

HARPER GREY LLP
3200 – 650 West Georgia Street
Vancouver, British Columbia, V6B
4P7
Canada

Tel: 604 687 0411
Fax: 604 669 9385

CASE SUMMARY: THE INSURER'S CONDUCT AMOUNTED TO A WAIVER OF THE INSURED'S BREACH WHERE THE INSURER DEFENDED THE CLAIM WITHOUT A RESERVATION OF RIGHTS OR A NON-WAIVER AGREEMENT FOR THREE YEARS BEFORE DENYING COVERAGE. INFORMATION INDICATING THAT THE INSURED WAS IN BREACH EXISTED AND WAS AVAILABLE TO THE INSURER THREE YEARS PRIOR TO THE DENIAL

Insurance law – Automobile insurance – Breach of policy – Good faith – Estoppel – Duties and liabilities of insurer – Waiver

Bradfield v. Royal and Sun Alliance Insurance Co. of Canada, [2018] O.J. No. 4072, 2018 ONSC 4477, Ontario Superior Court of Justice, July 20, 2018, A. Sosna J.

This action arose out of a motor vehicle accident involving three motorcycles and a car that occurred in 2006. The lead motorcyclist, Devecseri, collided with a car operated by Caton, resulting in a multi-vehicle collision. Devecseri was pronounced dead at the scene. Caton and the other two motorcyclists, Bradfield and Latanski, suffered personal injuries. Devecseri was in breach of his policy with his insurer, RSA, at the time of the collision as he had alcohol in his system. RSA did not learn that Devecseri was in breach until three years later.

RSA appointed an adjuster to investigate the loss in 2006. In a 2006 report, the adjuster confirmed RSA's instructions to obtain the coroner's report in an effort to determine if drugs or alcohol were a factor in the collision. Despite instructions to do so, the adjuster failed to obtain the coroner's report. Bradfield and Caton subsequently commenced actions for personal injuries. Caton named Bradfield and Devecseri's estate, among others, as defendants. In 2008, RSA appointed counsel to defend Devecseri's estate without a reservation of rights or proposing a non-waiver agreement. In 2009, RSA obtained the coroner's report following discoveries and learned that Devecseri had breached the policy. RSA ceased to defend Devecseri's estate and advised the parties that it was taking an off-coverage position. At trial, Caton was awarded \$1,800,000, apportioned 90% to the estate and 10% to Bradfield. The judgment also indemnified Bradfield against the estate.

Bradfield then commenced this action against RSA pursuant to s. 258 of the *Insurance Act*, R.S.O. 1990, c. I.8 for a declaration that he was entitled to recover the balance of the estate's policy limits. Bradfield argued that RSA's conduct from 2006 to 2009 amounted to a waiver of the breach and RSA should not have denied coverage. RSA argued that the principal of utmost good faith required the estate to provide all relevant information, which it failed to do. Further, RSA argued that there was no evidence of prejudice.

The Court adopted the reasons in a similar case, *Logel (Litigation Administrator of) v. Wawanese Mutual Insurance Co.*, [2008] O.J. No. 3717, which had been upheld by the Court of Appeal. As in *Logel*, the Court found that RSA's failure to take an off-coverage position for three years during which the coroner's report existed and was available to it, its defence of the claim and its continued defence of the claim through discovery amounted to a waiver by conduct of Devecseri's breach. Further, the Court stated that prejudice is presumed where the insurer persisted for almost three years in its defence through production and discovery. As a result, Bradfield was awarded the balance of the policy limits against RSA.

This case was digested by [Michael J. Robinson](#), and first published in the LexisNexis® Harper Grey Insurance Law Netletter and the Harper Grey Insurance Law Newsletter. If you would like to discuss this case further, please contact Michael J. Robinson at mrobinson@harpergrey.com.