



## Due diligence defence available to insureds who breach “not authorized to drive” exclusion: *Tut v RBC General Insurance Co.*, 2011 ONCA 644.

In a decision released October 17, 2011, the Court of Appeal has endorsed a due diligence defence for the “not authorized by law to drive” exclusion contained in statutory condition 4 of the Ontario standard automobile policy O.A.P. 1. G2 drivers who drive with alcohol in their blood can avoid the exclusion and are entitled to coverage if they can show that, although their blood alcohol level was not zero, this breach of the conditions of their driver’s licence occurred despite the exercise of due diligence on their part. Similarly, if an owner of an insured vehicle permits a G2 driver whose blood alcohol level is not zero to drive the vehicle, the owner is still entitled to coverage if the owner can show that this occurred despite the exercise of due diligence.

The insured G2 driver in this case had been drinking the night before the accident. He and a large group of his friends celebrated his 20<sup>th</sup> birthday the night before the accident. The accident occurred the next morning. Hospital records showed that after the accident the driver’s blood alcohol level was 1.5 times the legal limit. A toxicologist prepared a report for RBC which said that the insured must have had 10 standard drinks at his party. The report contained a small error about the driver’s weight. This error was one of the factors which led the motions judge to find as a fact that the insured driver had “a reasonable and honest belief that he had 0% blood alcohol concentration when he awoke the morning after his party.” The driver’s mother and the owner of the insured vehicle saw “nothing either in the house or in her son’s manner that would make it necessary for her to question him regarding the amount of alcohol he had drunk the night before.” The Court of Appeal gave deference to these findings and agreed that in the circumstances the insureds were entitled to coverage.

It would appear that the same logic will be applied in all cases of alleged breach of the “not authorized to drive” exclusion.

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