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INSURANCE DEFENCE

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Deductibles, Interest, Remedial Penalties; Oh My!

In the 2016 decision of *Dimopoulos v Mustafa*, the Defendant raised the following issues:

1. What is the appropriate statutory deductible that is applicable to the Plaintiff's award for general damages?
2. What is the applicable rate of pre-judgment interest on the award of general damages?
3. Should the award for a future chiropractic care be deducted from the Plaintiff's Accident Benefits settlement?
4. Should the Court award a remedial penalty against the Defendant insurer, in addition to the costs to be awarded to the Plaintiff for its conduct throughout the action and where it is approached to Mediation?
5. What costs should be awarded to the Plaintiff, given his success at Trial?

These are a lot of issues, and each is dealt with by Tzimas J.

Appropriate Deductible

In this case, the Jury awarded the Plaintiff $37,000.00 for general damages and $28,800.00 for future chiropractic care on May 26, 2015. However, there was a threshold motion that was brought, and the Court's decision on the threshold issue was released on January 19, 2016.

Amendments to the statutory deductible took place in this intervening time. Until August 1, 2015, the statutory deductible for incidents that occurred on or after October 1, 2003, was $30,000.00. However, on August 1, 2015, the deductible was increased to $36,540.00, with a provision that the deductible would be revised further every January.

The Plaintiff argued that the applicable deductible should be $30,000.00. The Defendant argued that the applicable deductible should be $36,540.00. It was decided since the Jury's award was made prior to August 1, 2015, that the $30,000.00 deductible was applicable. The argument that the amendment to the deductible is procedural, and therefore, a retrospective application was not accepted by the Court.

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Applicable Pre-judgment Interest on General Damages

Prior to January of 2015, the pre-judgment interest to accrue on damages for non-pecuniary losses in a personal injury action, was governed by Rule 53.01 of the Rules of Civil Procedure, which set the rate at 5% per year. However, on January 1, 2015, the *Insurance Act* was amended to include section 258.3(8.1). This eliminated the application of Rule 53.01. Again, the Defendant argued that the amendment should be applied retrospectively, in that the pre-judgment interest rate would be calculated in accordance with Section 128(1) of the *Courts of Justice Act*, resulting in an interest rate of 2.5%.

Reference was made to the recent Court of Appeal decision in *Somers v Fournier* which concluded that pre-judgement interest is a matter of substantive law, not procedural law and therefore, the amendment could not have retrospective application.

Remedial Penalty

It was found that defence counsel's aggressive opposition throughout this action, and even with the above points, should not result in a remedial penalty against the Defendant insurer.

The Plaintiff stated that the Defendant failed to mediate and failed to attempt to settle the Plaintiff's claim as expeditiously as possible. The Plaintiff went so far as to ask the Court to "lift the cloak of privilege" over the Mediation process and the Defendant's Mediation Brief so that they could understand the Defendant's failure to comply in the Mediation in a meaningful way. Defence counsel argued that the Defendant was:

> "Entitled to advance a vigorous defense and that the applicable sections did not take that right away."

Justice Tzimas stated that:

> " ... insurers, like any defendant, are entitled to take a case to trial. If the defendant loses, it will be subject to a damages award and substantial indemnity costs. That is a risk that the defendant is entitled to take. I also note that an insurer's statement that it is not prepared to settle a claim, cannot necessarily be equated with an insurer's failure to 'attempt to settle the case as expeditiously as possible'."

It was found that notwithstanding the Defendant's approach in the Mediation which stated that the Plaintiff would get shutout at trial, the Mediation Brief reflected meaningful participation by the Defendant. Accordingly, it was not found that the Defendant's behaviour ought to attract punitive costs sanctions.

Costs

Costs in the amount of $106,906.90 were found to be reasonable. This matter also included disbursements of $34,020.49. Given this was a 10-day Trial, the Court found the costs claim to be reasonable.

In terms of the costs of the motion, it was appropriate that the Plaintiff was awarded costs as the Plaintiff had been substantially successful with the exception of the penalty issue.

Conclusion

I think this case is significant for clarifying a number of different issues, including the applicable statutory deductible and the rate of pre-judgment interest. However, I think given the climate in light of the *Groia* decision, this case speaks to what is appropriate in terms of litigating a matter. Why should an insurer be afraid to take a hardline position at Mediation or Trial, if that is the position that they can substantiate? A Defendant insurer should not be discouraged for taking a hardline position because some cases warrant said approach.