



Bill 18:
Priority and Liability
of Rental Companies
Insurance Policies

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I. Shift in Priority: Pre-March 1, 2006

- *Insurance Act* (IA) made owner's policy first-loss insurance for third-party liability (s. 277).
- No vicarious liability on lessee or renter for negligence of driver.
- Rental company/lessor vicariously liable for negligence of driver → possible large awards against owner.

I. Shift in Priority: Policy Objectives

- To ensure the policies of renters/lessees are first in priority for damages arising from accidents involving leased or rented vehicles.
- Intended to limit the liability of rental car companies in situations where the renter/lessee causes injuries to others.
- Legislative concern was that rental rates would increase dramatically.
- The rationale: individual's own insurer should respond first because they are in the best position to assess the risk of a driver.
- We know what the Legislature intended. Did the language used effect the desired result?
(No, but F.S.C.O. may have ...)

I. Shift in Priority: Legislation

A. Highway Traffic Act

- Amendments make the lessee vicariously liable for the driving activities of the driver.
- Previously, the lessee was not even a potentially liable party.
- Now, lessee is statutorily vicariously liable for the driver, and his or her insurance is first-loss insurance.

I. Shift in Priority: Legislation

B. Insurance Act

- Section 277(1.1) of the *Insurance Act* sets out the priority scheme for third party liability for leased vehicles:
 1. The first level of insurance is any motor vehicle liability policy in which the **lessee/renter** is the named insured.
 2. 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.
 3. 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.
- “lessee” → a person who is **leasing or renting** the automobile for any period of time.

I. Shift in Priority: Cap on Liability

- Amendments to the *Insurance Act* (s.267.12) create a limit on the liability of rental companies/lessors to the greatest of the following:
 - 1) **\$1,000,000**;
 - 2) The amount of third party liability insurance required by law;
 - 3) The amount determined by the regulations that are made to determine the maximum amounts for this clause.
- The \$1M cap covers all lessors, with the exception of a vehicle which is used as a taxi cab or limousine.
- It is made clear that the cap is with respect to vicarious liability only → any independent negligence will be unrestricted with respect to damage exposure.

I. Shift in Priority: Cap on Liability

- The maximum amount is reduced by any amounts recovered under any third party liability provisions of the lessee/renter or any other persons with respect to the accident (s.267.12(1)(a)) → **BUT NOT** reduced by amounts paid under uninsured automobile coverage.
- Note: Argument arose that since lessee policy names lessor, that policy can't be used to reduce liability
 - However Endorsement OPCF 5C indicates that for purposes of s. 267.12(1)(a) lessee's policy deemed not to apply to lessor

II. Bill 18: Resulting Changes

- Changes have been made to the OAP 1 and endorsements to give effect to Bill 18 amendments.
- A. OAP 1**
 - After Bill 18, first revised version released on October 16, 2006 and effective January 1, 2007.
 - Changes include:
 - s. 2.2.4 provides coverage to insured and his/her spouse for their vicarious liability arising out of the rental of certain vehicles for periods of not more than 30 days.
 - Coverage grant in s. 3.3 references leasing and renting.
 - Fills gap: exposed as renter/lessee but policy did not cover liability as lessee unless also driver
 - s. 3.3.5 incorporates priority set out in s. 277(1.1) of IA for rented/leased vehicles.

II. Bill 18: Resulting Changes

B. OPCF 5C (Permission to Rent or Lease)

- Revised after Bill 18, effective January 1, 2007.
- Applies to short term (30 days or less) rentals.
- Provides coverage for the lessee and driver. But coverage is reduced by the amount of insurance available to the driver and lessee from their own policies.
- Possible that by reducing limits of driver and the lessee, the endorsement contravenes the minimum liability provisions of s. 252 of IA.
- May also re-order the priority of insurance policies for property damage claims (unlikely to override legislation).
- New wording introduced to ensure that lessee's policy can be used to reduce liability of lessor (\$1M - \$1M)

II. Bill 18: Resulting Changes

C. OEF 110 (Reduced Coverage for Lessees or Drivers of Leased Vehicles)

- Changes became effective January 1, 2008.
- Available for endorsement on SPF 7. (Standard Excess Auto Policy)
- Provides that maximum amount of insurance available under the excess policy (SPF 7) for lessee and driver is capped at \$1 million less any insurance available to the lessee/renter or driver.
- Once the \$1 million cap is reached, any remaining limits are only available to the named insured (the rental company).
- Endorsement is limited to bodily injury claims.

II. Bill 18: Resulting Changes

- The OEF 110 appears to have fixed issue that SPF 7 insures drivers and lessees.
- If car rental company is insured by OAP 1 endorsed with OPCF 5C and SPF 7 is endorsed with OEF 110, then rental car policy payout will likely be 0 if there is 1M of coverage available to renter/driver on own policies.
- Without OEF 110 endorsement on SPF 7, insurer of car rental company may be required to cover the liability of the car rental company, the driver and possibly the renter to the full limits of the SPF 7.
- To benefit fully from Bill 18 amendments, insurers of rental companies must endorse SPF 7 policies with OEF 110.
- The wording of OEF 110 presumed that without it renter and driver would have access to Excess policy (SPF 7).

II. Bill 18: Resulting Changes

RECENT CASE: *Xu v. Mitsui Sumitomo Insurance Co. Ltd.*, 2014 ONSC 167

- **Issue:** Application of Bill 18 before OEF 110 endorsement: the “legislative gap.”
 - Specifically: could the lessee access Toyota Canada’s policies on leased vehicle?
- **Facts:** application to determine coverage of lessee by lessor’s excess policy in the absence of OEF 110.
 - Defendant #1 Lu was lessee and driver of vehicle from TCCI.
 - Plaintiff Xu was passenger of vehicle leased from TCCI.
 - Leased car was struck by defendant #2 Tsui.
 - Defendants tendered their limits of \$1 million each.
 - Toyota Canada was owner of leased car; TCCI was lessor.
- **Toyota Canada’s insurance on leased vehicle:**
 - Basic automobile owner’s policy (OAP 1);
 - Excess/umbrella commercial coverage to \$5 million; and
 - Second excess coverage to \$10 million.

II. Bill 18: Resulting Changes

Xu v. Mitsui Sumitomo Insurance Co. Ltd., 2014 ONSC 167

- **Held:** Toyota Canada's policies could not be accessed by the lessee.
 - Owner /lessor's and lessor's insurer's exposure capped at \$1M (less other available insurance) even without OEF 110.
- **Rationale:** interpretation of legislative changes under Bill 18 evidenced intent to cap owner/lessor exposure.
 - Court's decision based on its interpretation of legislative intent.
 - **Interpreted s. 267.12 as limiting the liability of lessor's insurer despite language only referring to the lessor.**
- **Alternatively:** Toyota Canada's excess policies were unavailable to the renter on an interpretation of the applicable insurance contracts.
 - Alternative grounds for decision were more correct, but based on odd relationship between the owner (Toyota Canada) and lessor (TCCI).
 - No Bill 18 implications in the alternative reasoning.

II. Bill 18: Resulting Changes

Xu v. Mitsui Sumitomo Insurance Co. Ltd., 2014 ONSC 167

- **Wording of s. 267.12 alone does not support the Court's conclusion:**

Liability of lessors

267.12 (1) Despite any other provision in this Part, except subsections (4) and (5), in an action in Ontario for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of a motor vehicle that is leased, the maximum amount for which **the lessor or lessors** of the motor vehicle are liable in respect of the same incident **in their capacity as lessors** of the motor vehicle is the amount determined under subsection (3) less any amounts,

- (a) that are recovered for loss or damage from bodily injury or death under the third party liability provisions of contracts evidenced by motor vehicle liability policies issued to persons other than a lessor;
- (b) that are in respect of the use or operation of the motor vehicle; and
- (c) that are in respect of the same incident. 2005, c. 31, Sched. 12, s. 4.

II. Bill 18: Resulting Changes

Xu v. Mitsui Sumitomo Insurance Co. Ltd., 2014 ONSC 167

- **Rationale:** interpretation of legislative changes under Bill 18 evidenced intent to cap owner/lessor exposure.
 - Court's decision based on its interpretation of legislative intent.
 - Interpreted s. 267.12 of *Insurance Act* as intending to cap exposure of the lessor *and* the lessor's insurer (via claims through the renter or driver) at \$1 million, even in absence of OEF 110.

"In my view, the words of s. 267.12 are clear: the liability of a lessor or lessors in their capacity as lessors is limited to \$1 million... the \$1 million limitation operates despite any other provision in this Part"

- The court ignored the language of the provision which indicated that the *lessor's* liability was capped at \$1 million but the *lessor's insurer* enjoyed no such cap.
- Based on 2003 Ont. Court of Appeal case, *Beattie v. National Frontier Insurance Co.*, court was not open to read intent into provision:

"If the words of an Act are clear, they must be followed, even though they lead to manifest absurdity..."

- This may constitute a basis for appeal of this decision, but court also found factual basis for achieving same outcome which may determine whether appeal is pursued.

III. Applying Bill 18 to Other Coverages:

- **Does Bill 18 apply to Property Damage claims?**
 - Unlikely that amendments change priority.
 - s. 277(1.3) of IA states that s. 277(1.1) does not apply if s. 267.12(1) does not apply.
 - s. 267.12(1) is limited to “loss or damage from bodily injury or death” from use or operation of a leased motor vehicle.
 - Therefore, property damage is likely excluded from 277(1.1).
 - 277(1.1) priority incorporated into s. 3 of OAP 1 (“Liability Coverage”) which deals with bodily injury and property loss.
 - Causes confusion: creates argument.
 - But Legislation will likely prevail over policy wordings that suggest the opposite.

III. Applying Bill 18 to other Coverages:

- **Does Bill 18 apply to uninsured / underinsured motorist claims?**
- Who has priority for the unidentified motorist (UM) claim
 - When rented vehicle is struck by an uninsured motorist?
 - Does renter look to his own policy for UM coverage or the owner's policy (car rental company)?
- Court examined this fact scenario in: *Morrison v. Ashley* (2012), 108 O.R. (3d) 663 (Ont. S.C.J.).
- Section 3.3.5 of s. 3 of OAP 1 ("Liability Coverage") incorporates priority set out in s. 277(1.1) of *Insurance Act*.
- Section 5 of OAP 1 ("Uninsured Automobile Coverage") has nothing equivalent to s. 3.3.5.
- Priority in s. 5 of OAP 1 relies on priority set out in 277(1) → owner → driver (excess).
- Court found that UM coverage is governed by s. 277(1) - owner's policy first - and is unchanged by s. 277(1.1).
- Therefore car rental company policy responds when rented car is struck by uninsured motorist

III. Applying Bill 18: SABS

- Does Bill 18 apply to Statutory Accident Benefits coverage?
 - Unlikely.
 - Similar type of analysis as in *Morrison v. Ashley* → nothing in s. 4 of OAP 1 (“Accident Benefits Coverage”) that incorporates new priority scheme.

III. Applying Bill 18: Case Law Update

- **QUESTION: Are you a “renter”? In the “loaner” car scenario**
- Situation: the free “loaner”:
 - See *Coachman Insurance Co. v. Lombard General Insurance Co. of Canada* (2011), 105 O.R. (3d) 475.
 - See also, *Baird v. Abouibrahim*, 2012, 110 O.R. (3d) 600
 - Free loaner was not considered a rental. Court concluded it would be a “legal fiction” to consider loaner as rental.
 - Therefore, Bill 18 amendments did not apply.
 - Owner’s policy (dealership) was primary and driver’s policy was excess.
 - Legal fiction is to consider the loaner to be ‘free’.

III. Applying Bill 18: Case Law Update

- Situation: King rents car while insured car being repaired.
- See *Nguyet v. King*, 2010 ONSC 5506.
- Court considered the relationship between s. 2.2.2. of OAP 1 (“Temporary Substitute Automobile”) and s. 3.3.5 (“Rented and Leased Automobile”).
- Two sections must be read together in a way that both make sense.
- If a “temporary vehicle” is involved, the owner’s policy must respond first, unless the “temporary vehicle” is rented. If the vehicle is rented, then Bill 18 amendments apply.
- Court finds that even though lessee/renter would be reimbursed for cost of “temporary vehicle”, it was, nonetheless a rental.
- Therefore, lessee’s policy was primary.
- Importantly Ont. C.A. (on appeal) found that lessee policy was not obliged to defend car rental company just driver/lessee

III. Applying Bill 18: Case Law Update

- *Enterprise v. Meloche (2010) Ont. C.A.*
- Facts: Lee rents car from Enterprise
- Zhou is driver.
- Lee and Koo passengers.
- Lee and Koo sue Zhou and Enterprise.
- Koo does not sue Lee as renter.
- Application to determine if Lee's Policy with Meloche (Renter's Policy) is first loss and must respond and cover owner and Zhou.
- Justice Moore found that Renter's policy 'available' and stood first to cover claims against Enterprise and Zhou.
- Ont. C.A. overturned this decision. Agreed that Policy is 'first loss' but not engaged because not "available".
- Found neither owner or driver covered under renter's policy and since renter not sued his policy not 'available'.
- Very unusual result. Will likely be narrowly applied and restricted to cases where renter not sued by plaintiff.

III. Applying Bill 18: Case Law Update

Intact Insurance v. American Home Assurance, 2013 ONSC 2372

QUESTION: Who is the renter when car is rented for work?

- Overview:
 - A. rented car while in Toronto on business.
 - A. personally insured by Intact.
 - A. was also covered under CGL policy underwritten by American Home Assurance from employer.
 - A. was involved in MVA whilst in the course of his employment.

- Issue:
 - Who was the “renter” for the purposes of determining which insurance policy would respond to the loss?

- Facts of the rental:
 - A. paid for rental with employer’s credit card
 - Company policy stated that employees would be reimbursed for rentals
 - Company policy also dictated: type of vehicle, the manner of rental, the rental company used, and what would be reimbursed by the employer.

III. Applying Bill 18: Case Law Update

Intact Insurance v. American Home Assurance, 2013 ONSC 2372

- Intact's position:
 - Employer = renter (the "genuine" or "*de facto* lessee"), based on the way the car is rented, the company policy, and the reimbursement.
 - A. = driver
 - Therefore, employer's policy should respond first and A.'s policy should respond second.
- American Home's position:
 - A. = renter *and* driver.
 - Therefore, employer's policy needs not respond at all.
- Decision: if Budget wanted to sue on the rental contract, it would sue A. Therefore, A. was the lessee
 - Ignores principles of agency law.
 - Ignores the fact that a company cannot sign a contract, drive a car, or otherwise take any action, except through its employees

III. Applying Bill 18: Case Law Update

Smith v. Smith, 2012 ONSC 5872

- Facts:
 - Defendant rents vehicle; involved in MVA
 - Plaintiff passenger sues renter/ driver (spouse) and owner (rental company)
 - Defendant renter/ driver carried insurance policy of her own from insurer with \$1 million in third-party liability limits
 - Rental company sought summary judgment against plaintiff on basis of lessor's liability cap (\$1 million - \$1 million in other insurance = \$0).

- Issues:
 - Rental company argued that the action against it should be discontinued on the basis that insurer would be first in priority up to \$1 million
 - Rental company stated that insurer's \$1 million limit effectively decreased its exposure to \$0 by operation of *Insurance Act* s. 267.12(3):
 - Insurer refused to agree that the renter/ driver would absolutely and indefinitely be able to access the full \$1 million in coverage under the insurer's policy.
 - Insurer refused to agree that it could not take an off-coverage position with respect to the defendant at some point depending on changing circumstances.

II. Bill 18: Resulting Changes

Smith v. Smith, 2012 ONSC 5872

S. 267.12 theoretically lessened Rental Company's exposure to \$0:

Liability of lessors

267.12 (1) Despite any other provision in this Part, except subsections (4) and (5), in an action in Ontario for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of a motor vehicle that is leased, **the maximum amount** for which the lessor or lessors of the motor vehicle are liable in respect of the same incident in their capacity as lessors of the motor vehicle **is the amount determined under subsection (3) less any amounts,**

(a) that are recovered for loss or damage from bodily injury or death **under the third party liability provisions of contracts evidenced by motor vehicle liability policies issued to persons other than a lessor;**

(b) that are in respect of the use or operation of the motor vehicle; and

(c) that are in respect of the same incident. 2005, c. 31, Sched. 12, s. 4.

- Defendant renter/driver's policy provided \$1 million: \$1 M - \$1 M = \$0.

III. Applying Bill 18: Case Law Update

Smith v. Smith, 2012 ONSC 5872

- Rental Company's goal:
 - To use the reduction in s. 267.12 to justify being let out of the action entirely.
- Decision and reasons:
 - The court conceded that it was likely that rental company's liability would be \$0 in the final analysis.
 - Rental company was required to stay in the action on the basis that insurer might take an off-coverage position.
 - The specter of vicarious liability remained, despite the operation of the "other insurance" aspect of s. 267.12.
- Significance:
 - "Other insurance" provision can theoretically reduce lessor's exposure to \$0.
 - Lessors will still likely be required to incur the costs of a defense unless coverage from driver and/or renter's policies can be assured until the date of trial.

IV. The New Scheme in Practice

Who Covers Whom?

- With various Bill 18 changes and revisions, do the forms and endorsements provide:
 - Coverage to a driver on a renter's auto policy?
 - No. Coverage probably not extended to driver unless insured is driver. Also, unless renter sued may not have access to renter's policy. (see *Enterprise v. Meloche*)
 - Coverage to a renter on a driver's auto policy?
 - No. Coverage not extend to renter unless insured is the renter.

IV. The New Scheme in Practice

Who Covers Whom?

- Coverage to driver and renter on owner's policy.
 - Yes. But limits are \$1M less - renter/driver's policy limits
- Coverage to driver and renter on owner's excess policy?
 - Yes. And may have access to full liability limits, UNLESS:
 - OEF 110 is attached to excess policy .
 - If OEF 110 is attached, limits are \$1 million less renter/driver's policy limits.

IV. The New Scheme in Practice

Who Covers Whom?

- Coverage to an owner on a renter's or driver's policy?
 - No.
 - Court of Appeal in *Nguyet v. King*: s. 277(1.1) imposes no duty on renter's insurer to defend on behalf of rental company. There is no contractual relationship between rental company and renter's insurer.

IV. The New Scheme in Practice

- **A** (owner/lessor) rents car to **B** (renter/lessee) who is also the driver.
- **B** hits **C** in an at-fault accident.
- **C** sues:
 - **A** (owner/lessor) and
 - **B** (renter and driver)
- **C** (the plaintiff's) provable damages are \$2.5M.

IV. The New Scheme in Practice

Assume: Car Rental Company

- OAP 1: \$1M: Standard Owners Policy
- OPCF 5C: Permission to Rent or Lease
- SPF 7: Standard Excess Auto
- O.E.F. 110: Reduced Coverage For Lessees or Drivers of Leased Vehicles
Endorsement (attached to S.P.F. 7)
- Assume: Renter/Driver has Policy (OAP 1) for \$1M

IV. The New Scheme in Practice

- Liability:
 - Car Rental Company:
 - B/c of liability cap
 - Liability Exposure of \$1M less other insurance (\$1M)
 - Liability exposure of car rental company as defendant - \$0
- Liability:
 - Renter / Driver:
 - No benefit from cap so liable to full extent of loss
 - Exposure: \$2.5M

IV. The New Scheme in Practice

- Coverage:
 - Priority:
 - First Loss Insurer is Renter's Policy Insurer
 - Pay to Policy limit of \$1M
 - But not owe duty to defend (owner) car rental co.
 - Excess: Does Car Rental Policy provide excess coverage to Renter / Driver:
 - Under Standard OAP 1 coverage would extend to driver
 - But with **OPCF 5C** (effective date Jan. 2007)
 - Renter and driver covered but limits of coverage to them \$1M less Renter/Driver's coverage of \$1M = \$0
 - May violate minimum limits requirement.
 - All new and arguable

IV. The New Scheme in Practice

- **SPF 7:**
- Rental Car Companies Standard Excess Auto Policy
- Arguably provides coverage to Renter/Driver up to limits of coverage
- But with **OEF 110** Reduced Coverage for Lessees or Drivers of Leased Vehicles Endorsement (attached to SPF 7)
- Coverage ousted except as provided in Endorsement
- Renter/Driver probably covered but limits of coverage are \$1M less underlying coverage available to lessee and driver - \$1M
- Therefore coverage limits = \$0

IV. The New Scheme in Practice

- Result:
 - Plaintiff can get only \$1M of \$2.5M
Judgment satisfied by insurance coverage
 - Renter/driver exposed to amounts in excess of \$1M
 - Car Rental Co. not exposed because not liable ($\$1M - \$1M = \$0$)
 - But outcome very dependent on coverages obtained and endorsements attached
 - Will need to see the Policy and Endorsements to know if Car Rental Policy has exposure to amounts in excess of \$1M
 - Similar situation with leased (more than 30 days) vehicles but that is subject of another seminar

Conclusions

- Government and FSCO not working together. Amendments to legislation clearly left gaps and holes (no coverage for liability as lessee; and driver still unnamed insured on owner's policies) which FSCO (in consultation with I.B.C.) has tried to fill
- This has been attempted by amendments to: Policy and changes to Policy Forms and new Endorsements
- Many questions remain and will need clarity from courts and counsel
- Courts show reluctance to see bigger picture (Court of Appeal in *Enterprise v. Meloche*)
- Hopefully counsel can help

- ... Any Questions?