An Insured's Duty to Co-operate in an Automobile Insurance Context

By Craig Gillespie and Bottom Line Research[i]

In automobile liability policies, the statutory conditions impose a duty upon the insured to assist in securing information, evidence and the attendance of any witnesses, and to cooperate with the insurer, except in a pecuniary way, in the defence of any action.

Where the insured is in breach of such conditions respecting its cooperation, the insurer is entitled to withdraw from the defence and deny indemnity to the insured, provided the breach is substantial and material. An inconsequential or trifling breach does not generally exonerate the insurer from its contractual responsibilities under the policy.[ii]

In her text *General Principles of Canadian Insurance Law*, 1st Edit., (Markham, Ont.: LexisNexis, 2008), Barbara Billingsley discusses the insured's duty to cooperate as follows:

> "Viewed broadly, an insured's obligations to provide the insurer with notice of loss and proof of loss can be characterized as part of a general good faith duty on the part of the insured to cooperate with the insurer. However, depending on the type of insurance involved, the duty to cooperate may also include other elements. Most notably, the insured's duty to cooperate takes on a particular meaning in the context of liability insurance:
>
> > Since the insurer is liable to indemnify the insured in respect of the claim it is vital that the insurer have the insured's assistance and co-operation both in conducting a proper defence of the claim and in concluding a settlement on advantageous terms. Without the insured's assistance in securing and giving truthful evidence and obtaining the attendance of witnesses the insurer may be unable to mount an effective defence. Without the insured's assistance in concluding a settlement the insurer may be forced into taking the claim to trial and risk incurring a greater liability. [Reference: G.

> Hilliker, *Liability Insurance Law in Canada*, 4th ed. (Markham, Ont.: LexisNexis Canada, 2006) at 48]
>
> Given these considerations, modern liability insurance policies typically include express provisions prohibiting the insured from assuming liability for any claim brought against the insured by a third party and imposing a general duty on the insured to cooperate with the insurer, except in a pecuniary way, in the defence of any action. **This contractual duty operates as a condition precedent to the insured's right to recover, such that an insured's breach of this duty entitles the insurer to refuse to defend or to indemnify the insured.**" (at pp. 193-194)(emphasis added)

Billingsley continues, providing a general definition of the duty of cooperation and citing several examples of situations in which the courts have found a breach of the duty to cooperate:

> "… As a general matter … the duty of cooperation has been defined as obliging an insured to "assist willingly and to the best of his judgment and ability". Moreover, Canadian courts have held that an insured's conduct, or lack thereof, must be material and substantial in order to constitute a breach of the insured's basic duty to cooperate: a trivial lack of cooperation by an insured will not entitle the insurer to deny coverage. [Reference: *Travellers Indemnity Co. v. Sumner Co. and Fraser* (1960), 27 D.L.R. (2d) 562 (N.B.S.C.A.D.) at 565; aff'd, [1961] S.C.R. viii]
>
> Given these criteria and the overall objective of the cooperation clause in liability insurance policies, Canadian courts have found a breach of the duty to cooperate in various circumstances, including the following:
>
> - where the insured failed to respond to letters and other communications by the insurer seeking additional information about the incident giving rise to a lawsuit against the insured [Reference: *Thompson v. ING Halifax*, [2005] O.J. No. 3250 (S.C.J.); aff'd [2006] O.J. No. 3956 (C.A.)];
>
> - where the insured, without involving the insurance company, investigated and settled a claim brought against him and where the insured paid the judgment on a claim while the insurance company was still deciding whether to appeal [Reference: *Oberg v. Merchants Casualty Insurance Co.*, [1930] B.C.J. No. 18 (S.C.); *Colliers McClocklin Real Estate Corp. v. Lloyd's Underwriters, Lloyd's, England*, [2004] S.J. No. 308 (C.A.)];

- where the insured failed to keep the insurer informed about the status of the lawsuit against the insured and various offers to settle made by the third party claimant [Reference: *Canadian Newspapers Co. v. Kansa General Insurance Co.*, [1996] O.J. No. 3054 (C.A.)];

- where the insured intentionally failed to attend hearings, provide evidence or assist in obtaining witnesses in the course of a lawsuit commenced against the insured [Reference: *Satter v. Pafco Insurance Co.*, [1993] S.J. No. 253 (Q.B.)];

- where the insured promoted the action brought against him by a third party claimant [Reference: *Walters v. Ocean Accident and Guarantee Corp.*, [1935] B.C.J. No. 16 (C.A.)]; and

- where the insured lied to the insurer about the circumstances of the accident for the first two or three months following the accident. [*Provident Assurance Co. v. Adamson*, [1938] S.C.J. No. 27 (S.C.C.)]" (at p. 194)

Additional insights into an insured's obligation to cooperate with the insurer in circumstances where loss or damage to persons or property has occurred are found in Gordon Hilliker's, *Liability Insurance Law in Canada*, 3rd Edit., (Toronto: Butterworths, 2001), at pages 41-42:

> "The purpose behind the co-operation clause is readily apparent. Since the insurer is liable to indemnify the insured in respect of the claim it is vital that the insurer have the insured's assistance and co-operation both in conducting a proper defence of the claim and in concluding a settlement on advantageous terms. Without the insured's assistance in securing and giving truthful evidence and obtaining the attendance of witnesses the insurer may be unable to mount an effective defence. Without the insured's assistance in concluding a settlement the insurer may be forced into taking the claim to trial and risk incurring a greater liability.
>
> The requirement that the insured assist in enforcing any right of contribution or indemnity against any such person or organization who may be liable to the insured must be read in conjunction with the subrogation provision of the policy. This permits the insurer, by way of subrogation, to recover sums that it has paid on the insured's behalf.

. . .

> Under the terms of the policy, compliance with the co-operation clause is stated to be a condition precedent to the insurer's liability to the insured. Thus, where the insured is in breach of the co-operation clause, the insurer is entitled to withdraw from the defence and deny indemnity to the insured. As a matter of practice, in such cases the insurer may also cancel the policy.
>
> It is not every breach, however, that gives the insurer this right. In order for the insurer to withdraw from the defence and deny indemnity, the breach must be substantial and material. An inconsequential or trifling breach does not serve to exonerate the insurer from its contractual responsibilities under the policy.
>
> In addition, even when there has been a substantial and material breach of the co-operation clause, the insured may, in the appropriate circumstances, obtain relief against forfeiture." (footnotes omitted)

Similar guidance is found in *Insurance Law in Canada*, Looseleaf Edit., (Scarborough, Ont.: Carswell, c.1999-), where the authors cite the statutory conditions pertaining to automobile insurance and say this:

> "The statutory condition requires that the insured promptly notify the insurer in writing of the particulars of any accident and of any claim arising from it. Where the insurer acts on oral notice the requirement of writing may be dispensed with. … Notice to the insurer is required to permit it to have the fullest opportunity to make prompt and careful investigation. The term "prompt" has been construed as meaning "almost immediate" and calling for "exercise of ordinary diligence" but this too depends on what is reasonable in the circumstances – such as the difficulties facing the insured and prejudice (or lack of it) suffered by the insurer given the timing of the notice.
>
> The statutory condition also provides that if the insurer requires, the insured must verify that the claim arose out of the use or operation of the automobile and that the person operating the automobile at the time was a person insured under the contract. … The failure of the insured to notify the insurer prejudices the insurer by not giving it the opportunity to investigate the claim or defend it with its own counsel. The purpose of this condition is to protect the insurer against collusion in relation to fabricated or unfounded claims. … Related to this is the obligation of the

> insured to cooperate with the insurer and not to interfere in the negotiations for settlement in the legal proceedings. The obligation to cooperate is limited with respect to cooperation in the defence of the action. The refusal of an insured to give the insurer information as to whether he was intoxicated did not amount to a failure to cooperate since the fact of the insured's intoxication was not related to the defence of the third party claim but rather to whether the insurer could repudiate the coverage. To breach the statutory condition the breach must be substantial – an inconsequential or trifling breach will not exonerate the insurer. An insured's false disclaimer of ownership of the automobile could constitute either a failure to cooperate with the insurer or be an interference with the insurer's investigation such that the insurer was found to have no liability for defence costs associated with that false disclaimer." (at pp. 17-81, 17-82, para. 17.5(g))

Finally, for a summary of the American view respecting the insurer's duty to cooperate, reference may be had to *Couch on Insurance, 3d*, (St. Paul, Minn.: West, c.1995-), which states, in part:

> "… [C]ooperation in the first-party insurance context is largely ensured by means of such specific duties as that the insured provide adequate notice and proof of loss, that the insured submit to an examination under oath or an independent medical examination, and the like.
>
> … Many courts have explicitly recognized that these narrow duties concerning the investigation and proof of loss do not abrogate the express or implied duty to cooperate, so that the insured's failure to comply may be considered a breach of both the narrow, precise, duty and the broader more general duty to cooperate.
>
> The reason that a broader duty to "cooperate" is needed in a third-party insurance context is that the insurer cannot anticipate what type of cooperation will be required with the same degree of specificity as in a first-party context." (at pp. 199-10, 199-11, para. 199:1)

And further,

> "The failure to cooperate depends on the nature and extent of the insured's reaction, and its impact on the insurer's legitimate interests, not the number of incidents involved. Breach of the duty may be found from a single refusal to do or provide something, or based on the cumulative effect of a series of inactions and refusals. However, the

> insured may justify its actions in the same manner, and refusal to provide information at some point may be rendered meaningless by supplying the same information at a different time, if the lapse of time has not been demonstrably detrimental to the insurer." (at p. 199-61, para. 199:31)

The treatise further suggests that the insured may be found to have breached the duty to cooperate under circumstances where: (i) the insured was unavailable to the insurer and actively assisted the claimants; (ii) the passenger and insured concealed the identity of the driver; and (iii) the insured has concealed some relevant or material fact or failed to disclose other requested information to the insurer. (at p. 199-64, para. 199:33)

According to the authors, the mere non-action of an insured, by itself, will not justify a disclaimer of coverage on the ground of lack of cooperation. However, an insured may forfeit his/her right to recover under an insurance policy if s/he fails to abide by provisions in the policy requiring them to cooperate with the insurer's investigation of their claim, particularly where the insured's cooperation is a policy condition and the insured's failure to cooperate constitutes a material breach of the policy. (at pp. 199-61, 199-62, 199-71, paras. 199:32, 199:39)

And, the text adds this in relation to the consequences of a breach of the obligation to cooperate, <u>particularly after a claim is known or made</u>:

> "Most insurance policies, whether they are liability or indemnity policies, include what is commonly referred to as a "cooperation clause." In instances where a policy does not include such a clause one has been implied by law.
>
> . . .
>
> **As a general rule, an insured's breach of a cooperation clause precludes coverage and releases the insurer from its responsibilities depending on the jurisdiction's views as to the need to establish prejudice from the breach.**

> **Therefore, an insurer has an affirmative defense to an action on the policy either by the insured, or, unless superseded by financial responsibility laws, the injured claimant. In addition, the insured's breach provides the insurer with sufficient grounds to deny liability, and rescind the insurance contract."**
>
> (at pp. 199-26, 199-28 – 199-30, paras. 199:12, 199:13)(emphasis added)

In the oft-cited case of *Travellers Indemnity Co. v. Sumner Co.*, [1960] N.B.J. No. 13; 27 D.L.R. (2d) 562 (C.A.), West J.A. described the general duty of the insured to cooperate with the insurer pursuant to the statutory terms of an automobile policy as follows:

> "The duty of the insured under the policy here involved was to give promptly all material particulars within their knowledge bearing upon the accident and to co-operate, except in a pecuniary way, with the insurer which involved an opportunity to effect an early and favourable settlement. …" (QL, at para. 10)

In *Kruger v. Security National Insurance Co.*, [2008] A.J. No. 764; 65 C.C.L.I. (4th) 308 (Prov. Ct.), the insured, injured in automobile accident, was requested by the insurer to undergo a medical examination. While the insured did not object to the examination, she refused to sign a related release form.

Notably, there was no express provision in the contract of insurance with respect to authorizations of any kind.

In light of the limited obligation expressed in the contract of insurance, Ingram Prov. Ct. J. found that there was no breach of the policy or lack of good faith on the part of the insured sufficient to discharge the insurer from its obligations under the policy. He explained:

> "… The Defendant, as an insurer, has duties of at least a semi-fiduciary nature in respect of the Plaintiff and clearly has an obligation of good faith in adjusting the plaintiff's claim under the policy. The Plaintiff has

corresponding duties in advancing a claim under a policy. Co-operation and disclosure are fundamental to performance in good faith. However, each party has the right to ensure that its legitimate rights and interests remain protected while fulfilling its obligations to the other party under the contract.

In the present case, the Plaintiff unconditionally offered to be examined by the Defendant's doctor. This fact distinguishes the present case from the situation before Judge Hess and Justice Sullivan in *Beninger*, *supra*, and Judge O'Ferrall in *Sutherland*, *supra*. However, like the situations in the *Beninger* and *Sutherland* cases, the dispute arose "out of a failure by one, or the other, or both, to communication and cooperate" (O'Ferrall, P.C.J. in *Sutherland*). Open, candid, and good faith performance by the parties might have resulted in the Defendant explaining to the Plaintiff that the Defendant simply wanted to provide its doctor with the information provided to the Defendant by the Plaintiff. The Plaintiff may well have been prepared to sign an authorization limited accordingly. The Defendant was entitled to require the Plaintiff to "furnish such proof as is reasonably possible in the circumstances". The Defendant may well have satisfied itself whether the injury arose "directly and independently of all other causes" from the accident, whether the expenses were reasonable, and whether they were essential for the treatment or rehabilitation of the insured.

Clearly, each party blames the other for the lack of communication and cooperation in this case. The insured co-operated and disclosed as far and as much as was literally required by the terms of the policy. In a "push against shove" situation, in the light of the limited obligation expressed in the contract of insurance, I am not prepared to find either a breach of the policy or a lack of good faith on the part of the Plaintiff sufficient to discharge the Defendant from its obligations under the Policy. The Plaintiff did not neglect or refuse to attend upon any qualified medical examiner requested by the Defendant. I do not find in this case, as did Hess, P.C.J. in *Beninger*, that the insurer breached its obligation to the insured by imposing an improper condition on honoring its obligation under the policy, nor, as did Sullivan J., in *Kingsway*, on appeal from Hess, P.C.J., that the insured breached an obligation of good faith by imposing an inappropriate condition on attendance for a medical examination; nor do I find as did O'Ferrall, P.C.J., in *Sutherland*, that the insured failed to afford the opportunity to the insurer for the required medical examination.

In the result, the only breach under the policy was non-payment of the Plaintiff's medical expenses." (QL, at paras. 12-15)

Conversely, in *Sutherland v. Security National Insurance Co.*, [2006] A.J. No. 1096; 41 C.C.L.I. (4th) 138 (Prov. Ct.), a case referred to by Ingram Prov. Ct. J. above, an automobile policy dictated that benefits were contingent on a medical examination. The insured did not afford an opportunity for such medical examination and did not cooperate with the insurer.

In discussing this lack of cooperation and its consequences, O'Ferrall Prov. Ct. J. said this:

> "There are really two things required of the insured under the policy. On one hand, there is the obvious express requirement to afford the insurer's duly qualified medical practitioner an opportunity to examine the insured's person. On the other, there is the requirement on the insured to cooperate or even assist the insurer in exercising its right under the medical payments provision to obtain a second opinion on the necessity of medical services which are deemed by the insured's doctor to be essential for the treatment or rehabilitation of the insured.
>
> . . .
>
> … What's important is that the insured must cooperate with the insurer. He or she must provide those further and other assurances which might reasonably be requested, and perhaps required, to enable the insurer to exercise its right to determine whether the medical service rendered was essential for the treatment and rehabilitation of the insured. Given the lack of an explanation of the need for the authorization, I do not find that the insured breached the implied obligation she had under the medical expenses provision to assist her insurer in exercising its right to scrutinize claimed medical expenses. Having said that, it didn't go unnoticed that the insured's solicitor did nothing to better understand what was being asked of his client, notwithstanding the repeated threats to deny benefits. But when an insurer bases its refusal to pay benefits, which are prima facie payable under a policy, on a breach of the policy by the insured, then it has the onus, on a balance of probabilities, to establish that breach. I would rule that the insurer came close but nevertheless failed to discharge that onus with respect to the insured's failure to sign a consent to release medical information form.
>
> That leaves me with alleged failure to provide the insurer with an opportunity to medically examine the insured. Four, perhaps five letters were sent to the insured or her solicitor requesting that opportunity. No

evidence whatsoever of any kind of response was put before me. Admittedly, the insurer failed in its undertaking to arrange for the medical examination to take place. And I do find that the responsibility for arranging the medical examination lies with the insurer. And, it is true that the insurer never did name a duly-qualified medical practitioner who would conduct the examination; but, four letters and almost a year later, the insurer was still asking for the medical examination; and with no evidence to indicate that the insured "afforded" the insurer that opportunity, I am put in the position of having to find a breach of the policy by the insured. In my view, it would not have taken much to remedy the breach. A "one-liner" saying "Sure, you arrange it!" might have sufficed. But to ignore repeated requests constitutes a breach of a contract which, as I indicated at the outset, is founded on open and complete communication and cooperation. The messages being sent by the insurer may have been mixed and confusing; but I saw no evidence of any attempt to address the insurer's concerns. Furthermore, I do not find that the insurer was posturing or laying the legal groundwork for a denial of benefits. The insurer continued to pay the benefits until eventually it ran out of patience. The insured could also see from the insurer's letters, particularly the August 19, 2003 letter, that the insurer was puzzled by the continued need for treatment or by a nature of the treatment which was deemed necessary by the insured's attending physicians. That's exactly a circumstance that the opportunity to examine the insured, provided for in the agreement between the parties (ie. the policy), was intended to address.

It's unfortunate that I must dismiss the Plaintiff's claims for benefits she may have been entitled to. But to give judgment for those benefits would clearly have had the effect of denying the insurer the opportunity to assure itself that the Plaintiff was in fact entitled to those benefits or to suggest a better (read, "less expensive") way to treat or rehabilitate the insured. In a sense, the court is in the same position as the insurer. What remedy does it have other than to deny benefits when the insured is not cooperating in a manner it agreed to cooperate when the policy was entered into? In any event, the policy does link compliance with the medical examination provision with the payment of Section B benefits.

In making this decision I had regard to the decision of Sullivan, J. in *Kingsway General Insurance Co. v. Beninger* [2001] A.J. No. 1741. In that case the insured purported to impose an inappropriate condition upon his attendance for a medical examination by the insurer's medical advisor. The court found bad faith on the part of the insured. I do not find that in this case. Nor do I find a refusal to submit to a medical exam. I simply find no evidence that the insured afforded or offered that opportunity to her insurer when it was clear that the insurer was seeking that opportunity. It wouldn't have taken much on the insured's part to

> discharge this obligation but I was provided with no evidence whatsoever of even an attempt to provide the insurer with the opportunity it sought." (QL, at paras. 19-25)

An early case suggesting that the insured's disappearance did not constitute a breach of a policy condition requiring the insured to cooperate and holding an insurer liable to a third party judgment creditor is that of *Thorsen v. Merit Insurance Co.*, [1963] A.J. No. 104; 41 D.L.R. (2d) 528 (T.D.).

Woodruff v. Insurance Corp. of British Columbia, [2006] B.C.J. No. 324 (S.C.) was a case in which the plaintiff, Woodruff, was involved in a motor vehicle accident. Sheffield, a passenger in Woodruff's car, called the Insurance Corporation to report the accident. Woodruff later reported the accident also.

Woodruff met with the ICBC's adjuster and, amongst other things, sought payment of expenses. The adjuster though sought further information about the accident. Woodruff, unhappy with the adjuster's position, terminated the meeting without providing a statement of the circumstances of the accident.

The ICBC notified Woodruff that it needed more information to assess her claim and to defend against Sheffield's claim for bodily injuries suffered in the accident. The ICBC also notified Woodruff that their investigation of the accident indicated that she may have breached not only the *Insurance (Motor Vehicle) Act* by operating her car in a race or speed test but also the regulations by failing to cooperate with its investigation of the accident.

Woodruff refused to cooperate unless the ICBC provided her with information concerning its investigation.

Eventually, Woodruff sued the ICBC and John Doe, alleging that the accident was caused by an unascertainable owner and driver. Woodruff also sued her own insurer, seeking payment for material damage to her car and for medical benefits.

At trial, the judge concluded that Woodruff did not cooperate with the ICBC's investigation or in the defence of Sheffield's claim for damages for bodily injury. This failure to cooperate resulted in prejudice to the ICBC and thus the ICBC was held not to be liable to Woodruff for damages for the accident.

The relevant excerpts of the decision are these:

> "I find that Ms. Woodruff did not co-operate with the corporation in the investigation of the incident, or in the defence of the claim by Mr. Sheffield for damages for bodily injury. Ms. Woodruff did not provide, in a timely manner, a statement of her version of the incident of 25 May 2002. Ms. Woodruff did not co-operate with the corporation in the defence of Mr. Sheffield's claim for damages for bodily injury. In my opinion, an insured person cannot make co-operation contingent upon the provision by the corporation of the results of its investigation.
>
> I further find that Ms. Woodruff's failure to co-operate did result in prejudice to the corporation.
>
> The corporation was delayed in the adjustment of Ms. Woodruff's own claim. Unnecessary activity was required involving Ms. Woodruff's motor car, by reason of her failure to co-operate.
>
> As well, unnecessary time and expense was incurred in investigating and adjusting Mr. Sheffield's claims.
>
> In result, the corporation is not liable." (QL, at paras. 48-52)

A final noteworthy case in this regard is that of *Safeco Insurance Co. of America v. Furst*, [1996] O.J. No. 1269 (Gen. Div.). There, the insurer was able to establish a *prima facie* case of prejudice in that the total lack of cooperation from the insured prevented it from satisfactorily exploring potential defences or recourse against others.

As a result of this lack of cooperation, the liability of the insurer was limited to the $200,000 statutory minimum.

In his very brief judgment, Justice Spence said:

> "For purposes of s. 106 of the Insurance Act, R.S.O. 1980 the breaches and failures on the part of the insured constitute imperfect compliance rather than non-compliance. The plaintiffs (respondents) stand in the shoes of the insured for purposes of determining whether there should be relief against forfeiture. The breaches and failures of the insured are unexplained and therefore unjustified. The insurer has shown a prima facie case of prejudice in that the total lack of cooperation from the insured prevents it from exploring satisfactorily the defences that might be available or the recourse it might have against others.
>
> The insurer took many steps to locate the insured and I am not satisfied that its efforts in that regard were negligent.
>
> Accordingly, I do not think that forfeiture is inequitable. On this basis, no relief is granted. Liability of the insurer is limited to the $200,000 level." (QL, at paras. 1-3)

END

---

[i] With thanks to Andrea Manning-Kroon for her original research and writing of this article.

[ii] Reference: Alberta *Insurance Act*, *supra*, s. 614, stat. con. 3(3); *Kruger v. Security National Insurance Co.*, [2008] A.J. No. 764; 65 C.C.L.I. (4th) 308 (Prov. Ct.); *Sutherland v. Security National Insurance Co.*, [2006] A.J. No. 1096; 41 C.C.L.I. (4th) 138 (Prov. Ct.); *Safeco Insurance Co. of America v. Furst*, [1996] O.J. No. 1269 (Gen. Div.).