Changes Affecting Vicarious Liability For Lessors and the Priority of Third Party Liability in Car Rental Situations

Stephen G. Ross
March 1, 2006

<u>This article, written in light of the implementation of Bill 18 in 2006, complements the powerpoint presentation entitled "Bill 18: Priority and Liability of Rental Companies Insurance Policies."</u>

The government has now implemented Bill 18 which is an omnibus act which serves to amend a number of pieces of legislation, including the *Compulsory Automobile Insurance Act*, the *Highway Traffic Act*, and the *Insurance Act*.

The following is a brief summary and discussion of these changes.

Priority: Leased and Rented Vehicles

Section 277 of the *Insurance Act* has been amended with the express intention of changing priorities with respect to third party liability as it relates to leased and rented vehicles. The new priority scheme is as follows:

- The first loss insurance is any motor vehicle liability policy in which the lessee is the named insured.
- The second level of insurance is any motor vehicle liability policy in which the driver is a named insured; or is the spouse of a named insured (if driver resides with spouse); or in which the driver is listed as a driver in the contract.
- The third level or layer of excess insurance is any motor vehicle liability policy in which the owner of the automobile is a named insured.

Previously, that third layer of insurance, the policy covering the owner of the automobile involved in the accident, was first loss insurance.

In effect, the amendments have turned the priority scheme on its head. That which was first is now third, and that which was arguably not even available to respond to the loss (the insurance covering the lessee) is now first.

Amendments to the *Highway Traffic Act* now make the lessee vicariously liable for the driving activities of the driver. Previously, the lessee, unless equated to an owner (given the level of his or her control of the vehicle) was not even a potentially liable party. Now, by statute that entity is vicariously liable for the driver, and his or her insurance, is first loss insurance whether the lessee is the driver or not (so long as the ultimate driver was driving with the consent of the lessee).

The *Compulsory Automobile Insurance Act* has been amended to indicate, for the first time, that if an individual is renting a vehicle for more than 30 days, they must have their own insurance. Therefore, a person who does not own a vehicle will be required to purchase automobile insurance if he or she intends to rent an automobile for more than 30 consecutive days.

In short, the renter/lessee's policy now responds first; followed by the driver's policy (if different than the lessee); followed by the owner's policy which is expressly stated as excess insurance.

This change in priority is said to apply with respect to the use or operation of an automobile on or after March 1, 2006.

Lessor's Liability Cap

New Section 267.12 of the *Insurance Act* states that the maximum amount for which the lessor is liable shall be $1M, less any amount that is recovered under the third party liability provisions in motor vehicle contracts issued to persons other than lessor.

The $1M cap applies to all lessors, with the exception of the situation where a vehicle is used as a taxi cab, or limousine. It is made clear that the cap is with respect to vicarious liability only, and therefore, any independent negligence of the lessor will be unrestricted with respect to the damage exposure.

When does the change in third party priorities in car rental situations come into force?

Section 277 stipulates that if an automobile is leased, the following rules apply to determine the order in which the third party liability provisions of any available motor vehicle liability policies **"shall respond in respect of liability arising from or occurring**

in connection with the ownership or, directly or indirectly, with the use or operation of the automobile on or after the day this subsection comes into force."

This leads to two possible interpretations. One is that the change is with respect to liability which arises on or after March 1, 2006. Liability may be seen to arise consequent upon and on the date of the following non-exclusive events (occurring after March 1, 2006):

- the motor vehicle accident;
- a liability determination at trial;
- the discovery of sufficient evidence to establish liability on an objective basis (knew or ought to know); or
- any admission of liability.

This interpretation would obviously create much confusion, be very difficult procedurally, and potentially unworkable.

Another interpretation is that the changes apply with respect to "the use or operation of the automobile on or after the day this section came into force." The absence of a comma after the word "automobile" suggests this is the more likely interpretation. Furthermore, it is consistent with the legal presumption against retroactivity and would result in a much more certain application of the legislative changes.

As stated, the lessor liability cap provision (267.12) is clearer with respect to its application date. Subsection (5) stipulates that the new provision applies "only to proceedings for loss or damage from bodily injury or death arising from the use or operation of a motor vehicle on or after the day this section comes into force."

Thus, the liability cap provision applies with respect to proceedings flowing from car accidents which occur on or after the day the section comes into force.

This language reinforces the latter interpretation of the effective date of the priority change relating to the use of an automobile on or after March 1, 2006.

It makes the most sense for both amendments to become effective at the same time, and for the amendments not to apply retroactively. Therefore, I believe both amendments will be interpreted as applying to car accidents which occur on or after March 1, 2006.

I turn now to a basic fact pattern to illustrate the impact of these changes and some of the intended (and likely unintended) consequences.

Fact Pattern

- A (owner/lessor) rents car to B (renter/lessee) who gives vehicle to C (driver) to use.
- C hits D in an at-fault accident.
- D sues:
    - A (owner/lessor)
    - B (renter/lessee)
    - C (driver)
- D (the plaintiff's) provable damages are $1.4M.

Discussion

The amendments require the policies to respond in the following manner:

- The renter's own auto policy (assume minimum liability limits of $200K available).
- The driver's own auto policy (assume minimum limits of $200K available).
- The lessor's policy (assume third party liability limits of $1M).

The amendments to the *Highway Traffic Act* indicate that the lessor, lessee, and driver are joint and severally liable to the plaintiff.

Accordingly, the plaintiff could recover a judgment against the renter/lessee and/or the driver in the amount of $1.4M.

The lessor/owner's liability, however, is capped by the new amendments at $1M, less any amounts recovered under the third party liability provisions of policies issued to persons other than the lessor.

In this situation, that would mean that the lessor could only be held liable for $600K ($1M minus [$200K plus $200K]).

The stated legislative intention was to restrict payouts under lessor's policy (see Hansard discussion on this point).

However, it may be that this result has not been effected.

The driver will likely be deemed as an insured on the lessor's policy. This flows from the operation of Section 239 of the *Insurance Act* which extends coverage in a motor vehicle liability policy to the person named therein (the owner/lessor), and every other person who, with the named person's consent, drives the automobile.

Accordingly, assuming consent is not an issue, the driver will be an unnamed insured under the owner/lessee's policy, and will have presumably the full liability limits available to him or her to satisfy the judgment. See s. 244, rights of unnamed insureds.

Interestingly, the lessee likely does not enjoy the same benefit (as being an unnamed insured under the lessor's policy), since he is not driving the vehicle at the time of the accident.

Unless the lessor has a very specifically worded liability policy which does not enure to the benefit of others, then even though the named insured (lessor/owner) will enjoy the benefits of a cap on his or her liability, unnamed insureds (including the driver) who do not enjoy a capped liability would appear to retain full access to the entire third party liability limits available under the lessor's policy.

Accordingly, much will depend upon the wording of the umbrella and excess policies carried by the car rental companies.

However, it would appear that in failing to cap the liability of unnamed insureds on the lessor's policy, the legislation has likely failed to effectively restrict the potential payments under the lessor's policy to $1M.

I hope this update proves helpful. As always, should you have any questions arising from this communication, please do not hesitate to contact me or any of the lawyers at Rogers Partners LLP.