COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Stroszyn v. Mitsui Sumitomo Insurance Company Limited,* 2014 BCCA 431

Date: 20141106
Docket: CA041239

Between:

Edward Paul Stroszyn

Respondent
Appellant on Cross Appeal
(Petitioner)

And

Mitsui Sumitomo Insurance Company Limited

Appellant
Respondent on Cross Appeal
(Respondent)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Bennett
The Honourable Mr. Justice Willcock

On appeal from: An order of the Supreme Court of British Columbia, dated September 5, 2013 (*Stroszyn v. Mitsui Sumitomo Insurance Company Limited*, 2013 BCSC 1639, Vancouver Docket S131520).

Counsel for the Appellant Mitsui Sumitomo Insurance Company Limited:	D.L. Munn & A. Dixon
Counsel for the Respondent E.P. Stroszyn:	D.W. Yule, Q.C., J. Stanley, & S. Gersbach
Place and Date of Hearing:	Vancouver, British Columbia September 24, 2014
Place and Date of Judgment:	Vancouver, British Columbia November 6, 2014

Written Reasons by:
The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Madam Justice Bennett

Summary:

On appeal, a lessor's excess insurer seeks to set aside a declaration that the lessor's liability to pay damages to an accident victim (limited by s. 86 of the Motor Vehicle Act and s. 82.1 of the Insurance (Vehicle) Act to $1 million) is not reduced by payments made by ICBC under an insurance policy obtained by the lessee. On cross appeal, the accident victim seeks to set aside the determination that the driver of the vehicle is not an insured under the excess policy.

HELD: The appeal and cross appeal are allowed. The chambers judge erred in characterizing the settlement payment as a payment made on behalf of the lessee and driver only. ICBC insured all parties under the primary policy and its payment to the petitioner was made on behalf of each and every insured. As such, the payment has the effect of reducing the statutory liability of the lessor to the full extent of the payment made. FURTHER HELD: The driver is an insured under the excess policy, subject to the same terms and conditions in the underlying certificate and policy, as a result of the insurer's failure to expressly exclude drivers from coverage in accordance with the terms of s. 61(2) of the Insurance (Vehicle) Act.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] The parties to this appeal agreed to pose two questions of law to a judge in chambers as a term of the settlement of a claim for damages. This appeal and cross appeal arises from the resulting order.

[2] The petitioner and respondent in this matter, Mr. Stroszyn, suffered injuries as a result of a motor vehicle accident on May 15, 2008, when he was struck by a vehicle driven by Jason Chen, leased by Mary Chen ("Ms. Chen") from Honda Canada Finance Inc. ("Honda"). He brought an action against Jason Chen, Ms. Chen and Honda (the "Tort Action"). The parties settled the value of the petitioner's damages at $1,600,000. The Insurance Corporation of British Columbia ("ICBC") paid $1 million to the petitioner and the parties agreed to refer two questions to the court pursuant to a Reference Agreement dated December 20, 2012.

[3] The first question arises from the statutory limit on the amount for which the lessor of a motor vehicle is liable for damages arising from an accident involving the

leased vehicle. The parties (including, for this purpose, Honda's insurer, Mitsui Sumitomo Insurance Company Ltd. ("Mitsui")) seek to determine whether Honda is liable to pay to the petitioner any amount in excess of the $1 million paid by ICBC. They refer to this question as the "lessor damages" question.

[4] The second question arises because Jason Chen's liability, unlike that of the lessor, is not limited by statute. Honda is insured pursuant to a policy of excess insurance issued by Mitsui to a limit of $9 million. If Jason Chen is an insured under this policy, Mitsui will be obliged to pay to the petitioner the balance of the agreed damages on Jason Chen's behalf. The parties refer to the question whether he is so insured as the "excess coverage" issue.

[5] These two issues were described in the Reference Agreement as follows:

> The statement of Defence of Honda in the Tort Action pleads that the maximum amount for which Honda is liable, as the lessor of the vehicle driven by Mr. Chen, is the amount prescribed under section 82.1(2) of the *Insurance (Vehicle) Act,* that amount being $1 million (the "Lessor Damages Cap"). The Plaintiff contends that the Lessor Damages Cap applies in excess of the limits of the ICBC Policy, with the effect that the potential liability of Honda in the Tort Action is capped at $2 million, not $1 million.
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> The Plaintiff, and the Chens, contend that Jason Chen is an additional insured under the Mitsui Policy, and Mitsui denies that such is the case.

[6] The Reference Agreement resulted in a petition pursuant to Rule 2-1(2)(c) of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009, seeking resolution of the following points of law:

> a) Does s. 82.1 of the *Insurance (Vehicle) Act* operate to limit the exposure of Honda Canada Finance Inc. to $1,000,000 less any amounts recovered for loss or damage from bodily injury under the third party liability provisions issued by ICBC to Mary Chen and Honda Canada Finance Inc?; and
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> b) Is Jason Chen or Mary Chen an unnamed insured under a policy of insurance that the respondent placed with Honda Canada Finance Inc.?

[7] The chambers judge, for reasons indexed as 2013 BCSC 1639, resolved the "lessor damages" question in the petitioner's favor, holding that the liability of Honda in the Tort Action was not reduced by payments made by ICBC. Mitsui appeals that

order. The judge resolved the "excess coverage issue" in favor of Mitsui, holding that Jason Chen was not insured under the Mitsui policy. The petitioner cross appeals that order.

<u>The Statutory Framework and the Context of the Dispute</u>

[8] The petition was heard on the footing that the petitioner's injuries were caused by the negligence of the defendant Jason Chen. The liability of both Ms. Chen and Honda is vicarious liability arising from statutory provisions that deem the driver to be the agent of both the lessor, Honda, and the lessee, Ms. Chen.

[9] Section 86 of the *Motor Vehicle Act* (the "*MVA*"), R.S.B.C. 1996, c. 318, makes owners, lessees and lessors of automobiles vicariously liable for members of their households and those who drive vehicles with their consent:

> 86 (1.1) In the case of a motor vehicle that is in the possession of its lessee, in an action to recover for loss or damage to persons or property arising out of the use or operation of the motor vehicle on a highway, a person driving or operating the motor vehicle who
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> > (a) is living with, and as a member of the family of, the lessee, or
> >
> > (b) acquired possession of the motor vehicle with the consent, express or implied, of the lessee,
>
> is deemed to be the agent or servant of, and employed as such by, that lessee and to be driving or operating the motor vehicle in the course of his or her employment with that lessee.
>
> (1.2) In the case of a motor vehicle that is in the possession of its lessee, in an action to recover for loss or damage to persons or property arising out of the use or operation of the motor vehicle on a highway, a person driving or operating the motor vehicle who acquired possession of the motor vehicle with the consent, express or implied, of its lessor is deemed to be the agent or servant of, and employed as such by, that lessor and to be driving or operating the motor vehicle in the course of his or her employment with that lessor.

[10] Section 86 of the *MVA* limits the statutory liability of the lessor, but not the driver:

> (1.3) The liability under subsection (1.2) of a lessor is subject to the applicable limit established under section 82.1 of the *Insurance (Vehicle) Act*.

> (2) Nothing in this section relieves a person deemed to be the agent or servant of the owner or lessee and to be driving or operating the motor vehicle in the course of his or her employment from the liability for such loss or damage.

[11] The limit of the lessor's vicarious liability is set out in s. 82.1 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 ("*I(V)A*"):

> 82.1 (1) In an action to recover for loss or damage to persons or property arising out of the use or operation of a leased motor vehicle on a highway in British Columbia, the maximum amount for which the lessor of the motor vehicle is liable, in that lessor's capacity as lessor of the motor vehicle, in respect of any one incident is the amount determined under subsection (2).
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> (2) The maximum amount for the purposes of subsection (1) is the greatest of the following amounts:
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> > (a) $1 000 000;
> >
> > (b) the amount established, or determined in the manner prescribed, by regulation;
> >
> > (c) the amount of third party liability insurance coverage required by law to be carried in respect of the motor vehicle.
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> (3) Subsection (1) does not apply
>
> > (a) in respect of amounts payable by a lessor other than by reason of vicarious liability imposed under section 86 of the *Motor Vehicle Act*, or
> >
> > (b) to prescribed lessors or motor vehicles, or prescribed classes of lessors or motor vehicles.

[12] The lease agreement between Honda and Ms. Chen stipulated that she would obtain third-party liability insurance to a limit of at least $1 million and that such insurance would cover Honda. She did so. Ms. Chen, Jason Chen and Honda are insured by a primary third-party liability insurance policy issued by ICBC to a limit of $1 million.

[13] The *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83, Part 2, s. 8, requires that lessors be included as owners on an owner's certificate. It provides:

> 8 An applicant for an owner's certificate for a leased vehicle shall set out in the application form
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> > (a) the name of the owner, followed by the word "lessor",

> (b) the name of the renter of the vehicle, followed by the word "renter", and
>
> (c) the address in the Province of either the owner or the renter of the vehicle.

[14] Honda is the named insured under an excess insurance policy issued by Mitsui to a limit of $9 million. The Mitsui policy, on its face, insures only Honda and expressly provides that it does not insure lessees or drivers of leased vehicles. However, Mitsui is licensed to issue insurance in British Columbia and has deposited a Power of Attorney and Undertaking ("PAU") with the Superintendent of Insurance, and both the license and the PAU bind Mitsui to the BC statutory motor vehicle insurance regime. The regime precludes Mitsui from raising a defence to a claim made against its policy that could not be raised if the policy had been issued in British Columbia.

[15] The *I(V)A* restricts the ability of an insurer providing optional excess auto insurance to contract out of the statutory scheme of insurance:

> 61 (1) An optional insurance contract may only
>
> > (a) extend coverage that is specified in a certificate or a policy to a limit that is in excess of that provided by the certificate or policy for every insured, and, except as provided under subsection (1.1), on the same terms and conditions, or
> >
> > (b) provide coverage that is not specified in a certificate or in a policy that extends the coverage that is specified in a certificate.
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> (1.1) Subject to subsections (1.2) and (2) and the regulations, an optional insurance contract referred to in subsection (1) (a) may prohibit a specified person or class of persons from using or operating the vehicle, exclude coverage for a specified risk or provide different limits of coverage for different persons or risks or classes of persons or risks.
>
> (1.2) An optional insurance contract may not, in respect of third party liability insurance coverage,
>
> > (a) prohibit a person who is living with and as a member of the family of
> >
> > > (i) the owner of the vehicle, and
> > >
> > > (ii) in the case of a leased motor vehicle, if the policy was purchased by the lessee, of the lessee of the motor vehicle,
> >
> > from using or operating the vehicle, or
> >
> > (b) exclude or provide different limits of coverage for that person.

> (2) A prohibition, an exclusion or a limit referred to in subsection (1.1) is not binding on the insured unless the policy has printed on it in a prominent place in conspicuous lettering 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".

Order Appealed From

[16] After describing the positions taken by the parties, the chambers judge resolved the "lessor damages issue" as follows, at paras. 35 and 36:

> [35] In my view, the payment of $1,000,000 on behalf of the lessee does not reduce the liability of Honda Canada to zero. It is simply a payment by one joint tortfeasor towards the total liability of the jointly liable parties. By virtue of s. 86(1.2) of the *MVA*, both the driver, Mr. Chen, and Honda Canada are jointly liable for the damages of $1,600,000. Pursuant to s. 82.1, Honda Canada's portion of that liability cannot exceed $1,000,000. Of the total liability, $1,000,000 has been discharged by ICBC on behalf of the lessee, but Honda Canada remains liable as a joint tortfeasor, for $600,000.
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> [36] This result is consistent with the plain meaning of s. 82.1 of the *I(V)A* which limits the liability of Honda Canada to $1,000,000. Its portion of the joint liability will not exceed $1,000,000. In my view, the combined effect of s. 86(1.2) of the *MVA* and s. 82.1 of the *I(V)A* is to expose a lessor, like Honda Canada, to liability as a jointfeasor, of $1,000,000, but no more. Thus, in this case, if the driver/lessee had no insurance coverage, the lessor would be liable for the amount of $1,000,000. On the other hand, if the insurance coverage of the driver/lessee resulted in a payment of $1,600,000, then no amount would be payable by the lessor, Honda Canada.

[17] Turning to the "excess coverage issue" the chambers judge held:

> [48] The Policy does not contain the words in quotes in s. 61(2).
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> [49] I agree with the respondent that, by implication, the words of s. 61(1.2) contemplate that where an excess policy is not purchased by a lessee, such as in the case at bar, the persons mentioned in that section can be excluded or covered up to different limits than the insured.
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> [50] I also agree with the respondent that s. 61(1.2) is meant to protect insureds from exclusions or limits to coverage of which they may not be aware. Where, as here, the driver/lessee were not insured under the Policy, s. 61(1.2) has no application in relation to them. Surely, the lack of the wording in the Policy referred to in quotes in that section does not make the driver/lessee insured parties under the Policy.
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> [51] In my view, the coverage under the Policy is only extended to the lessor as the named insured, and the provisions of s. 61 of the *I(V)A* do not alter the effect of its express terms so as to provide coverage to the lessee/driver.

The Appeal

[18] Mitsui says the judge erred in law in characterizing the $1 million payment by ICBC as a payment made solely on behalf of the lessee and not a payment made on behalf of all of the insureds, including the lessor, Honda. In effect, Mitsui says the question before the court was mischaracterized by the judge (at para. 13) as follows:

> The interpretation question that arises is whether, pursuant to s. 82.1, the liability of a lessor is reduced by <u>any amount paid by the lessee's insurer</u>.
>
> [Emphasis added.]

[19] Mitsui says the payment of a portion of the judgment by any party jointly and severally liable with another discharges the liability of all, and that being the case, the payment of $1 million to the petitioner discharges all those jointly liable to the full extent of the payment. It says the legislature has not altered that rule by enacting the provisions of the *MVA* or the *I(V)A*.

[20] The petitioner argues, in its factum, that the statutory limit of the lessor's liability is not reduced by payments made by insurers pursuant to third-party liability coverage in policies *issued to or obtained by* lessees or drivers (whether or not the policy in question named the lessor as an insured). This argument is founded upon the following propositions:

a) differences in the regimes adopted in British Columbia and other provinces evinces an intention on the part of the legislature not to reduce the statutory liability of lessors by any amounts paid pursuant to third-party liability provisions of insurance contracts issued to persons other than lessors;

b) the legislative intent to set the cap above the insurance available to lessees and drivers was clearly expressed in Hansard; and

c) legislation imposing a cap on liability should be read narrowly against the beneficiary of the cap, so as to advance the objective of fully compensating accident victims.

[21] On appeal, the petitioner acknowledged that to the extent any payment made could be regarded as having been made on behalf of Honda, whether under the primary ICBC policy obtained by the lessee or the excess policy issued to Honda by Mitsui, such payment reduced Honda's liability under the cap. The petitioner no longer argues that the lessor's liability under the cap is in excess of all payments made pursuant to the third-party liability coverage in a policy obtained by the lessee. It argues only that the cap is in excess of payments made *by or on behalf of the lessee or the driver*.

[22] The sole question before us, as I see it, is whether the payment by ICBC wholly discharged Honda from its vicarious liability, or whether there is any basis upon which the Court can, and should, attribute only a portion of the payment to Honda and regard that payment as partially discharging Honda's statutory liability.

[23] The petitioner submits that, in the unusual circumstances of this case, where the liability of one of several parties jointly and severally liable for the damages is limited by statute, the Court should allocate the payments made in settlement of the claim to each of the liable parties. The petitioner submits that, there being no basis for doing so otherwise than equally, the Court should consider one-third of the payment made to the petitioner by ICBC to have been made on behalf of Honda, reducing Honda's liability to the petitioner by $333,333. After giving Honda credit for that portion of the ICBC payment, its residual liability under the statutory cap ($1.0 million less the $333,333 credit) would be sufficient to require it to pay the entire balance of the petitioner's claim: $600,000.

[24] I see no basis in law for considering only a portion of the ICBC payment to have been made on behalf of Honda. In my view, each of the insureds in this case can regard the whole of the payment made by ICBC to have been made on his, her or its behalf and to have reduced its liability to the petitioner to the full extent of the payment. In the absence of a statutory provision limiting the lessor's liability, all three would remain jointly and severally liable for the balance of the petitioner's damages. However, the *I(V)A* having limited the lessor's liability to $1 million, it is my view that

the payment of $1 million to the petitioner on behalf of all insureds, including the lessor, completely discharges the lessor's liability and leaves the other defendants jointly and severally liable for the balance of the damages.

[25] This must certainly be the case where the liability of Ms. Chen and Honda is entirely vicarious. Vicarious liability is discharged to the extent of any payment made in satisfaction of a plaintiff's claim for damages. This is not a case where liability can be apportioned by degrees of blameworthiness, or severed.

[26] The respondent argues that if the legislature had intended to require lessors to pay only the difference between all other available insurance and $1 million, the legislature would have included in the *I(V)A* provisions similar to s. 267.12 of the *Insurance Act*, R.S.O. 1990, c. I-8, the parallel Ontario legislation imposing a cap on lessors' liability, or s. 187 of the Alberta *Traffic Safety Act*, R.S.A. 2000, c. T-6. Those provisions expressly reduce the statutory liability of lessors by any amounts paid pursuant to third party liability provisions of insurance contracts issued to persons other than lessors. Although the Ontario legislative provisions were considered by our legislature when our comparable provisions were enacted, no such express provision was included in the *I(V)A*. The respondent says the omission of such a provision is indicative of an intention that the limit of liability should not be reduced by payments made on behalf of lessees or drivers.

[27] The argument must be addressed in light of this Court's discussion of the statutory regime in *Yeung (Guardian ad litem of) v. Au*, 2006 BCCA 217 ("*Yeung*"), in which it was said to be obvious that liability, in cases such as this, rests first with the negligent driver. The *I(V)A* does not disturb the underlying common law. At para. 35, the Court held:

> [35] … The purpose of s. 86, then, is to extend liability as well to the owner in two situations - where the driver or operator is living with and as a member of the family of the owner, or where the driver or operator acquired possession of the vehicle with the owner's express or implied consent. Where these conditions are met, s-s. (1) deems the driver or operator to be the agent or servant of the owner, and to be driving or operating the vehicle in the course of his or her employment. Effectively, this makes the owner liable on common law principles of agency. Sub-section (2) clarifies that s-s. (1) does

> not relieve the driver or operator from liability, leaving open the possibility of recovery by an injured plaintiff from both the owner and the driver.

[28] In the circumstances of this case, because the lessor is an insured under the ICBC policy, we need not determine whether the lessor's liability is reduced by payments expressly made by or on behalf of lessees or drivers alone. The liability of the lessor is certainly reduced by payments made on its behalf by its insurer and I cannot see in the legislation an evident intention to treat payments made under the primary insurance policy as payments made on behalf of the tortfeasor alone and not payments equally made by the parties vicariously liable for his negligence and insured under the payer's policy, as they would be at common law.

[29] In my opinion, the omission of any provision addressing the effect of payment by lessees or drivers on the liability of lessors from our legislation may be explained by differences in the underlying auto insurance schemes. The Ontario scheme, reviewed in detail in *Xu v. Mitsui Sumitomo Insurance Company Limited*, 2014 ONSC 167 ("*Xu*"), bears some similarities to the British Columbia scheme but differs in substantial respects. In particular, the mandatory statutory insurance in British Columbia requires lessees to name lessors as insureds. The ICBC coverage in this case is not coverage issued to a person other than a lessor and the minimum mandatory coverage under the statutory regime is not intended to provide coverage for lessees and drivers to the exclusion of lessors.

[30] Further, as Newbury J.A. noted in *Yeung*, relying upon the judgment in *Zago et al. v. Davies et al.* (1985), 18 D.L.R. (4th) 272 (Ont. C.A.), the Ontario legislation imposing liability on automobile owners makes them directly, rather than vicariously, responsible for the negligent operation of motor vehicles. If that is the case, (some Ontario cases refer to the liability of lessors as vicarious), a payment made by a driver might not wholly discharge the owner, in the absence of a statutory provision to that effect.

[31] Reference to Hansard does not assist the petitioner. I agree with the chambers judge's view that the record in Hansard is not particularly helpful. There is

certainly no express consideration given to the effect on the liability of the lessor of payment by the lessee's insurer. There is no consideration of the effect of payment of part of a claim by the insurer of several parties, jointly and severally liable, only one of whom can take advantage of the statutory limit of liability. There is no consideration of the differences between the legislation here and in other provinces. There is some suggestion that the legislature sought to enact legislation that would effect the same result here that it obtains in other provinces, with a view toward uniformity of treatment of lessors.

[32] There is merit in the argument that legislation limiting liability must be construed in such a manner as to protect a victim's right to full compensation. That objective was recognized in *Yeung* where the Court held at para. 33:

> [33] Consistent with the foregoing [objective of ensuring compensation by making lessors vicariously liable for operators], when courts are asked to construe exemptions or exceptions to a general rule, they are "particularly concerned" that such provisions be interpreted in light of their underlying rationale and not be used to undermine the broad purposes of the legislation: R. Sullivan, ed., *Driedger on the Construction of Statutes* (4th ed., 2002) at 397. In *The Interpretation of Legislation in Canada* (3rd ed., 2000), P.-A. Côté explains:
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>> It is noteworthy that what is of concern here is the non-extension of exceptional provisions and not their restrictive interpretation. In fact, the reasons that the legislature provided for provisions of exception are just as worthy of respect as those which justify the general rule. The principle is that exceptions should not be extended; where there is doubt, the general rule is favoured over the exception. [At 502.]

[33] It is clear, however, that the interpretive rule as an aid to construction is only to be resorted to in the event of ambiguity, "where there is doubt".

[34] The statute is clear in limiting the liability of lessors. There is no ambiguity in the provisions in question that would justify reading into the legislation a provision that would have the effect sought by the petitioner.

The Cross Appeal

[35] There is no dispute that the Mitsui policy is an "optional insurance contract" to which s. 61 of the *I(V)A* applies, as it is a contract of automobile insurance providing excess liability insurance coverage.

[36] Section 61, cited above, requires optional insurance contracts to extend coverage to every insured on the same terms and conditions as those described in the underlying certificate or policy. The underlying certificate and policy, in this case that issued to Ms. Chen, also insures Jason Chen by virtue of s. 63(b) of the *Insurance (Vehicle) Regulation*.

[37] In *Xu,* T. McEwen J. of the Ontario Superior Court of Justice, recently held that a driver could not establish a *prima facie* entitlement to coverage under a Mitsui excess policy. In doing so, however, he noted:

> [52] The applicants submit that under s. 239 of the *Insurance Act*, every owner's policy insures every person to whom the named insured consents to drive the automobile described in that policy. They further submit that s. 244 of the *Insurance Act* deems such persons to be a party to the insurance contract. The applicants submit that as a result, the Commercial Excess policy is an owner's policy that Lu is insured under because he had TCCI's consent to drive the vehicle.
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> [53] The applicants argue that this position is supported by the Ontario Court of Appeal's decisions in *Guardian Insurance Co. v. York Fire and Casualty Insurance Co.* , [1992] O.J. No. 3199 (C.A.), *Avis Rent A Car System, Inc. v. Certas Direct Insurance Company* (2005), 75 O.R. (3d) 421 (C.A.) and *ING Insurance Company v. Lombard General Insurance Co.*, 98 O.R. (3d) 522. In these cases, the court held that the lessor's excess or umbrella insurance policies covered the lessee/driver based on the above-mentioned provisions of the *Insurance Act*.
>
> [54] *I am keenly aware that these cases stand for the proposition that where an excess or umbrella insurance policy qualifies as an owner's policy under the Insurance, that policy will cover the lessee/driver as if he or she was a party to the insurance contract. I am also aware that in Guardian, although the underlying Standard Garage Policy did not respond (like the underlying policies in this case did not respond), the Court of Appeal upheld the trial judge's ruling that the owner/lessor's follow-form coverage responded nevertheless.*
>
> [Emphasis added.]

[38] The provisions of the *I(V)A* require Mitsui to afford coverage to Ms. Chen and Jason Chen on the same terms and conditions as those in the ICBC certificate, unless Mitsui expressly limits the coverage it affords in conformity with the *I(V)A.*

[39] The *I(V)A* permits an insurer providing optional insurance coverage to prohibit a specified person or class of persons from using or operating the vehicle and to exclude such persons from coverage. The petitioner acknowledges Mitsui might properly prohibit Jason Chen from obtaining coverage under its policy. He argues Mitsui did not do so in accordance with s. 61 of the *I(V)A*.

[40] The petitioner says s. 61(2) prescribes how an insurer can exclude individuals or risks from the insurance provided under an optional insurance contract, or limit its exposure. In order to exclude anyone from the coverage afforded under its policy, Mitsui is required to print on the policy, in conspicuous lettering in a prominent place, the words that appear in s. 61(2): "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". It did not do so.

[41] The chambers judge held that Mitsui could exclude Jason Chen from coverage notwithstanding the failure to include the words mandated by the *I(V)A*. The judgment is founded upon the view that the words of the policy would not have come to the attention of Jason Chen because it was "meant to protect insureds from exclusions or limits to coverage of which they may not be aware". The omission of the mandated words was therefore considered to be immaterial.

[42] In my view, the failure to meet the statutory requirement precludes the insurer from reducing or altering the underlying coverage by writing limiting terms into the excess policy. The statute provides a means by which an insured may easily determine whether the coverage afforded under the lessor's excess coverage differs from the underlying coverage. The wording required by the *I(V)A* is a measure of protection for all insureds. The exclusion of lessees and their agents from coverage is only effective if the mandated words appear on the policy; the exclusion is

ineffective if the mandated words do not appear. That is so, whether or not the wording is brought to the attention of the insured.

[43] In *Temple Sholom v. I.C.B.C.* (1986), 8 B.C.L.R. (2d) 130, 33 D.L.R. (4th) 231 (C.A.), this Court upheld the decision of Wood J. (1986), 70 B.C.L.R. 69 (S.C.), precluding an insurer from relying on provisions in an insurance policy where it had not printed words mandated by the *Insurance Act* ("This policy contains a clause which may limit the amount payable") on the face of the policy. The insurer argued it had complied with the statute by printing the caution at a location reasonably proximate to the clause in question, so as to alert the insured to the existence of the clause when it would be most likely to be noticed. That argument was rejected as inconsistent with the deliberate choice of language by the legislature. An analysis of the effective notice to the insured was unnecessary.

[44] In response to the cross appeal, Mitsui says ss. 61(1.2) and (2) must be read together and that the wording described in subsection (2) is only necessary where the insurer seeks to rely upon a prohibition, exclusion or limit of a very narrow class. That class is said to be defined, in some manner, by subsection (1.2). In my view, that cannot be so. Subsection (1.2) prohibits an insurer from excluding certain persons from coverage or providing them with coverage to different limits or on different terms from those in the certificate or underlying policy. The obligatory wording set out in s. 61(2) is <u>not necessary</u> and would be ineffective to exclude any of the persons or risks described in subsection (1.2). The wording described in s. 61(2) <u>is necessary</u> with respect to all other permissible prohibitions, exclusions or variations in limits.

<u>**Conclusion**</u>

[45] For those reasons, I would allow the appeal, set aside the order made in relation to the "lessor damages" issue, and substitute in its place the declaration sought by the appellant: that the payments made to the petitioner by ICBC have the effect of reducing the liability of Honda to the full extent of the payments made.

[46] I would also allow the cross appeal, set aside the order made in relation to the "excess coverage" issue, and substitute in its place the declaration sought by the cross appellant: that Jason Chen is an insured under the Mitsui policy, subject to the same terms and conditions as contained in the underlying certificate.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Madam Justice Bennett"