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INSURANCE LAW BULLETIN

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Limits, Offsets, and Subrogation – *Tuffnail v. Meekes*

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Introduction

The Ontario Court of Appeal recently considered a situation of joint and several liability amongst parties and the limits of insurance available to the compensable plaintiffs.

Facts

Tuffnail was injured in a single-vehicle crash on September 13, 2009, following a rural wedding reception. A fellow passenger, Petrie, was killed. The driver of the vehicle, Meekes, had been served alcohol at the wedding hosted by the groom, Bolton, and bartended by Coulthard.

Tuffnail commenced an action against Meekes, Bolton, and State Farm (Tuffnail's auto insurer for OPCF-44R/underinsured motorist coverage). State Farm and Bolton brought third party actions against Coulthard. Of note, Coulthard was not sued by Tuffnail.

On May 10, 2017, after a 6-week trial, the jury awarded damages and apportioned liability among Meekes, Bolton, Coulthard, and Tuffnail as follows:

- Meekes (driver) – 65%
- Bolton (host) – 20.03%
- Coulthard (bartender) – 11.12%
- Tuffnail (plaintiff) – 3.85%

After the 3.85% was deducted, Tuffnail was awarded \$3,435,034.71 in damages. The available insurance from the at-fault parties was as follows:

- \$200,000.00 in auto insurance coverage to Meekes;
- \$2,000,000.00 was available to Bolton (not an MVA policy); and,
- \$1,000,000.00 was available to Coulthard (not an MVA policy).

The insurance proceeds were insufficient to cover Tuffnail's award. Following post-verdict rulings delivered July 23, 2019, the parties filed for appeal on multiple grounds.

The Meaning of “Available” and “Jointly Liable”

“Available”

Meekes was an underinsured motorist within the meaning of the OPCF-44R as his coverage was limited to the statutory minimum of \$200,000.00. Tuffnail’s coverage under the OPCF-44R provided up to \$1,000,000.00 in the aggregate and thus \$800,000.00 in potential, maximum coverage.

The issue before the trial judge was whether Coulthard’s insurance coverage was “available” to Tuffnail. If it was available, the \$1,000,000.00 limit of Coulthard’s policy would be deducted from any calculation of State Farm’s benefit exposure to Tuffnail under s. 7 of the OPCF-44R. Thus, State Farm’s exposure would be reduced from \$800,000.00 to \$347,454.00, after deducting the Meekes, Bolton, *and* Coulthard policy limits.

Ss. 7 and 20 of the OPCF-44R read as follows:

7. 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 excess to 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;

20. Where a claim is made under this change form, the insurer is subrogated to the rights of the eligible claimant by whom a claim is made, and may maintain an action in the name of that person against the inadequately insured motorist and the persons referred to in section 7 of this change form.

The Court of Appeal found in favour of State Farm. State Farm was permitted to deduct the limits of Coulthard’s insurance coverage in calculating the amount it was required to pay Tuffnail. In so finding, the Court noted Tuffnail’s admission that Coulthard’s insurance coverage would be available to him if Coulthard was found jointly liable.

“Jointly Liable”

An individual cannot be jointly liable unless and until he or she is so found. The Court of Appeal held that the trial judge had erred in finding that Coulthard was not jointly liable to Tuffnail. State Farm had a right of subrogation against Coulthard under s. 20 of the OPCF-44R, and thus Coulthard was necessarily jointly liable with Meekes to Tuffnail. Additionally, the Court found that State Farm’s claim against Coulthard was, at its core, a subrogated claim made on behalf of Tuffnail with the legal consequence of putting Coulthard’s liability to Tuffnail at issue. The Court concluded that the correct interpretation of s. 7 of the OPCF-44R was one that allowed State Farm to deduct the limits of Coulthard’s insurance coverage in its payment to Tuffnail under the OPCF-44R.

Notably, State Farm had no independent right to claim against Coulthard. State Farm did not cause or contribute to Tuffnail’s damages, and therefore, unlike Bolton, could not assert a right of contribution and indemnity against Coulthard under section 1 of the *Negligence Act*. Instead, State Farm sought contribution and indemnity from Coulthard through its subrogated interest in statute and policy via its third party claim. State Farm’s subrogation rights were modified by the *Insurance Act* (s. 278 of the *Insurance Act* and the OPCF-44R), allowing State Farm to subrogate against Coulthard before Tuffnail was fully indemnified.

Subrogation and Indemnification

The Court confirmed that the right of subrogation is derivative in nature. State Farm was only advancing the cause of action that the insured would otherwise have against the responsible party (in this case, Coulthard). As such, if Tuffnail did not have a claim against Coulthard, State Farm would have had no right to subrogate. Thus, in bringing its third party claim against Coulthard, State Farm stepped into Tuffnail's shoes to claim against Coulthard.

In citing its past decisions in *Morey v. Knipple* and *Freudmann-Cohen v. Tran*, the Court concluded that a subrogated claim advanced via a third party claim would necessarily be based upon the third party's status as a potential joint or concurrent tortfeasor. In the subject case, Coulthard was a concurrent tortfeasor who, given the jury's apportionment of liability, was jointly liable for causing the plaintiff's damages. The foregoing, in conjunction with the Court's confirmation of State Farm's ability to bring a claim against Coulthard on behalf of Tuffnail, meant that Coulthard was jointly liable with Meekes and Bolton for causing Tuffnail's injuries for the purposes of s. 7 of the OPCF-44R.

Even if an insurer's objective in bringing a third party claim is only to protect its right to subrogate in relation to amounts it is called upon to pay the insured plaintiff and the insurer accordingly restricts its third party claim to a claim in contribution for amounts it is required to pay the insured plaintiff, such a claim is necessarily founded on the third party's potential responsibility for causing the insured's damages.

As the amount recoverable from the at-fault parties' insurers was less than the judgment for Tuffnail, Tuffnail and State Farm disagreed at whom between them should bear the shortfall.

In Ontario, the common law right of subrogation is altered by s. 278(1) and (2) of the *Insurance Act*; s. 278(1) permits an insurer to subrogate prior to full indemnification of its insured, while s. 278(2) states that where the net amount recovered is insufficient to provide complete indemnity, the insurer and the insured shall recover *pro rata*. In this case, the Court found s. 278(2) applied despite State Farm's right of subrogation arising from the OPCF-44R. As a result, State Farm was entitled to pursue recovery of its subrogated interest against the Defendant, Bolton Estate, and against Coulthard. State Farm was to share with the Plaintiffs on a *pro rata* basis any amounts it recovered by way of subrogation until the Plaintiffs received full indemnification under the Judgment.

Take Aways

An auto insurer, in responding to a claim from its own insured for under insured or unidentified motorist coverage should, at the outset and throughout the investigative process, satisfy itself that all potentially responsible parties are included in the litigation as early as possible. Requests should be made to the insured plaintiff to add any missing parties. If rejected, the insurer should proceed by issuing a statutory third party claim to "step into the insured's shoes" to protect its and the insured's interests and make "available" all avenues of coverage to preserve any OPCF-44R limits. This also serves to reduce the first-party insurer's burden in covering gaps between coverage and judgment amounts. *Tuffnail* can provide comfort to insurers in the sense that even where a plaintiff does not claim against other potentially at-fault third parties, the insurance of these third party tortfeasors can be "available" as per the language of the OPCF-44R.