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Recent Caselaw

1st Case

The first case featured in this issue focuses on the impact of the insured's knowledge of an alleged "material change in risk". This case follows the New Brunswick Court of Appeal Decision in *Aviva v. Thomas* 2011 NBCA 96 (featured in last month's Newsletter)

2nd Case

The second case is a decision from Ontario that demonstrates the extent to which an insured business must verify that an employee is "authorized by law" to operate a company vehicle. The court concluded there was not a breach of Statutory Condition 4(1) (authorized by law to drive) of the *Insurance Act* in this case.

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NB Court Index

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Violette v. The Wawanesa Mutual Insurance Company, 2012 NBBR 47 — 1st Case

The Plaintiff's souped up Ford Mustang collided with a cement wall while the Plaintiff was performing laps on a race track at a Performance Driving School. The vehicle was rendered a total loss and the damages were assessed at $26,272.50.

The Defendant refused to pay out the claim on the basis that the Plaintiff failed to report a 'material change in risk, i.e. that the vehicle was being used during a driver training course for performance driving and lapping. The Defendant relied on the statutory condition contained in the insurance policy which set out that the insured must promptly notify the Insurer or its local agent in writing of any change in the risk material to the contract within his knowledge.

Two issues were addressed by the Court:

1) if the use of the Mustang to participate in a performance driving course resulted in a material change in risk; and

2) if so, did the insured know that such use of the Mustang constituted a material change in risk.

Evidence at trial revealed the Mustang was insured as a Class 1 - max. 18,000 km/yr, which was the lowest risk class of insurance, and was subject to the lowest premium available. The Court determined that the use of the Mustang had changed from the time it was bought and insured to the time of the loss. The Court accepted that had the Defendant known the Plaintiff was using the vehicle on a race track it would not have approved the risk as it did not provide insurance to vehicles used on race tracks.

The Court then addressed the second issue, i.e. if the insured knew that a material change in risk had occurred.

The Court referred to the recent Court of Appeal decision in *Aviva v. Thomas* 2011 NBCA 96 (summarized in last month's newsletter), and reviewed the wording of the statutory condition at length: "The Insured named in this contract shall promptly notify the Insurer or its local agent in writing of any change in the risk material to the contract and within his knowledge."

The Court reiterated that any vagueness or ambiguity in the wording of the policy was to be interpreted in the favor of the insured.

Despite the fact that the Plaintiff was an ex-RCMP officer, the Court found that he did not know that the use of the Mustang in performance driving resulted in a material change in risk. The Court held that the statutory condition pertaining to 'material change in risk' can only apply if the insured is aware that the change in circumstances constitutes a material change in risk.

Judgement was rendered in favor of the Plaintiff.

The *Thomas* and *Violette* decisions clearly bring to light issues with respect to an insurer's reliance upon a material change in risk as a basis for denying coverage.

Wawanesa Mutual Insurance Company v. S.C. Construction Ltd., 2012 ONSC 353 — 2nd Case

The insured was a small family run carpentry business. Wawanesa was the insurer of the automobiles used by the company in its daily operations.

An owner of the insured company allowed a long time employee to drive a company vehicle home overnight when the employee's own vehicle was not working. The employee was involved in a motor vehicle accident that evening, and it was discovered he did not have an Ontario driver's licence.

Wawanesa applied for a declaration that the insured breached Statutory Condition 4(1) of the *Insurance Act* R.S.O 1990, c. I.8, by allowing the employee to drive the company vehicle when has was not authorized by law to do so.

The facts revealed that the owners of the insured company had not allowed the employee to drive the company vehicles on a regular basis; in fact, the employee had only driven a company vehicle three to four times in his ten years of employment with the company. The owners of the insured company and other employees of the company had seen the employee drive his own vehicle to work and in a personal capacity on a regular basis. One of the owners of the insured company testified that he would not have allowed the employee to drive the car if he had known he did not hold a valid driver's licence.

Previous case law found that if an employee is not hired as a driver and there are good reasons to believe he or she has a driver's licence, it is not unreasonable to let the employee drive the employer's vehicle occasionally without first demanding to see the employee's drivers licence.

In this case, the Judge found that the insurer had not established a breach of Statutory Condition 4(1). The owners of the insured company acted reasonably in allowing the employee to drive the company van home overnight. The insurer had not shown the insured knew or ought to have known that the employee was not authorized to drive. The insurer also had not proven there was a material change in risk as the employee was not a regular or habitual driver of the company van.

Statutory Condition 4(1) under the Ontario *Insurance Act* is similar to Statutory Condition 2 under the New Brunswick *Insurance Act*.

Our newsletter is not intended to give legal advice, however, to discuss legal matters or obtain the full text of cases, readers are welcome to contact Foster & Company.