

## Welcome to the Insurance Law Group at Pallett Valo LLP

We strive to stay current on the latest legislative changes and case law, so that we can provide our clients with timely and helpful advice. Our group recently came across 2 cases, which we thought would be of interest, which demonstrates the spectrum of our insurance work. The first addresses whether your home insurance can provide coverage for a work place incident, and the second, focuses on coverage for operating another person's motor vehicle, when you may have restrictions with regard to operating your own vehicle.

### Home Insurance Coverage for a Workplace Injury?

For those of you that did not know, if I was not a lawyer, I would be rocking out on a stage singing and doing all things musical, which is why this case is interesting to me on a number of different levels.

If you are having an after-hours jam session at your office and an injury occurs, is there coverage under your home insurance policy for the injury? According to the following decision, there is!

*Aviva Insurance Company v. Intact Insurance Company* is a recent decision of the Ontario Superior Court of Justice about whether a home insurance policy should be contributing towards a workplace injury. The case addresses the importance of pleadings, the test for overlapping insurance and what constitutes excess insurance, and *res judicata* and issue estoppel, which are important issues in the insurance realm.

#### Background

Sanjay Patel, the insured, was holding an after-hours jam session at his engineering firm. His friend Novak fell off of a ladder during the jam session, and sustained injuries.

Mr. Patel was potentially liable on three fronts - as principal of the engineering company, as principal of the numbered company which owned the building, and he was exposed personally because he had invited Novak to his building for reasons unrelated to his engineering business.

Mr. Patel had three potentially applicable insurance policies:

- (1) RSA offered insurance to Patel as a principal of the engineering firm where the incident took place;

- (2) Aviva, insurer of the company owning the building which was controlled by Patel; and

- (3) Intact, Patel's home insurer.

Patel sought coverage from each of the three insurers. Aviva and RSA acknowledged their duty to defend Patel, but issued a reservation of rights letter in the event that Patel was liable in his personal capacity. Aviva and RSA offered to provide a defence of Patel regarding the injuries sustained by Novak.

Intact refused to defend Patel.

#### “Other Insurance” Clauses

Both the RSA and Aviva policies had “other insurance” clauses. Intact's other insurance clause was as follows:

##### Insurance Under More Than One Policy

If you have other insurance which applies to a loss or claim, or would have applied if this policy did not exist, this policy will be considered excess insurance and we will not pay any loss or claim until the amount of such other insurance is used up.

## Patel's Application against Intact

In an application brought for coverage by Patel against Intact, it was found that the Intact policy is excess insurance and would not respond until the amount of such insurance is used up, and since coverage had not been exhausted, there was no obligation for Intact to defend.

## RSA's Claim against Intact

RSA had sought to compel Intact to provide a defence, but an applications judge, after reviewing the other insurance policies, held that Intact had no duty to defend, since it was an excess insurer.

## Settlement with Novak

Settlement was reached at a private mediation. Intact was invited to participate at the mediation, but declined, taking the position that the policy was excess and would not be triggered.

The action was settled for \$380,000.00 all inclusive, with 1/3 split against Patel in his personal capacity. The funding for the personal interest defence of Patel was split on a 50:50 basis between Aviva and RSA.

## Aviva's Claim against Intact

Aviva went on to seek reimbursement for Intact's proportionate share of costs incurred by Aviva in defending Patel in his personal capacity and for Intact's proportionate share of the settlement of the underlying action paid by Aviva for Patel's personal liability.

Aviva's Statement of Claim **did not distinguish between the various capacities in which he was or could have been acting at the time of the loss**. This is important because the Claim did not trigger one particular type of coverage.

It was found that **notwithstanding the earlier application by Patel, the issue of Intact's duty to indemnify had never been fully decided**. Accordingly, the doctrine of issue estoppel nor *res judicata* applied.

The court made reference to *Family Insurance Corp. v. Lombard*, a 2002 decision of the Supreme Court of Canada, which adopted the following principles as establishing the right to contribution among insurers where there are overlapping policies:

1. All the policies concerned must comprise the same subject matter.
2. All the policies must be effected against the same peril.
3. All the policies must be effected by or on behalf of the same assured.
4. All the policies must be in force at the time of the loss.
5. All the policies must be legal contracts of insurance.
6. No policy must contain any stipulation by which it is excluded from contribution.

The court held that the two policies were not overlapping, but complementary in that they each respond to separate allegations relating to separate risks; personal and corporate. It was found that Intact wrongfully failed to provide a defence and failed to indemnify Patel for loss caused by him in his personal capacity.

The court further held that Intact should not be allowed to question the allocation of the 1/3 split, given that Intact took "significant risk" in not attending the mediation despite its duty to defend, that the issue of indemnification had not been finally addressed, and that the other parties "acted reasonably and in good faith in settling the action".

Lastly, it was found that there were equitable grounds for Intact to contribute to the defence and settlement, relying on unjust enrichment.

## Conclusion

Intact may still appeal the decision. It is also likely that RSA will assert a similar motion if RSA and Intact cannot agree on similar terms.

It really all comes back to first principles and looking at the pleadings to determine what type of coverage is afforded. Notwithstanding the "other insurance" clauses, the pleadings asserted a loss in part in Patel's personal capacity and therefore, triggered coverage under the home insurance policy.

Going forward, I will be ensuring that all of my jam sessions are at home, under one policy of insurance!

**If you are having an after-hours jam session at your office and an injury occurs, is there coverage under your home insurance policy for the injury?**



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# The Good and the Bad of Insurance in Winter

For many, winter is not only a time for holiday festivities and celebrations, but also an opportunity to engage in winter pursuits. However, late-night celebrations, hazardous road conditions, and the increased propensity to consume alcohol make winter one of the most dangerous times of the year.

## A Spike in Insurance Claim Applications

For insurers, treacherous winter conditions result in a spike in accidents and automobile insurance claims – whether involving ATVs, snowmobiles, or cars.

If an insurer’s investigation reveals that the driver at fault was operating the vehicle under a restriction, the insurer may attempt to deny the claim on the basis that the driver was not “authorized by law” to drive or operate the automobile, pursuant to a provision of the *Ontario Insurance Act*:

The insured shall not drive or operate or permit any other person to drive or operate the automobile unless the insured or other person is authorized by law to drive or operate it.  
 (“**Statutory Condition 4(1)**”)

The question of whether an individual is “authorized by law” to drive or operate an automobile has been the recent subject of litigation in Ontario.

Middleton and Pankhurst consumed alcohol that night. In the evening, Middleton left the ice huts by foot, while Pankhurst stayed behind. Later, Middleton called Pankhurst’s cell phone, explained that he was lost and disoriented and asked Pankhurst to pick him up. Pankhurst drove his snowmobile on the lake, found Middleton, and drove back. While on that road, Pankhurst lost control of his snowmobile and both he and Middleton were ejected, resulting in significant injuries to Middleton.

Middleton and his mother, Susan, brought a personal injury claim against Pankhurst. The parties reached a settlement whereby Pankhurst would pay \$900,000 to the Middletons (the “**Settlement**”).

Aviva, insurer for Pankhurst, argued that pursuant to Statutory Condition 4(1), it was not obliged to pay any part of the Settlement, because Pankhurst was **not authorized by law** to drive at the time of the accident, because he breached his probation order by drinking and driving at night.

## Treacherous winter conditions often result in a spike in accidents and automobile insurance claims

In a unanimous decision, the Ontario Court of Appeal’s ruling in *Middleton v Pankhurst* (“*Pankhurst*”) now provides insurers and claimants with clarification on the interpretation and application of Statutory Condition 4(1).

### The Ontario Court of Appeal’s ruling in *Middleton v Pankhurst*

#### The Facts

On January 24, 2009, Middleton and Pankhurst agreed to go ice fishing on Lake Simcoe. Pankhurst travelled by snowmobile to meet Middleton at a remote location on the lake, where some of their friends had ice huts.

At the time, Pankhurst had a valid class G driver’s licence, which was not subject to any restrictions. However, he was subject to a probation order arising from a guilty plea to careless driving in 2008. That order prohibited Pankhurst from driving at night and from driving with alcohol in his system.

#### Decision of the Trial Judge

The trial judge found that Pankhurst **was authorized by law** to drive at the time of the accident because he had a valid driver’s licence that was not subject to any restrictions imposed by the Ministry of Transportation (“**MTO**”). The trial judge rejected Aviva’s argument that “authorized by law” refers to not only the provincial licensing scheme operated by the MTO, but also to violations of court orders, such as Pankhurst’s probation order.

In her ruling, the trial judge relied on an earlier decision of the Ontario Court of Appeal, where the court found that the phrase “authorized by law” was not intended to apply to breaches of the law not directly connected with violations of driving licence conditions. The trial judge also held that Aviva’s position was inconsistent with section 118 of the *Insurance Act* (discussed below).

Aviva appealed the decision.

## Decision of the Ontario Court of Appeal

On appeal, a unanimous court upheld the trial judge's decision and dismissed the appeal. The court found that the legal authority to drive, at any given time, depends on the existence of a valid licence issued by the responsible regulatory authority and compliance with the conditions attaching to that licence.

The court noted that further restrictions on the legal authority to drive, such as a court order, would allow insurers to deny coverage in various situations where there has been a criminal law violation. Any such restrictions would be contrary to the intention of Statutory Condition 4, which is meant to allow an innocent third party to receive compensation for the losses caused by an impaired driver.

In addition, Aviva argued that section 118 of the *Insurance Act* was not applicable because Pankhurst violated a court order and not a statute or any other law. The Ontario Court of Appeal disagreed, stating that there was no meaningful distinction between a court order and "any criminal or other law in force in Ontario" in this context.



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Moreover, the court noted that the objective of section 118 of the *Insurance Act* was to provide insurance protection for negligent tortfeasors who do not intend to cause harm, and to their victims. Aviva's fault based analysis ignored the policy objective of ensuring that there is coverage available for the claims of innocent tort victims.

## **Bottom Line for Insurers**

As clarified by the Ontario Court of Appeal in *Pankhurst*, "authorized by law" relates to an insured's legal entitlement to operate a motor vehicle, which, in turn, depends on the insured having possession of a valid driver's license along with his or her compliance with the terms of that licence at the time of the accident.

Therefore, it is not enough for insurers to rely on an insured's breach of a court order or criminal law to deny coverage under Statutory Condition 4, unless the breach relates to a restriction imposed by the MTO on an insured's driver's licence. For the courts, to allow otherwise would compromise the potential of tort compensation for innocent victims of an insured's criminal wrongdoing.

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## Pallett Valo LLP Insurance Law Practice

In today's market it's important to not only stay current with new trends and heightened regulations, it is also critical to know how to minimize future litigation risks. From consumer claims, to product compliance, to professional liability we provide insurers, adjusters, underwriters, brokers, risk managers and self-insured companies with innovative solutions to handle all types of insurance risks, claims and disputes.

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