

Absolute Liability: Applicability and Exceptions - When Is It Absolute?

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IN THIS ISSUE

WHAT IS "ABSOLUTE LIABILITY"?

WHEN DOES ABSOLUTE LIABILITY APPLY?

EXCEPTIONS TO ABSOLUTE LIABILITY

MATERIAL MISREPRESENTATION

CONCLUSION

CONTACT

FREDERICTON

Stephanie Charlton

(506) 444-9286

scharlton@coxandpalmer.com

FREDERICTON

Monika Zauhar

(506) 453-9644

mzauhar@coxandpalmer.com

What Is "Absolute Liability"?

Absolute liability is the obligation of an insurer to indemnify an innocent third party who was injured by an insured, while the insured was in violation of the insurance policy. Under the absolute liability provision of the *Insurance Act*, RSNB 1973, c I-12, [the 'Act'], the insurer may deny coverage to the insured for the breach of the policy; however, the insurer remains responsible for indemnifying the innocent third party up to the statutory limits, which is \$200,000 in New Brunswick. In other words, the innocent third party is not prejudiced completely from recovery by the insured's violation of the insurance policy, except to the extent of statutory limits.

Absolute liability arose out of concerns for the innocent third party driver – it was held to be contrary to public policy to deny recovery to an innocent third party who was injured in an accident when that party had no way of knowing or preventing the insured's violation of the policy.

The absolute liability provision is found in section 250 of the Act. It is section 250(1) of the Act that provides injured third parties a right of direct recourse against the insurer once a judgment has been recovered against an insured person entitled to indemnity under the automobile liability policy. As per section 250(11), when the policy provides for coverage in excess of this limit, as the majority of policies do, the insurer is entitled to avail itself of any defence it has against the insured, notwithstanding section 250(4). This means that the insurer may deny claims made by the injured third party in excess of \$200,000, on the basis that the insured violated the policy and is therefore not entitled to coverage.

When Does Absolute Liability Apply?

Absolute liability applies in the following circumstances:

- When an insured is in violation of one or more of the Statutory Conditions included in the insurance contract;
- When an insured has committed a criminal act with the intent to cause harm; and
- When an insured has made a material misrepresentation on the application for insurance.

Section 230(1) of the Act lists various statutory conditions, which are deemed to be a part of every automobile insurance contract. The two Statutory Conditions, which trigger the absolute liability provision of the Act, pertain to material change in risk [#1] and prohibited use of the automobile by the insured [#2]. If an insured violates either or both of these Conditions, the insurer is absolutely liable to any injured innocent third party.

Statutory Condition 1

In *Patriquin v Gogo*,^[1] the insured's failure to disclose a new driver with an impaired driving conviction [a material change in risk], triggered the absolute liability provisions of the *Insurance Act* and reduced the obligation of the insurer to the statutory limit of \$200,000.

Statutory Condition 2

With respect to the prohibited use of the automobile by the insured, a policy breach by the insured may include driving while not “authorized by law”; while not qualified; while prohibited by a Court Order; while under the age of 16; for an illicit/prohibited purpose; and/or while in a race. In such a case, the insurer is absolutely liable to indemnify the injured innocent third party, as per the Act.

However, what is meant by “authorized by law,” thereby triggering the absolute liability provisions, has been the subject of much discussion. In *Kereluik v Jevco Insurance Co.*,^[2] the impaired insured was involved in an accident in which he injured a third party. He was charged with impaired driving and breach of an Undertaking [as he was under a Court Order to abstain from the possession and consumption of any alcoholic beverages]. The insured had a valid Ontario driver’s licence at the time of the accident. The third party commenced an action against the insured; the insurer defended the insured for several years. However, once the insurer became aware of the insured’s breach of an Undertaking, it stopped funding his defence. The insurer argued that by breaching the Undertaking, the insured was not “authorized by law” to drive and thereby in breach of a Statutory Condition. The Court of Appeal upheld the decision of the application judge and concluded that the insured was entitled to a defence and to indemnification from the insurer.

It was held that the insured was actually “authorized by law” to drive, because he held a valid Ontario driver’s licence, he was in compliance with the terms of that licence, the licence contained no alcohol-related condition or prohibition and the licence was in good standing. **With respect to the meaning of “authorized by law,” the Ontario Court of Appeal stated that this condition pertains to the validity and terms of an insured’s licence to drive at the time of the accident.**^[3] **It was ruled that the legal authority to drive depends on the insured’s possession of a valid driver’s licence and his/her compliance with the terms of the licence.** The Court concluded that there is nothing in the language or legislative history of this Statutory Condition to suggest that the phrase “authorized by law” is intended to apply to breaches of the law not directly connected with violations of driving licence conditions.^[4]

Graduated Licensing Regimes

The concept of absolute liability has been slightly complicated by the addition of graduated licensing schemes in New Brunswick and other provinces. As a result of amendments in 1996 to the *Motor Vehicle Act*, RSNB 1973, c M-17, in order to become a fully licensed driver in New Brunswick, new drivers must pass all stages of the graduated driver’s licence program. A graduated licensing regime consists of multiple levels/stages, in which a new driver faces certain driving restrictions at each level. The conditions imposed on a driver by a graduated licensing scheme constitute conditions precedent to the lawful authority to drive.^[5] The alcohol prohibition in place for novice drivers forms an express part of the licence conditions imposed on beginner drivers. This is distinguishable from insureds who were driving under the influence, but held a valid driver’s licence with no conditions.

Therefore, **an insured who breaches a condition on a non-graduated licence is considered not “authorized by law” to drive and thus, is in breach of the insurance policy.** When this occurs, the insurer is absolutely liable to innocent third parties for any injuries caused by the insured, as the insured is in breach of a Statutory Condition.

In *Logel (Litigation Administrator of) v Wawanesa Mutual Insurance Co.*,^[6] the insured was a “G2 driver” at the time of the accident and had alcohol in her system. The “G2” level of licensing prevented any level of alcohol in a driver’s system, while operating a vehicle.

The first issue before the Court was whether the presence of alcohol in the insured’s body at the time of the accident constituted a breach of the Statutory Condition, which would reduce her policy limits from \$1,000,000 to \$200,000 for the purposes of liability to a third party. The insurer’s position was that the insured breached the Statutory Conditions of her policy, as she was in violation of the *Highway Traffic Act* Regulation, which required her, as the holder of a “G2 licence,” to have a blood alcohol concentration of zero. Therefore, the insurer took the position that, it was only liable to a third party for the minimum statutory limit, pursuant to the absolute liability provisions. However, the Court considered that such an interpretation could clearly present an unfair result in the application of the absolute liability provisions – an insurer could be exposed to full policy limits and held liable to a third party where a fully licensed driver is found impaired at the time of an accident, yet only partially liable to a third party to the statutory minimum, where a driver, holding a graduated licence, operated a vehicle having consumed any quantity of alcohol. The Court noted that this position seemed contrary to the intention of the commonly referred regime of a “no fault” scheme.^[7] Nevertheless, the Court considered itself bound by a previous decision, and held in favour of the insurer on this issue, concluding that the insured was not authorized to drive at the time of the accident, because of her consumption of alcohol and the resulting breach of the Statutory Condition.

Intentional Criminal Act

Further, absolute liability has been applied in situations where the insured committed an intentional criminal act. The public policy rules contained within section 118 of the Ontario *Insurance Act* and section 2 of the New Brunswick *Insurance Act* provide that, if an insured violates a criminal law with the intent to bring about loss or damage, the insurance policy may be rendered unenforceable. This then triggers the absolute liability provisions of the *Insurance Act*, which allow the innocent third party to recover, despite this criminal act. In other words, an insurer may deny an insured’s claim for indemnity pursuant to section 118, but section 258 makes it clear that an innocent third party is not to be deprived of his or her remedy.^[8]

For example, in *Joachim v Abel*,^[9] the insured intentionally operated his truck so as to strike and injure the plaintiffs. The Court held that the right of the plaintiffs under section 258 of the Ontario *Insurance Act* [section 250 in New Brunswick] to have insurance money applied to judgment was not prejudiced by the criminal and intentionally harmful act by the insured. To hold otherwise would be inconsistent with the intent of the absolute liability provisions.

On the other hand, where an insured *did not intend* to bring about loss or damage, the insurance contract would not necessarily be rendered unenforceable, and the insurer may be fully exposed. Therefore, it is important to distinguish between criminal acts where loss or damage was not intended and intentional criminal acts.

Exceptions to Absolute Liability

A third party's action against an insurer under section 250(1) of the Act must be a claim against an insured for which indemnity is provided by a contract. Not every person who operates a listed automobile is an "insured" for whom "indemnity is provided."^[10] The absolute liability provisions only come into effect after a possibility of indemnity to the insured has been established. In other words, an action pursuant to the absolute liability provisions must be founded on a policy of insurance. If there is no such possibility of indemnity, then there is no absolute liability. The following reflect exceptions to absolute liability and absolve the insurer from any liability to the injured third party:

- Where the driver of an insured vehicle **does not have consent** of the named insured to operate the vehicle.^[11] In *Walker v Allstate Insurance Co of Canada*,^[12] the infant plaintiff was injured when struck by a motorcycle being driven without the owner's consent. The plaintiff obtained a judgment against the driver of the motorcycle and subsequently brought an action to determine whether the driver's insurer should pay her judgment against the driver. It was held that the driver was not entitled to indemnity under the motor vehicle policy and therefore, the third party could not recover from the insurer pursuant to the absolute liability provisions.
- Where the automobile in the accident is not specifically insured under the insured's automobile policy. For example, in *Winch v Keogh*,^[13] the plaintiff was injured in a motor vehicle accident by a driver who was driving a truck that weighed over 4,500 kilograms. The automobile policy on the truck did not contain coverage for trucks weighing over 4,500 kilograms. The plaintiff's insurer denied responsibility to cover the alleged loss on the basis that the plaintiff had a claim against the driver's insurer under the absolute liability provisions. The Court held that absolute liability does not obligate insurers to indemnify innocent third parties in situations where the driver was not insured for the vehicle being driven. A third party cannot recover from the insurer unless the insured could have been entitled to indemnity under the policy.
- Cases where there was no insurance contract in effect at the time of the event giving rise to the claim of the innocent injured party, e.g. policy had expired and was not renewed. In such a case, the tortfeasor is not an insured for which indemnity for the plaintiff's claim against them is provided by a contract of insurance.^[14]
- Where the driver of the insured automobile is an excluded driver. In New Brunswick, Special Endorsement Form 28 ["SEF 28"] is an endorsement, which can include a list of excluded drivers under the insurance policy. If the driver of an insured automobile is an "excluded driver" within such an endorsement, then the driver is not entitled to indemnity under the insurance contract and the absolute liability provisions are not applicable. For example, in *Toulouse v Makadebin*,^[15] the insurance policy at issue contained an "excluded driver" endorsement. The Court held that the insurer was not absolutely liable for the acts of the excluded driver, as there was no contract in force with respect to this driver, and therefore, no possibility of indemnity.

The situation is unique with respect to an intoxicated driver. In New Brunswick, as in other provinces, such as Ontario, as a result of public policy based amendments to the *Insurance Act*, there is no longer a Statutory Condition prohibiting an insured from driving while intoxicated. Therefore, an insured who drives while under the influence is no longer in breach of the insurance contract for the purposes of *Section A* coverage.^[16] This means that, in such a situation, there is no bar to an innocent injured third party recovering from the insurer the amount of the policy limits, and not just the statutory limits, provided that the insured did not intend to cause harm, i.e. intentional criminal act, as discussed above.

In other words, the absolute liability provisions do not apply to an intoxicated driver, but since impaired driving no longer results in a breach of the insurance policy, then the insurer is fully liable. This exception is different from the above exceptions where the insurer is not liable at all.

Material Misrepresentation

In New Brunswick and Ontario, it has further been established that a misrepresentation or willful concealment of facts by the insured on the application for motor vehicle liability insurance, contrary to section 229(1) of the Act, no longer invalidates the contract. Although previously thought to be an exception to absolute liability, this does not preclude an innocent third party from recovering from the insurer of the policy, under section 250 of the Act. This was the subject of the case of *Campanaro v Kim*,^[17] where the Ontario Court of Appeal considered two cases, in each of which the named insured knowingly misrepresented that he was the owner of the insured motor vehicle. The insurer took the position that its policy on the vehicle was void from the outset, [referred to as *void ab initio*], because of the insured's misrepresentation that he owned it.

Section 233(1) of the Ontario *Insurance Act* [akin to section 229(1) in New Brunswick] provides that, where an insured knowingly misrepresents or fails to disclose in the application any fact required to be stated therein, then a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited.

As noted by the Court in **Campanaro**, *ibid*, in a 1946 decision of the New Brunswick Supreme Court, Appeal Division, it was held that, if the insured makes a misrepresentation in the application for insurance, the policy is considered void from the outset. Thus, the third party is held not to have any cause of action against the insurer, notwithstanding the absolute liability provisions.^[18] Following this decision, the Act in New Brunswick, as well as other provinces, including Ontario, was amended for public policy reasons. Section 250(5) was added to the Act in New Brunswick [section 258(5) in Ontario]. Section 250(5) of the Act provides that, it is not a defence to an action under this section to claim that an instrument is not a motor vehicle policy, when it was issued as a motor vehicle liability policy, was sold by an insurer, and is alleged by a party to the action to be such a policy.

In **Campanaro**, *ibid*, after reviewing this amendment to the Act and subsequent jurisprudence, the Court was of the opinion that, **an insurer issuing an instrument that purported to be a motor vehicle liability policy could not validly defend an absolute liability action on the basis of any misrepresentation by the named insured, including a misrepresentation about the ownership of the vehicle.**^[19] It was held to be clear that the amendment was intended to overcome the effect of former cases, and preclude an insurer from defending an innocent third party's claim on the basis of any material misrepresentation.^[20]

A similar decision was rendered in the New Brunswick case of **State Farm Mutual Automobile Insurance Co v General Accident Assurance Co of Canada**,^[21] where the insured knowingly and incorrectly stated in the insurance application that she was the owner of the subject automobile, when in fact, the automobile was driven and owned by her son, who had no valid driver's licence and was unable to obtain liability insurance. The son was involved in an automobile accident where an innocent third party was injured. Subsequently, the insurer discovered that the insured was not the owner of the vehicle and denied coverage based on misrepresentation by the insured as to the owner of the vehicle. In light of section 250(5) of the Act, the Court held that the insurer of the subject automobile was primarily liable to the injured party, pursuant to the absolute liability provision of the Act. The right of the innocent third party was not prejudiced by the misrepresentation on the part of the insured. See also: **Dore v General Insurance Corp of New Brunswick**,^[22] **Laurentian Casualty Co of Canada v State Farm Mutual Automobile Insurance Co**,^[23] and **Merino v ING Insurance Company of Canada**.^[24]

The above jurisprudence indicates that, the effect of section 250(5) of the absolute liability provisions of the Act is to allow an innocent third party to recover from an insurer, notwithstanding an insured's material misrepresentation on an insurance application.

Conclusion

The concept of absolute liability has fundamentally altered the traditional practice of insurance law. As such, it is crucial that insurers be aware of the circumstances in which they may be absolutely liable to an innocent third party, despite the insured's violation of the policy, including a violation of a graduated licensing scheme.

In an absolute liability fact situation, insurers are not left without recourse. Pursuant to the Act, an insurer who is subjected to a judgment in favour of the innocent third party may, in turn, seek recovery against the insured, if a breach of the policy is established. However, it is questionable, practically speaking, whether the insurer will actually be able to financially recover from the insured.

^[1] **Patriquin v Gogo** (2006), 152 ACWS (3d) 708, 43 CCLI (4th) 275 (Ont Sup Ct J), additional reasons at: [2007] OJ No 149, 154 ACWS (3d) 947 (Sup Ct J).

^[2] **Kereluik v Jevco Insurance Co**, 2012 ONCA 338 [Kereluik].

^[3] *Ibid* at para 13.

^[4] *Ibid* at para 15.

^[5] *Ibid* at paras 23 and 24.

^[6] **Logel (Litigation Administrator of) v Wawanesa Mutual Insurance Co**, [2008] OJ No 3717, 171 ACWS (3d) 931 (Sup Ct J), affirmed: 2009 ONCA 252.

^[7] *Ibid* at para 7.

^[8] **Joachim v Abel**, [2003] OJ No 1484, 64 OR (3d) 475 (CA).

[9] *Ibid.*

[10] *Brown v Williamson*, 2014 ONSC 5487 at para 39.

[11] *Co-operators General Insurance Co v Lanteigne*, [1999] NBJ No 304, 215 NBR (2d) 394 (CA); section 232(1) of the Act; *Collrin v Parker* (1997), 188 NBR (2d) 226 (QB); *Campanaro v Kim*, [1998] OJ No 3518, 164 DLR (4th) 400 (CA) at paras 62 to 64 [*Campanaro*].

[12] *Walker v Allstate Insurance Co of Canada*, [1989] OJ No 710, 67 OR (2d) 733 (CA) [*Walker*].

[13] *Winch v Keogh*, [2005] OJ No 4759, 78 OR (3d) 468 (Sup Ct J).

[14] *Colven Distributors Ltd v Allstate Insurance Company*, 1993 CarswellOnt 669 (Ct J, Gen Div); *Checkpoint General Motors Corp Pontiac Buick v Co-Operators General Insurance Co*, [1987] NBJ No 1189, 84 NBR (2d) 255 (QB).

[15] *Toulouse v Makadebin*, [1998] OJ No 2621, 80 ACWS (3d) 633 (Ct J, Gen Div).

[16] *Kereluik*, *supra* note 2 at para 21.

[17] *Campanaro*, *supra* note 11.

[18] *Ibid* at paras 22 and 30; *Bourgeois et al v Prudential Assurance Co Ltd*, [1946] 1 DLR 139, 1945 CarswellNB 4 (SC, AD).

[19] *Campanaro*, *supra* note 11 at para 50.

[20] *Ibid* at para 51.

[21] *State Farm Mutual Automobile Insurance Co v General Accident Assurance Co of Canada*, [1995] NBJ No 405, 167 NBR (2d) 48 (CA).

[22] *Dore v General Insurance Corp of New Brunswick*, [1991] NBJ No 338, 115 NBR (2d) 123 (QB, TD).

[23] *Laurentian Casualty Co of Canada v State Farm Mutual Automobile Insurance Co*, [1998] OJ No 2239, 160 DLR (4th) 446 (CA).

[24] *Merino v ING Insurance Company of Canada*, 2019 ONCA 326.

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