SUPREME COURT OF NOVA SCOTIA

Citation: *Classic Freight Systems (2011) Limited v. Dexter Construction Company Limited*, 2019 NSSC 347

Date: 20191209
Docket: Hfx No. 466529
Registry: Halifax

Between:

Classic Freight Systems (2011) Limited, Penske Truck Leasing Canada Inc. and Logan James Andrews

Plaintiffs

v.

Dexter Construction Company Limited and Eastern Traffic Services Limited

Defendants

Decision

Judge:	The Honourable Justice John P. Bodurtha
Heard:	January 24, 2019, in Halifax, Nova Scotia
Written Release:	December 9, 2019
Counsel:	Kyla Russell and Sarah Flanagan, for the Plaintiffs Wayne Francis, for the Defendants

Background

[1] I heard a motion under Rule 12 brought by Dexter Construction Company Limited and Eastern Traffic Service Limited, the defendants in an action brought by Classic Freight Systems (2011) Limited, Penske Truck Leasing Canada Inc., and Logan James Andrews, for an Order that the plaintiffs' claims for:

- Damage to a 2016 Volvo Tractor and 2014 Great Dane trailer (identified as "the Classic Vehicle" in the Statement of Claim);
- Loss of use of a 2016 Volvo Tractor and 2014 Great Dane trailer (identified as "the Classic Vehicle" in the Statement of Claim); and
- Damages related to damaged contents contained in a 2016 Volvo Tractor and 2014 Great Dane trailer (identified as "the Classic Vehicle" in the Statement of Claim

are barred by section 138A of the *Insurance Act of Nova Scotia,* R.S.N.S. 1989, c. 231.

[2] The parties have filed an agreed statement of fact. That statement, along with other materials filed on the motion, establish the following facts. Penske Truck Leasing was the owner of a 2016 Volvo commercial truck that it leased to Classic Freight. The truck was insured under a motor vehicle liability policy issued by The Sovereign General Insurance Company. On July 9, 2015, the truck – operated by Classic Freight employee Logan Andrews – was towing a Great Dane trailer laden with cargo and was travelling eastbound in the right lane on Highway 104. Approximately one kilometer west of exit 15, the truck crested a hill and came upon two blocked lanes of traffic. The truck made contact with two of the stopped vehicles before leaving the highway, rolling over, and coming to rest in the ditch. One of the vehicles hit by the truck was a 2012 Dodge Journey SUV that was insured by the Insurance Company of Prince Edward Island, an insurer licensed to sell automobile insurance in Nova Scotia. The truck and its contents suffered damage as a result of the incident, as did the Great Dane trailer and its cargo. Mr. Andrews sustained injuries in the incident.

The accident occurred at 5:01 pm. The RCMP were called at 6:00 pm and conducted an investigation at 6:40 pm. The RCMP Collision Reconstruction Investigation Report stated at page 3:

> Due to the nature of the incident, I contacted the Nova Scotia Department of Labour. Mr. Mitchell MacGregor, Occupational Health and Safety Officer, was briefed on the collision and with the approval of the Colchester District R.C.M.P.

> detachment, all photos and relevant investigative material was given to Mr. MacGregor for investigation.
>
> The joint investigation into this collision revealed that there were 2 main workplace parties involved in this incident, Nova Scotia Department of Transportation and Municipal Group (Dexter). The Classic Freight Truck was federally regulated and the Nova Scotia Department of Labour had no jurisdiction over that vehicle.
>
> The cause of the collision was the lack of proper signage/advance warning for motorists who were quickly approaching the backed up traffic on Highway 102 due to construction.

The Report of Workplace Inspection prepared by Mr. MacGregor included the following at page 3:

> In response to this collision, the RCMP investigated, noting that there weren't any TC-1A (Advance Warning Construction Ahead) caution signs erected on Highway 104 east, and that at the time of the accident, traffic had backed-up and formed a queue a distance of approximately 800 meters before the first warning signs erected on the Highway 104 east off-ramp (exit 15). Essentially, the involved driver crested a small hill and turn, came upon 2 blocked lanes of traffic, and the collision occurred.

The Occupational Health and Safety Division issued a compliance order to Dexter Construction dated February 22, 2017. The order advised Dexter Construction that it had contravened s. 13(1)(a) of the *Occupational Health and Safety Act*, S.N.S. 1996, c. 7, in the following manner:

> You have contravened the above provisions as follows:
>
> Failed to ensure that adequate traffic control application guides/plans were implemented in the absence of an approved code of practice on the above noted micro seal project. Although the plans that were submitted to TIR covered some elements of the project, they did not cover the total scope (quick lane change & regulating traffic with Traffic Control Personnel on controlled access ramps as noted in inspection findings of this report).

Dexter Construction was ordered to develop or review the existing procedure for evaluating traffic control plans for projects.

According to plaintiffs' counsel, Sovereign paid its insured for the damages to the truck. Sovereign then filed a subrogated action against the defendants to recover those funds.

The question of law

[3] Rule 12 of the Civil Procedure Rules provides:

> **Scope of Rule 12**
>
> 12.01 (1) A party may, in limited circumstances, seek the determination of a question of law before the rest of the issues in a proceeding are determined, even though the parties disagree about facts relevant to the question.
>
> (2) A party may seek to have a question of law determined before the trial of an action or the hearing of an application, in accordance with this Rule.
>
> **Separation**
>
> 12.02 A judge may separate a question of law from other issues in a proceeding and provide for its determination before the trial or hearing of the proceeding, if all of the following apply:
>
> (a) the facts necessary to determine the question can be found without the trial or hearing;
>
> (b) the determination will reduce the length of the proceeding, duration of the trial or hearing, or expense of the proceeding;
>
> (c) no facts to be found in order to answer the question will remain in issue after the determination.
>
> **Determination**
>
> 12.03 (1) A judge who orders separation must do either of the following:
>
> (a) proceed to determine the question of law;
>
> (b) appoint a time, date, and place for another hearing at which the question is to be determined.
>
> …

[4] The leading decision on Rule 12 is *Mahoney v. Cumis Life Insurance Company*, 2011 NSCA 31, where Fichaud J.A. stated:

> [15] Under Rule 25.01 of the former Civil Procedure Rules, the practice was that the chambers judge could decide a preliminary issue of law only if the parties filed an agreed statement of fact: e.g. *Seacoast Towers Services Ltd. v. MacLean* (1986), 75 N.S.R. (2d) 70 (S.C.A.D.), paras. 18-23, and various other authorities.
>
> [16] The new Rule 12 does not require an agreed statement for the determination of a preliminary question of law. This is clear from Rule 12.01(1) - a party may "in limited circumstances, seek the determination of a question of law ... even though the parties disagree about the facts relevant to the question".

> [17] Rule 12.02 recites those "limited circumstances": (a) "the facts necessary to determine the question can be found without the trial or hearing", (b) the determination will reduce the length or expense of the proceeding, and (c) "no facts to be found in order to answer the question will remain in issue after the determination". Conditions (a) and (c) contemplate that the Chambers judge, on a Rule 12 motion, may find facts, but only (1) the facts necessary to determine the pure legal question before him and (2) if all those facts, necessary to decide the pure legal question, can be determined without a trial.
>
> [18] So the first step with Rule 12 is to identify the pure legal question to be determined. Rule 12.01(1) permits a motion for determination of "a question of law". Rule 12.03(1) permits the judge either to determine "the question of law" or appoint a time to determine that question of law. The Rule does not authorize a determination of a question of fact or mixed fact and law, excepting only those facts that scaffold the point of pure law under Rule 12.02(a) as I have discussed.
>
> [19] The second step is to identify all the facts that are necessary to determine that question of pure law. Nothing in Rule 12 permits a judge to decide facts that are unnecessary to determine the question of pure law in the motion. A party who wishes an assessment of evidence on other matters, leading to a judgment by interlocutory ruling, should make or join a summary judgment motion under Rule 13.04 ("Summary judgment on evidence").
>
> [20] The third step under Rule 12 is to decide whether all those facts necessary to determine the issue of pure law in the motion "can be found without the trial or hearing".
>
> [21] This third step generates the question - What does Rule 12.02(a) mean that those facts "can be found without the trial or hearing"? In my view, it does not mean that a judge under Rule 12 can assess evidence in the same fashion as in a motion for summary judgment on the evidence under Rule 13.04. Under Rule 13.04, a responding party must "put his best foot forward" with evidence or risk a determination that there is no genuine issue of material fact requiring trial, or that its claim or defence has no real chance of success, and a consequent dismissal of the action or defence: *Aylward v. Dalhousie University*, 2011 NSCA 20, para. 11, affirming *Dalhousie University v. Aylward*, 2010 NSSC 65, paras. 20-25; *Ristow v. National Bank Financial Ltd*., 2010 NSCA 79, paras. 5-9; *Nova Scotia (Attorney General) v. Brill*, 2010 NSCA 69, para. 173. Rule 12 does not give the chambers judge that power. A judge under Rule 12 may not determine contested facts that might hinge on testimony at a trial. That is the point of Rule 12.02(a)'s condition that "the facts...can be found without the trial".
>
> [*Emphasis added*]

[5] Although it is no longer a requirement for a preliminary determination of law, an agreed statement of fact makes the motion judge's task much simpler. The first step is to identify the question of law to be determined. The question can be stated as follows:

> Are the plaintiffs' claims for property damage, loss of use and damaged contents barred by s. 138A of the *Insurance Act*, R.S.N.S. 1989, c. 231?

[6] The second step is to identify all the facts that are necessary to determine the question of law. Those facts are as set out in the agreed statement of fact and I would add the following facts:

> On the Date of the Loss, Dexter Construction was conducting a highway construction project near the accident scene. Eastern Traffic Services provided traffic control services for the project.
>
> The plaintiffs filed an action against the defendants alleging that the defendants conducted their work in a negligent manner, causing the traffic backup that led to the accident.

[7] The third step is to decide whether all the facts necessary to determine the issue of pure law can be found without the trial or hearing. This question can be answered in the affirmative, as both parties agree on the necessary facts. The parties also agree, correctly in my view, that the factors set out under Rule 12.02(b) and (c) are clearly met. Accordingly, I may exercise my discretion to answer the question.

Section 138A of the *Insurance Act*

[8] Section 138A of the Insurance Act states:

> 138A (1) This Section applies if
>
> > (a) an automobile or its contents, or both, suffers damage arising directly or indirectly from the use or operation in the Province of one or more other automobiles;
> >
> > (b) the automobile that suffers the damage or in respect of which the contents suffer damage is insured under a contract evidenced by a motor vehicle liability policy issued by an insurer who is licensed to undertake automobile insurance in the Province or who has filed with the Superintendent, in the form provided by the Superintendent, an undertaking to be bound by this Section; and
> >
> > (c) at least one other automobile involved in the accident is insured under a contract evidenced by a motor vehicle liability policy issued by an insurer who is licensed to undertake automobile insurance in the Province or who has filed with the Superintendent, in the form provided by the Superintendent, an undertaking to be bound by this Section.
> >
> > …

(3) Where this Section applies, an insured is entitled to recover for the damages to the insured's automobile and its contents and for loss of use from the insured's insurer under the coverage described in subsection (1) of Section 114 as though the insured were a third party.

(4) Recovery under subsection (3) must be based on the degree of fault of the insurer's insured as determined under the fault determination rules prescribed by regulation under clause (a) of subsection (1) of Section 138B.

(5) An insured may bring an action against an insurer if

> (a) the insured is not satisfied that the degree of fault established under the fault determination rules accurately reflects the actual degree of fault; or
>
> (b) the insured is not satisfied with a proposed settlement,

and the matters in issue shall be determined in accordance with the ordinary rules of law.

(6) Where this Section applies,

> (a) an insured has no right of action against any person involved in the incident other than the insured's insurer for damages to the insured's automobile or its contents or for loss of use;
>
> (b) an insured has no right of action against a person under an agreement, other than a contract of automobile insurance, in respect of damages to the insured's automobile or its contents or for loss of use, except to the extent that the person is at fault or negligent in respect of those damages or that loss; and
>
> (c) an insurer, except as permitted by the regulations, has no right of indemnification from or subrogation against any person for payments made to the insurer's insured under this Section.

…

(7) Nothing in this Part precludes an insurer, in a contract belonging to a class prescribed by the regulations, from agreeing with an insured that, in the event that a claim is made by the insured under this Section, the insurer shall pay only

> a) an agreed portion of the amount that the insured would otherwise be entitled to recover; or
>
> (b) the amount that the insured would otherwise be entitled to recover, reduced by a sum specified in the agreement.

…

(12) This Section does not affect an insured's right to recover in respect of any physical damage coverage in respect of the insured automobile.

(13) This Section does not apply to damage to those contents of an automobile that are being carried for reward.

…

The positions of the parties

[9] The parties agree that the preconditions set out at s. 138A(1)(b) and (c) are met in this case. The dispute is with respect to whether the truck leased to Classic Freight and operated by Mr. Andrews suffered "damage arising directly or indirectly from the use or operation in the Province of one or more other automobiles".

[10] The plaintiffs argue that s. 138A does not apply, because the accident did not "arise from" the use or operation of one or more other automobiles. The accident, they say, was caused by the negligence of the defendants, and the physical contact between the Classic Freight truck and the other two vehicles was merely incidental. The plaintiffs submit that Mr. Andrews was already in the "agony of collision" when the truck struck the other two vehicles. In other words, the truck was already on its way into the ditch when it hit the other automobiles, and the damage to the truck would have occurred regardless of the incidental contact with the other vehicles. The plaintiffs say s.138A was intended to address property damage claims between automobile insurers in situations where one or more drivers involved in the collision was at fault, not to bar insurers from suing independent third party tortfeasors to recover amounts paid out to insureds for damage to their vehicles. According to the plaintiffs, this interpretation is consistent with the goals of the fair automobile insurance reforms – risk management and cost control.

[11] The defendants argue that the facts of this case fit squarely within s. 138A(1)(a). They say the phrase "*arising directly or indirectly from* the use or operation … of one or more other automobiles" does not mean "*caused by* the use or operation of one or more other automobiles". In this case, but for the use or operation of the automobiles that were stopped in both lanes of the highway, Mr. Andrews would not have had to take evasive action, colliding with two other vehicles and sending the truck into the ditch. The defendants further state that interpreting s. 138A(1)(a) to include accidents involving third party tortfeasors is consistent with one of the purposes of Direct Compensation for Property Damage schemes – allowing insureds to be compensated immediately for their losses by avoiding protracted multi-party legal disputes. According to the defendants, if the legislature had intended to limit s. 138A to accidents caused by the negligence of another driver, it could easily have done so by including language to that effect. Instead, they say, the legislature deliberately chose broad language that would capture a wide variety of incidents. Finally, the defendants submit that their

proposed interpretation of s. 138A(1)(a) finds further support in s. 138A(6)(c), which provides that, where s. 138A applies, an insurer, except as permitted by the regulations, has no right of indemnification from or subrogation against *any person* for payments made to the insured under this Section. The section does not say "against any other automobile insurer".

Legislative interpretation

[12] In *Sparks v. Holland*, 2019 NSCA 3, the Nova Scotia Court of Appeal, *per* Justice Farrar, reiterated the proper approach to legislative interpretation:

> [27] The Supreme Court of Canada and this Court have affirmed the modern principle of statutory interpretation in many cases that "[t]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at ¶21).
>
> [28] This Court typically asks three questions when applying the modern principle. These questions derive from Professor Ruth Sullivan's text, *Sullivan on the Construction of Statutes*, 6th ed (Markham, On: LexisNexis Canada, 2014) at pp. 9-10.
>
> [29] Ms. Sullivan's questions have been applied in several cases, including *Keizer v. Slauenwhite*, 2012 NSCA 20, and more recently, in *Tibbetts*. In summary, the Sullivan questions are:
>
> 1. What is the meaning of the legislative text?
> 2. What did the Legislature intend?
> 3. What are the consequences of adopting a proposed interpretation?
>
> (Sullivan, pp. 9-10)

[13] Later in her text, Sullivan notes that "[t]he modern principle emphasizes the importance of purposive analysis in statutory interpretation": p. 259. She further states, in a passage cited by the Court of Appeal in *Sparks*:

> A purposive analysis of legislative texts is based on the following propositions:
>
> (1) All legislation is presumed to have a purpose. It is possible for courts to discover or adequately reconstruct this purpose through interpretation.
>
> (2) Legislative purpose must be taken into account in every case and at every stage of interpretation, including initial determination of a text's meaning.

> (3) In so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided.
>
> This approach to statutory interpretation does not necessarily make purpose the most important consideration in interpreting legislation. It merely ensures that the legislature's purposes – including both the purpose of the Act as a whole and the purpose of the particular provision to be interpreted – are identified and taken into account in every case.
>
> [p. 259]

In view of the need to take legislative purpose into account at every stage of interpretation, including the initial determination of the text's meaning, it makes sense to begin with the second of Sullivan's three questions.

What did the legislature intend?

[14] As Sullivan explains, this question involves consideration of the purposes the legislature hoped to achieve when it enacted the provisions under review.

[15] Section 138A of the *Insurance Act* addresses "Direct Compensation for Property Damage", or DCPD. As noted by the parties, s. 138A came into force on April 1, 2013, as part of a provincial government package of automobile insurance reforms labelled "Fair Auto Insurance Reforms". The reforms were implemented after a report provided by CFN Consultants (Atlantic) Inc. to the Department of Finance in May 2011, and a September 2011 report from the Nova Scotia Utility and Review Board (2011 NSUARB 160). The DCPD provisions were part of the second phase of reforms, with the first phase having been introduced on November 9, 2011.

[16] In April 2010, the Nova Scotia Government committed to undertaking an overall review of auto insurance in the province, to be completed before March 31, 2011. To that end, the Department of Finance commissioned CFN Consultants, an independent reviewer, to conduct the "Nova Scotia Automobile Insurance Review" and to prepare a report outlining its recommendations. The review was based on research, a jurisdictional review, stakeholder consultation, and two rounds of feedback from the public and key stakeholders. Stakeholders included the Insurance Brokers Association of Nova Scotia, the Canadian Independent Adjusters Association, the Insurance Bureau of Canada, TD Insurance, the Canadian Association of Direct Response Insurers, and the Association of Car Rental Operators.

[17] The Interim Report was tabled on March 31, 2011, while the NS Auto Insurance Final Report was completed on May 31, 2011. According to the Final Report, the primary purpose of the review was "to ensure Nova Scotians continue to have access to appropriate coverage with premiums that are fair, stable and affordable": p. 16. The Final Report contains a list, beginning at p. 2, of CFN Consultants' key recommendations, including, at p. 4:

> **g.** **Direct Compensation for Property Damage** – It is recommended that Nova Scotia adopt this claims settlement model on the basis that it will be clearer to the consumer and should result in faster/better customer service, a more efficient system, reduced litigation and increased accuracy in rate setting. As noted, a careful implementation and a public education plan will need to be undertaken prior to the implementation of this claims' settlement model;

[18] Direct Compensation for Property Damage is canvassed more fully at pp. 46-47:

> **a.** **Background**: In this claims settlement model, the automobile policy holder deals with their own insurance company on all matters related to their claim. Insurance claimants collect payments and damage recovery directly from their own insurer. An owner's motor vehicle liability policy issues against liability resulting from loss of or damage to property. Under this model, the insured is entitled to recover, based on the degree of fault of the insured, for damages to his/her automobile and its contents and for loss of use from his/her own insurer as though the insured were a third party. In this model, the insured's right of action is against his/her own insurance company.
>
> **b.** **Environmental scan and research summary**: This claims settlement model is in place and working well in Quebec, Ontario and New Brunswick. It is also used extensively in the US. <u>The principal benefit is that it simplifies the process for the consumer and results in a rate setting that is more precise as the insurer knows exactly what is being insured.</u> During the Review, discussions with the Office of the Superintendent of Insurance of the Government of New Brunswick and the New Brunswick consumer advocate indicated that this system is working well, and is supported by consumers.
>
> **c.** **Issue definition and scope**: <u>This is a more efficient system with less litigation and quicker settlement of claims</u>. The claims settlement model is more 'consumer friendly' in that the consumer is dealing with their own company with whom they already have a relationship. This factor contributes to the likelihood of better service for the consumer.

> The accuracy of rate setting is enhanced as the insurer has precise information on the vehicle that would need to be repaired or replaced in advance of an accident.
>
> Implementation of this claims settlement model is generally seen to be cost neutral, although there could be some 'premium dislocation' in the initial stages, as insurers make adjustments to rates to more accurately reflect the value of their customers' actual vehicles.
>
> Adoption of this model would help with standardization, particularly, in Eastern Canada.
>
> …
>
> In implementing this claims settlement model, Nova Scotia can benefit from New Brunswick's experience in adopting this approach over the past four years.
>
> **d.** **Action options**: Implement DCPD in Nova Scotia and have an actuarial assessment undertaken. Implementation of this initiative is expected to be cost neutral.
>
> **e.** **Recommendations**: It is recommended that Nova Scotia adopt this claims settlement model on the basis that it will be clearer to the consumer and should result in faster/better customer service, a more efficient system, reduced litigation and increased accuracy in rate setting. As noted, a careful implementation and a public education plan will need to be undertaken prior to the implementation of this claims settlement model.
>
> [*Emphasis added*]

[19] On June 22, 2011, the Minister of Finance provided a letter to the Nova Scotia Utility and Review Board directing the Board to examine four of the reform options outlined in the CFN Final Report, including Direct Compensation for Property Damage. Although the UARB focused primarily on the estimated costs and impact on premiums of implementing a DCPD claims settlement model, the information it set out by way of background is useful:

> [70] In Nova Scotia, when an insured driver has an accident, the means and the source of compensation is determined by who is found to be at fault for the accident. In a case where the insured driver is not at fault, the driver makes a claim against the other insured driver's TPL coverage. The claim is processed by the other driver's insurance company. In this case, situations may arise where the client is left to deal with an insurance company which is less efficient at paying claims than the client's own carrier.
>
> [71] Where the insured driver is at fault for the accident, the claim is made against the insured's Collision coverage.

> [72] In other provinces, notably Ontario, Quebec and New Brunswick, Direct Compensation for Property Damage ("DCPD") was created. To the extent the insured involved in an accident is at fault, the claim would be processed under Collision coverage. However, to the extent the insured is not at fault, the claim would be paid through their own DCPD coverage. There would be no need to deal with the other driver's insurance company. This approach is more understandable for insureds leaving them to deal with their chosen carrier. Whether the DCPD claim payment is subject to a deductible is a matter of government policy in each of the jurisdictions requiring DCPD.
>
> [73] The property damage ("PD") component of the TPL coverage, required to be carried by insured drivers on their vehicles, consists of two parts: the first being costs to repair the vehicle of another driver; the second covering damage to other property. The DCPD replaces the first part, while the second would remain embedded in the TPL coverage. For the purposes of this report, the second part is referred to as property damage-tort ("PD-T").
>
> [74] With the introduction of DCPD, the claims expected by the insured carrier become more certain. The costs to repair or replace the vehicle are better known. The insurance company need only know what type of car the insured drives, using industry rate group tables (based upon claims experience for that exact model of car) to determine how much premium to charge.
>
> [*Emphasis added*]

[20] In addition to these reports, the parties provided the court with copies of the House of Assembly debates in relation to the *Fair Automobile Insurance (2011) Act*. The debates are not particularly helpful. The Nova Scotia government indicated that the reforms were part of a "consumer-friendly package of improvements" to auto insurance in Nova Scotia. The reforms were intended to "strike the right balance between fairness, affordability and stability".

[21] Based on the above reference materials, the legislature adopted the DCPD provisions (s. 138A) to achieve the following objectives:

> 1. Simplifying the property damage claims process for the consumer;
>
> 2. Making the claims process more efficient, with faster/better customer service;
>
> 3. Reducing litigation;
>
> 4. Increasing accuracy in rate setting; and
>
> 5. Harmonizing Nova Scotia's legislation with other provinces already using a DCPD system.

[22] None of this information addresses whether the legislature intended to restrict the application of s. 138A(1) to situations where property damage was

caused by the fault of another driver rather than an independent third party tortfeasor. As noted in the materials, however, at the time Nova Scotia introduced DCPD, the system was already in place in Ontario and New Brunswick.[1] While New Brunswick implemented DCPD in 2004, Ontario has had DCPD in place since 1990. Since the legislature's intention was to adopt the same system in Nova Scotia, it is helpful to consider evidence of legislative intention from those jurisdictions.

[23] In New Brunswick, the Hansard debates on the Legislative Assembly of New Brunswick website only go back to 2008, and there is no relevant case law applicable to the matter before me.

[24] In Ontario, in 1990, the Ontario government implemented a new threshold-no-fault system. Bill 68 – the *Insurance Statute Law Amendment Act, 1990* – was presented for First Reading on October 23, 1989. At that time, the Honourable Murray Elston, Minister of Financial Institutions, stated:

> Today I will be introducing legislation which will ensure affordable auto insurance rates and a comprehensive accident benefit plan to protect the more than six million drivers in Ontario.
>
> The motorists of this province want two things. They want stable insurance rates. Sky-rocketing insurance premiums will not be tolerated. People expect to be treated fairly and this government will make sure that they are. Drivers want to be well protected in the event they are hurt in auto accidents. That is why they pay premiums in the first place, and what they do not need while they are recovering are long delays and excessive legal expenses.
>
> …
>
> The Ontario motorist protection plan is a comprehensive program. The system itself will be reformed in this new legislation so that consumers get premium savings and improved benefit protection. The underlying causes of higher insurance rates -- accidents and injuries on our roads -- will be addressed through a number of other initiatives so that premiums remain affordable in the future.
>
> Other highlights of the package are swift payment of accident benefits without the need to sue; greatly improved levels of payments: more people than ever before will be eligible for income replacement benefits including seniors, students and the unemployed; child care benefits will be available for the first time and income

[1]Since Nova Scotia's adoption of DCPD, Prince Edward Island and Newfoundland have followed suit. Prince Edward Island introduced DCPD provisions in 2014: *Insurance Act*, R.S.P.E.I. 1988, c. I-4, s. 254.3. Newfoundland's new DCPD provisions will come into force on January 1, 2020: *An Act to Amend the Automobile Insurance Act*, S.N. 2019, c 14, s. 5.

replacement for unpaid homemakers will be more than doubled; the freedom and flexibility to purchase additional insurance for even greater protection will be provided; a new, strong regulatory authority; a speedy and accessible system for resolving disputes; continued access to the courts in cases of serious injury and death; strong deterrents to bad driving; new measures to reduce accidents and improve highway safety; enhanced consumer protection; reform of the tort system.

…

That is why the government is introducing this legislation. These important reforms will result in significant savings for consumers. Under the new system, average premiums will not increase at all for rural drivers and will rise only eight per cent for urban motorists next year.

…

These reforms will accomplish the twin goals of premium savings and improved accident benefits by reducing the need to sue. The vast majority of people involved in auto accidents suffer only minor injuries and they will be well protected by the higher levels of guaranteed benefits available in the new plan.

Injured victims will not have to pay expensive legal fees or wait months, and sometimes years, for compensation. Thus there will be no need to sue in about 90 per cent of all cases. In the remaining cases, those involving serious injury or death, higher compensation levels may be required and therefore access to the courts will be maintained. Guaranteed accident benefits will also be paid to these individuals or their estates, thereby providing support during the litigation process.

By reserving the courts for the most serious cases and reducing the amount of litigation in the system, significant savings can be achieved, savings which can be passed on to the consumer in the form of lower insurance rates and higher benefits. Under the new system, guaranteed accident benefits will be delivered within 10 to 30 days. Insurance companies will face substantial penalties for not paying on time. Additionally, a system of accessible and speedy dispute resolution will be available.

…

I want to emphasize that the Ontario motorist protection plan is not designed to protect the bad drivers of the province. It will penalize them more than ever. Deterrents will be a key component of the system. Fault will continue to be used for rating purposes. That means good driving records will be reflected in preferred insurance rates and bad drivers will be paying higher premiums.

Additionally, the new plan recognizes that the cost of insurance is directly related to the number and severity of accidents on the roads. In order to address these underlying causes of higher insurance rates, a series of initiatives will be introduced by the government over the next several months.

…

[*Emphasis added*]

[25] The Bill obtained Second Reading on December 5, 1980 on the promise by the government that public hearings would be held. Those hearings were held in January and February 1990. The Bill received Third Reading and Royal Assent on May 28, 1990 and the *Insurance Statute Law Amendment Act, 1990*, S.O. 1990, c. 2 (also called the Ontario Motorists Protection Plan or "OMPP") came into effect on June 22, 1990. At that time the DCPD provisions were as follows:

> 230a.—(1) This section applies if an automobile or its contents, or both, suffers damage arising directly or indirectly from the use or operation in Ontario of any other automobile and both are insured under contracts evidenced by motor vehicle liability policies issued by insurers licensed to undertake insurance in Ontario.
>
> (2) If this section applies, an insured is entitled to recover for the damages to the insured's automobile and its contents and for loss of use from the insured's insurer under the cover- age described in subsection 209 (1) as though the insured were a third party.
>
> (3) Recovery under subsection (2) shall be based on the degree of fault of the insurer's insured as determined under the fault determination rules.
>
> (4) An insured may bring an action against the insurer if Dispute the insured is not satisfied that the degree of fault established under the fault determination rules accurately reflects the actual degree of fault or the insured is not satisfied with a proposed settlement and the matters in issue shall be determined in accordance with the ordinary rules of law.
>
> (5) If this section applies,
>
> > (a) an insured has no right of action against any person involved in the incident other than the insured's insurer for damages to the insured's automobile or its contents or for loss of use;
> >
> > (b) an insurer, except as permitted by the regulations, has no right of indemnification from or subrogation against any person for payments made to its insured under this section.
>
> (6) This section does not affect an insured's right to recover in respect of any physical damage coverage in respect of the insured automobile.
>
> (7) This section does not apply to damages to those contents of an automobile that are being carried for reward.
>
> (8) This section does not apply if the damage occurred before the coming into force of this section.
>
> (9) This section does not apply if both automobiles are owned by the same person.

> (10) This section does not apply to damage to an automobile owned by the insured or to its contents if the damage is caused by the insured while driving another automobile.

[26] Although the Hansard debates do not refer to the DCPD provisions specifically, *Automobile Insurance in Ontario*, (Markham: Butterworths Canada Ltd., 1991), by Allan O'Donnell, Q.C., was published not long after the new system was introduced. In *Pilotte v. Gilbert*, 2016 ONSC 494, Chapnik J. noted that "Mr. O'Donnell was involved in the development of the OMPP system and was an advisor to the government at the time": para. 163. O'Donnell describes the purpose of the book as "an effort to organize and explain the amendments made to the Ontario *Insurance Act* created by Bill 68, the *Insurance Statute Law Amendment Act*, 1990, S.O. 1990, c. 2, the numerous Regulations passed thereunder and the new automobile insurance policy": p. vii. The text has been cited by the Ontario Superior Court of Justice, the Ontario Court of Appeal, and the Supreme Court of Canada.

[27] Chapter 3 explains the new Ontario system in relation to property damage, the author writes:

> A new system of property damage has been developed as a substitute for claiming directly or indirectly from the insurer of the tortfeasor … Basically, an insured's own insurer pays for loss or damage to the automobile to the same extent that the insured would have claimed in tort against the insurer of a tortfeasor. While one could argue whether or not in law this is third party liability insurance or first party insurance, in fact, it is first party insurance. It thus leaves the insured dealing almost exclusively with his own insurer even where another driver would, under the previous system, be liable in law to pay the automobile damage.
>
> [p. 20]
>
> [*Emphasis added*]

[28] The author explains that the DCPD system is an agreement between the insurer and the insured:

> 1. IT IS AN AGREEMENT BETWEEN INSURER AND INSURED
>
> The insurer agrees that it will pay for its insured's automobile repairs when it is damaged by the fault of the driver of some other automobile. Possibly, instead of having a fight on its hands, the insured simply has the insurer handle most of the problems, including the expense involved in repairing the car. The insured will almost always deal with the insurer which the insured or the broker has chosen as one that will give prompt and satisfactory attention to the insured's losses. "Direction Compensation – Property Damage" thus becomes a first party

> coverage instead of a third party coverage. Only in rare circumstances will an automobile owner ever have to deal with an insurer that is a stranger. Examples of such rare circumstances are the insured automobile being struck by an automobile insured by an insurer not licensed in Ontario or by an automobile where the accident takes place outside Ontario. And if the automobile owner has purchased the optional collision, loss of use and comprehensive coverages, that owner will never have to deal with any insurer but his/her own. As long as the driver of the insured's automobile was not at fault for the accident causing the car damage, the premium will not increase because the insurer has paid such a claim
>
> [p. 40]

[29] In relation to subrogation, O'Donnell writes:

> 5. IF THE AGREEMENT APPLIES, THE CAR OWNER HAS NO RECOURSE AGAINST ANYONE OTHER THAN HIS OWN INSURER FOR CAR DAMAGE, DAMAGE TO CONTENTS OF THE CAR OR LOSS OF USE OF THE CAR
>
> The insurer has, in effect, satisfied whatever tort claims the insured had under the old system. The tort claims having been satisfied,the insured's right of action is taken away against all others. (s. 230(5)(a))
>
> [p. 43]

[30] And further, at p. 51:

> 14. SUBROGATION
>
> Under the previous system insurers subrogated against each other when they paid their insured for automobile damage in circumstances where their insured was not wholly responsible for the accident. Even though most insurers were signatories to a settlement agreement which cut down on the number of disputes as to liability, that system still cost money. On average a given insurer would pay out approximately $10 million a year to all other insurers for such subrogated claims and would collect the same amount from all other insurers. All that was happening was that moneys were changing hands and incurring substantial transaction costs along the way. In effect, there were transaction costs in the system which produced no savings to insurers or insureds. Thus, under the new system with the exceptions outlined below, subrogation has been abolished. Thus, we have a "knock for knock" system whereby each insurer absorbs most of its policyholders' property damage claims without attempting to recover same from the insurers of tortfeasors causing such claims. In any individual case, the result can be unfair to the insurer but in the totality of such claims, the result is fair to all insurers. Insureds are not affected because they are not surcharged in premium for accidents that are not their fault.
>
> [*Emphasis added*]

[31] These materials suggest that the Ontario government introduced its threshold-no-fault system, which included DCPD, primarily for the benefit of consumers. The goal was to lower premiums while, at the same time, making it faster and easier for those consumers to obtain compensation. Lower premiums would be achieved by eliminating transaction costs associated with subrogated actions between auto insurers, and by increased accuracy in rate setting. Although there are references in the O'Donnell text to an insured's own insurer paying for property damage caused by the fault of another driver, he does not directly consider the system's applicability to independent third-party tortfeasors.

What is the meaning of the legislative text?

[32] For ease of reference, the legislative text is as follows:

> 138A (1) This Section applies if
>
> > (a) an automobile or its contents, or both, suffers damage arising directly or indirectly from the use or operation in the Province of one or more other automobiles;
> >
> > …

[33] The subrogation provisions are also relevant:

> (6) Where this Section applies,
>
> > (a) an insured has no right of action against any person involved in the incident other than the insured's insurer for damages to the insured's automobile or its contents or for loss of use;
> >
> > (b) an insured has no right of action against a person under an agreement, other than a contract of automobile insurance, in respect of damages to the insured's automobile or its contents or for loss of use, except to the extent that the person is at fault or negligent in respect of those damages or that loss; and
> >
> > (c) an insurer, except as permitted by the regulations, has no right of indemnification from or subrogation against any person for payments made to the insurer's insured under this Section.

[34] As noted previously, the parties agree that the preconditions at s. 138A(1)(b) and (c) are met in this case. Plaintiff's counsel also confirmed that if the court finds that s. 138A(1)(a) is met, her client acknowledges that the language of "any person" in s. 138A(6)(c) would bar the subrogated property damage claims against the defendants. Accordingly, the proper interpretation of s. 138A(1)(a) will determine the motion.

[35] As noted by the moving parties, the phrase "arises out of the ownership, use or operation of a vehicle" has been considered by the Supreme Court of Canada in *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405. In that case, the appellant was driving his van when he was attacked by a gang of six people. As he attempted to drive away from the men, he was shot. The bullet struck his spinal cord, leaving him with severe, permanent injuries. The appellant was insured by the respondent under a standard automobile insurance policy. He applied to the respondent for medical and other benefits under Part VII of the *Revised Regulation (1984) under the Insurance (Motor Vehicle) Act.* After the respondent denied liability, the appellant filed an action for a declaration that he was entitled to the benefits claimed. The Supreme Court of British Columbia dismissed the action. The Court of Appeal dismissed the appellant's appeal.

[36] Section 79(1) (in Part VII) of the *Revised Regulation (1984) under the Insurance (Motor Vehicle) Act* provided as follows:

> 79. (1) Subject to subsection (2) and sections 80 to 88, 90, 92, 100, 101 and 104, the corporation shall pay benefits to an insured in respect of death or injury caused by an accident that arises out of the ownership, use or operation of a vehicle and that occurs in Canada or the United States of America or on a vessel travelling between Canada and the United States of America. . . .
>
> [*Emphasis added*]

[37] At the trial level, the court noted that the phrase "arising out of the ownership, use or operation of a vehicle" had been previously considered by the Supreme Court of Canada on two occasions. The first case established the "purpose test", while the second established the "chain of causation" test. The trial judge concluded that the two tests were complementary, meaning that the plaintiff had to satisfy both to be entitled to Part VII benefits. According to this approach, the plaintiff had to show: (1) that the accident arose out of the ownership, use or operation of a vehicle, and, (2) that the chain of causation between the ownership, use or operation of the vehicle and the injuries or damage sustained was not broken by some intervening act.

[38] The trial judge held that merely sustaining injuries while in a vehicle was not sufficient to establish a causal link between the injuries and the ownership, use or operation of a vehicle. In the court's view, the appellant's injuries did not result from an accident attributable to the use of a vehicle. Instead, the court said, the injuries were caused by an act of wanton criminal violence.

[39] The Court of Appeal affirmed the trial judge's interpretation and his conclusion. The Court of Appeal emphasized that the words "arising out of" required a causal or consequential relationship between the accident and the ownership, use or operation of a vehicle, but acknowledged that a direct or proximate causal relationship was not required. According to the Court of Appeal, an accident that arises out of the ownership, use or operation of a vehicle is one which can be attributed to the utilization of a vehicle.

[40] Justice Major, for the Supreme Court of Canada, considered the no-fault character of the benefits in relation to s. 79(1) of the *Regulation* and stated:

> 16 The no-fault character of the benefits in question does not change the interpretation of s. 79(1). No-fault means that the respondent's liability to pay benefits occurs when injury arises out of the ownership, use or operation of a vehicle, regardless of the presence or absence of fault. The injury must still arise out of the ownership, use or operation. However, this does not mean that a narrow, technical interpretation is dictated. Traditionally, the provisions providing coverage in private policies of insurance have been interpreted broadly in favour of the insured, and exclusions interpreted strictly and narrowly against the insurer (Brown and Menezes, at p. 131). In *Indemnity Insurance Co. v. Excel Cleaning Service*, [1954] S.C.R. 169, it was held that the construction given to a policy of insurance must not nullify the purpose for which the insurance was sold.
>
> 17 In the same way, while s. 79(1) must not be stretched beyond its plain and ordinary meaning, it ought not to be given a technical construction that defeats the object and insuring intent of the legislation providing coverage. The two-part test to be applied to interpreting this section is:
>
> > 1. Did the accident result from the ordinary and well-known activities to which automobiles are put?
> >
> > 2. Is there <u>some</u> nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the appellant's injuries and the ownership, use or operation of his vehicle, or is the connection between the injuries and the ownership, use or operation of the vehicle merely incidental or fortuitous?
>
> This two-part test summarizes the case law interpreting the phrase "arising out of the ownership, use or operation of a vehicle", and encompasses both the "purpose" and "causation" tests posited in the jurisprudence.

[41] The Supreme Court held at para. 18 that the first part of the test was met:

> The appellant here was driving his van down a street; the accident clearly resulted "from the ordinary and well-known activities to which automobiles are put". The first part of the two-part test is satisfied.

[42] Justice Major described the second part of the test as follows:

> 21 The question is whether the requisite nexus or causal link exists between the shooting and the appellant's ownership, use or operation of the van. With respect to causation, it is clear that a direct or proximate causal connection is not required between the injuries suffered and the ownership, use or operation of a vehicle. The phrase "arising out of" is broader than "caused by", and must be interpreted in a more liberal manner. A formulation of the causation principle is found in *Kangas v. Aetna Casualty & Surety Co.*, 235 N.W.2d 42 (1975), where the Michigan Court of Appeals stated at p. 50:
>
> > . . . we conclude that while the automobile need not be the proximate cause of the injury, there still must be a causal[*] connection between the injury sustained and the ownership, maintenance or use of the automobile and which causal connection is more than incidental, fortuitous or but for. The injury must be forseeably identifiable with the normal use, maintenance and ownership of the vehicle.
>
> That court recognized that the words "arising out of" have been viewed as words of much broader significance than "caused by", and have been said to mean "originating from", "having its origin in", "growing out of" or "flowing from", or, in short, "incident to" or "having connection with" the use of the automobile. …
>
> …
>
> 23 *Dickinson v. Motor Vehicle Insurance Trust*, [1987] 61 A.L.J.R. 553, a decision of the High Court of Australia, describes a causal connection test which does not require a direct or proximate relationship between the use of the vehicle and the injuries suffered. The court stated at p. 555:
>
> > Whether or not the appellant's injuries were actually caused by the use of the motor car, it is sufficient to say that they arose out of such use. The test posited by the words "arising out of" is wider than that posited by the words "caused by" and the former, although it involves some causal or consequential relationship between the use of the vehicle and the injuries, does not require the direct or proximate relationship which would be necessary to conclude that the injuries were caused by the use of the vehicle. . . .
>
> That court reasoned that under the "wide formula", as expressed by the wording "arising out of", it is the injury which must be caused by or arise out of the use of the motor vehicle. Negligence or fault in the use or operation of a motor vehicle does not need to be the cause of the injury. The liability for the injury may arise from a tortious act other than the negligent use of a motor vehicle. This is an important distinction.
>
> [*Emphasis added*]

[43] The Supreme Court concluded that although the cause of the appellant's injury was a bullet, the shooting arose out of the appellant's ownership, use or operation of his vehicle:

> 26 If the appellant had not been shot, but had lost control of his car while trying to get away from his assailants, the injuries suffered as a result of a subsequent car crash would surely be covered by the respondent. Similarly, if the appellant had suffered injuries as a result of being intentionally hit by those same assailants using a car instead of a gun, the respondent would not deny coverage. I do not think the instant case can be distinguished from the foregoing hypothetical examples. Generally speaking, where the use or operation of a motor vehicle in some manner contributes to or adds to the injury, the plaintiff is entitled to coverage.
>
> 27 The appellant's injuries arose out of the ownership, use and operation of his van. They originated from, flowed from, or were causally connected with its ownership, use and operation. Neither can it be said that there was an intervening act, independent of the ownership, use or operation of the vehicle, which broke the chain of causation. The appellant is therefore entitled to Part VII no-fault benefits to compensate him for the injuries suffered as a result of the accident.
>
> [*Emphasis added*]

[44] The *Amos* decision dictates that the phrase "arising directly or indirectly from the use or operation … of one or more other automobiles" must be interpreted broadly. As the Supreme Court noted at para. 23, "[n]egligence or fault in the use or operation of a motor vehicle does not need to be the cause of the injury", or, in this case, the "damage". The damage needs only to be "incident to" or "having connection with" the use or operation of one or more other automobiles.

[45] O'Donnell's text, *Automobile Insurance in Ontario,* offers some guidance on the meaning of the words "directly or indirectly":

> Most damage will occur directly because of a direct impact by automobiles. But a driver may swerve to avoid colliding with a vehicle traveling on the wrong side of the road and in the process collide with some object. This would constitute an automobile being damaged "indirectly" from the use or operation of another automobile. [p. 41]

[46] Ontario case law is helpful in assisting the court in its interpretation of s. 138A(1)(a), and s. 138A(6) because these decisions interpret the legislative provisions which served as a model for the New Brunswick and Nova Scotia provisions. The decision of *SOCI Bassie v. Warren R.J. Brown Bituminous Paving Co.*, 1993 CarswellOnt 760 (Ont. Gen. Div.), is directly applicable to the case before the court.

[47] In *Bassie,* the plaintiff, Allen Bassie, was driving eastbound on Elias Street near its intersection with Quebec Street in London, Ontario. One of the defendants, Towland (London) 1980 Limited, a construction contractor, was performing road construction at the intersection of the two streets. A flagman employed by Towland was directing the traffic on both Quebec Street and Elias Street at the intersection. The flagman waved the plaintiff through the intersection. The third party, Donald Frampton, was driving northbound on Quebec Street and collided with the plaintiff's vehicle in the intersection. The plaintiffs, Allen Bassie and Paul Bassie, were reimbursed by their own insurer for the property damage to their vehicle pursuant to the DCPD provisions of their policy. The insurer then brought a subrogated claim against the defendants – Towland, the flagman John Correria, Warren R.J. Brown Bituminous Paving Company Limited, and the Warren Paving & Materials Group Ltd. In setting out the agreed facts, the court noted:

> 4 The sole, or at least the primary cause of the collision, was the negligence of the defendants, Towland and John Corrieia. The parties agree that the third party, Donald Frampton, did not cause the collision and was not in any way responsible for same.

[48] The question before the court was whether s. 263 of the *Insurance Act,* S.O. 1990, c.I-18 precluded the insurer from proceeding with a subrogated action against the defendants to recover the amounts paid out under the policy. Justice Leitch set out the relevant provisions:

> 9 Section 263(1) provides as follows:
>
> This section applies if an automobile or its contents, or both, suffers damage arising directly or indirectly from the use or operation in Ontario of any other automobile and both are insured under contracts evidenced by motor vehicle liability policies issued by insurers licensed to undertake insurance in Ontario.
>
> 10 Section 263(5) provides as follows:
>
> If this subsection applies,
>
> (a) an insured has no right of action against any person involved in the incident other than the insured's insurer for damages to the insured's automobile or its contents or for loss of use;
>
> (b) an insurer, except as permitted by the regulations, has no right of indemnification from or subrogation against any person for payments made to its insured under this section.

[49] The parties agreed that both vehicles involved in the accident were insured under valid insurance policies issued by insurers licensed to undertake insurance in Ontario.

[50] The court summarized the plaintiffs' position as follows:

> 11 The plaintiffs submit that the right to subrogate is well recognized at common law and by statute. The plaintiffs submit that the legislature must demonstrate unequivocally its intention to eliminate common law and statutory subrogation rights in order for those rights to be eliminated by s. 263.
>
> 12 The plaintiffs submit that the plaintiffs' automobile did not suffer "damage arising directly or indirectly from the use or operation in Ontario of any other automobile". Rather, the damage arose from the negligence of Towland in failing to properly train, test, instruct and supervise its flagman, Mr. Corrieia and, in addition, the damage arose from Mr. Corrieia's negligent acts in directing traffic. It is the plaintiffs' submission that s. 263 only precludes further proceedings in the circumstances where a collision between two insured motor vehicles is caused by the conduct of the drivers of the motor vehicles and not an independent third party.
>
> [*Emphasis added*]

[51] The defendants' position was as follows:

> 13 The defendants submit that the words of s. 263(1) are clear and by these words the plaintiffs are precluded from their right of subrogation. The defendants submit that the damage to the plaintiffs' vehicle arose from the use of the Frampton motor vehicle. There would have been no damage to the plaintiffs' vehicle but for the fact that the Frampton vehicle hit the plaintiffs' vehicle. The defendants submit that the plaintiffs' interpretation requires the word "negligent" to modify the word "use" in s. 263(1). In other word s. 263(1) would only apply if one or both drivers were negligent. The defendants further submit that the plaintiffs' interpretation makes s. 263(5)(a) redundant and therefore the plaintiffs' version cannot be accepted.
>
> [*Emphasis added*]

[52] Justice Leitch agreed with the defendants that s. 263(1) applied to the facts of the case:

> 17 In my view s. 263(1) is not ambiguous and it applies to the circumstances of this case. The plaintiffs' vehicle suffered damage which arose directly from the use or operation of the Frampton vehicle. There is no question that the Frampton vehicle collided with the plaintiffs' vehicle.

18 In submitting that s. 263(1) does not apply to this situation because there was no negligence on the part of the driver of the Frampton vehicle the plaintiffs relied on the interpretation of the words "directly or indirectly from the use or operation" of an automobile by the Supreme Court of Canada in *Law, Union & Rock Insurance Company Limited v. Moore's Taxi Limited*, [1960] S.C.R. 80. In that case the court found that there must be a continuous chain of causation between the negligent operation of a vehicle and the injuries sustained in order for the exclusion it had under consideration to apply. The exclusion related to claims arising out of the ownership, use or operation by the insured of any motor vehicle. The court found that the plaintiff's personal injuries resulted from the taxi driver's failure to escort her across the road and not from the use and operation of the vehicle.

19 In my view, the reasoning of the supreme Court in *Law, Union, supra*, does not assist in the interpretation of s. 263 of the Act in the circumstances of this case. In these circumstances there is no question that the damage to the plaintiff's vehicle resulted from the use and operation of the Frampton vehicle.

20 Negligence on the part of Frampton is not a pre-condition to the application of s. 263(1) and I therefore find that s.263(1) applies to the circumstances of this case.

[*Emphasis added*]

[53] The court proceeded to consider the subrogation provisions:

21 Having determined that s. 263(1) applies, it is necessary to consider s.263(5)(a) and (b). These sections provide that the insured has no right of action against any person involved in the incident and the insurer cannot subrogate against any person for payment. The plaintiffs submit that Towland which is vicariously liable as John Corrieia's employer for his actions and is itself liable as a result of its own negligence in not properly training and supervising Mr. Corrieia is not a person involved in the incident and is therefore still subject to an action by the plaintiffs.

22 The plaintiffs cited the decision of Brockenshire J. in Champagne v. Bell Canada [November 17, 1992 which is unreported] as authority for its submissions in that Brockenshire J. noted that even if a claim for personal injury against an employee of Bell Canada would be barred by s. 266 the plaintiff automobile driver could pursue its claim against Bell Canada based upon Bell Canada's vicarious liability for its employee.

23 Section 266 only bars claims against a "person present at the incident". Section 263(5) (a) bars claims against any "person involved in the incident" which in my view is open to a broader interpretation than the provisions of s. 266. Section 263(5)(b) is broader still and bars subrogation against "any person". According to the *Interpretation Act*, R.S.O. 1990 a person includes a corporation. Pursuant to s. 263(5)(b) the right of subrogation for property damage claims has been completely abolished save and except as specifically permitted by the

> Regulations. Ont. Reg. 275/90 provides for subrogation only in situations involving repairs, parking garages and tow trucks.
>
> 24 As stated by O'Donnell in *Automobile Insurance in Ontario* at p.51:
>
> > we have a 'knock for knock' system whereby each insurer absorbs most of its policyholders' property damage claims without attempting to recover same from the insurers of tortfeasors causing such claims. In any individual case, the result can be unfair to the insurer but in the totality of such claims, the result is fair to all insurers. Insureds are not affected because they are not surcharged in premium for accidents that are not their fault.
>
> 25 Section 263 precludes the plaintiffs from proceeding with an action against the defendants.
>
> [*Emphasis added*]

[54] In *583809 Ontario Ltd. v. Kay*, [1995] O.J. No. 1626 (Ont. Ct. (Gen. Div.)), the facts of the case were not in dispute. The defendant leased a vehicle from the plaintiff. The lease agreement contained the following term, in large print, under the heading "Collision Damage Waiver":

> In consideration of the payment of $0 dollars per day or part day thereof renter's liability for damage to rented vehicle is limited to all per accident provided all terms of the rental agreement are complied with and accident is reported to The Car Rental Place within 12 hours after occurrence and to police and notwithstanding payment of said fee customers shall be fully liable for all collision damage to vehicle by striking overhead objects and is responsible for all damages and insurance.

[55] While the car was in the defendant's possession, it was involved in an accident causing $10,907.40 in damage. The plaintiff made a claim against the defendant in contract for payment of that sum to compensate it for its loss. The defendant defended the action on several grounds, including that s. 263 of the *Insurance Act* prevented the bringing of such an action. On that issue, Justice Somers wrote:

> 12 My first concern about this approach is that this subsection is one of a group designed by the legislature to bring to an end claims which were really made by one insurance company against another in the names of their respective insureds strictly for the property damage that had occurred in an accident. This is not such an action. The plaintiff appears in this action not as an insured, but as a contracting party and the owner of a car which was damaged while under lease to and in the care of the defendant. Counsel for the defendant takes the position that this is of no particular significance because one should look at the plain wording

> of the statute and conclude that since the car in question was insured the plaintiff is an insured within the meaning of s. 263(5) and has lost its right of action.
>
> 13 I am not satisfied that s. 263 was designed to deprive a right of action to the owner of a vehicle who is bringing a claim for damage to that vehicle under its contractual rights. Clearly it intended to prevent the owner of the vehicle from bringing an action in negligence against the party who did the damage to his car. However, it is a principle of statutory interpretation that where the intended purpose of the Act was to restrict or remove a right that existed prior to its being passed, it should say so in clear and unambiguous terms. In my view if it had been the intention of the legislature to deprive a contracting party of its right to claim that to which it is entitled under the terms of its contract, it would have said so: *Laidlaw v. Metropolitan Toronto (Municipality)*, [1978] 2 S.C.R. 736 at p. 748, 87 D.L.R. (3d) 161 at p. 169.
>
> 14 I have concluded therefore that s. 263 of the Insurance Act does not deprive a plaintiff of its right to maintain this action.
>
> [*Emphasis added*]

[56] The reasoning in *Bassie* was applied in *Wawanesa Mutual Insurance Co. v. Ontario (Provincial Police)*, [2000] O.J. No. 814 (Ont. Sup. Ct. J.). In that case, Wawanesa brought a subrogated claim against the defendants for property damage and repayment of statutory accident benefits. The facts were as follows. The insured was driving a truck that went out of control when the vehicle went in contact with broken pavement on the shoulder of the highway. The truck collided head on with a tractor trailer transport truck. As a result of the collision, one of the passengers was killed, while two others were injured.

[57] The defendants brought a motion for summary judgment. With respect to the property damage claims, they argued that s. 263(5)(b) of the *Insurance Act* stripped Wawanesa of any subrogation rights it may have against the defendants. Wawanesa pointed to a new section that had been added to the subrogation provisions – s. 263(5)(a.1) – and suggested that it allowed an individual who suffers property damage to recover indemnities from parties other than his or her own insurer.[2] Wawanesa argued that if the insured had such a right, it would open

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[2]The revised s. 263(5) read as follows:

263(5) If this subsection applies,

> (a) an insured has no right of action against any person involved in the incident other than the insured's insurer for damages to the insured's automobile or its contents or for loss of use;
>
> (a.1) an insured has no right of action against a person under an agreement other than a contract of automobile insurance in respect of damages to the insured's automobile or its contents or loss of use, except to the extent that the person is at fault or negligent in respect of those damages or that loss.

up the possibility that there is also a new right of subrogation in the insurer. Justice Kozak reviewed the previous case law, including *Bassie*, and held:

> 31 The language of Section 263 of the Act is clear and unambiguous and demonstrates unequivocally the intention of the legislature to eliminate common law and statutory subrogation rights with respect to property damage. The newly enacted Section 263(5)(a.1) does not create any ambiguity which would lead this court to conclude that it suggests a window of opportunity for a possible or potential subrogation claim. Subsection 263(5)(a.1) does no more than qualify and quantify Section 263(5)(a) which confines the insureds right of action for property damage to his automobile to his automobile insurer. Accordingly it is hereby ordered that the plaintiffs are hereby precluded from proceeding against the defendants in the herein action with respect to the property damage claim.

[58] Other aspects of the decision were appealed, and the findings reversed: [2001] O.J. No. 1802 (Ont. Sup. Ct. J. Div. Ct.). Wawanesa did not appeal the finding that the subrogated property damage claim was barred by s. 263(5)(b).

[59] The current leading case on s. 263 is *Clarendon National Insurance*, 2007 ONCA 680, [2007] O.J. No. 3797. Justice Juriansz, for the Court of Appeal, described the issue on appeal as follows:

> 1 This appeal raises the question whether there are circumstances in which Ontario's "no-fault" insurance regime permits a tort action for recovery of property damage against a negligent party. I conclude that the "no-fault" regime prohibits all tort actions for recovery of property damage against a negligent party. This prohibition applies not only to claims of individuals, but also to subrogated claims brought by insurers.
>
> 2 In this case, the motion judge considered herself bound by this court's judgment in *Tuttle v. Travelers Indemnity Co.* (2005), 75 O.R. (3d) 184 to permit the individual plaintiff and his subrogated insurer to maintain their tort action in negligence against the appellants on the basis that the property damage payments that the insurer paid to the insured were not made under s. 263 of the *Insurance Act*, R.S.O. 1990, c. I-8. In my view, *Tuttle* is distinguishable and s. 263 bars the respondents' tort claim.
>
> [*Emphasis added*]

> (b) an insurer, except as permitted by the regulations, has no right of indemnification from or subrogation against any person for payments made to its insured under this section.

[60] The facts of the case were as follows. The plaintiff, a resident of Brampton, Ontario, was the owner-operator for an American trucking company located in Texas. His tractor was insured by double policies of insurance. Clarendon National Insurance provided the physical damage coverage and American Home Assurance provided the liability coverage. Clarendon was a national insurance company located in and governed by the laws of the United States. It was not a licensed insurance carrier under the *Insurance Act* and had not filed an undertaking to be bound by the provisions of s. 263 with the Superintendent of Financial Services. American Home was also an American insurance company, but it had filed an undertaking under s. 263.

[61] The plaintiff was involved in a collision with the appellants on Highway 401 in Toronto. His tractor suffered physical damage and Clarendon paid for the damage, minus the deductible. The plaintiff and Clarendon commenced an action in Ontario alleging that the collision was caused by the appellants' negligence and seeking reimbursement for the amounts paid to repair the tractor, along with interests and costs. The appellants filed a defence claiming that the respondents' claims were barred by s. 263 of the *Insurance Act*. The respondents then brought a motion for an order that s. 263 did not bar their action, and an order striking those portions of the statement of defence that pleaded otherwise. The motion judge granted the orders and the appellants appealed.

[62] Justice Juriansz began by explaining the statutory no-fault regime:

> 7 Section 263 of the *Insurance Act* replaced the tort system that resolved automobile damage claims prior to its enactment. In the new statutory scheme, insureds can no longer sue the tortfeasor driver whose negligence has caused damage to their cars. Rather, their own liability insurer pays for the damage, to the extent that they were not at fault, under the third party liability section of their motor vehicle liability policies. Insureds can recover the at-fault portion of their damage by purchasing collision coverage. Insurers have no right of subrogation for payments to their own insureds, but, on the other hand, do not have to pay the subrogated claims previously brought by other insurers in the tort system. The result is that the statutory regime eliminates the transactions costs that were inherent in the tort system.
>
> 8 Section 263 is the heart of the regime. The section applies when three criteria are met:
>
> > 263(1) This section applies if,
> >
> > (a) an automobile or its contents, or both, suffers damage arising directly or indirectly from the use or operation in Ontario of one or more other automobiles;

> (b) the automobile that suffers the damage or in respect of which the contents suffer damage is insured under a contract evidenced by a motor vehicle liability policy issued by an insurer that is licensed to undertake automobile insurance in Ontario or that has filed with the Superintendent, in the form provided by the Superintendent, an undertaking to be bound by this section; and
>
> (c) at least one other automobile involved in the accident is insured under a contract evidenced by a motor vehicle liability policy issued by an insurer that is licensed to undertake automobile insurance in Ontario or that has filed with the Superintendent, in the form provided by the Superintendent, an undertaking to be bound by this section.

9 When the section applies, s. 263(2) provides that the insured is entitled to recover property damage from his or her own insurer:

> (2) If this section applies, an insured is entitled to recover for the damages to the insured's automobile and its contents and for loss of use from the insured's insurer under the coverage described in subsection 239(1) as though the insured were a third party.

10 Key to the regime is the insured's inability to recover property damage from anyone other than his or her own insurer, except in the very limited circumstances described in s. 263(5)(a.1):

> (5) If this section applies,
>
> (a) an insured has no right of action against any person involved in the incident other than the insured's insurer for damages to the insured's automobile or its contents or for loss of use;
>
> (a.1) an insured has no right of action against a person under an agreement, other than a contract of automobile insurance, in respect of damages to the insured's automobile or its contents or loss of use, except to the extent that the person is at fault or negligent in respect of those damages or that loss.

11 In addition, s. 263(5)(b) prevents insurers from advancing subrogated claims for payments they have made to their insureds:

> (b) an insurer, except as permitted by the regulations, has no right of indemnification from or subrogation against any person for payments made to its insured under this section.

12 Insurers from other jurisdictions can opt to participate in Ontario's regime by filing an undertaking with the Superintendent under s. 226.1:

> 226.1 An insurer that issues motor vehicle liability policies in another province or territory of Canada, the United States of America or a jurisdiction designated in the Statutory Accident Benefits Schedule may file an undertaking with the Superintendent, in the form provided by the Superintendent, providing that the insurer's motor vehicle liability policies

> will provide at least the coverage described in sections 251, 265 and 268 when the insured automobiles are operated in Ontario.
>
> 13 Foreign insurers who file undertakings derive the advantages of being part of the regime, but s. 226.1 obligates them to provide certain benefits to their insureds. These benefits include, for example, statutory accident benefits pursuant to s. 268 and damage coverage to the insured's automobile pursuant to s. 265(1)I.

[63] The court then reviewed the motion judge's decision:

> 15 … The accident was entirely the fault of the driver of the other vehicle. The collision insurer paid Mr. Tuttle for his property damage and then brought a subrogated claim against Mr. Tuttle's liability insurer. This court in Tuttle decided that this claim was not barred by s. 263(5)(b).
>
> 16 The motion judge understood this court's decision in *Tuttle* to be based on a reading of s. 263(5)(b) alone, and particularly on the fact that the insurer's payment to its insured was not made "under this section". She quoted and relied upon the following comment Laskin J.A. made at paragraph 3:
>
> > Section 263(5) only applies if the insurer paid for the damage to its insured's automobile under a motor vehicle liability policy. Because the Associates policy is not a motor vehicle liability policy, s. 263 does not apply to it and Associates is therefore not precluded from exercising its rights of subrogation.
>
> 17 The motion judge did note that one of the purposes of the s. 263 regime is to prevent actions in negligence for property damage to automobiles, but she considered herself bound by this court's decision in *Tuttle*. Therefore, because Clarendon had not paid for the damage to Mr. Bounthai's vehicle under s. 263, she concluded that the plaintiffs were not barred by s. 263 from pursuing their claim against the defendants.
>
> [*Emphasis added*]

[64] The Court of Appeal considered first whether the individual plaintiff was entitled to maintain a tort action in negligence against the individual tortfeasors:

> 19 In this case, Mr. Bounthai's liability insurer, American Home, was statutorily required to provide coverage for his property damage because it had filed an undertaking under s. 226.1. Because the undertaking was filed, all three criteria of s. 263(1) are met: Mr. Bounthai's vehicle suffered damage from an accident in Ontario, his vehicle was insured by an insurer that had filed an undertaking with the Superintendent, and another vehicle involved in the accident (i.e. the appellants') was insured by a domestic insurer licensed to undertake automobile insurance in Ontario. Consequently, Mr. Bounthai is entitled to recover for the physical damage to his tractor from his liability insurer, American Home.

> 20 As the statutory regime applies, Mr. Bounthai's ability to sue in tort is restricted by the provisions of s. 263. Mr. Bounthai cannot maintain a tort action in negligence against the Candows. Section 263(5)(a) prevents him from suing anyone other than his own insurer for damages to his car. Sections 263(5)(a)'s general rule is subject to the exception set out in s. 263(5)(a.1). This exception permits a right of action where an action is brought "*under an agreement, other than a contract of automobile insurance*". It permits an action in contract and does not permit an action in tort.
>
> 21 The exception would apply, for example, where a provision of a lease agreement requires that the lessee return the vehicle to the lessor in an undamaged state. Where the lessee fails to do so, the lessor can bring an action against the lessee in contract: *583809 Ontario Ltd. v. Kay* (1995), 24 O.R. (3d) 445 (Gen. Div.), *A Plus Car & Truck Rental v. Pun*, [1999] O.J. No. 1291 (Div. Ct.). The exception in s. 263(5)(a.1) has been applied also to situations where the defendant has agreed to pay for the damage to the plaintiff's vehicle without the parties resorting to their insurance - in effect a claim on an oral contract. In *Harpeet v. Markham (Town of)*, [2006] O.J. No. 2439 (S.C.J.), P. Gollom Deputy J. observed at para. 17 that the exception in 263(5)(a.1) "expands causes of action against a person involved in the incident provided the person has entered into a contract, and the person is at fault or negligent." *McClinton v. Estien*, [2003] O.J. No. 5680 (S.C.J.), is another such case.
>
> 22 In this case, however, Mr. Bounthai's action is not brought "under an agreement". Mr. Bounthai's claim is a tort claim that falls within the general rule of s. 263(5) so it is statutorily barred.
>
> [*Emphasis added*]

[65] Having found that the individual plaintiff had no claim against the tortfeasors, the Court of Appeal held that it followed that the insurer had no subrogated claim:

> 23 An insurer's right to bring a subrogated action is dependent on the existence of a cause of action by the insured. This is so both under the common law and under the statute. Justice Sharpe explained the common law principle in *McCourt Cartage Ltd. v. Fleming Estate* (1997), 35 O.R. (3d) 795 at 799 (Gen. Div.):
>
> > If the insured has no right of action, then the foundation of the insurer's right to bring a subrogated action is removed. It is clear that at common law, an insurer's right to bring a subrogated action is derivative of and dependent upon the existence of a cause of action by the insured.
>
> 24 The *Insurance Act* is entirely consistent with this common-law principle by providing an insurer is subrogated "to all rights of recovery of the insured". Section 278(1) of the Act provides:

> An insurer who makes any payment or assumes liability therefore under a contract is subrogated to all rights of recovery of the insured against any person and may bring an action in the name of the insured to enforce those rights.
>
> 25 Section 263(5)(b) does not disturb this common-law and statutory principle. The import of s. 263(5)(b) is to eliminate any rights of subrogation an insurer may have for payments it has statutorily been compelled to make to the insured "under this section". Where the insurer has made the payment other than "under this section", the insurer is subrogated to whatever rights of recovery that the insured has otherwise.
>
> 26 Since, as discussed above, s. 263(5)(a) extinguishes an insured's right to recover property damage from a tortfeasor, his or her insurer cannot have a subrogated right to recover property damage from a tortfeasor. Therefore, Clarendon has no right to bring a subrogated tort claim in this case.

[66] The phrase "damage arising directly or indirectly from the use or operation … of one or more other automobiles" means damage incident to, or having connection with, the use or operation of one or more other automobiles (see *Amos*). It does not mean damage "caused by" the use or operation of one or more other automobiles. In other words, a direct or proximate causal connection is not required between the damage and the use or operation of one or more other automobiles. As long as the use or operation of one or more other vehicles contributes to the subject vehicle's damage, the condition under s. 138A(1)(a) is met. The words "directly or indirectly" mean that a collision between two or more vehicles is not necessary to satisfy s. 138A(1)(a). The section also covers damage that occurs when a driver, as a result of the use or operation of another automobile, is forced to take evasive action to avoid a collision. The Ontario courts have held that s. 263(1) – s. 138A(1)'s Ontario counterpart – applies even where the damage is caused by an independent third party. Negligence on the part of another driver is not required for the provision to apply. As Justice Kozak observed in *Wawanesa*:

> The language of Section 263 of the Act is clear and unambiguous and demonstrates unequivocally the intention of the legislature to eliminate common law and statutory subrogation rights with respect to property damage.
>
> [*Emphasis added*]

[67] I find that the meaning of s. 138A(1) is that it applies wherever an automobile or its contents, or both, suffers damage, whether through collision or otherwise, that is incident to or connected with or contributed to by the use or operation of one or more automobiles in Nova Scotia. Negligence on the part of another driver is not a precondition to the application of s. 138A(1).

[68] However, before adopting this interpretation, it remains necessary to consider Sullivan's third question under the modern principle – what are the consequences of adopting this proposed interpretation? And what are the consequences of adopting the interpretation proposed by the plaintiffs?

What are the consequences of adopting the proposed interpretation?

[69] At this stage, we must consider the consequences of applying s. 138A(1)(a) where the property damage is alleged to have been caused by an independent third-party tortfeasor. The most unsatisfactory implication of this interpretation is that an insurer is forced to pay for property damage caused by a negligent third party. In any individual case, that outcome seems unfair and unlikely to result in lower premiums for consumers – one of the purposes of DCPD. Looking at the broader perspective, however, most accidents *are* caused by driver negligence, and any unfairness that results in those rare cases where fault lies elsewhere is likely to be shared reasonably equally among all insurers. No insurer is in a better position regarding s. 138A than any other insurer. Furthermore, allowing insurers to sue third parties would not necessarily maintain lower premiums for consumers. Fault might not always be clear cut, and an unsuccessful subrogated action will only add costs to the system.

[70] More importantly, from the court's perspective, the interpretation proposed by the plaintiffs would undermine the goals of DCPD to a much greater extent than would that proposed by the defendants. If s. 138A(1)(a) is interpreted as applying only where the damage was caused by the negligence of another driver, as proposed by the plaintiffs, an insurer would be entitled to deny liability under s. 138A in any case where it concluded that the damage had another, more proximate, cause. The insured's only recourse in that situation would be to sue his or her insurer under the policy, or to sue the third party in tort.

[71] If the phrase "damage arising directly or indirectly from the use or operation … of one or more other automobiles" were interpreted to mean "damage caused directly or indirectly by the negligent use or operation of one or more other automobiles", there would be no obligation on an insurer to compensate its insured for property damage where the insurer concludes that the damage was caused by a third party, such as a construction company doing roadwork; a municipality that negligently failed to install additional stop signs, or to repair road damage in a timely manner; an automobile manufacturer that was negligent in its design of the insured's vehicle; or a dealer who sold the insured an unsafe vehicle. This could not have been what the legislature intended when it enacted the DCPD provisions.

Consider the following comments by Allen O'Donnell in *Automobile Insurance in Ontario* in relation to the impact of a car accident on a consumer:

> Because lawyers and politicians are accustomed to high incomes often accompanied with excellent fringe benefit plans, such as wage replacement when injured or sick, there is a tendency of those who can influence the choice of a compensation system to forget that for the bulk of citizens, the tragedy of a car accident creates great financial stress and anxiety. For the average person, the car must be repaired or replaced very quickly so that the wage earners can get to work to earn an income. While the car is being fixed, another car must be rented. Someone, namely an insurer, must take care of paying for the car repairs and for paying for the rental car. Very few family budgets can manage these expenses while a dispute carries on as to who should pay. Family and working life cannot come to a halt just because the family car is not operational. When a wage earner suffers personal injury the mortgage must still be paid and food and clothing must continue to be purchased. Only the certainty of having insurance moneys coming in fast can cure the anxiety and stress of financial problems occasioned by automobile accidents. ...
>
> [pp. 26-27]
>
> [*Emphasis added*]

[72] These comments are just as applicable today in the matter before me. Accepting the plaintiffs' proposed interpretation would reintroduce uncertainty and inefficiency into the claims process for consumers, along with litigation costs for both consumers and insurers -- all of which the legislature intended to eliminate when it introduced the DCPD.

[73] It is also important to recognize that the DCPD system is not always "fair", even where property damage is caused by the fault of another driver. Section 138A applies where the automobile that suffers the damage and at least one other automobile involved in the accident are insured by an insurer licensed to do business in Nova Scotia or who has filed an undertaking to be bound by s. 138A. Consider an automobile accident involving A, B, and C. A and B are both insured by an insurer licensed to do business in Nova Scotia. C is not insured. C is 100% at fault for the accident. Pursuant to s. 138A(1), the insurers for A and B must compensate them for any property damage to their vehicles. Section 138A(6) then comes into play:

> 138A (6) Where this Section applies,
>
> (a) an insured has no right of action against any person involved in the incident other than the insured's insurer for damages to the insured's automobile or its contents or for loss of use;

> (b) an insured has no right of action against a person under an agreement, other than a contract of automobile insurance, in respect of damages to the insured's automobile or its contents or for loss of use, except to the extent that the person is at fault or negligent in respect of those damages or that loss; and
>
> (c) an insurer, except as permitted by the regulations, has no right of indemnification from or subrogation against any person for payments made to the insurer's insured under this Section.

[74] Pursuant to ss. 138A(6)(a) and (c), neither A and B, nor their insurers, have any right to sue C to recover for property damage to their automobiles. The insurance companies must pay out to compensate A and B for the negligence of C, who walks away scot-free. The same result would follow if C was insured with an American insurer who had not filed an undertaking to be bound by s. 138A. The plaintiffs in this case argued that the legislature did not intend for parties who do not participate in the DCPD system to benefit from it. However, if the legislature had intended for the DCPD to apply only where there would have been a subrogated action by one insurer against another under the former third party system, it would have drafted s. 138A(1) as applying only where *all* vehicles involved in the accident are insured by insurers licensed in Nova Scotia or who had filed an undertaking to be bound by s. 138A. In fact, such an approach was tried in Ontario when DCPD was first introduced, and later abandoned. Section 263(1) of the *Insurance Act*, S.O. 1990, c.I-18 initially provided as follows:

> 263(1) This section applies if an automobile or its contents, or both, suffers damage arising directly or indirectly from the use or operation in Ontario of any other automobile and both are insured under contracts evidenced by motor vehicle liability policies issued by insurers licensed to undertake insurance in Ontario.
>
> [*Emphasis added*]

[75] In *Automobile Insurance in Ontario,* O'Donnell notes at p. 41:

> While the section talks about "both" automobiles, the result is that the number of automobiles involved can be many more than two, such as a chain rearend collision involving dozens of vehicles which often happens on the busier highways in Ontario especially in inclement weather. However, as long as the damage occasioned to an Ontario insured's automobile is caused by other automobiles insured by insurers licensed in Ontario, the insured is entitled to direct compensation from his or her own insurer. But if even one of the cars that caused the insured's damage is insured by an insurer not licensed in Ontario, direct compensation does not apply.
>
> [*Emphasis added*]

[76] Section 263(1) was repealed in 1993 and replaced with the following[3]:

> 263(1) This section applies if,
>
> (a) an automobile or its contents, or both, suffers damage arising directly or indirectly from the use or operation in Ontario of one or more other automobiles;
>
> (b) the automobile that suffers the damage or in respect of which the contents suffer damage is insured under a contract evidenced by a motor vehicle liability policy issued by an insurer that is licensed to undertake automobile insurance in Ontario or that has filed with the Commission, in the form provided by the Commission, an undertaking to be bound by this section; and
>
> (c) at least one other automobile involved in the accident is insured under a contract evidenced by a motor vehicle liability policy issued by an insurer that is licensed to undertake automobile insurance in Ontario or that has filed with the Commission, in the form provided by the Commission, an undertaking to be bound by this section.
>
> [*Emphasis added*]

[77] In relation to this specific amendment, the legislature clearly recognized that the purposes of DCPD were better served by broadening the scope of s. 263(1), even if unfairness to insurers in individual cases would occasionally result. Nova Scotia has adopted the same approach. Accordingly, interpreting s. 138A(1)(a) in a manner that would occasionally create unfairness for insurers in individual cases is not inconsistent with the rest of the section.

Applying s. 138A to the facts of this case

[78] In applying s. 138A to the facts of this case. The relevant questions under s. 138A(1) are answered as follows:

(1) Did an automobile or its contents suffer damage?

Yes. The Classic Freight truck operated by Mr. Andrews suffered extensive damage.

(2) Did that damage arise directly or indirectly from the use or operation in the Province of one or more other automobiles?

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[3] *Insurance Statute Law Amendment Act, 1993*, S.O. 1993, c. 10, s. 21.

Yes. The damage was incident to or connected with the use or operation of the Dodge Journey and the other vehicles stopped on the highway, which necessitated the evasive action taken by Mr. Arsenault. Said differently, the use or operation of the Dodge Journey and the other vehicles stopped on the highway contributed to the damage to the Classic Freight truck.

(3) Was the Classic Freight truck insured under a contract evidenced by a motor vehicle liability policy issued by an insurer who is licensed to undertake automobile insurance in the Province or who has filed an undertaking to be bound by s. 138A with the Superintendent?

Yes.

(4) Was at least one other automobile involved in the accident insured under a contract evidenced by a motor vehicle liability policy issued by an insurer who is licensed to undertake automobile insurance in the Province or who has filed an undertaking to be bound by s. 138A with the Superintendent?

Yes.

[79] With the preconditions under s. 138A(1) met, it remains to determine whether the plaintiffs' insurer has any right of subrogation against the defendants.

[80] Section 138A(6)(c) provides that where s. 138A applies, "an insurer, except as permitted by the regulations, has no right of indemnification from or subrogation against any person for payments made to the insurer's insured under this Section". The defendants clearly fall within the category of "any person". The insurer's action against the defendants, to the extent that the claims are for damage to the truck and its contents, other than damage to those contents that were being carried for reward[4], is barred.

[4]See s. 138A(13). O'Donnell writes at pp. 47-48 with respect to contents being carried for reward:

The second exception of "contents of an automobile that are being carried for reward" was intended to separate personal risks from commercial risks (s. 230a (7)). It was not intended that the property damage – direct compensation system pay for goods that should normally be insured under a cargo policy (an inland marine policy) whether or not the owner or carrier of the goods chose to so insure such goods. Damage to contents of automobiles "carried for reward" are not payable under the new system. They remain under the old system. Thus, goods being carried for reward in a taxi, with or without a passenger being present, or goods being carried in a car or truck for reward such as those carried by couriers or delivery trucks do not fall into the new system. The insurer of such goods or the owner or bailee of such goods can simply claim against the tortfeasor causing damage to such goods as they did in the past. Assuming that such goods were damaged by collision with an automobile of some kind, the insurer of the automobile causing the damage is liable to pay for the damages to such goods. …

Bodurtha, J.