UNIDENTIFIED MOTORIST CLAIMS IN ONTARIO
AN OVERVIEW
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Unidentified motorist claims are, at times, challenging to investigate and resolve. Frequently, all the liability evidence is solely within the knowledge of the plaintiff. There is some comfort to be had in an initial scene investigation by the police, and supporting evidence arising from the property damage to the vehicle. In the event more than one vehicle was involved in the accident, witness statements are generally supportive of the plaintiff's allegations of a John Doe causing the accident.

Single vehicle roll-overs present different challenges. Unidentified motorist claims involve both the AB and tort sides of each claim and can present a significant accident benefits expense to the insurer, particularly in the event of multiple occupants.

All motor vehicle policies in the Province of Ontario are required to provide unidentified and uninsured motorist provisions. [1]

The unidentified vehicle is a vehicle whose driver or owner cannot be determined.

Since the owner or driver cannot be determined, there is no applicable and collectible bodily injury liability or property damage liability insurance for the ownership, use and operation of the vehicle and therefore, the unidentified vehicle is deemed uninsured.

The coverage extends to "*persons insured under the contract*" which includes "*any person while an occupant of the insured vehicle*" as well as the insured, and "*his or her spouse, and any dependant relative of either while an occupant of an uninsured vehicle or while not an occupant of an automobile or of railway rolling stock that runs on rails, who is struck by an uninsured or unidentified vehicle*." This would include situations such as pedestrian knock downs and inter-vehicular hit and runs.

Coverage is also extended to directors, officers, employees, or partners of vehicles insured by corporations, as well as their spouses or dependant relatives, if the vehicle is made available for their regular use and they are not the owner of another vehicle insured under a contract.[2]

Dependant Relatives cannot claim under the policy of the vehicle involved in the accident if they have a policy of their own to claim against, or if they were an occupant of their own uninsured vehicle.[3]

[1] Section 265(9) of the Insurance Act RSO 1990 cI.8 as am and O. Reg 676
[2] Section 265 (2) of the Insurance Act RSO 1990 cI.8 as am
[3] Section 265 (4) of the Insurance Act RSO 1990 cI.8 as am

If the vehicle is being used or operated by an excluded driver under the policy, the injured person is not insured under that policy, except for purposes of the Statutory Accident Benefits Schedule and cannot bring an action under the unidentified motorist provisions of that policy.[4]

Limitation on Damages

The unidentified limits for damages are $200,000 per accident regardless of the number of claimants.

This amount could be reduced by $25,000 as a result of property damages claims.

Consideration of the number of eligible claimants and the totality of the general damages can lead to early resolution. When there are multiple claimants and the claim has the potential to meet or exceed the limits available, reserves at the limit can quickly be allocated into an interest bearing account pending distribution. Allocation of the amounts payable to individual plaintiffs should be agreed to by the plaintiffs and their counsel, or alternatively, by way of an application to the court or binding arbitration commenced by a plaintff. Funds ought not to be released early to some plaintiffs, leaving the remaining plaintiff's potentially shut out of any compensation. [5]

Liability

In the event one per-cent liability can be attributed to any other person who has third party liability on their motor vehicle liability policy, that person's policy is responsible to compensate the injured persons, 100%.[6]

Once a party has been identified to which some liability attaches, the full limits of that policy are exposed. It is in the best interests of the injured party to find some other source of liability to properly indemnify him or herself.

Making an Unidentified Motorist Claim

The Regulation[7] is specific as to the steps required by the claimant when making this claim. These are designed to provide the insurer with the maximal opportunity to investigate the circumstances of the loss and identify other potential parties.

The claimant is required to:

> report the accident to a police officer, peace officer or judicial officer within 24 hours after it a occurs, or as soon as practicable;

[4] Section 265 (3) of the Insurance Act RSO 1990, cI.8 as am
[5] O. Reg 676 Section 2(1) and section 251 of the Insurance Act supra
[6] O. Reg 676 Section 2(1)(c)
[7] O. Reg. 676 RRO 1990 as am

to give the insurer a written statement within 30 days after the accident (or as soon as practicable), setting out the details of the accident, stating that the person who caused the accident cannot be identified , and whether the claimant was injured or killed, and what property damage was done;

to make the damaged vehicle available for inspection by the insurer; (This can be difficult in the event the claimant is not the owner of the vehicle.)

to provide proof of the claim for damages within 90 days of the loss , or as soon as reasonably possible in the circumstances; *and*, upon the request of the insurer;

to provide a certificate of the medical or psychological advisor stating the cause of injury or death, and, if applicable, the nature of the injury and expected duration of the disability; and,

to provide details of any other insurance policy, other than life insurance to which the claimant may have recourse. (ie, disability insurance ST and LTD's, CPP or EI disability insurance).

The insurer is entitled to have a medical assessment of the claimant.

All litigation must be commenced within 2 years of the date the cause of action arises. (Discoverability Rules apply).

Claims for damages can be resolved by agreement between the insurer and insured person, by arbitration, subject to the provisions and procedures of the Arbitrations Act, or by way of civil litigation.

OPCF 44R

The "family protection" provisions are often claimed concurrently with the UM. Although frequently it is a requirement of the insurer that this endorsement is purchased by the insured, it is not mandatory.

The OPCF-44R endorsement allows for the full limits of the policy to be available to the *named insured* and *his/her spouse or dependant relative* in the event of a collision with an unidentified motorist.

Dependant Relative is defined as:

(a) A person who is principally dependant 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 dependant 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, and

(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 substitute automobile as defined in the Policy.

Relatives who are *not dependant for financial support* upon the insured or his or her spouse are *not covered* by the OPCF-44R endorsement of the vehicle involved in the accident *if* they have the same coverage on another policy.

This allocates the exposure between more than one insurer, which could be very significant in the event of catastrophic injuries or multiple claimants with potential depletion of the policy limits.[8]

Independent Evidence

However, in order to invoke the coverage pursuant to the OPCF-44R endorsement, *independent evidence* as to the circumstances of the accident is required. This format of the evidence to be relied upon is described rather precisely. The person claiming entitlement must provide corroborating evidence, either by way of an independent (other than by a spouse or dependant relative as defined in the endorsement , or physical evidence indicating the involvement of an unidentified automobile.[9]

Spouses are defined as "*two persons who are married to each other; persons that have entered into marriage that is voidable or void, in good faith on the part of the person making the claim; or have lived together in a conjugal relationship outside marriage continuously for not less than three years; or are in a relationship of some permanence, if they are the natural or adoptive parents of a child.*[10] This definition is more specific than that set out in the Insurance Act.

Claims Investigation

[8] OPCF-44R Endorsement section 1.2
[9] OPCF-44R section 1.5 (C), (D)
[10] OPCF-44R section 1.10

For the claims person who is presented with a claim wherein the insured alleges he or she was involved in an accident caused by an unidentified motorist, the following steps are recommended:

Review the policy to establish whether an OPCF 44R endorsement applies.
Ensure the vehicle can be inspected, (a forensic engineer may be involved in the inspection)
Secure the motor vehicle accident report and any police notes or forensic investigations done by the police
Interview any witnesses
Establish the identity and relationships of all occupants of the vehicle
Establish the availability of other motor vehicle liability policies to occupants
Consider an interest bearing account for the conservation of the policy limits
Evaluate and resolve the property damages claims to a maximum of $25,000
Establish AB claims as submitted and if necessary, commence Disputes Between Insurers as soon as possible).