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B.C. "CAPS" VEHICLE LESSORS' VICARIOUS LIABILITY EXPOSURE



BACKGROUND

Many British Columbia drivers only carry the basic minimum third party liability coverage of \$200,000. As a result, many injured parties are left pursuing a driver with inadequate coverage. Those parties have some options, particularly if the driver is not the owner of the vehicle. In B.C. drivers who have possession of a motor vehicle with the express or implied consent of its owner are deemed by B.C.'s *Motor Vehicle Act* to be the owner's "agent or servant". At law this makes the owner vicariously liable for the driver's negligent operation of the vehicle.

THE LAW

The B.C. *Motor Vehicle Act*, specifically Section 86, provides that the owner of a motor vehicle is vicariously liable for the damages caused by a driver, unless the owner "*only retains his title while a conditional sales contract is being fulfilled.*" Does that include a lease agreement if there is an option to purchase the vehicle at the end of the lease period? If so, would that mean that leasing companies would not be vicariously liable for the motorist's tort liability?

In *Yeung (Guardian ad litem of) v. Au* the B.C. Court of Appeal concluded that a lease with an option to purchase was different than a conditional sales contract. The Court reasoned that a lessor was not entitled to the same protection as a conditional sale vendor. Unlike its previous decision in *Schoenbach*, the Court did not rely on the repealed statutory definition of a conditional sales contract (from the old *Sale of Goods on Condition Act*), and instead stated that when an Act is repealed the Court must consider that it never existed. The Court applied the common-law definition of a conditional sales contract (where the buyer agrees to purchase the item and pay in instalments), which did not include leases with an option to purchase. The Court determined that if the leasing company's lease in *Yeung* was no longer protected by the exception in the *Motor Vehicle Act* for conditional sales agreements, then it had no reason not to hold the leasing company vicariously liable as an owner of the vehicle. The damage award was almost \$6 million. Since this decision in 2006, leasing companies have faced significant legal exposure for motorist's careless driving. Lawyers have since raised arguments that there are differences as between a "true lease" and a "financing lease", but this was not considered in *Yeung*. Leave to appeal to the Supreme Court of Canada was granted in *Yeung* earlier this year.

B.C. CAPS VICARIOUS LIABILITY – NEW LEGISLATION

In response to *Yeung*, the efforts of lobbyists such as the Truck Rental and Leasing Association (TRALA) and in consideration of recent changes to laws in the United States and Ontario to either eliminate or contain lessors' vicarious liability, B.C. has taken steps to legislate a "cap" on lessors' vicarious liability.

Amendments to the *Insurance (Vehicle) Act* have passed 3rd Reading in the Legislature but are not yet in force. Upon ratification by the Lieutenant Governor In Council section 82.1 will provide that the maximum amount for which the lessor of a motor vehicle is liable, in its capacity as lessor of the motor vehicle, is \$1 million "*in respect of any one incident*".

We expect that section 82.1 of the *Insurance (Vehicle) Act* will come into force during the fall session of the Legislature.

IMPACT OF A LEGISLATED "CAP" ON LESSORS' LIABILITY

- Organizations and companies involved in vehicle renting and leasing now have the security of knowing their exposure is limited however the exact degree of the limit is yet to be determined.
- The meaning of "*in respect of any one incident*" will likely be determined by the Courts. "Incident" may have a meaning that equates with accident or occurrence or a meaning that equates with an individual person's loss or damage.
- TRALA continues to work to clarify the new legislation's impact on both the lessee and lessor relative to insurance primacy. TRALA is pushing for a solution similar to last year's efforts in Ontario that makes the lessee's policy primary. Under Ontario law, the lessor is vicariously liable only for the difference between the lessee's coverage and the \$1 million cap in place in that province.
- Lessors could still have liability exposure independent of vicarious liability, to which there is no legislated ceiling.
- With lower liability exposure, premiums for Lessors Contingent Liability insurance may be reduced.

AUTHOR Steven D. Wallace
Direct Line: 604-891-0353 E-mail: swallace@dolden.com

EDITOR Alex L. Eged
Direct Line: 604-891-0357 E-mail: aeged@dolden.com