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CASE SUMMARY: DRINKING, DRIVING, AND COVERAGE DO NOT MIX

The insured driver was intoxicated by alcohol to the point where she was incapable of proper control of her vehicle, thus breaching a condition of her insurance policy.

Insurance law – Automobile insurance – Breach of policy – Impaired driver – Care, custody, or control of motor vehicle – Third parties

Derkson v. Insurance Corp. of British Columbia, 2019 BCSC 2009, [2019] B.C.J. No. 2228, 2019 BCSC 2009, British Columbia Supreme Court, November 22, 2019, K. Horsman J.

The insured rear-ended another vehicle after consuming alcohol at a pub, causing vehicle damage and personal injuries to the insured's passenger and the other driver. The insurer, the Insurance Corporation of British Columbia (ICBC), denied coverage on the basis that the insured was "incapable of proper control of the vehicle" at the time of the collision, and was therefore in breach of her conditions of insurance.

The insured sued ICBC for coverage for both the damage to her vehicle and for indemnity against third party claims. In issue was whether she breached a condition of her coverage under the Insurance (Vehicle) Regulation, B.C. Reg. 447/83. Section 55(8)(a) of the Regulation specifies circumstances in which an insured is deemed to have breached a condition of their third party liability coverage. There is a similar provision for first party coverage under section 3(9)(a) of Schedule 10 of the Regulation. Both sections deem a breach of coverage where:

(a) the insured is operating a vehicle while the insured is under the influence of intoxicating liquor or a drug or other intoxicating substance to such an extent that he is incapable of proper control of the vehicle.

In order for the insurer to meet its onus to prove the breach, the insurer had to prove whether, on a balance of probabilities, the insured's negligent acts were of such a nature and degree as to be explainable only by compelling the inference that the influence of alcohol caused the negligent acts, and that the effect of the alcohol was to render the insured incapable of proper control. The test was thus whether the collision would have been avoided if the insured had been sober.

Credibility of the witnesses was central as there was no evidence to establish the insured's blood alcohol level at the time of the accident and no accident reconstruction evidence. The insurer argued that a reasonable inference could be drawn from the evidence as a whole that the insured was incapable of proper control of her vehicle due to the influence of alcohol.

The insured testified that she consumed one beer and nine ounces of wine while at the pub. She left the pub to drive her friend home. The insured testified that while she was driving she suddenly came upon a stopped car that did not have its lights on. She saw the other vehicle too late and did not have time to avoid a collision. Police attended and the insured was administered a roadside breath test, which she failed. She was issued an Immediate Roadside Prohibition from driving by the police, although she later successfully sought a review of the Immediate Roadside Prohibition.

The insurer called six witnesses at trial, including three police officers who attended the scene of the accident. The police officers' evidence was consistent in that the insured's speech was slurred, her eyes were bloodshot, and she had difficulty walking at the scene. One of the officers smelled alcohol coming from the insured. The driver of the other vehicle testified his vehicle's lights were turned on and that his vehicle was in motion. The insured's passenger testified that she was drunk and the group at the pub consumed Jager Bomb shots. The insured's other witness did not see the accident but recalled being very drunk at the pub.

The Court rejected the insured's evidence of her alcohol consumption and level of impairment as it was inconsistent with the evidence of other witnesses at trial. Moreover, the Court rejected the insured's version of how the accident occurred, finding the other driver's version of events more plausible. The Court ultimately drew the inference that the insured was intoxicated due to the consumption of alcohol to the point that she was incapable of proper control of her vehicle, and therefore breached a condition of her insurance. As a result, the insured's action for coverage was dismissed.

This case was digested by [Joe Antifaev](#), 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 Joe Antifaev at jantifaev@harpergrey.com.