



Burns' Briefs

VICARIOUS LIABILITY... LIABILITY WITHOUT FAULT

Recently, several originators have asked me to provide an update on the status of vicarious liability in British Columbia, Alberta and Ontario. Fortunately, early in my research the CFLA released its Winter Newsletter which contains just such an update.

By way of background, the concept of vicarious or substitute liability in the context of vehicles and accidents arose so that people who had chauffeurs could not escape liability when the chauffeur got into an accident. You learn early on in law school to sue wide, starting with the driver and the owner of the vehicle and trying to extend the claim to the manufacturer and everyone in between. The 'objective' is to find the deep pockets. The resulting extension to lessors, as owners, is antiquated and unfair. However, Courts seem to try and find compensation for victims and who better to target than well insured corporations. Anyway, the following is the current status:



British Columbia

On February 1, 2007, three judges of the Supreme Court of Canada accepted the request for a hearing in the appeal of the decision of the BC Court of Appeal in the Transportacion case.

In May, 2006, the provincial Court of Appeal essentially overturned the decade-long understanding that a vehicle lessor with a lease containing an option to purchase was not vicariously liable for damages and injuries resulting from an accident where the driver of the leased vehicle was at fault.

The decision of the Supreme Court of Canada granting leave to appeal the Transportacion judgment of the BC Court of Appeal is significant. There is some concern, however, that the BC Government may simply decide to delay legislative action until the Supreme Court of Canada decides which could take 2 to 3 years. Whether or not the Supreme Court eventually overrules the Court of Appeal will not solve the industry problem. The CFLA and the BC Superintendent of Motor Vehicles are in negotiations.

If you are interested in learning more about the Transportacion case and some suggestions for protecting yourself from liability, I have attached a publication of Davis & Company LLP. If you cannot open the attachment then go to www.davis.ca and click on publications and search the words "vicarious liability" to get the May, 2006 article by Robert B. Swift & Diana L. Dorey.

In my view, an open ended lease with a guaranteed residual value does not constitute a 'conditional sale contract' and so vicarious liability would apply, so let's hope the negotiations are successful.



Alberta

In April of 2003, the Alberta Court of Appeal dismissed two Ford Credit Canada Limited appeals and confirmed that lessors are “owners” of vehicles, under the Alberta Highway Traffic Act. As such, lessors are “vicariously liable for loss or damage sustained in consequence of the driver’s (lessee’s) negligence provided that the driver had the care and possession of the motor vehicle with the owner’s express or implied consent”.

As in BC, the CFLA and the Motor Dealer’s Association of Alberta are in discussions with the government.



Ontario

The amendments to the Ontario Highway Traffic Act and to the Insurance Act capping the vicarious liability of lessors and rental companies at a maximum of \$1 million came into effect on March 1, 2006 (my 54th birthday). The changes were not retroactive. In other words, lessors and rental companies remain liable for injuries and damages caused by the negligent use of vehicles they own arising from accidents prior to March 1, 2006 so make sure your assets are protected.

On January 23, 2007, a judgment was rendered by the Ontario Superior Court of Justice involving a vehicle accident. According to the judgment liability was not the issue; rather the quantum of damages was the focus. The accident involved a leased vehicle driven by the lessee and the claims come from two passengers. The lessor is Ford Credit and the damage award is \$24 million. Because the accident occurred in 2003, prior to the March 1, 2006 change in legislation in Ontario, the lessor may well be held to be vicariously liable. The amount of damages granted in this judgment may be appealed.

As of March 1, 2006 there is a cap of \$1 million on the vicarious liability of vehicle lessors and renters. If a leased or rented vehicle is the cause of a serious accident, the lessor or rental company will have no liability so long as the customer has \$1 million of insurance. If the lessee or rental customer has less than \$1 million of coverage (or is denied coverage for some breach of insurance contract condition), the lessor or rental company, as owner of the vehicle, is liable for the difference between the insurance the customer has and \$1 million.

It is important to note that under Bill 18, it was a deliberate policy decision to exclude the owners of taxi cabs, limousines and “livery vehicles” from the protection of the \$1 million ‘cap’. Where the “owners” of these vehicles are lessors or rental companies, they remain fully vicariously liable for injuries arising from negligent use of these vehicles. The reference to “livery vehicles” was included even when officials later confirmed they did not know what a “livery vehicle” was and still cannot tell the industry. You can bet that the Courts will tell us in the fullness of time if the industry reps and government cannot agree.

There have been concerns that claims can be made against the insurers of lessors and rental companies for injuries caused by the negligence of lessees or renters that could effectively circumvent the “cap”.

One ‘gap’ area in insurance relates to the short term rental of trucks. Most short term renters of trucks may only have personal auto insurance policies. Those personal auto policies do not insure the driver’s liability when driving a truck, only a passenger car. In those circumstances, in the event of an accident claim, the short term renter of a truck will not have any insurance in place to respond to a claim. The \$1 million liability of the rental company will therefore be called upon. Rental companies can include insurance coverage in its rental fee and automatically obtain at least \$1 million of insurance to cover this liability.

The Financial Services Commission of



Ontario (“FSCO”) regulates the auto insurance sector. Among other things, FISCO mandates the specific wording that must be used in contracts of auto insurance regardless of who may be the insurer.

The current FSCO mandated contract language states that the primary policy insures the owner and the driver. In light of the changes to the law brought in by Bill 18, FSCO intends to amend the mandated contract language of the primary contract to state that the primary policy insures the driver, the owner and the lessee.

Most lessors and rental companies have a secondary, excess or umbrella auto policy that provides broad business insurance backup-typically for anywhere between \$5 and \$20 million. FSCO has mandated the required contract language for the secondary, excess or umbrella auto policy as well. This policy insures a number of risks. Among other things, the FSCO mandated language states that the secondary or umbrella auto policy covers the vehicle owner (the lessor or the rental company) and the driver of the vehicle.

The effect of the FSCO language is to open up secondary, excess or umbrella auto policy to claims against the “driver” of the vehicle up to the amount of the policy coverage. So while Bill 18 may “cap” the liability of a lessor or rental company at \$1 million, the effect of the FSCO mandated contract language is to allow the cap to be circumvented as a claim for a much larger amount could be exercised against the insurer of the lessor or rental company under the secondary, excess or umbrella policy. Apparently, although the intention was to cap both personal injury and property damage, the

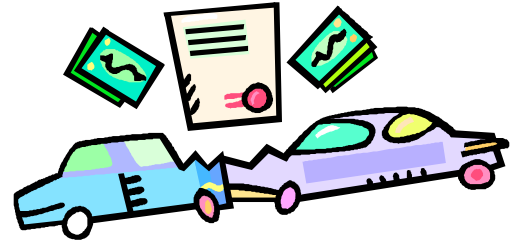
Contact List

Questions, comments, or concerns may be directed to the appropriate person:

General Ph: 416-364-6191
Fax: (416) 364-6642
Email: info@corpfinance.ca
John Burns: (416) 673-2366
Rozmin Patel: (416) 673-2361
Bruce Wonnacott: (416) 673-2353
Alison Bell-Ashley: 416-673-2365
Tammi Adams (416) 673-2374

drafting inadvertently omitted a reference to property damage.

So, stay tuned for a definition of “livery vehicle”; new language from FSCO and hopefully a cap on property damage.



AND IN OTHER NEWS...

On August 10, 2005, U.S. President George Bush signed the federal highway bill, which included the “Graves Amendment”- a ban on vehicle lessor and rental company vicarious liability across the United States.

On September 11, 2006, Judge Thomas V. Polizzi of the Supreme Court, Queens County, held that the “Graves Amendment” “is an unconstitutional exercise of congressional authority under the Commerce Clause...”. Of course there is another decision by a different Queens County Supreme Court upholding the law. Expect an appeal. The legal effect of the decision will be limited to the State of New York but pending a successful appeal, those leasing or renting vehicles in the State of New York may now revert to business practices in place there prior to the adoption of pre-empting federal legislation in August 2005. The point is that just when you think you can relax because a law has been passed the Courts might intervene to strike it down.

The issue of vicarious liability should be of interest to all originators because the law of vicarious liability is determined by the jurisdiction in which the accident occurs, not the governing law of the province stated in the contract of lease. In other words, if an accident occurs in Ontario involving a vehicle leased in BC or Alberta, a vicarious liability claim arising from the accident is subject to the laws of Ontario.

