Ontario Court Holds the New Deductible Applies Retroactively to MVA Actions

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The Ontario Superior Court recently held that the deductible applicable to non-pecuniary damages in all pending MVA actions is the amount established by O. Reg. 221/15 under the *Insurance Act*. At the time of the decision in December of 2015, this amount was $36,540. The decision supports the position that the deductible applicable to MVA-related actions will depend on when the case is adjudicated, regardless of when the accident occurred.

In *Vickers v. Palacious*,[1] Justice Martin James held that the legislative intent behind the new deductible, which came into effect on August 1, 2015, was to have retroactive application. The amount of the new deductible represents a material increase over the previous statutory deductible of $30,000 that had been implemented in 2003 by O. Reg. 312/03.

The previous regulation provided that all actions arising from MVAs occurring after a specific date would have the statutory deductible applied. James J. noted that the new regulation specified no such date. Moreover the new amount was set to expire on December 31, 2015, at which point the new deductible is to be adjusted based on indexation and readjusted annually. This indicated a clear intent that all pending lawsuits should have the new deductible apply. To hold that the increased deductible should be restricted to lawsuits commencing after August 1, 2015, as the plaintiff argued, would be unreasonable given that the amount would again change on January 1, 2016.

James J. also held that the increased deductible is a matter of procedural and not substantive law, meaning it applies retrospectively. Significantly, this position and the outcome of the *Vickers* case conflicts with the earlier decision of *Cobb v. Long Estate*,[2] where the court held that the new deductible should not apply to existing actions.

In *Cobb*, Justice M. Belch held that the deductible formed part of the threshold provisions of the *Insurance Act*, which is a matter of substantive rather than procedural law, following the Court of Appeal's decision in *Wong v. Lee*.[3] Therefore, according to Belch J., the August 1, 2015 change to the deductible cannot be applied retrospectively. It is worth noting that a notice of appeal has been filed in relation to the *Cobb* decision.

Given the opposing results in *Cobb* and *Vickers*, the issue of whether the adjusted deductible applies retrospectively will likely require a decision by an appellate court. Clarification on this point is especially important since the deductible has again "reset" as of January 1, 2016 to $36,905.40 and will do so annually going forward.

[1] 2015 ONSC 7647.

[2] 2015 ONSC 6799.

[3] 2002 CanLII 44916 (ON CA).

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