More Food for Thought: Court Releases New Decision on Deductible, Interest Rates and Waiving Mediation Privilege

June 29, 2016

On June 22, 2016, an endorsement was issued in *Dimopoulos v Mustafa*, 2016 ONSC 4119 pertaining to issues raised during the argument of a threshold motion in a motor-vehicle accident case. These issues included the following:

1. The applicable statutory deductible for general damages;
2. The applicable rate of pre-judgment interest on general damages; and
3. Whether the court should award a remedial penalty against the defendant's insurer as a result of its conduct throughout the action and at mediation.

By way of background, on May 26, 2015 the jury awarded the plaintiff $37,000 for general damages. The court accepted the plaintiff's contention that the applicable deductible was $30,000 because the jury awarded damages before the August 1, 2015 amendments to the *Insurance Act*. Although the plaintiff's entitlement to general damages was still in question after the amendment due to the outstanding threshold motion, the amount had already been set before the amendment came into effect. The Court ruled that the appropriate deductible in respect of a given award is the deductible that was in effect at the time the quantum was determined by the Court, which is important in light of the fact that the deductible now increases annually.

The plaintiff in this case also successfully argued that he was entitled to a 5 percent pre-judgment interest rate on general damages. In coming to its decision, the Court relied on the decisions in *El-Khodr v. Lackie*, 2015 ONSC 4037; *Cobb v. Long Estate*, 2015 ONSC 6799; and *Carr v. Modi*, 2016 ONSC 1300; all of which determined that the August 1, 2015 amendments to the Insurance Act were substantive rather than procedural in nature, and thus could not apply retrospectively. These decisions all rely on the Ontario Court of Appeal's decision in Somers v. Fournier, 2002 CanLII 45001 (C.A.), where it was determined that pre-judgment interest was a matter of substantive rather than procedural law.

This case also explicitly discards a line of cases which characterize pre-judgment interest (and the statutory deductible) as questions of procedural law which allow for retrospective application, including *Cirillo v. Rizzo*, 2015 ONSC 2440 and *Corbett v. Odorico*, 2016 ONSC 1964.

As noted in our case comment of April 15, 2016, the increasing number of competing decisions on the retrospective application of the August 1, 2015 amendments will likely require the Court of Appeal's involvement to settle the issue.

Of further interest was the Court's decision not to apply a remedial penalty "despite the astonishingly aggressive opposition by the defendant" as well as "an obvious attempt to reduce the plaintiff's award to zero." The plaintiff argued that the basis for such a penalty existed pursuant to sections 258.5(1) and (5) of the *Insurance Act*, which requires an insurer to "attempt to settle the claim as expeditiously as possible" failing which, the Court can award costs.

The plaintiff successfully argued that in the circumstances, privilege over the defendant's mediation brief ought to be lifted. The plaintiff quoted several statements from the defendant's mediation brief as evidence of the defendant insurer's failure to attempt to settle the claim as expeditiously as possible.

The Court ultimately reviewed the mediation brief and noted that the defendant assessed the plaintiff's claims "in substantial detail and explained why it believed that the plaintiff's evidence was weak". This allowed the plaintiff to review his risks and trial strategy and "enabled the plaintiff to obtain an understanding of the defendant's position and the reasons for that position."

The Court's commentary on this point should provide some comfort to insurers that an aggressive position coupled with a negative outcome on the issue of damages does not necessarily constitute a failure to participate meaningfully in the mediation process.

By

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