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Who Has Priority To Pay In The Rental Vehicle Case?

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Your comments are appreciated and If there are any accident benefits or tort topics that you would be interested in reading about, please feel free to **email** me and I will certainly explore the possibility of writing an article.

When defending an insurer in a motor vehicle case involving a rental vehicle some sound investigation may result in a significant savings. In fact, in the decision of ***Shahrooz v. Lin*** (2014) [set-out below] the insurer ended up saving hundreds of thousands of dollars following a decision regarding the priority rules of indemnity of insurance. While as it is commonly understood that Section 277 (otherwise known as Bill 18) sets out that an insurer of a personal vehicle has priority of insurance over that of the insurer of a rental vehicle, a closer review of the law suggests that this is not always the case. Knowledge of the law pertaining to rental vehicles is essential to the proper adjusting of such claims; and may result in a reduction or even the elimination of exposure.

The Basics

The widely held view of the purpose of section 277 was to make an insurer of the owner of a rental vehicle the lowest in the line of priority when dealing with the obligation to indemnify a claimant for his loss. To be clear, the insurer of a rental vehicle is responsible for indemnifying a claimant, but only the last of three levels of priority. The insurer of a defendant's personal vehicle in a rental vehicle case is typically first in the line of priority. In short, the order of priority is as follows:

1. The lessee's insurer is first
2. The driver's insurer is second
3. The owner's insurer is third

What is pivotal is the actual language of Section 277 (1.1). Section 277 (1.1) does not specifically mention anything about rental companies and rental vehicles. The actual language addresses "leased" vehicles and "lessees" (see end of article for language of section 277). In most cases there is no confusion over the circumstances involving a leased / rental vehicle. For instance, a car rental company owns the vehicle (ie Budget) and rents the vehicle to a renter (ie Smith). That is a straightforward case in which the insurer for Budget is last in the line of priority and the insurer for Smith as the lessee is first. Not all facts match this straightforward model; and this is what we need to investigate.

Shahrooz v. Lin (2014): If Two Lessees Then They Are Equal In Priority

In ***Shahrooz*** (my case), the defendant Lin rented a van directly from the hardware store Rona to transport goods to his home. Rona had leased the van from the rental company Ryder. Lin was involved in a motor vehicle accident while driving the rental vehicle which resulted in the claimant Shahrooz suffering from significant injuries (including being found catastrophic in the accident benefits realm). Both Rona and Ryder were insured with the same insurer. The issue to be decided is which insurer had priority; the insurer for Lin or the insurer for Rona.

The Court found that there were two lessees in this case. By way of a leasing agreement, Ryder had leased the van to Rona. By way of a rental agreement, Rona had leased the van to Lin (it was found that renting is equivalent to leasing). The Court found that section 277 (1.1) did not specifically set-out any language that gave unique rights to owners of rental vehicles. The language discussed lessees, drivers, and owners. Similarly, it was irrelevant that the same insurer insured both Rona and Ryder. The Court found that both Rona and Lin were lessees and equal in the line of priority.

As per section 277(1.2) of the ***Insurance Act***, the court found that the insurer for Lin and the insurer for Rona are equally liable to indemnify the claimant. Accordingly, the insurer for Lin and for Rona were both responsible to compensate the claimant on a 50% basis. Since Lin had $1,000,000 in policy coverage through his personal automobile policy, both the insurer for Lin and the insurer for Rona were both responsible for a maximum of up to half of those limits ($500,000 each). While as the claimant is not affected by this ruling, the insurers for Lin and Rona were found responsible to compensate the claimant on a 50-50 basis.

The significance of this ruling lies in the importance of uncovering who is the true owner of a rental vehicle. For instance, does Budget own all of its rental vehicles, or does it lease these vehicles from a third party company? If Budget were to lease its vehicles then perhaps we are dealing with another situation involving two (or more) lessees. By application of the decision of ***Shahrooz***, the insurer for the personal vehicle would limit their exposure to 50% (or less) if there is more than one lessee of the vehicle.

At the adjusting / discovery stage, it is imperative to obtain the particulars of the actual owner of the vehicle. If the owner of the vehicle is not the car rental company, then the nature of the agreement between the two companies for the use / operation of the vehicle must be investigated in order to determine if we are dealing with a case involving two lessees.

Intact Insurance Company of Canada v. American Home Assurance Company of Canada, (2013) Who Is the True Lessee: Business or Personal

In ***Intact v. American Home***, an employee of the company Colt Engineering rented a vehicle from Budget Car Rental on a credit card that was provided to him by the company. The credit card was in the employee's name but was provided to him by the company, there was an agreement that he would be fully reimbursed for the car rental expenses, and he was in the course of his business when he rented the vehicle. At the time of the accident, Intact insured the employee for his personal vehicles and American Home insured Colt Engineering under a CGL policy that provided automobile accident coverage if an employee is involved in motor vehicle accident in the course of his or her employment.

The question that was left to the Court to determine was whether the technical lessee of the vehicle was the employee or the employer. If the lessee was the employer then American Home would have first priority but if it was the employee then Intact would be required to respond.

The Court found that the true lessee was the employee and accordingly Intact had the first level of priority. In short, the Court ruled that if it were to find the employer as the lessee that this would introduce the concept of a "de facto lessee" and give rise to complicated questions regarding employment law. The Court also reasoned that the actual signed contract was between Budget and the employee and that there was no direct nexus between Budget and the employer. The specifics of the ruling are as follows:

> "As a matter of first impression, I agree with American Home's argument. I see no unfairness in a straightforward interpretation of the section, and I see no reason to give s. 277 a reading that would introduce the concept of "de facto lessee" and encourage factual and legal disputes between insurers about how employment law, agency law, corporate law, partnership law, and the law of contract might apply to cast doubt on who is a lessee under s. 277 of the ***Insurance Act.***
>
> Who is the lessee can be tested and determined by asking the following question: Who can the lessor (Budget Car Rental) sue to enforce the car rental contract? In the case at bar, the answer to this question is Mr. Ashrafi. In the case at bar, the privity of contract was between Budget Car Rental and Mr. Ashrafi. This is not a case where Colt Engineering signed a car rental contract; this is a case where Mr. Ashrafi signed a car rental contact. As it happens, Mr. Ashrafi is entitled to be reimbursed for the rental expense by Colt Engineering but that is a matter between him and Colt Engineering. There is no privity of contract between Budget Car Rental and Colt Engineering."

This decision raises some important issues pertaining to vicarious liability and insurance law. If an employer has

a policy of automobile insurance that covers the actions of its employees while they are operating vehicles one would think that the employer's policy of insurance would respond. This risk was presumably contemplated by the employer's insurer. It would be interesting to see if another Judge would come to the same conclusion.

Elias v Koocheck (2014) A Third Party Defendant Has Priority

In ***Elias***, the renter of the vehicle was Moshe and the driver of the vehicle at the time of the accident was Koochek. Koochek was listed as an additional driver on the rental agreement and did not have his own personal insurance. Moshe had personal insurance but was not named as defendant in the lawsuit as he was not driving the vehicle. The named defendants were the driver of the vehicle (Koocheck) and the owner of the vehicle (Aviscar). Accordingly, the insurance policy of Aviscar was forced to respond to the claim. Aviscar then commenced a third party claim against Moshe and brought a motion to determine which insurer was responsible to respond to the claim.

The third party Moshe argued that since he was a third party he was only responsible to reimburse the defendant after a verdict at trial. Since he was not a defendant in the lawsuit, there was no "insurance available" as per the language of section 277(1.1). The Court disagreed and found that the insurer for the third party Moshe had first priority to respond to this claim as the intent behind the legislation "was to make the owner's policy a policy of last resort and to make the renter's policy the first to respond". The Judge found that the Third Party Moshe could not rely on the technical mechanism by which a party was brought in to the litigation to defeat the applicability of section 277(1.1).

Nguyet v. King, (2011) No Duty To Defend Rental Company

The priority rules that dictate the obligation of the insurer for the leased vehicle to have priority, do not require it also to defend the rental company. In ***Nguyet***, the Court of Appeal ruled that s.277(1.1) imposes no duty on the lessee's insurer to defend the rental insurer. Section 277(1.1) speaks to the priorities of payment of losses by third party plaintiffs and not to an obligation to defend. There is no contractual relationship between the two.

This is particularly important when there is an allegation of faulty mechanical repair or the failure to equip the vehicle with snow tires in snowy weather conditions. The renter of a vehicle is not responsible for ensuring that the vehicle is fit for operation; that is the obligation of the rental company. If the vehicle is defective then that is an actionable wrong as against the owner of the vehicle and not the driver.

Conclusion

In most cases the issue of priority of indemnification in a rental vehicle case will be straightforward. The personal insurer for the renter will have priority over that of the insurer for the rental company. With that being said, certain basic investigations ought to be performed to properly investigate whose duty is it to respond to the claim. As in ***Shahrooz***, we need to determine who the actual owner of the vehicle is and the nature of any leasing agreements. Does a rental company actually own the vehicle? Is there a third party situated between the owner of the vehicle and the renter. As per ***Intact v. American Home*** there may be a distinction in priority between a vehicle that has been rented by an individual for personal reasons compared to one rented on behalf of a company. In ***Elias*** it was found that an insurer for a renter who was named as a third party (not a defendant) would have priority over a named defendant. In ***Nguyet*** we learn that there is no duty for an insurer of a personal vehicle to defend a rental company.

A proper investigation of a claim involving rental vehicles requires us to probe into the intricacies of the relationship between the parties. As in the ***Shahrooz*** case, we just might find something unique about the case that substantially reduces or eliminates any exposure.

Download: Shahrooz et al v.Yuan Lin et al Reasons.pdf

Section 277(1) Of The *Insurance Act*

Other insurance

277. (1) Subject to section 255, insurance under a contract evidenced by a valid owner's policy of the kind mentioned in the definition of "owner's policy" in section 1 is, in respect of liability arising from or occurring in connection with the ownership, or directly or indirectly with the use or operation of an automobile owned by the insured named in the contract and within the description or definition thereof in the policy, a first loss insurance, and insurance attaching under any other valid motor vehicle liability policy is excess insurance only. R.S.O. 1990, c. I.8, s. 277 (1).

Order in which policies are to respond

(1.1) Despite subsection (1), 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:

1. Firstly, insurance available under a contract evidenced by a motor vehicle liability policy under which the lessee of the automobile is entitled to indemnity as an insured named in the contract.

2. Secondly, insurance available under a contract evidenced by a motor vehicle liability policy under which the driver of the automobile is entitled to indemnity, either as an insured named in the contract, as the spouse of an insured named in the contract who resides with that insured or as a driver named in the contract, is excess to the insurance referred to in paragraph 1.

3. Thirdly, insurance available under a contract evidenced by a motor vehicle liability policy under which the owner of the automobile is entitled to indemnity as an insured named in the contract is excess to the insurance referred to in paragraphs 1 and 2. 2005, c. 31, Sched. 12, s. 6 (1).

If more than one policy required to respond

(1.2) For the purposes of the application of each of paragraphs 1, 2 and 3 of subsection (1.1), if insurance is available under more than one motor vehicle liability policy that is required to respond, each insurer is liable only for its rateable proportion of any liability, expense, loss or damage. 2005, c. 31, Sched. 12, s. 6 (1).

Exceptions

(1.3) Subsection (1.1) does not apply,

(a) to an insured's right of recovery referred to in subsection 263 (2);

(b) if the automobile is not a motor vehicle as defined in subsection 1 (1) of the ***Highway Traffic Act***; or

(c) if subsection 267.12 (1) does not apply. 2005, c. 31, Sched. 12, s. 6 (1).

Insurer liable only for its rateable proportion of liability, etc.

(2) Subject to sections 255 and 268 and to subsection (1) of this section, if the insured named in a contract has or places any other valid insurance, whether against liability for the ownership, use or operation of or against loss of or damage to an automobile or otherwise, of the insured's interest in the subject-matter of the contract or any part thereof, the insurer is liable only for its rateable proportion of any liability, expense, loss or damage. R.S.O. 1990, c. I.8, s. 277 (2).

Rateable proportion defined

(3) "Rateable proportion" as used in subsections (1.2) and (2) means,

(a) if there are two insurers liable and each has the same policy limits, each of the insurers shall share equally in any liability, expense, loss or damage;

(b) if there are two insurers liable with different policy limits, the insurers shall share equally up to the limit of the smaller policy limit;

(c) if there are more than two insurers liable, clauses (a) and (b) apply with necessary modifications. R.S.O. 1990, c. I.8, s. 277 (3); 2005, c. 31, Sched. 12, s. 6 (2).

Lessee defined

(4) In this section,

"lessee" means, in respect of an automobile, a person who is leasing or renting the automobile for any period of time, and "leased" has a corresponding meaning. 2005, c. 31, Sched. 12, s. 6 (3).

The Beard Winter Defender
Past Issues

Everything An Accident Benefits Adjuster Needs To Know About A Tort Claim But Were Afraid To Ask

There are fundamental differences in the adjusting for an accident benefits claim compared to that of a bodily injury claim.

What You Need To Know About An Incurred Expense

One of the most significant changes to the *Schedule* post September 1, 2010 revolves around the question as to what constitutes an incurred expense. Gone are the days in which a family member / friend would be compensated for providing attendant care assistance to a claimant for love. Now they must show they did it for money.

The New Summary Judgment Rules and Insurance Law: A New Weapon in the Arsenal of Litigation (tort and accident benefits)

As an insurer, there is perhaps nothing more frustrating then getting dragged into years of litigation when there is no legal exposure.

What is an Economic Loss? The Appeal Courts Have Spoken

Slowly but surely the changes to the Statutory Accident Benefits Schedule are being interpreted by the Courts and Arbitrators. The Court of Appeal decision of *Henry v. Gore* (2013) and The Director's Delegate decision of *Simser v. Aviva* (2014) provide us with some guidance as to what an Economic Loss means.

The Law of Damages In Motor Vehicle Accident Cases (Tort): 101

The law with respect to the burden of proof in motor vehicle accident cases is often overlooked until it is too late. We need to know what we need to prove when assessing cases, advancing a position at a mediation, and well before we step inside a courtroom.

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