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PUBLICATION

Court Rules that the Increase in Deductibles is not Retrospective

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Introduction

In less than one year, the provincial government has twice changed the rules for calculating damages for victims of motor vehicle accidents. Both times, it failed to clearly state when the new rules are to take effect.

Effective January 1, 2015, the *Insurance Act* was amended and outlined a new rule for the calculation of pre-judgment interest on general damages. That rule contained no clear transitional language. As a result, it is unclear whether the new rule applies to existing actions, new actions or only to claims arising from accidents which occurred on or after January 1, 2015. Clear transitional language could have made the legislature's intentions clear. This lack of clarity has led to at least three conflicting decisions and confusion for the personal injury bar.

Effective August 1, 2015, the regulation under the *Insurance Act* which specifies the amount of the deductibles for non-pecuniary general damages for motor accident victims and for their families under the *Family Law Act* was amended. The threshold for the non-application of the deductibles was also amended.

The unanswered threshold question is whether these changes apply to accidents which occurred before that date. In 2003, when the deductibles were increased, the language used made it clear that the changes only applied to accidents occurring after the date the regulation came into force. The new wording contains no clear transitional language. It will be up to Courts to clarify the government's intentions.

We have one decision that the regulation is not to be applied to accidents that predate its enactment. Will this decision be the last word on this issue?

In *Cobb v Long (the Estate of)* 2015 ONSC 6799, Belch J. concluded that the provision was not retrospective and only applied to accidents which occur on or after August 1, 2015. His Honour purported to follow the decision of the Court in *El-Khodr v. Lackie,* 2015 ONSC 4766, which

actually addressed the January 2015 P.J.I. amendment. His Honour refused to apply the regulation retrospectively and noted that insurers had charged premiums to consumers based on the assumption that the new deductible of $30,000 in the regulation was in effect. If the regulation was applied retrospectively, then insurers would reap a windfall.

The Legislation

Deductibles for general and FLA damages were introduced under Bill 59 in the Fall of 1996. The original deductibles were $15,000 and $7,500 respectively. Bill 59 provided that those deductibles could be changed by regulation. O/Reg 461/96 was amended effective October 1, 2003 to increase the deductibles to $30,000 and $15,000 respectively. The language in the regulation specifically indicated that the changes applied only to incidents that occurred on or after October 1, 2003.

When the deductibles were raised in 2003, the *Act* was also amended to provide that no deductible applied if the general damages exceeded $100,000 or F.L.A. damages exceeded $50,000. However, there was no provision permitting these amounts to be changed by regulation.

Effective August 1, 2015, the regulation that deals with deductibles was amended. It provides that the deductible until December 31, 2015 is $36,540 for non-pecuniary general damages and $18,270 for F.L.A. damages. There is nothing in these provisions which suggest that the date of the accident or the date a lawsuit is commenced plays any role in determining what deductible should be applied. It should be noted that that the previous provisions in the regulation increasing the deductibles to $30,000 and $15,000 respectively were repealed. The revised regulation also provides for these amounts to be increased in January of every year to account for inflation. Collectively, these amendments seem to suggest that the government's intention was to increase the deductibles immediately for all accidents regardless of when they occurred. It is difficult to see how the old $30,000 deductible could apply to outstanding actions if it has been repealed.

In addition, the legislature decided to raise the exemption amounts. This could not be accomplished by regulation so the *Act* itself was amended. It provides that the exemption amounts until the end of 2015 are $121,799 and $60,899 respectively. These amounts will be increased to account for inflation annually as well. Again, it appears that the intention was to make these new exemptions apply to existing cases.

The Decision in *Cobb*

When this issue came before Belch J. in *Cobb v Long,* His Honour concluded that the central question was whether the change to the deductible was a change in substantive or procedural law. If it was the former, then Belch J. was of the view that any legislative change should not be applied retrospectively. His Honour relied on the Ontario Court of Appeal decision in *Wong v Lee* 2002 CarswellOnt 742 for the proposition that the deductible was a matter of substantive law. That case arose out of Bill 164. If Ontario law applied, the plaintiff would not have been entitled to recover any pecuniary losses and would also have been subject to both a threshold

and deductible with respect to his non-pecuniary general damages. That Court concluded that all of these changes were substantive rather than procedural, but the Court's reasons seemed to focus on the prohibition on recovery of pecuniary losses rather than the deductible.

His Honour also relied on the Court of Appeal's decision in *Somers v Fournier*, 2002 CarswellOnt 2119. The issue in that case was whether costs, P.J.I., and the Trilogy cap were issues of substantive or procedural law. The issue of deductibles was not directly addressed. However, the Trilogy cap was found to be an issue of procedural rather than substantive law. It is therefore possible that the Court of Appeal, if asked to address the question of changes to the deductible only, might conclude that deductibles are more akin to the Trilogy cap than they are to P.J.I.

Observations

Whether the deductible amendment should be given retrospective effect may not turn solely on the substantive/procedural question. The question is more complex than that and other rules for the construction of legislation should be considered.

It should not be forgotten that the changes to the deductible were made by regulation, but that the changes to the exemption were made through changes to the legislation itself. The legislature clearly has the power to change substantive law retrospectively. However, it is usually quite difficult to convince a Court to enforce a regulation in a manner that affects accrued substantive rights. This raises the intriguing possibility that one might be found to be retrospective in effect and the other not.

This issue may eventually find its way to the Court of Appeal and should result in a decision much lengthier and with a more wide-ranging discussion than the decision of Belch J.

One additional comment should be made. If the regulation is found to apply to accidents which occurred before August 1, 2015 (i.e., it is retrospective), then the amount of the deductible and of the exemption would be tied to the date of settlement or trial. If that is true, then both sides will be obliged to amend their offers on January 2nd of each year to take into account the revised deductibles and exemptions. If this is the case, then the salutary effect of making the deductibles irrelevant to costs awards will be more than offset by the need to revise offers annually.