Focus INSURANCE

Excess policy coverage depends on the province

Nicole Mangan

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Lessor liability caps and the coverage available to lessees under a lessor's excess insurance policy were issues recently considered in *Stroszyn v. Mitsui Sumitomo Insurance Co.* [2014] B.C.J. No. 2723, and *Xu (Litigation guardian of) v. Mitsui Sumitomo Insurance Co.* [2014] O.J. No. 5454. While the decisions appear to produce consistent results, the provincial legislative schemes contain important differences.

In *Stroszyn*, the court concluded that under section 82.1 of B.C.'s *Insurance (Vehicle) Act*, the amounts paid under a primary policy reduced any payment obligations owed by the lessor. The court also found that the insurer's failure to comply with section 61 of the act, which requires express warning provisions if contractual terms in an optional insurance contract differ from the underlying policy, resulted in coverage for additional insureds despite express, contrary policy terms.

In the case, a vehicle driven by Stroszyn was struck by a vehicle driven by Jason Chen and leased by Mary Chen from Honda Canada Finance Inc. Chen's lease agreement with Honda required her to carry $1 million of liability insurance, and name Honda as an insured. Honda was also an insured under an excess insurance policy to a limit of $9 million with Mitsui Sumitomo Insurance Company Ltd. It was agreed that Stroszyn's damages were $1.6 million. $1 million was paid by Ms. Chen's primary insurer and a determination as to the excess insurer's responsibility for the remaining $600,000 was sought.

Stroszyn argued that s. 82.1 of the B.C. act did not specify that amounts recovered under the primary policy were deductible from the cap where the primary policy was "issued to or obtained by lessees or drivers." The lessor argued that the common law principles of joint liability dictated that the payment by, or on behalf of one jointly liable party, discharged the liability of all other jointly liable parties to the extent of that payment. The court determined each insured could treat the entire primary policy payment as reducing their liability to the plaintiff to the extent of the amount paid. The statutory cap on the lessor's liability then resulted in all the lessor's obligations under the B.C. act being discharged.

Section 267.12 of Ontario's *Insurance Act* expressly reduces the liability of a lessor to the extent of any payment under a primary policy. Despite the differing statutory language, the court in *Stroszyn* was satisfied the B.C. act was not ambiguous on this issue.

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In *Xu*, the court concluded lessees are not entitled to coverage under a lessor's excess insurance policy, beyond the $1 million liability cap applicable to a lessor, for policy periods that arose during the legislative gap between the enactment of section 267.1 of the Ontario act and the OEF 110 endorsement to the standard excess policy form. Section 267.1 provides a $1 million lessor liability cap in defined circumstances. The OEF 110 endorsement expressly limits coverage for a lessee or driver under a lessor's policy. Section 267.1 was introduced by the provincial government in March 2006 and the OEF 110 endorsement was approved on Jan. 1, 2008 (the legislative gap).

In *Xu*, a vehicle driven and leased by Jianhua Lu collided with a vehicle driven by Josephine Tui. Jay Xu was a passenger in Lu's vehicle, which was leased from Toyota Credit Canada Inc. Toyota, it was argued, was entitled to the benefits of two excess policies with Mitsui, the first a commercial excess and umbrella policy with a limit of $5 million, and the second a commercial excess policy with a limit of $10 million. Tui's and Lu's primary insurers paid $1 million each and a determination as to whether the excess insurer had any further responsibility was sought.

The excess policy in *Stroszyn* contained an endorsement that only Honda was an insured in respect of leased vehicles. Section 61 of the B.C. act states that when an optional insurance contract extends the limit of coverage, it must do so for every insured on the same terms and conditions. Certain prohibitions, exclusions and limits to coverage are permitted under optional insurance contracts but they will only be effective if the policy contains, in a prominent place and in conspicuous letters, the words: "This policy contains prohibitions relating to persons or classes of persons, exclusions of risks or limits of coverage that are not in the insurance it extends." These words were not contained in the excess policy, and Honda's excess insurance was deemed to cover the driver and the lessee beyond the limits available under their primary policy.

The section 61 issue from *Stroszyn* would not arise in Ontario as the OEF 110 endorsement confirms that coverage for drivers of leased vehicles under a lessor's insurance policy is limited and *Xu* now applies to the legislative gap.

Comparing the issues and applicable legislation considered in these two decisions reveals that, in each province, different results can arise on the issue of a lessee's coverage under an excess policy obtained by the lessor. However, each province now has greater certainty on this issue.

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Safety: The decision is expected to help municipalities evaluate risk

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As part of its analysis, the court adopted a four-step test for analyzing a cause of action under s. 44 of the *Municipal Act, 2001*:

1. Non-repair

The plaintiff must prove on a balance of probabilities that the municipality failed to keep the road in question in a reasonable state of repair.

2. Causation

The plaintiff must prove the "non-repair" caused the accident.

3. Statutory defences

Proof of "non-repair" and causation establish a prima facie case of liability against a municipality. The municipality then has the onus of establishing that at least one of the three defences in s. 44(3) applies.

4. Contributory negligence

A municipality that cannot establish any of the three defences in s. 44(3) will be found liable. The municipality can, however, show the plaintiff's driving caused or contributed to the plaintiff's injuries.

> A municipality has no duty to keep its roads safe for those who drive negligently.
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> **Court of Appeal for Ontario**

A clear test will help counsel and judges analyze the evidence and the law and hopefully lead to decisions that are more consistent with the statute and leading authorities.

Finally, the court rejected the trial judge's notion that the duty of care owed to "the ordinary driver" is open to adjustment based on local custom, instead agreeing with the appellant that this is "an invitation to traffic chaos." There is but one universal standard of care expected of drivers across the province — "the ordinary driver exercising reasonable care" — and the municipality's duty extends only to making its roads safe for those reasonable drivers.

It is hoped that the analysis contained in the *Fordham* decision will be followed in other cases, thereby restoring confidence on the part of municipalities and their insurers that the liability of road authorities will be assessed in a manner consistent with leading jurisprudence and statutory authority. In turn, this should promote predictability in the assessment of liability when accidents occur and, more importantly, allow municipalities to evaluate their risk and take reasonable steps to prevent accidents that could give rise to liability in the first place.

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