

## Personal Injury

# Inadequately insured able to claim damages under own optional coverage

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(December 21, 2020, 11:04 AM EST) -- Ontario Policy Change Forms (OPCF) 44R Family Protection Coverage is optional automobile insurance coverage which applies in collisions involving an "inadequately insured motorist." This includes collisions in three scenarios: underinsured drivers whose total liability insurance is less than the amount of the OPCF 44R coverage, uninsured automobiles and unidentified automobiles. A person involved in a collision with an inadequately insured motorist may claim damages from their own insurer where they are covered by an OPCF 44R endorsement.

At issue in *Lamb v. Co-operators General Insurance* [2020] O.J. No. 3492 was the third scenario, where a vehicle struck the plaintiff and fled the scene before it could be identified. The OPCF 44R insurer brought an unsuccessful summary judgment motion disputing the reasonableness of the plaintiff's efforts to identify the vehicle. It argued that there was no triable issue relating to its potential liability because the plaintiff had "every opportunity" to identify the vehicle owner or driver and failed to do so. The motion judge disagreed, and wrote:

The question is not whether it was possible for Ms. Lamb to identify the driver or record his license plate. Instead, it is whether her failure to do so was unreasonable in the circumstances, which necessarily takes into account her condition in the aftermath of the accident ...

... to conclude that Ms. Lamb behaved unreasonably by not prioritizing obtaining the driver's identifying information or recording his license plate would entirely ignore the reality of her situation. At the time, Ms. Lamb was rather obviously not in any condition to collect pertinent information regarding the driver who struck her.

The court found that the plaintiff did not have a reasonable opportunity to identify the driver or vehicle that struck her because of her physical injuries and emotional condition after the collision, and the driver's decision to flee within minutes.

Under s. 265(2) of the *Insurance Act*, "unidentified automobile" means an "automobile with respect to which the identity of either the owner or driver cannot be ascertained." This determination, the motion judge found, turned on the reasonableness of the plaintiff's efforts to identify the owner or driver.

The motion judge cited as authority for that proposition the Court of Appeal for British Columbia decision in *Leggett v. Insurance Corporation of British Columbia* [1992] B.C.J. No. 2048, where Justice Taylor wrote:

The question, in my view, is not whether Mr. Leggett acted reasonably in deciding initially to abandon whatever rights he had, but whether he acted as a reasonable person would have acted who wanted to protect those rights, whatever they might prove to be.

Here, the motion judge found that the plaintiff had acted reasonably. She was struck in a plaza parking lot by a fast-moving vehicle and suffered a fractured tibial plateau that would later require surgery. The driver did not engage the plaintiff or her husband who was waiting for her in the parking lot and instead was concerned only about damage to his vehicle.

Within two minutes of the collision, the plaintiff's husband brought her into a nearby restaurant. The driver had fled when her husband went back outside minutes later.

The insurer denied the plaintiff's application for accident benefits through her husband's OPCF 44R endorsement on the basis that she was 100 per cent at fault for the collision. The insurer later changed its position on the motion to rely on the plaintiff's failure to identify the vehicle or driver.

At issue on the motion for summary judgment was whether there was a triable issue concerning the reasonableness of the plaintiff's failure to identify the driver who struck her or to record the licence plate of his vehicle.

The motion judge dismissed the motion and concluded that there was a triable issue that could not be resolved by summary judgment. The plaintiff had suffered a significant injury, was in considerable pain and likely in shock after the collision.

She could not be faulted for focusing on her condition and hence had not acted unreasonably by failing to obtain the driver's identifying information right after being struck. Indeed, to find otherwise, the motion judge wrote, "would entirely ignore the reality of her situation."

The motion judge also rejected the argument by the insurer that the plaintiff's husband had tacitly communicated to the driver that he was free to leave by moving her into the restaurant. To the contrary, s. 320.16(1) of the *Criminal Code* imposed an obligation on drivers to identify themselves after an accident and remain at the scene.

Put bluntly, the motion judge concluded that the insurer's position was not a workable standard because it had a perverse effect and led to an absurd result:

In the end, acceding to Co-operators' position on this motion would serve to cast the burden on a plaintiff seeking redress for injuries caused by an "unidentified automobile" far too high. If a plaintiff is injured by a motor vehicle, and because of her injury is not in a position to collect information about the driver of that vehicle or record his license plate before that driver takes flight, they are the very sort of claimant the law should protect. To close the door on such a plaintiff's claim would, in practical terms, have the somewhat perverse effect of only ever affording coverage to those injured by "hit and run" drivers who have the misfortune of being rendered unconscious. That would be a rather absurd result. It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 36 O.R. (3d) 419, at p. 27. (See *Lamb*, para. 60.)

In the result, the motion was dismissed because insurer failed to satisfy the motion judge that there was no triable issue as to the reasonableness of the plaintiff's efforts to identify the driver or vehicle.

This decision is a reminder that the reasonableness inquiry as to the claimant's efforts to identify a fleeing vehicle and driver starts with his or her condition after the collision.

The court will take a practical approach to assessing any failure to identify the vehicle and driver in light of the severity of the collision, the resulting injuries and the conduct of the fleeing driver. The efforts will likely be found to be reasonable where the claimant acts as a reasonable person in the circumstances would and fails to identify the driver and vehicle.

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