for any one accident regardless of the number of persons injured or killed or the damage to the automobile and contents (see Section 2(1) of Regulation 676).

Accordingly, if there is more than one claimant and the aggregate claims exceed $200,000 then the claimants must share the $200,000 on a pro-rata basis depending on the value of their individual claims.

UNDERINSURED MOTORIST COVERAGE: OPCF-44R

An underinsured motorist claim can arise when the at fault driver's third party liability limits are insufficient to compensate the injured person's claim. Common examples of this include:

- Accidents involving multiple claimants all sharing in the at fault driver's limits;
- Accidents involving U.S. motorists with low third party limits, i.e. $25,000;
- Accidents where the at fault motorist's insurer adds itself as a statutory third party reducing the available limits to $200,000;
- Accidents involving uninsured motorists where the claim exceeds $200,000.

The Relevant Document

Unlike UAC, there is only one document giving rise to underinsured coverage and this is the **Family Protection Endorsement** known as the **OPCF-44R**. This is additional coverage added to the policy in exchange for a higher premium. The OPCF-44R is not a creature of statute. It is an insurance contract and is to be interpreted accordingly. Most, but not all, Ontario Automobile Policies include the OPCF-44R. Typically the limit of the OPCF-44R is the same as the third party liability limits of the policy to which it is attached. Before making a claim, the injured person must establish that the policy under which they are claiming does indeed have the OPCF-44R endorsement.

Under Which Endorsement Can an Injured Person Claim?

Unlike UAC, the OPCF-44R follows the person insured under the endorsement and that person's family and not necessarily the vehicle involved in the accident. Accordingly, whether an occupant of your own vehicle or the occupant of another vehicle or a pedestrian, the claim would be to:

1. Your own OPCF-44R;

2. The OPCF-44R of your spouse, or

3. the OPCF-44R of anyone to whom you would be considered a dependent relative.

Additionally, in certain circumstances a claim may be made to:

1. The OPCF-44R of a company car (with certain restrictions – see OPCF-44R s. 1.6(b))

This is an important distinction often missed by counsel. Accordingly, when dealing with a claim involving a person injured in an accident with an uninsured driver, the following rule applies:

1. The uninsured claim is first made under the automobile policy of the vehicle in which the injured person was an occupant;

2. The underinsured claim, by contrast, is first made under the injured person's own automobile policy or the automobile policy of a family member (as defined in the endorsement).

This can often result in the need to sue two different automobile insurers for a claim arising out of a single accident.

Accessing the Endorsement

However, it is very important to note that the mere fact that the at fault driver's third party liability limits are insufficient does not necessarily mean that the OPCF-44R will automatically respond. There is only access to the endorsement if the stated third party liability limits of the at fault driver are less than the stated limits of the endorsement. This is set out in Section 4 of the OPCF-44R which states the following:

4. **The insurer's maximum liability under this change form, regardless of the number of eligible claimants or insured persons injured or killed or the number of automobiles insured under the Policy, is the amount by which the limit of family protection coverage exceeds the total of all limits of motor vehicle liability insurance … of the inadequately insured motorist and of any person jointly liable with that motorist.**

In other words, there is no access to the OPCF-44R if the third party liability limits of the at fault motorist are the same as the limits of the endorsement. This applies even if the injured person is not receiving the full limits of the third party policy.

Multiple Claimants

For example, in some cases, multiple claimants may have to share pro-rata in the limits of the at fault motorist. If there are two claimants with catastrophic injuries and the insurance limits of the at fault motorist are $1,000,000, then each claimant (assuming their damages are equal) would only receive $500,000 from the at fault policy despite the fact that their claims are worth much more.

Under such circumstances, a claimant insured under an OPCF-44R with a $1,000,000 limit would still not be able to access the endorsement for the difference between the $500,000 received from the at fault motorist and the $1,000,000 of the endorsement. This is because the limits of the OPCF-44R and the limits of the at fault motorist are the same.

This principle was upheld by the Ontario Court of Appeal in *Van Bastelaar v. Bentley*, [2011] OJ No. 4666 where it was stated that the underinsurer's obligation to pay under the OPCF-44R does not arise until the total amount of insurance held by the tortfeasor at the moment of the accident is less than the OPCF-44R limit.

Amounts Available Under the OPCF-44R

Where, however, the third party liability limits of the at fault driver are less than the limit of the OPCF-44R, then the Endorsement is available and can be accessed.

In such circumstances, the amount of insurance available would be the difference between the limit of the OPCF-44R and the limits of the at fault motorist. The following examples illustrate this point:

- OPCF-44R limit is $2,000,000 and at fault motorist limits are $1,000,000 – amount of insurance available under the OPCF-44R would be $1,000,000.

- OPCF–44R limit is $1,000,000 and insurer of at fault motorist adds itself as a statutory third party reducing limits to $200,000 - amount of insurance available under the OPCF-44R would be $800,000.

- OPCF-44R limits are $1,000,000 and at fault motorist is from Florida with third party limits of $25,000 - amount of insurance available under the OPCF-44R would be $975,000.

In addition, whatever amount is available under the OPCF-44R is payable as excess insurance to what ever amount is actually "received" by the injured person from the third party limits of the at fault motorist. The decision in *McGrath v. Arshad* [2008] O.J. No. 5771, illustrates this point. In that case, the at fault driver had third party liability limits of $200,000. McGrath had an OPCF-44R with $2,000,000 limits. Accordingly, the amount available under the OPCF-44R was therefore $1,800,000. However, there were multiple claimants. The court assumed, for the purposes of the case, that McGrath's share of the $200,000 limits of the at fault driver would only be $20,000.

McGrath's OPCF-44R insurer tried to argue that the their obligation to pay under the endorsement was limited to only that portion of McGrath's claim, if any, that exceeded $200,000 even though McGrath was only receiving $20,000. The judge hearing the case disagreed and stated:

> **…in my view the defendant is required to make up any shortfall between the actual amount a claimant received from an inadequately insured motorist for damages to which the claimant may be legally entitled up to the limit of coverage under the OPCF-44R (in this case, $1,800,000).**

Other Important Issues and Considerations When Making a OPCF-44R Claim

Family Law Act Claimants

Family Law Act claimants are also permitted to make claims under the OPCF-44R. In this regard, s. 1.3 of the endorsement defines an "eligible claimant" to include:

> **(a) Any other person who, in the jurisdiction in which the accident occurs, is entitled to maintain an action against the inadequately insured motorist for damages because of bodily injury to or death of an insured person.**

The 1% Rule

Unlike UAC, the OPCF-44R can avoid payment if there are other tort feasors with available insurance. This is not limited to only motor vehicles as is the case with UAC. In this regard, Section 7 of the endorsement states the following:

> **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 in excess to the 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.**

In other words, not only is the OPCF-44R endorsement excess to the insurance available from the inadequately insured motorist but it is also excess to insurance from any other person jointly

liable with the inadequately insured motorist such as a tavern or municipality. This may have the effect of restricting access to the endorsement completely.

Standard of Proof – Unidentified Motorist Claims

The issue of standard of proof under the OPCF-44R is much different than under UAC. Whereas the standard of proof for UAC is the balance of probabilities, the OPCF-44R has added requirements for claims involving unidentified motorists.

In this regard, s. 1.5 of the endorsement states the following:

> **(C) Where an eligible claimant alleges that both the owner and driver of an automobile referred to in clause 1.5(b) cannot be determined, the eligible claimant's own evidence of the involvement of such a vehicle must be *corroborated* by *other material evidence*; and**
>
> **(D) "Other material evidence" for the purposes of this section means**
>
> **(i) independent witness evidence, other than evidence of a spouse as defined in Section 1.10 of this change form or a dependent relative as defined in Section 1.2 of this change form;**
>
> **(ii) *physical evidence* indicating the involvement of an unidentified automobile.** [emphasis added]

In the decision in *Featherstone v. John Doe*, [2013] O.J. No. 2541, the plaintiff claimed that she was forced off the road by an unidentified driver. Importantly, there was no contact between the two vehicles. The only physical evidence at the scene consisted of the plaintiff's own tire marks leaving the roadway.

The OPCF-44R carrier brought a motion to dismiss the claim against the endorsement on the basis that there was insufficient "physical evidence" to support the plaintiff's allegation regarding an unidentified motorist.

In dismissing the insurer's motion, the judge found that "physical evidence" does not require that the evidence emanate from the other vehicle. So long as the physical evidence "indicates" the involvement of another vehicle, it will suffice.

Notice Provisions

Section 15 of the OPCF-44R endorsement requires the following by way of notice to the insurer:

> 15. The following requirements are conditions precedent to the liability of the insurer to an eligible claimant under this change form:
>
> (a) The eligible claimant shall promptly give written notice with all available particulars, of any accident involving injury to or death of an insured person and of any claim made on account of an accident;

(b) The eligible claimant shall, upon request, provide details of any policy of insurance other than life insurance to which the eligible claimant may have recourse;

(c) The eligible claimant and insured person shall submit to examination under oath and shall produce for examination at such reasonable place and time as is designated by the insurer or its representatives, all relevant documentation in their possession or control, and shall permit extracts and copies of them to be made.

The endorsement also requires an eligible claimant to deliver a copy of the Statement of Claim issued against a culpable defendant and further that **action under the OPCF-44R be initiated within 12 months and/or no later then two years.** (But see discussion of Limitation Period below)

Dependent Relative

Unlike uninsured motorist claim, the OPCF-44R does specifically define dependent relative as follows:

1.2 "Dependent Relative" means:

(a) a person who is principally dependent for financial support upon the named Insured or his or her spouse and who is

(i) under the age of 18 years;

(ii) 18 years or over and is mentally or physically incapacitated;

(iii) 18 years or over and in full time attendance at a school, college or university.

(b) a relative of the named insured or of his or her spouse, who is principally dependent on the named insured or his or her spouse for financial support;

(c) a relative of the named insured or of his or her spouse, who resides in the same dwelling premises as the named insured;

(d) a relative of the named insured or of his or her spouse, while an occupant of the described automobile, a newly acquired automobile or a temporary substituted automobile as defined in the policy.

BUT – subsection 1.2 (c) and 1.2 (d) apply only where the person injured or killed is not an insured person as defined in the Family Protection coverage of any other policy of insurance or does not own, or lease for more than 30 days an automobile which is licensed in any jurisdiction in Canada where family protection coverage is available.

Importantly, a dependent relative under the OPCF-44R need only live in the same residence as the insured person in order to be eligible. That relative need not be financially dependent on the insured person. This would appear to be an extension of coverage different than coverage for

dependent relatives under the UAC. (See paragraph 39 of *Gardiner v. MacDonald Estate*, 2014 ONSC 227.)

Limitation Periods

In a recent Court of Appeal decision in *Schmitz v. Lombard General Insurance Company of Canada,* [2014] O.J. No. 531 the court unanimously held that the limitation period for an underinsured claim begins to run the day after the demand for payment from the OPCF-44R insurer is made. The court analyzed the discoverability provision in Section 17 of the OPCF-44R and Section 5 of the *Limitation Act* and concluded that the *Limitation Act* did apply. Applying the discoverability principle, it was held that the plaintiff does not realize a loss until the demand for indemnity under the OPCF-44R is made, and is rejected. Specifically, the court held that the claimant suffers a loss "caused by" the OPCF-44R insurer's omission in failing to satisfy the claim for indemnity the day after the demand for identification was made.

Application for leave to appeal to the Supreme Court of Canada was dismissed without reasons.

The practicable consequences of this decision may be that there is effectively no limitation period for claims under the OPCF-44R. The OPCF-44R does not require a plaintiff to demand payment of the excess coverage at any particular time.

Costs

There has always been some uncertainty as to whether or not costs are payable pursuant to a claim under the OPCF-44R. This arises from Section 6 of the endorsement which states the following:

> **The amount payable to an eligible claimant under this change form shall be calculated by determining the amount of <u>damages</u> the eligible claimant is legally entitled to recover from the inadequately insured motorist …** [emphasis added].

However, once a lawsuit is commenced against the OPCF-44R carrier, an argument can be made for costs pursuant to the provisions of the *Courts of Justice Act.*

Personal Liability Umbrella Policies (PLUPs)

The courts of held that Personal Liability Umbrella Policies (PLUPs) are **not** part of a motor vehicle liability policy and are **excess** insurance to the OPCF-44R. Accordingly, a person injured by the negligence of an underinsured motorist would first claim against their OPCF-44R before being able to access the PLUP (see *Keelty v. Bernique* [2002] O.J. No. 83 (ONCA) and *Heuvelman v. White* [2004] O.J. No. 4342 (ONCA)).

OFF COVERAGE POSITIONS

When an insurer takes an "off coverage" position, the impact can be as equally detrimental for the plaintiff as it is for the person who has been denied coverage.

In this regard, consider the case of a pedestrian (with no access to uninsured or underinsured coverage) who is catastrophically injured in a motor vehicle accident. Assuming, the at fault driver had insurance with third party liability limits of $1,000,000, this would be the amount that would be available to the plaintiff as compensation. However, if the insurer were to take the position that its insured driver was in breach of the policy at the time of the accident, it could move to add itself as a Statutory Third Party and thereby reduce the amount of insurance available to the plaintiff to $200,000 (the statutory minimum).

Under such circumstances, can the plaintiff challenge the insurer's decision and add the insurer as a defendant in the lawsuit. Traditionally, the answer is no. This is essentially a contract (coverage) dispute and there is no privity of contract between the plaintiff and the insurer. The plaintiff did not pay a premium to the insurer. By law, the insurer's only obligation to the plaintiff is to make available the statutory minimum limits of $200,000.

The only recourse for a plaintiff who wanted to challenge the insurer's off coverage position is to obtain a judgment against the at fault motorist and then commence an application against the insurer under s. 258(1) of the *Insurance Act*. Only then could the plaintiff challenge the insurer's off coverage position.

The recent decision in *Williams v. Pintar* [2014] O.J. No. 1267, however, may change this procedure going forward. In this case, the insurer of the at fault motorist (Jevco) added itself as a statutory third party. The at fault motorist did not defend the action and was noted in default. The plaintiff then moved to amend the Statement of Claim to add Jevco as a defendant to the action and to claim declaratory relief against Jevco that it be obligated to pay the plaintiff any amount found owing by the at fault motorist.

Jevco's main defence to the motion was that there was no cause of action between the plaintiff and Jevco until the plaintiff obtained a judgement against the at fault motorist. While the Master hearing the motion agreed with this in principle, he still found that it was appropriate to add Jevco as a defendant in the main action. This provided the parties with a more efficient means of resolving the coverage issue and was not contrary to the principles of s. 258(1) of the *Insurance Act.*

While this was only a motion to amend pleadings, it does provide some authority to permit a plaintiff to at least challenge the insurer's off coverage position by adding that insurer as a defendant in the main action.

CONCLUSION

The law involving uninsured, unidentified and underinsured motorist claims remains as complicated today as it was when it was first introduced in Ontario more than 35 years ago. While the general principles remain relatively straight forward, to provide adequate compensation to motor vehicle accident victims, the infinite factual circumstances to which the law applies has given rise to a body of case law that can be confusing to even the most experiences lawyers and judges. Accordingly, it is imperative that lawyers practicing in this area

give very careful consideration to both the specific facts and the proper procedures required in each case before advancing or defending such claims.

The following articles were a valuable resource in the preparation of this paper:

- "***Bull's-Eye: The Target Defendant and Insufficient Policy Limits***"; Frank Kosturik,– 2015
- "***Uninsured and Underinsured Motorist Coverage: 2014 Update***"; Jay Skukowski and Emily Wunder – 2014
- "***UMC and OPCF 44R: Similar but Different***"; Fraser R. Gow
- "***Can an Insurer be Added as a Defendant by a Plaintiff to Determine a Coverage Issue?";*** Christopher Dunn - 2104