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INSURANCE LAW BULLETIN

September 20, 2017 – by Alexander Neaves

Court of Appeal Rules that New Prejudgment Interest Rate is *Retroactive* (and more!):

A discussion of the companion appeals in *El-Khodr v. Lackie*[1] and *Cobb v. Long Estate*[2]

Yesterday, the Ontario Court of Appeal, in a long-awaited decision in two separate appeals, ruled that the January 1, 2015 change to the prejudgment interest ("PJI") rate (part of Bill 15) was effective from the day it came into force and applied to all actions then in the system. In other words, the new PJI rate rule is indeed "retroactive".

In addition to this important ruling, the Court of Appeal resolved questions about the applicability of other insurance cost-reducing changes to the *Insurance Act* and Ontario Regulation 461/96. The court has made it clear that the new deductible amounts and the rule that deductibles should now be taken into account when comparing a judgment to a Rule 49 offer were also retroactive changes, and thus apply to all cases regardless of when commenced.

Finally, the Court of Appeal discussed the method by which statutory accident benefits should be deducted from tort damages (and how assignments of future benefits should operate) in order to ensure a plaintiff does not receive double compensation.

All of these rulings are significant and should be given immediate effect in any ongoing motor vehicle tort litigation, including any mediation or settlement negotiations. The rulings are discussed in some further detail below.

[1] 2017 ONCA 716

[2] 2017 ONCA 717

New PJI Rate is Retroactive

As automobile insurers are well aware, section 258.3(8.1) was added to the *Insurance Act* as part of Bill 15, "Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014", with an effective date of January 1, 2015. The change, in short, was intended to replace the previous rule that a PJI rate of 5% should apply to non-pecuniary general damages for personal injury (mandated by the Rules of Civil Procedure pursuant to the *Courts of Justice Act*). Instead, for motor vehicle litigation, the "bank rate" would apply under section 258.3(8.1), which has been much lower than 5% for the past several years (The rate is presently at 0.8% and has been no higher than 1.3% since the second quarter of 2009.)

The question of whether this change in the PJI rate applied retroactively (that is, to cases already in progress as of January 1, 2015) or whether it only applied prospectively to new cases has been hotly debated and decisions of the Superior Court of Justice have gone in both directions.

In the above-cited two decisions (*El-Khodr* and *Cobb*), released together yesterday, the Court of Appeal has put the debate to rest, ruling unanimously that the change in the PJI rate mandated by section 258.3(8.1) had immediate effect on all cases as of January 1, 2015. The court reasoned that to give the change in PJI retroactive effect was most consistent with 1) the applicable legislative context, 2) the fact that the right to a particular *rate* of PJI does not vest until an award of damages is actually made (and therefore retroactive application of the rate change does not interfere with vested rights) and 3) the purpose of Bill 15, which was to reduce automobile insurance premiums now, not years down the road.

In regards to the third point, MacFarland J.A. held as follows:

> [103] Given the delays that are inherent in litigation, to achieve the cost reduction goal as quickly as possible and within the two-year window promised by the government would require the amendments introduced by Bill 15 to apply to cases already in the system. I note that such an interpretation does not undermine the legitimate interests of tort plaintiffs. Any perceived unfairness to litigants who commenced their actions before the effective date of the amendment can be ameliorated through the exercising of a trial judge's discretion under s. 130 of the *Courts of Justice Act* to award prejudgment interest at a rate other than the default rate.

Accordingly, going forward in any Ontario motor vehicle tort action, the rate of PJI that should be used for non-pecuniary losses should be the applicable bank rate for the quarter in which notice of the loss under section 258.3 of the *Insurance Act* was given. These rates are readily available on the Ministry of the Attorney General's website.

The only proviso to this is that the court has discretion under section 130 of the *Courts of Justice Act* (as it always has) to modify the rate of PJI in some circumstances (taking into account various factors, including changes in market interest rates, the fact that an advance payment was made, the circumstances of medical disclosure by the plaintiff, the amount claimed and the amount recovered in the proceeding, and the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding). Whether there is a legitimate argument to deviate from the bank rate for

PJI will depend on the specific circumstances of any given case, but any such deviation should arguably be the exception, not the rule, in light of the court's ruling yesterday.

New Deductibles are Retroactive

For much the same reasons as discussed above, the Court of Appeal has also held that the new deductibles, which are indexed each year for inflation under Ontario Regulation 461/96[3], apply retroactively. For 2017, the deductibles for non-pecuniary general damages and non-pecuniary FLA damages are, respectively, $37,385.17 and $18,692.59. The monetary thresholds for these damages above which the deductibles do not apply are, respectively, $124,616.21 and $62,307.59.

Accordingly, going forward, there should be no debate that all damages awards and negotiated settlements should proceed on this basis. The deductibles and monetary thresholds that apply in the year of the award or settlement should be used, regardless of when the action was commenced.

Deductibles to be Considered in Rule 49 Offers

Effective August 1, 2015, section 267.5(9) of the *Insurance Act* was amended to state that the determination of a party's entitlement to costs shall be made "with regard" to the deductibles. Based on the former version of that section, the Court of Appeal had confirmed in 2007 in *Rider v. Dydyk* that, when comparing a Rule 49 offer to the trial result for the purpose of determining costs, any deductibles that applied should not be taken off the award. The Court of Appeal has now clarified that, regardless of when an action was commenced, the new section wording applies.

In *Cobb*, this resulted in a reversal of the trial judge's award of costs in the plaintiff's favour of upwards of $400,000 (which incidentally the Court of Appeal described as "out of all proportion" for a chronic pain case). After applying the deductible for general damages, the Court of Appeal found that the defendant had clearly beaten its Rule 49 offer. Accordingly, it was held that, in the ordinary course, it should follow that the plaintiffs would be entitled only to their partial indemnity costs to the date of the defendant's offer and that the defendant would be entitled to their partial indemnity costs thereafter.

Another noteworthy aspect of the Court of Appeal's ruling on this point was a reminder that, in comparing a plaintiff's result to a defendant's Rule 49 offer for the purpose of cost consequences, the *net* result after reducing any deductible accident benefits (and the statutory deductibles) must be used. That is, "any costs award must reflect the reality" of the final judgment.

This ruling will help parties craft effective Rule 49 offers in motor vehicle cases and achieve more predictable cost consequences.

Deduction of Past and Assignment of Future Statutory Accident Benefits

Unrelated to the above findings in *Cobb* was an important clarification from the Court of Appeal regarding the deductibility of accident benefits from tort awards. The court confirmed that the *total* amounts received by the plaintiff prior to trial for income

[3] These changes came into effect August 1, 2015.

replacement benefits (whether received in the normal course of the AB claim or by way of a full and final settlement) are deductible from the *total* of all tort damages awarded for income loss, whether past or future. The court held the same with respect to housekeeping benefits. This is because the deductibility provisions in section 267.8 of the *Insurance Act*, the court held, do not differentiate between past and future losses. This interpretation is also consistent, the court noted, with the purpose of the statutory deduction procedure in section 267.8—to prevent double recovery for a single loss.

In a similar vein, the court in *El-Khodr* held that the rules for structuring an assignment for future statutory benefits must be relaxed in order to avoid double recovery. That is, the court held, strict qualitative and temporal matching requirements should not be applied to s. 267.8 (as was done in previous decisions such as *Bannon v. McNeely* and, more recently, *Gilbert v. South*). Rather, the assignment and trust provisions of the *Insurance Act* require the court to match benefits that will be received after trial to the broad, enumerated statutory categories only in a general way.

While the Court of Appeal's ruling with respect to the assignment of future accident benefits warrants a detailed discussion of its own, there is no question that it will assist tort defendant insurers to avoid compensating a plaintiff for losses already covered under the SABS claim.