Statutory Deductible Significantly Reduces Jury Award in Recent Post-Trial Ruling

May 02, 2018

Background

The plaintiff suffered a whiplash injury and was absent from work for several weeks following what the Court described as “a relatively minor rear end collision” in February 2009. The main issue in dispute was whether the plaintiff’s chronic pain condition resulted from the motor vehicle accident.

After approximately three weeks of trial, the jury returned a verdict and awarded $42,500 for general damages, $76,121 for lost income prior to trial, and $0 for loss of future income. The Court noted that it was evident from the decision that the jury had accepted the arguments advanced by the defence.

General Damages

The Court noted that pre-judgment interest is to be calculated after the statutory deductible has been applied to the general damages award. Citing the Court of Appeal decision of *El-Khodr v. Lackie*, the Court held that if an accident occurred after November 1, 1996, general damages awards (made in 2018) which fail to exceed $126,610.07 are subject to the statutory reduction of $37,983.33. This is the case regardless of the date of the accident or when the action commenced.

The Court noted that “the pre-judgment interest rate for non-pecuniary damages in motor vehicle cases is the ordinary pre-judgment interest rate under s. 128(1) of the *Courts of Justice Act* and not the rate for non-pecuniary loss under s. 128(2) and the *Rules of Civil Procedure,*” although the Court maintains its jurisdiction to award a different interest rate under s. 130. The Court chose to exercise its discretion and assessed a rate of four per cent per year. In doing so, the Court considered the length of time the action had been before the court, the fact that the action was supposed to proceed to trial in 2016 when the law was unsettled, and the overall circumstances of the case.

As a result of the reduction for the statutory deductible, the net general damages award totalled $4,266.67 ($5,760 with pre-judgment interest).

Past Loss of Income

On the issue of past loss of income, due to the Court's determination that the defendants were entitled to $76,200 in collateral benefits credits against the amount awarded by the jury, the award was reduced to zero, as the credits exceeded the sum of the jury award. Specifically, credits were provided for Income Replacement Benefits, LTD monies and the income earned by the plaintiff in the first year after the accident.

Conclusion

The Court stated that the outcome was "disastrous" for the plaintiff and would "only have been worse had [it] granted the threshold motion." Notably, the Court commented that the outcome illustrated the legislative intention for only the most significant tort claims not be eliminated and "injured motorists be largely confined to claiming no fault benefits under their own insurance policies." Moreover, this case provides an example of "how annual indexing of the monetary threshold for unreduced general damages and annual indexing of the deductible" may, at first glance, result in unreduced general damages being mostly unattainable. Interestingly, the Court noted that over the past several years, jury awards of general damages greater than $130,000.00 are the exception in this jurisdiction.

Upcoming Cases

As noted above, reference was made to the Court of Appeal's decision *El-Khodr v. Lackie*, which is the subject of a leave to appeal application before the Supreme Court, as well as the upcoming five-judge Court of Appeal panel in *Cadieux v. Saywell*. A further alert will be provided upon the release of the decisions included above.

By

T. Kirk Boyd, Matthew Sherman

Expertise

Insurance Claim Defence

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749