

Procedural Developments in Litigation

Presented By

Natalie Kolos & Kevin McGivney
Borden Ladner Gervais LLP

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Agenda

1. Adverse Costs Insurance
2. Case Management Pilot Project
3. Partial Summary Judgment Motions
4. General damages cap exclusions
5. Changes to Small Claims Court and the Rules of Simplified Procedure
6. Discretion on rate for pre-judgment interest (*MacLeod v. Marshall*, 2019 ONCA 842)

Adverse Costs Insurance

- What is Adverse Costs Insurance?
 - Originally known as “after-the-event Insurance”, it is a policy purchased by a plaintiff, where the insurer will generally pay some amount of costs and/or disbursements should the plaintiff be unsuccessful at trial.
 - Coverage for plaintiff’s disbursements
 - Possibility of “walk-away coverage”

Adverse Costs Insurance: Disclosure

o Disclosure of insurance policy

- In *Fleming v. Brown*, 2017 ONSC 1430, the Court found that adverse costs insurance was subject to Rule 30.02(3) “even if irrelevant to an issue in the action” and ordered production of the policy.
- In *Jamieson v Kapashesit*, 2017 ONSC 5784, the law firm held a blanket policy that applied to all its clients. The law firm was not “a party” as required by Rule 30.02(3). As such, the Court found that this policy was not required to be disclosed.

Adverse Costs Insurance: Disbursement

- Compensable Disbursement? Courts are conflicted:
 - In *Markovic v. Richards*, 2015 ONSC 6983, the Court found that the premium was not a compensable disbursement
 - In *Armstrong v. Lakeridge Resort Ltd*, 2017 ONSC 6565, the Court did require the defendant to pay the premium from costs insurance as a disbursement.

Adverse Costs Insurance: Disbursement

- Compensable Disbursement? Courts are conflicted:
 - In *Little v. Floyd Sinton Limited*, 2018 ONSC 3165, the Court followed *Markovic* and would not allow it as a compensable disbursement.
 - In *Stewart et al. v. Wood et al.*, 2019 ONSC 3931, the Court recognizes there is ‘conflicting opinions on this issue’
 - Court finds that “adverse costs insurance to be an “access to justice” issue. For that reason, I hold it to be a compensable disbursement to be included as a costs obligation payable to the Plaintiffs.”

Adverse Costs Insurance: Applicability

- *Peter B. Cozzi Professional Corporation v. Szot*, 2019 ONSC 1274
 - One year before trial, the plaintiff purchased litigation protection insurance from DAS with a limit of \$100,000. The Policy stated: “under the terms of this policy we will pay what you owe for your opponent’s assessed legal costs and disbursements direct to your lawyer”.
 - At trial, the Court found that the damages did not exceed the statutory deductible and ordered costs of \$161,790 against the plaintiff (\$90,790 in costs and \$71,000 in disbursements).

Adverse Costs Insurance: Applicability

- The Court found:
 - the Policy was between DAS and the plaintiff. Aviva was not a party.
 - a contract cannot confer rights or impose obligations arising under it on any person except for the parties to the contract.
 - nothing in the language of the Policy requires that an adverse costs order be paid before the disbursements owed to the insured's lawyer.
 - the only beneficiary to the policy was the plaintiff and that he has the right to determine how they are used.

Case Management

- What is case management?
 - Rule 77 (Ottawa, Toronto, County of Essex) – no simplified proceedings
 - Court may, with consent of all parties, assign a proceeding to case management
 - Court may also assign a proceeding to case management on its own initiative or upon the request of one party
 - Rule 37.15 (outside of Ottawa, Toronto, County of Essex)
 - Court may direct all motions in proceeding(s) be heard by a particular judge
 - Judge directed to hear all motions in the proceeding(s) may refer issues to a Master where properly within their jurisdiction

Case Management

- One Judge Model - pilot project effective February 1, 2019 (all regions)
 - Simplified Procedure cases are not eligible for the pilot project
 - Judge assigned to case-manage an action will preside over:
 - Pre-trial hearings;
 - Case management conferences; and
 - **Trial**
 - Judge will not preside over case conferences dedicated to settlement discussions
 - No interlocutory motions without approval of managing judge (informal resolution preferred)

Case Management

- Case management judge will fix a trial date early, imposing a schedule for completion of necessary steps
- Trial date fixed by case management judge adjourned only in exceptional circumstances
- Inclusion in the pilot project at discretion of Regional Senior Judge
- Factors to be considered similar to those factors relevant to obtaining case management
- Any party may apply to participate in the pilot project by writing the Regional Senior Judge or completing an application form
- Pilot project to last for approximately 2 years

Partial Summary Judgment

- Rules dealing with summary judgment were amended in 2010 to improve access to justice
- Amended rules:
 - “No genuine issue for trial” to “no genuine issue requiring a trial”
 - Increased fact-finding powers
- Supreme Court’s interpretation of Rule 20 (*Hryniak v. Mauldin*, 2014 SCC 7)
 - A trial is not the default procedure;
 - There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment

Partial Summary Judgment

- Factors to be considered on whether motion for partial summary judgment appropriate:
 - (1) Motions may cause resolution of main action to be delayed
 - (2) Motion for partial summary judgment may be very expensive
 - (3) Judges will have to spend time hearing and deciding motions that do not dispose of the action
 - (4) Record will not be as expansive as the record at trial

Butera v. Chown, Cairns LLP, 2017 ONCA 783; *Mason v. Perras Mongenais*, 2018 ONCA 978

Partial Summary Judgment

- When should partial summary judgment be considered?
 - issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost effective manner (1)
 - discrete issues, like limitation periods, which do not overlap with the merits that are left for trial (2)

(1) *Butera v. Chown, Cairns LLP*, 2017 ONCA 783

(2) *YRSCC No. 1206 v. 520 Steeles Developments Inc.*, 2018 ONSC 3766

Partial Summary Judgment

Mason v. Perras Mongenais, 2018 ONCA 978

“With respect, the culture shift referenced in *Hryniak* is not as dramatic or as radical as the motion judge would have it. The shift recommended by *Hryniak* was away from the very restrictive use of summary judgment, that had developed, to a more expansive application of the summary judgment procedure. However, nothing in *Hryniak* detracts from the overriding principle that summary judgment is only appropriate where it leads to “a fair process and just adjudication” Certainly there is nothing in *Hryniak* that suggests that trials are now to be viewed as the resolution option of last resort. Put simply, summary judgment remains the exception, not the rule.”

General Damages Cap

- Damages Trilogy is a reference to three Supreme Court of Canada decisions from 1978 (i.e. *Andrews v. Grand & Toy Alberta Ltd.*)
- \$100,000 limit on non-pecuniary damages
- \$363,297 in 2019 dollars

General Damages Cap

The “cap” doesn’t apply to:

1. Defamation claims
2. Intentional torts: *D.S. v. Quesnelle*, 2019 ONSC 3230

Small Claims Court

- Limit for claims increased from \$25,000 to \$35,000 (effective January 1, 2020)
- MAG rationale
 - Reduced wait times in litigation
 - Cost efficient representation
- Comparison with Superior Court claims:
 - Mandatory settlement conference
 - No examinations for discovery
 - Cost awards are limited to 15%

Simplified Procedure – *Rule 76*

- Limit for claims increased from \$100,000 to \$200,000 (effective January 1, 2020)
- Time limit for discoveries increased from two hours to three hours
- Pre-Trial to be scheduled within 180 days of the action being set down

Simplified Procedure – *Rule 76*

- All trials to proceed by summary trial
- Trials limited to 5 days
- No more jury trials
- Limit on costs - \$50,000 (\$25,000 for disbursements)

Pre-Judgment Interest Rate: General Damages

- *MacLeod v. Marshall*, 2019 ONCA 842
 - On appeal, whether the trial judge exercised his discretion under s. 130 of the *Courts of Justice Act*, and specifically, whether he considered the changes in market interest rates when exercising his discretion to depart from the default rate

Pre-Judgment Interest Rate: General Damages

○ Section 130 *CJA*:

- 130 (1) The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under section 128 or 129,
 - (a) disallow interest under either section;
 - (b) allow interest at a rate higher or lower than that provided in either section;
 - (c) allow interest for a period other than that provided in either section.
- (2) For the purpose of subsection (1), the court shall take into account, [among other things]
 - (a) changes in market interest rates...

Pre-Judgment Interest Rate: General Damages

- s. 258.3(8.1) of the Insurance Act changed the rate of prejudgment interest to the bank rate, to be calculated pursuant to s. 127 of the CJA. Subsection 258.3(8.1) reads as follows:
 - Subsection 128(2) of the Courts of Justice Act does not apply in respect of the calculation of prejudgment interest for damages for non-pecuniary loss in an action referred to in subsection (8).
- s. 128(2) of the CJA provides that “[d]espite subsection (1), the rate of interest on damages for non-pecuniary loss in an action for personal injury shall be the rate determined by the rules of court”.

Pre-Judgment Interest Rate: General Damages

- *Rule 53.10 of the Rules of Civil Procedure*, provides that the prejudgment interest rate on damages for non-pecuniary loss in an action for personal injury is 5% per year.
 - 2014 amendment to s. 258.3(8.1) of the Insurance Act, the 5% rate did not apply in the context of motor vehicle accident actions.

Pre-Judgment Interest Rate: General Damages

○ Court of Appeal held:

- “trial judge was correct that s. 258.3(8.1) does not apply, his conclusion that therefore the default prejudgment interest rate of 5% is applicable is not correct in law.”
- Trial should have taken into account the factors listed in s. 130(2) of the *CJA*, including the changes in market interest rates.
 - Interest rates at material time were low
- **Overall, Court of Appeal set PJI at 1.3% instead of 5%**

○ Effect:

- Settlement negotiations (debate over PJI rate)
- Litigation strategy (i.e. delay to benefit from PJI not as effective)



Questions?



Thank You

For more information, contact:

Natalie Kolos

Partner

416.367.6609

nkolos@blg.com

Kevin McGivney

Partner

416.367.6118

kmcgivney@blg.com

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