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Authorized by Law…

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In *Middleton v. Pankhurst*, 2017 ONCA 835 ("*Pankhurst*"), the Court of Appeal for Ontario upheld a trial judge's decision which addressed the issue of being "authorized by law" to drive within the meaning of Statutory Condition 4(1), O. Reg. 777/93 of the *Insurance Act*, which provides as follows:

> 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. [emphasis added]

In *Pankhurst*, the defendant picked up the plaintiff on his snowmobile after the plaintiff was stranded and lost on a dark and frozen-over Lake Simcoe. On their way home, the defendant lost control of the snowmobile and both he and the plaintiff were ejected from the vehicle. The plaintiff suffered significant injuries as a result. At the time of the accident, the defendant was in violation of a probation order stemming from a guilty plea to careless driving. The order prohibited him from operating a motor vehicle between 7 p.m. and 5 a.m. and from having any alcohol in his blood while operating a motor vehicle.

Aviva was the insurer for the defendant and denied coverage, taking the position that Mr. Pankhurst was "not authorized by law" to drive due to the terms of the probation order. Unifund was the plaintiff's mother's insurer and was added as a party in respect of coverage for under or uninsured claims. It took the position that "authorized by law" in Statutory Condition 4 requires that the insured driver hold a valid driver's licence issued by the Ministry of Transportation and comply with its terms. The trial judge, Justice Matheson, stated that "Mr. Pankhurst had a valid G driver's licence at the time of the accident, which was in good standing and was unrestricted on its terms" (para. 45).

Aviva argued that the phrase "authorized by law" captures not only the Ministry of Transportation licensing, which includes restrictions and suspensions, but also the terms of the defendant's probation order, which he was in breach of at the time of the accident.

Justice Matheson ruled that "[i]t is the Ministry of Transportation that has legislative authority to authorize people to drive" (para. 52), and found that the defendant 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. She rejected Aviva's position that "authorized by law" refers to violations of court orders, such as the defendant's probation order. As such, Aviva was ordered to pay the full costs of the settlement as Mr. Pankhurst was entitled to full coverage under his policy.

Justice Matheson relied on the Court of Appeal for Ontario's decision in *Kereluik v. Jevco Insurance Co.*, 2012 ONCA 338 ("*Kereluik*"). Justice Cronk, in the appellate authority, found that Statutory Condition 4 and the phrase "authorized by law" in the condition were concerned with the validity and terms of an insured's licence to drive at the time of the relevant motor vehicle accident and were not intended to apply to breaches of the law not directly connected with violations of driving licence conditions.

Both Justices Matheson and Cronk relied on section 118 of the *Insurance Act* in that "authorized by law" does not include a consideration of whether the insured is subject to criminal law prohibitions that impact his or her ability to drive.

The central takeaway from *Pankhurst* and *Kereluik* is the overarching goal of shielding innocent third parties, who are at risk if liability coverage is removed as a result of committing a criminal offence. This goal was manifest by the legislature in three ways:

1. Softening earlier versions of *Insurance Act* conditions which made impaired driving unlawful (no longer a Ministry of Transportation condition);
2. by enacting section 118 of the *Insurance Act* which may exclude coverage when both a law is broken and when there is deliberate intent to harm; and
3. taking out exclusionary language from the standard Ontario Automobile Policy.

If the appeal in *Pankhurst* was accepted, the goal underlying section 118 would be negated and would mark a return to a fault-based analysis of insurance coverage.