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ARTICLE

Court Of Appeal Clarifies Interpretation Of 2015 Amendments To The Insurance Act With Respect To Statutory Deductibles And Interest

Overview

The Ontario Court of Appeal released its decisions in *El-Khodr v. Lackie* ("El-Khodr") and *Cobb v. Long Estate* ("Cobb") together on September 19, 2017. Both were appeals from judgments after jury trials in actions arising out of motor vehicle accidents. The jury awards were not under appeal.

The issues on appeal were the trial judges' interpretations of the 2015 amendments to the *Insurance Act* on pre-judgment interest rates and statutory deductibles, and the treatment of collateral benefits in the context of motor vehicle accidents.

With the release of these decisions, subject to a successful Application for Leave to Appeal to the Supreme Court of Canada, the Court of Appeal has put an end to the debate amongst Superior Court and Divisional Court judges with respect to whether the 2015 amendments to the *Insurance Act* have retrospective effect (they do). As outlined below, the Court of Appeal concluded as follows on these important issues:

- The applicable pre-judgment interest rate on non-pecuniary damages in motor vehicle accident claims is the rate prescribed by section 127(1) of the *Courts of Justice Act*, and not 5% regardless of when the motor vehicle accident took place and/or when the action was commenced.
- The applicable statutory deductibles will be the amounts set out annually in the Ontario Gazette based on the date of trial regardless of when the motor vehicle accident took place and/or when the action was commenced.
- For the purposes of assessing offers to settle in determining a party's entitlement to costs, the effect of the applicable statutory deductible is to be taken into account regardless of when the motor vehicle accident took place and/or the action was commenced.

We discuss each of these issues below.

1. Applicable Interest Rate

On January 1, 2015, the *Insurance Act* was amended to provide that the pre-judgment interest rate on non-pecuniary damages in motor vehicle accident claims would no longer be governed by Rule 53.10 of the *Rules of Civil Procedure*, which sets the rate at 5% per year on non-pecuniary damages for actions for personal injury, but will be calculated in accordance with section 127(1) of the *Courts of Justice Act* which defines the pre-judgment rate in a proceeding where a person is entitled to an order for the payment of money. The issue before the Court of Appeal was whether the amendment was retrospective — *i.e.*, did it apply to all actions tried after the date of the amendment or only to proceedings commenced after January 1, 2015.

In *El-Khodr*, the trial judge found that the amendment was not retrospective. She found that the entitlement to the interest rate of 5% set out in the *Rules of Civil Procedure* was a substantive right which therefore could not be retrospective. In *Cobb*, the trial judge did not make any determination as to whether the amendment was retrospective, but exercised the discretion available to him pursuant to section 130 of the *Courts of Justice Act* to vary the prescribed interest rate and selected a pre-judgment interest rate of 3%.

The Court of Appeal concluded that the amendment to the *Insurance Act* with respect to the pre-judgment rate in motor vehicle accident claims was intended to have retrospective effect. The result therefore in *El-Khodr* was that the interest rate was reduced from 5% to 2.5% (*i.e.*, the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced). The Court of Appeal found no reason to interfere with the trial judge's exercise of his discretion in *Cobb*, in part because the defendant advised the Court that it was content with the 3% interest rate.

In coming to its decision that the amendment to the pre-judgment rate was retrospective, the Court of Appeal found that the intent of the legislature was that the amendment would apply to causes of action that had already arisen but not been tried. The Court noted that previous amendments to the *Courts of Justice Act* in respect of pre-judgment interest had specifically provided that the amendments would only apply to causes of action arising after a stipulated date. The Court reasoned that the absence of such language in the present amendment led to the conclusion that the legislature intended the amendment to be retrospective.

2. The Applicable Deductible

The Court of Appeal, in its decision in *Cobb*, considered whether the plaintiff's non-pecuniary damages should be reduced by a deductible of \$30,000, which applied to claims arising from motor vehicle accidents prior to August 1, 2015, or whether an increased deductible of \$36,540 (the deductible in effect at the time the jury reached its verdict in *Cobb*) should be applied.

The Court of Appeal found that the legislature intended for the deductible provision to apply to all actions which had not yet been tried. Further, the Court followed the rationale that "since the jury awards damages in today's dollars, the quantum of the deductible should similarly be calculated in today's dollars."

As with the interest rate, the changes made to the deductibles will apply to all actions arising out of motor vehicle accidents. While not explicitly considered, this decision also means that the increased vanishing deductible will most likely apply to all actions.

3. The Statutory Deductible is to be taken into account in Assessing Offers to Settle

The Court of Appeal in *Cobb* also considered the assessment of costs in light of the August 1, 2015 amendments to section 267.5(9) of the *Insurance Act* which provides that a party's entitlement to costs would be determined after the effect of the applicable statutory deductible was considered. The prior version was that a party's entitlement to costs would be considered without regard to the effect of the deductible.

In *Cobb*, the jury's award for damages, after deductions for collateral benefits and the deductible, was \$34,000. The trial judge, however, relied on the pre-amendment wording to find that for the purposes of assessing costs, the jury's award should be considered to be \$69,185. As a result, the defendant's offer of \$40,000 inclusive of all damages was found to be less than what the plaintiff recovered.

The Court of Appeal found that section 267.5(9) should be applied retrospectively to all actions and that, as a result, the defendant's offer exceeded the amount recovered by the plaintiff. The Court went on to find that the defendant's offer to settle was a valid Rule 49 Offer and overturned the trial judge's award of in excess of \$400,000 in costs and disbursements to the plaintiff. It ordered that each party bear its own costs of the trial.

Conclusion

The Court of Appeal's decisions in these cases settle the debate which erupted after the 2015 amendments to the *Insurance Act*. The decisions provide certainty for all litigants on how to assess the interest and deductible aspect of claims. There may be, however, an increase in requests to the trial judge to use his or her discretion to increase the interest rate under section 130 of the *Courts of Justice Act* and time will tell how any such requests will be dealt with.

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