



## Current Articles 2002 - May

### Co-operators v. McNaughton Automotive Ltd.

In June, 2001, the Ontario Court of Appeal ruled in this case that when there is an at-fault accident resulting in a total loss, insurers are not allowed to apply a deductible AND retain the value of any salvage. Following this decision an insurer must decide to either charge a policy deductible or obtain the salvage – but not both. The Supreme Court of Canada upheld this decision by dismissing Co-operators' leave to appeal the lower court decision.

There are over 20 class actions that have been commenced for the recovery of previously charged deductibles. Some insurers are fixing a retro date for payment of deductibles to the date of the Court decision – June 18, 2001. Counsel for IBC has indicated that the limitation period should be put back to the date the Insurance Act was last rewritten –1993, however many of the lawsuits go back as far as the 1970's. Interestingly, the 3 public insurers in Western Canada are continuing to charge the deductible and retain the salvage!

As an insurance lecturer for over a quarter of a century this puzzles me! In the Basic Insurance Course we note that the Insurance Act defines Insurance as " the undertaking by one person to indemnify another person .....". The text books go further to define "indemnity" as to pay the actual amount of the loss –no more and no less or to put the person back in the same position he/she was in immediately prior to the loss. Continuing with the textbooks, additional principles are introduced to support the principle of indemnity and one of which is "salvage". To quote –"if an insured has been reimbursed for his loss as though the property were destroyed – a total loss – the insurer is entitled to possession of the property remaining." The insurer can then sell the property and retain the proceeds as Salvage.

If an insured should be paid the actual cash value of a vehicle and, for example, an agreed value of \$15,000., and retain the salvage which has a remaining value of \$1,500., then it follows that the insured has obtained a total loss settlement of \$16,500. and has profited by the accident. Therefore the insured has not been indemnified as the text books state.

Now what about the deductible? Well, the auto policy states: " the deductible is the amount you agree to pay toward the cost of any single claim you make under this section (Loss or Damage Section –7.3). That is quite clear and doesn't differentiate if it is a total loss or if there is any salvage value. The textbooks also state that a deductible may be applied and which will reduce the amount paid by an insurer.

Who are we to argue with the Supreme Court but in my opinion this whole decision is a contradiction of some of the basic principles of insurance. At the annual meeting of the Gore Mutual, I discussed this situation with Linda Paccanaro, Vice President of Claims. Her opinion was the same that the decision violates the indemnity provisions. It was also her opinion that the Supreme Court are forcing the issue to bring about an amendment to the Statutory Condition 6 (5) –Insurer Liable for Cash Value of Automobile. This condition indicated that the insurer is liable for the actual cash value but makes no mention of the application of a deductible, or who retains

the salvage. Of late, I have learned that the Insurance Bureau of Canada has proposed some amendments to the automobile Statutory Conditions so it becomes a "wait and see" situation for the future.

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