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INSURANCE LAW BULLETIN

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By Brett Shillington (Student)

Elbakhiet v. Palmer Case Note

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The Ontario Court of Appeal recently handed down its decision in *Elbakhiet v. Palmer* concerning costs. The appellants, defendants in the motor vehicle accident action, appeal from the trial judge's costs award of almost $580,000. The respondents claimed damages of almost $2 million. The jury awarded damages of only $144,013.07, comprised of $25,000 non-pecuniary damages, $94, 013.07 pecuniary, and $25,000 in Family Law Act Claims. The total award, inclusive of pre-judgment interest was $153,999.37.

The appellants made a Rule 49 offer to settle before trial of $145,000 plus prejudgment interests and costs. The appellant's argued there was a general understanding that interest at 5% should apply to the entire offer, which would make this offer to settle greater than the total awarded.

Timing of the Offer

A Rule 49 offer must be made at least 7 days before the commencement of the hearing. The Court of Appeal confirms in this case that a civil trial commences within the meaning of Rule 49 when evidence has been first heard.

Did the Offer exceed Judgment?

Clarity of the Offer

The problem in this case was that the appellant's offer did not specify an amount or a rate for prejudgment interest, because the rate varies depending upon the element of the claim. The Court of Appeal held that the uncertainty as to the amount that would accrue for prejudgment interest in the circumstances of this case was narrow and did not prevent the respondents from fairly determining whether to accept the offer or proceed with the trial. The key takeaway is that any "uncertainty" that arises from a provision for costs should only be relevant in deciding whether the party relying on the offer has met its burden of proof under Rule 49. In other words, uncertainty of this nature should not in itself invalidate the offer.

Whether the appellants established that the offer did in fact exceed the Judgment

A major issue in this case was whether the appellants established that the offer exceeded or was equal to the Judgment. The court held the appellants did not meet the burden of proof imposed by Rule 49. The court found that only by making some arbitrary distribution of interest could the appellants establish that

their offer exceeded the Judgment. The important takeaway here is to ensure offers to settle have either stated amounts of interest or stated interest rates for each element of the settlement.

Relevant Considerations for Setting the Costs

The Court of Appeal stated that given the offer to settle was virtually the same as the Judgment, this was a case where the court had to consider the impact of Rule 49.13. The court confirmed Rule 49.13 is not concerned with technical compliance with Rule 49.10, but "calls on the judge to make a more holistic approach." The court held that the appellants complied with the spirit of Rule 49 even if they failed for technical reasons to provide an offer that exceeded the Judgment.

The Court of Appeal also found that the trial judge failed to consider "the amount claimed and the amount recovered in the proceeding" as required by Rule 57.01(1)(a). The court held it was not fair and reasonable to award the respondents costs of almost $580,000 for a claim the jury valued at just under $145,000.

Decision

The appellants were successful on appeal. The court reduced the costs to be paid by the appellants to $100,000. The court stated this amount was more consistent with the objectives of fairness and reasonableness and gives attention to the need for some proportionality.

The decision also highlights the need to make offers that are certain and identify the application of pre-judgment interest.