Focus INSURANCE

Who will benefit from usage-based insurance?

Leonard Kunka

Desjardins General Insurance Group has recently launched usage-based auto insurance (UBI) for its automobile policyholders in Ontario. Other insurers are watching and have indicated that they may be following Desjardins' lead.

The concept is relatively simple. By attaching a wireless monitoring device to an automobile, insurance companies will be able to obtain information about an insured's driving habits, including acceleration, braking, speed, distance travelled, and the times when the vehicle is being operated. In return for agreeing to opt into this program, Desjardins says that data from these recorders will be reviewed, and "safe" or "less risky" drivers could potentially receive a lower annual automobile insurance premium.

Insurance companies will argue that the information collected from such devices allows them to more accurately match insurance rates, deductibles and perhaps other coverage to actual driving practices.

Currently, insurers consider a person's actual driving record, (driving infractions and convictions) as well as claims history (accidents and payouts by the insurer), to determine who is a better risk and therefore pays a lower premium. Insurers also take into account the locality where the insured resides, and whether the vehicle is being used to drive to work in order to set premiums. Is that information not a reliable measure of the risk the insurer is trying to insure? I certainly believe the information currently used is far more reliable than information from the UBI data recorders, which I feel can be easily misinterpreted. A few examples of how the data can be misinterpreted should suffice to highlight some of my concerns.

A recent *New York Times* article raises a red flag regarding the driver who has to use the highway daily to get to work. This driver would regularly be operating their vehicle in excess of 80 km/hr. Does that necessarily mean they are a poorer driver than someone who has to drive slowly through congested city traffic each day to get to work? It is quite likely, though, that insurers would consider the former driver a poorer risk because of the amount of time the driver is operating the vehicle on a highway at speeds in excess of 80 km/hr.

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Another problem with the UBI technology is that it does not differentiate between sudden braking or acceleration which is due to "aggressive driving," versus the same actions which are actually good defensive driving practices in response to the dangerous actions of another driver. My concern is that insurers will simply count up the number of instances of sudden acceleration or braking, and treat them all as an indication of poor driving practices.

The critical question which arises is: Who will be setting the standard for what constitutes "safe" versus "poor" driving practices based on this data? I would certainly want to know what data would put me into a "good" versus "poor" risk category before agreeing to use the UBI system. Without knowing that information, insurers have complete control over setting their own standard for who will be considered a good enough driver to warrant a premium reduction. In addition, how will insurers treat those who decide not to opt into the program? Will they be considered poorer risks because they do not agree to be monitored?

Skeptics will say if insurers are interested in promoting UBI, there is likely a greater benefit to the insurance industry than to the driving public. I remain unconvinced about the promise of reduced premiums, as insurers have never delivered on promises to reduce premiums. Instead, I see this technology as a mechanism for insurers to control their profit levels and slowly ratchet up all drivers' premiums.

Finally, who is going to bear the costs of purchasing and installing these devices and the computer programs and staff necessary to analyze this data? Are we to believe the insurance industry will absorb those costs and at the same time pass along substantial premium reductions to good drivers, or is it more likely that those costs will be passed along to all drivers, thereby removing any premium savings?

From a legal perspective, user-based data that is collected by insurance companies has huge implications for accident investigations/reconstruction and litigation. As plaintiff's counsel in a motor vehicle accident claim, I would always request production of the user-based data from the defendant's insurance company to gain insight into historically aggressive or unsafe driving practices.

Aside from the obvious privacy issues, this technology represents a major shift in the way insurance companies set their premiums. The jury is still out on whether this technology will prove beneficial to consumers. It is incumbent on the Superintendent of Insurance to review the practices of insurers employing this technology to ensure that it is being used to actually pass along premium savings to good drivers, rather than being used as a covert way to impose higher insurance premiums upon all drivers.

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Negligence: Destruction must be done to influence litigation

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anticipated negligence. Accordingly, intentional destruction is not required in order for the court to grant remedies up to and including striking a pleading. Arguably, the law in these jurisdictions could benefit the legal system by:

- Preventing the spoliator from benefiting from their failure to preserve evidence;
- Enhancing truth determination; and,
- Promoting the integrity of the judicial system.

In Ontario, Justice Ian Leach recently reiterated the spoliation requirements stipulated in *Gutbir* in his interim endorsement on spoliation in the Ontario Superior Court decision, *Stilwell v. World Kitchen Inc. et al.* The purpose of the interim endorsement was to determine whether the doctrine of spoliation, including the rebuttable presumption of the evidence's adverse impact, should be put to the jury. Justice Leach ultimately determined that doing so would be unfairly prejudicial to the plaintiffs.

In *Stilwell*, the plaintiff was washing a cooking pot which had *allegedly* been manufactured by one of defendants. The pot broke into four pieces and caused severe lacerations to the plaintiff's wrists. A few hours after the accident occurred, Mrs. Stilwell (also a plaintiff) cleaned the area and threw out the pieces of the broken kitchen pot. At trial, Mrs. Stilwell testified that she had no intention of starting a lawsuit or gaining an advantage in a lawsuit when she discarded the broken pieces.

Approximately 16 days after the accident, Mrs. Stilwell sent an e-mail to the alleged manufacturer of the kitchen pot. At trial, she testified that her sole intention in doing so was to warn those responsible that their product was defective in order to prevent others from experiencing similar issues. Mrs. Stilwell then had a telephone conversation with a representative of the manufacturer. Justice Leach took note of the fact that Mrs. Stilwell had not demanded any compensation during her telephone conversation with the manufacturer's representative.

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>
> **Michael White**
> **Kathryn Shani**
> Borden Ladner Gervais

In discussing the law of spoliation, Justice Leach referred to *St. Louis*, *McDougall* and *Gutbir*. He emphasized that the spoliation doctrine is only triggered when the party invoking it provides the necessary evidentiary basis that there was an intentional destruction of relevant evidence when litigation was existing or pending, and that the rebuttable presumption does not apply simply because evidence was destroyed. The doctrine of spoliation should not be put to the jury unless the trial judge is satisfied that the necessary evidence has been produced.

Justice Leach held that the defendants in *Stilwell* had not presented any evidence at trial that either of the plaintiffs had the intention to destroy evidence with the intention to influence the outcome of existing or pending litigation. He also stated that both plaintiffs testified that they had no such intention, provided a rational explanation as to why the evidence was destroyed, and that their evidence was not contradicted by any evidence put forth by the defence. Furthermore, the plaintiffs were never cross-examined on what their intentions were at the time that the evidence was destroyed. Therefore, as there was no evidence and no "air of reality" to the defendants' assertions, the doctrine of spoliation and rebuttable presumption could not be put to the jury.

The *Stilwell* decision reflects the ongoing trend of Canadian courts to impose a high evidentiary burden on a party seeking to invoke the spoliation doctrine.

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***Reasons: St. Louis v. Canada* [1896], 25 SCR 649; *McDougall et al. v. Black & Decker Canada Inc. et al* [2009] ABCA 353; *Gutbir v. University Health Network* [2010] ONSC 6752; *Stilwell v. World Kitchen Inc. et al* [2013] ONSC 3354.**

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